APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 43
HCA/2023/449/XC

Lord Justice Clerk
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

RM

Respondent

Appellant: Lord Advocate (Bain KC), Macintosh (sol adv)); the Crown Agent
Respondent: Graham KC; PDSO (Falkirk)

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27 October 2023

[1] The respondent was convicted after trial of three charges (2, 7 and 9), involving three complainers (CD; CM; and MD), each of whom had been his partner at the time of the offending. The offences were all charges of anal and vaginal rape. They each involved a

degree of force, which seems to have been of escalating severity through time. Charge 2 libelled various occasions over periods extending in total to 39 months, between December 2011 and June 2013, then a further period between December 2014 and September 2016; charges 7 (October –December 2019) and 9 (September 2021) both related to a single incident. Charges 2 and 7 were aggravated under the Abuse and Sexual Harm (Scotland) Act 2016. In respect of the first complainer the respondent was acquitted of charges alleging abusive and threatening behaviour, two further charges of rape, and one of attempted rape. Charges of threatening and abusive behaviour and sexually assaulting the complainer in charge 7 were withdrawn by the Crown.

[2] The respondent was 29 at the time of conviction. The offences encompassed in charge 1 covered a period at the start of which the respondent was 18 and at the end of which he was almost 23; in charge 7 he was 26 or just short thereof; and in charge 9 he was 27 or thereby.

[3] The trial judge imposed a sentence of 1 year on charge 2; 2 years on charge 7; and 5 years on charge 9, each to run consecutively, in other words a total sentence of 8 years. He was obliged to consider making Non-Harassment orders in respect of charges 7 and 9, but declined to do so.

[4] The crown appeals against the sentences as unduly lenient; and also, under section 108 (2)(b)(ii), that it was inappropriate not to make the NHOs.

Background

Charge 2

[5] The trial judge says that on this charge no specific episode of rape was identified, rather the complainer spoke to the generality of behaviour by the respondent. She gave

evidence of encounters that would typically commence consensually but become non-consensual. She gave evidence that he knew she didn't want the sex to continue but he would nevertheless continue. He held her down so she couldn't move. They had separated for a period then reunited, but the behaviour continued thereafter. The relationship came to an end when the respondent assaulted the complainer, who suffered serious injuries to her face. The respondent received an 18 month sentence for this. This incident was narrated in a docket to the indictment. The details of the first complainer's evidence, as recorded in the trial judge's report, are scant. He states "there was little exact detail about the episodes of rape covered by charge 2".

[6] Fortunately, the details which the complainer gave in evidence were set out in the Crown submissions and agreed by senior counsel for the defence. These stated that the complainer spoke of the first incident in which, after intercourse had commenced, she told the respondent to stop and that she wasn't in the mood but he ignored her. The respondent placed his forearm on the victim's chest holding her down. She tried to move away but was not able to. This situation occurred on various occasions throughout the relationship beginning when she was aged 18 or 19 [ie during the period covered by the libel] and in every property that she lived in with the respondent. They would begin having consensual sexual intercourse but the respondent would begin to do things she was not comfortable with and would continue even if she said no. Sometimes he held her down and other times she froze. There were occasions when she would say "no", or "ow"or scream and occasions when she would bleed. She described that the respondent would penetrate her vagina and anus with his penis and penetrate her vagina with his fingers. He would hook his fingers inside her vagina, causing her discomfort. When the victim protested the respondent said, "What are you going to do now?" showing her that he had control over her.

Charge 7

[7] The second complainer gave evidence that on the occasion of this incident, they had both been drinking. The victim and the respondent began having consensual vaginal intercourse on the couch and then the floor. The victim was not comfortable and it hurt because she was on the floor. She made the respondent aware of this although she couldn't remember what she said. She tried to push him away but he pushed back and continued to have sex with her. He penetrated both her vagina and her anus with his penis.

[8] After a period, the respondent got up, allowing the victim to get up and go to the front door. She described feeling both angry and upset as she moved towards the door to get away. She was naked. The door was locked so she could not get out. She was facing the door when the respondent came up behind her and pushed against her. The respondent seized her by her hips, pushed her against the door and penetrated her vagina with his penis. The victim stated in evidence that she did not want to have sex with the respondent at this time. She tried to turn around and the respondent then pushed her to the floor, landed on top of her and continued to have vaginal sex with her. The victim was crying loudly. After a period, the respondent got up but she could not say whether he had ejaculated or not.

[9] They discussed the incident the following day, when he apologised, bought her flowers and took her for a meal. The relationship continued for about a year and a half before they separated.

Charge 9

[10] The third incident occurred when the complainer and the respondent were in a "fledgling" relationship. After the complainer cooked a meal, they went out for the evening

before returning to her house. What commenced as consensual sex became non-consensual sex involving oral, anal and vaginal penetration. The respondent began to pull her hair and put his hands around her throat so she was struggling to breathe. She stood up and he put his hands on her shoulders, forced her to the ground and forced his penis inside her mouth whilst his hand was on the back of the victim's head. She was pushing him away and told him she didn't want him to do this. She was crying when the respondent's penis was in her mouth. She tried to get away but the respondent pushed her to the ground and then penetrated her vagina with his penis. The victim repeatedly told the respondent to get off her. She was able to kick the respondent off her and ran upstairs to the bathroom.

[11] When she came out the respondent was outside the bathroom. He pushed her into the bedroom and onto her bed where he penetrated her anus with his penis. She described this as horrible, sore and disgusting. She was crying and begging him to stop. He was laughing and said, "Fucking take it bitch." She managed to kick the respondent off her and ran to the toilet because she thought she was going to need to use it. She then ran out of the house and phoned the police. She had various injuries as a consequence including bruising to her neck, arms, legs and bottom. She also had injuries to her tongue and lips and suffered whiplash.

The judge's report

[12] The trial judge states that he did not think a *cumulo* sentence was appropriate for charges which were separated in time and related to different complainers. However, in imposing individual, and consecutive, sentences he had to bear in mind the totality principle. Of the respondent's convictions the domestic assault was relevant inasmuch as it demonstrated a propensity to domestic violence, but he had no convictions for sexual

violence. This meant that it would not be appropriate simply to tot up the sentences he considered would have been appropriate for each offence.

[13] Had he been doing so, the sentence would have been 2 years on charge 2. Although this was a serious charge, the respondent was young and immature at the time. The trial judge appears to have regarded it as significant that the episodes began as consensual before becoming non-consensual but he does not tell us what significance he attached to this.

[14] As to charge 7, had this been on its own the sentence would have been one of 3 years. At the time the respondent was still young, and both parties were drunk. He was contrite and had apologised. The judge was confident that the relationship continued because the second complainer wanted it to.

[15] Charge 9 would have attracted a sentence of 6 years. By the time of this incident he was over 25 and ought to be regarded as fully responsible for his actions. This rape too began as a consensual encounter but evolved into a violent episode. The impact on the victim was significant and the respondent seemed oblivious to the gravity of his conduct.

[16] The aggregate of these sentences would have been a sentence of 11 years; that was excessive for the circumstances of the offending looked at as a whole. Looking at matters in the round he considered it would be appropriate to reduce each of the sentences by one year to reflect the totality principle. He thus imposed a sentence of 1 year on charge 2; 2 years on charge 7; and 5 years on charge 9, consecutive to each other, and resulting in an overall sentence of eight years. He then broke the charges down and sentenced accordingly. He attributed three months of the sentences on charges 7 and 9 to the aggravation.

[17] As to the issue of NHOs, he noted the concerns of the first complainer but considered these related to the assault for which he had been separately prosecuted, not to the charge on the indictment. The second complainer gave no indication that the respondent had

contacted her in any way or that she fears he will do so, and has left Scotland. An order was unnecessary. The VIS from the third complainer gave no indication that there had been any further contact or that she was apprehensive about this. A NHO was not appropriate.

[18] Commenting on the grounds of appeal the trial judge agreed that the offences suggested a propensity for physical and emotional harm. But this depended on whether he addressed his underlying attitudes and values. Heavy drinking was strongly associated with his misconduct. Such self-destructive behaviours are often associated with youth. Much of the offending behaviour covers a period when he was either young or very young. The trial judge did not feel able to assume he would continue on his present path. As to the possibility of an extended sentence, his report states:

> "The possibility of an extended sentence is raised in the CJSW report along with other disposals. I came to the conclusion that I should not extend his sentence. He had no sexual offences on his criminal record. I would have applied an extended sentence had he previously been convicted of a sexual offence. I did not consider that three convictions represented a pattern of sexual offending such as to warrant an extended sentence given his relative age and immaturity."

As to the assertion that he had "no information" about the respondent's maturity:

> "While it is true that I had no report from a psychologist or GP expressing an opinion on [RM's] maturity it is widely accepted that young people lack judgement especially where sex or alcohol is involved. The Guidelines for Sentencing Young People refers to the studies that supports the proposition that young people lack judgement (see paragraph 4). I took the view that he was young and immature at the time of charge 2. Although charge 7 straddles his 25th birthday I considered that I should make some adjustment for his age."

Submissions for the Crown

[19] The Lord Advocate submitted that, as his report showed, the trial judge confused so many different issues and misdirected himself on so many issues that he had reached an unduly lenient sentence. He failed to explore with any degree of seriousness the question of

the risk presented by the respondent, unjustly and inappropriately dismissing the terms of a detailed CJSWR which identified a significant risk.

[20] He misdirected himself on the application of the Sentencing of Young Persons guideline, which had no application, given that the respondent was nearly 30 at the time of sentencing. The terms of his report made it impossible to say whether he actually thought he was applying the SYP guideline, but the repeated focus on the age of the respondent, and the point at which he turned 25 suggests that he might have done so. Even if he was merely seeking to reflect the respondent's youth at the time, which in any event he misstated, the appropriate way to do so was not by reference to the SYP guideline. Moreover, it was really only a relevant matter regarding the first charge. The trial judge seemed to have approached the matter by selecting 25 as the vital age, and concluding that where an offender was below that age at the time the offence was committed, the sentencer should simply make a downward adjustment for age. That was simply the wrong approach, under the guideline or otherwise. The trial judge demonstrated a complete lack of insight into the importance of the application of the guideline and repeated guidance from this court. These submissions were expanded under reference to specific elements of the case:

(i) The nature of the offending

[21] The trial judge did not properly recognise the serious nature of the offending, and had not taken account of several important factors, including the use of force, showing an intention to cause harm; the use of the words "Fucking take it bitch" (charge 9); persistence in the face of complainer's protestations; or attempts to escape; and an escalating pattern of severity against the background of a conviction for violence.

(ii) Assessment of maturity

[22] The trial judge based his approach on general statements made in the Sentencing Young People guideline, which did not in any event apply. Given the repetition of behaviour in charges 7 and 9, his age and level of maturity were not significant factors contributing to his offending behaviour. In any event, his youth was clearly not a factor regarding charges 7 and 9, something the trial judge failed properly to have recognised.

(iii) Assessment of harm

[23] The very nature of the offending should have suggested to the trial judge that the harm to the victims would be significant. The trial judge did not appear to have taken proper account of the VISs, as required by the Sentencing Process Guideline. These indicate a high degree of harm suffered in each case.

(iv) Aggravating or mitigating factors

[24] The trial judge did not give adequate weight to these, which included intimate partner violence, repeat violence to the first complainer, including a prior conviction for domestically aggravated assault, the fact that the offences were committed under the influence of alcohol and the statutory aggravations in two of the charges. His assessment that the respondent showed contrition regarding charge 7 was not justified.

(iv) Assessment of risk and extended sentence

[25] The many errors committed by the trial judge led him entirely to fail to identify the risk posed by the respondent. He misdirected himself by treating each offence as a one off, and failing to recognise the seriousness of the offending as a whole. There was a pattern of

offending on a trajectory of increasing seriousness. The CJSWR identified a serious ongoing risk which the trial judge ignored. The CJSWR raised substantial concerns regarding the respondent's propensity to re-offend and recommended a period of post-release supervision. This was a case where an extended sentence was merited.

(v) Consistency of sentencing

[26] There was a significant disparity between the sentence that the judge says he would have imposed in respect of charge 9 and those he would have imposed in respect of charges 2 and 7. There was a lack of consistency between these sentences in respect of three broadly similar offences showing a disproportionate approach. A fair and proportionate total sentence reflecting the seriousness of the conduct libelled would have been to impose a single *cumulo* sentence reflecting the full scale of criminality across the three charges.

(vi) Analogous cases

[27] An examination of similar cases in Scotland suggested that the sentence was unduly lenient: for example *HM Advocate* v *Cooperwhite* 2013 SCCR 461, *Ibbotson* v *HM Advocate* 2022 SCCR 265, *Simion* v *HM Advocate* 2023 SLT 647; *HM Advocate* v *LB 2022 JC 176*. A similar conclusion would be reached on consideration of the Sentencing Guidelines in England and Wales. Whilst these should not be applied too rigidly in Scotland they can be used by sentencers as a cross-check to identify any major disparity which arises.

(vii) Non Harassment Orders

[28] The trial judge misdirected himself as to the operation of the statutory provisions, leading him to apply the wrong test regarding the complainers in charges 7 and 9. He did not place sufficient weight on the VIS of one of the complainers indicating repeated

harassment had already taken place, or on the harm spoken to by the others. He failed to recognise that correct approach to such orders as explained in *Finlay* v *Corrins* [2020] SAC (Crim) 1.

Submissions for the respondent

[29] For the respondent, senior counsel did not seek to defend the approach taken by the trial judge. Save for a submission that the overall sentence finally imposed was not unduly lenient, he agreed entirely with the criticisms advanced by the Lord Advocate as to the way in which the trial judge had approached matters.

[30] Although it was not clear, then or now, whether the trial judge considered that he was applying the SYP guideline, the repeated references to the respondent's age and the emphasis placed on the age of 25 were such that, in counsel's submission, the court could reasonably take it that he at least placed significant weight on the SYP, which clearly was of no application.

[31] Senior counsel agreed with the Lord Advocate that the trial judge had erred in relation to where he found mitigation, his approach to the age of the respondent, his method of assessing risk, his understanding of the principle of totality and his selection of sentences for charges 2 and 7 which were inappropriate. In short, his whole approach was indefensible. At the sentencing diet senior counsel had suggested (a) that a *cumulo* sentence would be appropriate; and (b) that the test for an extended sentence had been met.

[32] Having said all that, he submitted that the trial judge had eventually reached "broadly the right place by entirely the wrong means". In other words, an overall *cumulo* sentence of 8 years would not be unduly lenient, especially if combined with a period of extension. He had no submissions to make against the imposition of NHOs.

Analysis and decision

HM Advocate v Bell

[33] The correct approach for assessing whether a sentence is unduly lenient is set out in *HM Advocate* v *Bell* 1995 JC 350 where the court noted (p353I-J) that to attract such a description the sentence:

> "must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate."

As the court noted (p353J-K), this will be easier to detect in some cases than in others. This is a case where the trial judge imposed individual consecutive sentences for the offences, so, whilst the court must of course have regard to the aggregate period of imprisonment imposed, and whether that may be described as unduly lenient, the court must also consider the individual sentences imposed on each charge. As noted in *Bell,* there are cases in which

> "A very short term of imprisonment may be seen clearly to be unduly lenient where the sentence normally imposed for the particular offence, in analogous circumstances, is a very long one."

The sentences imposed in respect of charges 2 and 7 manifestly fall into this category; and would do so even if the overall sentence did not meet the test for undue leniency, a point to which we will revert shortly. As the court noted in *Bell,* where the court considers that a sentence is unduly lenient, although it is not obliged to impose a more severe sentence

> "It should and will do so if a more severe sentence is necessary for the protection of the public, or because the offence is a very serious one and a more severe sentence is required in order to provide guidance to sentencers generally."

It is necessary for the purposes of guidance to sentencers generally to state clearly and unequivocally that a sentence of one year for a series of successive rapes over a period extending to 39 months, and with a degree of force, is obviously unduly lenient; and the

same applies to the imposition of a 2 year sentence in the circumstances of charge 7. As to the sentence on charge 9, it is certainly lenient. We would take no issue with the submission of the Lord Advocate that on its own it might be expected to attract a sentence of 6 years. Taken on its own, therefore, it might not meet the test for undue leniency. However, in the context of the offending overall, and the resultant sentence of 8 years overall, it does in our view meet the *Bell* test. This was clearly a case for an extended sentence, as senior counsel for the respondent had recognised at the outset of his plea in mitigation.

[34] It is clear that the trial judge made a series of errors in his assessment of the gravity of the offences, the harm caused, the culpability of the respondent and the risk he posed. It is not clear that he understood the Sentencing of Young person's Guideline; and he appears to have considered as mitigating factors which were no such thing.

The respondent's age

[35] The trial judge noted that at the time of the offences encompassed in charge 2 the respondent "was young and immature"; at the time of the offence in charge 7 he was "still young but older than he had been at the time of charge 2"; and by the time of charge 9 "He was over 25. By then he ought to be regarded as fully responsible for his actions." The implication is that the trial judge did not consider him to be so in relation to the earlier offences. Noting the respondent's heavy drinking, he further added that "Such self-destructive behaviours are often associated with youth. Much of the offending behaviour covers a period when he was either young or very young." On the issue of maturity, to which we will return, he stated:

> "… it is widely accepted that young people lack judgement especially where sex or alcohol is involved. The Guidelines for Sentencing Young People refers to the studies that supports the proposition that young people lack judgement (see paragraph 4). I took the view that he was young and immature at the time of charge

> 2. Although charge 7 straddles his 25th birthday I considered that I should make some adjustment for his age."

The trial judge was in error in saying charge 7 straddled the respondent's 25th birthday, in fact at the start of the latitude taken he was just over two weeks short of his 26th birthday and by the time of charge 9 the time of that offence he was a month short of his 28th birthday. At the commencement period of charge 2 he was 18, and by the end of the period (there had been a gap in the parties' association in the *interim*) he was a month shy of his 23rd birthday.

[36] The trial judge's focus on the respondent's age at the time of the various offences, and the repeated concentration on whether he was under or over 25 might seem to suggest that the trial judge thought he was dealing with a case to which the Sentencing of Young Persons guideline applies. However, on reflection it is unthinkable to us that the trial judge might have considered that the SYP guideline had any direct application. That guideline states in clear and unambiguous terms that

> "For the purposes of this guideline, a young person is someone who is under the age of 25 at the date of their plea of guilty or when a finding of guilt is made against them."

The respondent was obviously not such a person in respect of any of the charges, being 29 at the time of conviction, so the guideline could have no direct effect. The guideline does not apply to an individual of mature years who was a young person at the time when the offending took place.

[37] A more generous understanding of the trial judge's approach is that he considered the terms of the guideline to have some residual application to the sentencing of the respondent, having regard to his youth at the time of charge 2, and on the mistaken understanding of his age, at the time of charge 7 also.

[38] It is indisputable that when an adult is being sentenced for crimes committed as a child, or as a young person, a relevant factor in the sentencing is the individual's age and maturity at the time of the offending. This is axiomatic, and is not a product of the SYP guideline, it is a generally applied principle of sentencing, referred to for example in *Greig* v *HM Advocate* 2013 JC 115 and *M(H)* v *HM Advocate* 2018 HCJAC 26. It is acknowledged in the Sentencing Process guideline which notes that the offender's age, or level of maturity, at the time of committing the offence may be relevant to the assessment of culpability. But in such cases this will only be one of numerous relevant considerations. The key point is that the sentencing is carried out at the time of the conviction in light of all the known factors, of which age at the time of offending is but one. In *Greig* for example, the fact that there had ensued a period of 37 years without criminal conduct, together with the fact that the ongoing risk presented by the appellant was low, were viewed as being of considerable significance. The present case is far removed from such circumstances. Rather than an intervening period without criminal conduct, the respondent's offending has persisted, and indeed escalated; and the risk he presents is significant. Whilst to an extent he had youth on his side at the time of the events in charge 2, (although he hardly meets the trial judge's categorisation as "very young") despite the chronicity of his behaviour during that period, the same does not apply to the later offending. It is not an appropriate approach to sentencing in circumstances such as the present to say the respondent was young, and hence immature, at the time of the offending and thus a lesser penalty should be imposed. That is not the correct approach even when the SYP guideline does apply, when an individualised approach is required, and age alone is not a key determinant. Most significantly, the imperative to treat rehabilitation as a primary purpose does not apply outwith the confines of the SYP guideline; as the Principles and Purposes guideline makes clear there is not

otherwise a hierarchy of purposes, and which are most important will depend on the circumstances of each case, the nature of the offending, the harm caused, the culpability of the offender, and the risk posed.

[39] The reality is that what the trial judge had to deal with was a persistent, escalating, course of conduct against consecutive partners, which had not been in any way diminished by an earlier conviction for domestically aggravated assault, two charges of domestically aggravated assault to injury, and culpable and reckless conduct. The trial judge has misdirected himself as to the relevance of the respondent's age at the time of charges 2 and 7 and hence his culpability for the offending behaviour, which is in fact of a high level.

[40] The trial judge states that he took account of the fact that the respondent showed contrition in respect of charge 7: based entirely on the fact that after the event he gave flowers to the complainer and apologised. His "contrition" however, is nowhere apparent in the CJSWR where he alleges that all the complainers were lying; nor is it easy to identify "contrition" as a genuine mitigating factor when it was followed by the commission of the offence libelled in charge 9. In fact the actions which the trial judge describes as contrition are entirely consistent with controlling behaviour, which was spoken to both by the first complainer, and is evidenced in the remarks made by the respondent to the third complainer. In this context the trial judge seems oblivious to the implications of the fact that the jury returned verdicts in charges 7 and 9 of an aggravation under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, which necessarily means that they accepted that the respondent intended to cause physical or psychological harm, or was at least reckless as to doing so. The observations he made regarding the circumstance that the relationship between complainer 2 and the respondent did not end immediately after the incident in charge 7, are wholly irrelevant, and fails to reflect common understanding that there may be

many reasons why someone remains in an abusive relationship, some of which are even alluded to in the complainer's VIS.

[41] Similarly, he appears to have attached significance, in the sense of treating it as a factor that was mitigatory, to the fact that in all instances the behaviour resulted from "consensual encounters which became non-consensual", failing to acknowledge that they became non- consensual because the respondent continued to force himself on the complainer after they had told him to stop, and by using force which escalated through the commission of the offences. They are the typical product of violent, controlling and entitled behaviour.

[42] These errors fed into a further error made by the trial judge, namely the assessment of risk.

Assessment of risk and extended sentence

[43] The trial judge's approach to the age, and hence culpability, of the respondent was one of the factors which led him to underestimate the risk which he presented. The trial judge states that he made a deliberate decision not to impose an extended sentence. He appears to have based this decision on two factors:

(a) the respondent's relative youth, saying:

> "Much of the offending behaviour covers a period when he was either young or very young. I did not feel able to assume he would continue on his present path."; and

(b) the fact that whilst he had a conviction for violent offences, he had no prior conviction for sexual offences.

[44] In fact the latter seems to have been the prevailing reason, since we are told that had there been such a conviction an extended sentence would have been imposed. The trial judge seems rather to have dismissed the significance of the conviction in 2017 against the

first complainer, which clearly had no deterrent effect against further violence towards domestic partners. The offending extended over a ten year period, involved three complainers, one of whom had been the victim of violent prior physical assaults, and a seemingly escalating pattern of violence accompanying the sexual offending. The risk that he would indeed continue on that present path was an obvious one, and was one which was highlighted by the CJSWR which described the behaviour as "severe, chronic and escalating intimate partner violence", adding that the respondent presented a serious risk of harm- physical, emotional, and sexual- to anyone with whom he enters a relationship.

[45] The trial judge states at para 23 of his report that "It is difficult at this stage to gauge whether he actually has any insight or will engage with offence focused work. " The CJSWR comprehensively addressed that issue and suggested that an extended sentence would allow for management of identified risks. The trial judge in fact seems to have paid little regard to the CJSWR, which also stated:

> "[The] offences, and his response to the victim's experiences, may suggest a degree of hostility towards women, lack of empathy towards their experience and a pattern of inflicting sexual violence towards those he is in a relationship with to meet his own sexual needs. The presence of these factors with multiple partners over a sustained period of time suggests he poses a serious risk of harm to any partner he is involved in a personal relationship with."

As senior counsel for the respondent conceded before the trial judge, the conditions of section 210A of the Criminal Procedure (Scotland) Act 1995 are clearly met.

Concurrent, consecutive or cumulo sentences

[46] When dealing with a series of offences on an indictment, it is, of course, a matter of discretion for a sentencing judge to determine what form the sentences should take (*Nicholson* v *Lees* 1996 JC 173). Nor is there an obligation to impose a *cumulo* penalty merely because the offences form part of a course of conduct, although that is a classic circumstance

where such a sentence may be merited, as submitted to the trial judge by senior counsel for the respondent. Indeed, there may be specific reasons not to do so, connected, for example with sentencing limits for certain of the offences (see, for example *DS* v *HM Advocate* 2017 SCCR 129). Equally, however, when sentencing for a series of offences, the court must be alert to the risk that making the sentences consecutive might result in an excessive sentence; whereas concurrent sentences might not reflect the overall criminality of the behaviour on the indictment. In such cases there is much to be said for the imposition of a *cumulo* penalty which does so. This is recognised in *McDade* v *HM Advocate* 1997 SCCR 52; it is also recognised in England – *R* v *C* [2007] 2 Cr App R (S) 98; *R* v *Wilding* [2019] 2 Cr App R (S) 37.

[47] In the latter, the court observed that it had

> "encouraged the practice whereby in a serious, multiple-count case the sentencing judge should endeavour to impose one term of imprisonment which reflects the defendant's overall criminality. That makes for clarity and simplicity. We are told that the judge was urged to adopt that course here. We consider that it would have been much better if the judge had done so. It would have avoided the problems which we have identified."

A similar point was made in *Gartshore* v *HM Advocate* [2023] HCJAC 1, where the sentencing judge had imposed consecutive sentences for a series of interlinked offences clearly forming part of a course of conduct. The court noted:

> "[29] … the charges were essentially part of the one course of conduct, involving the same locus and an overlapping timeframe. The individual charges of course reflect the criminality of each accused but this seems to have been a classic case for the assessment of that criminality in each case as an overall whole, ideally suited for the imposition of a cumulo sentence, as in *McDade v HM Advocate* 1997 SCCR 52. The trial judge by approaching matters the way he did greatly overcomplicated what was in essence a simple scenario, and caused himself difficulties further down the line when he had to adjust the sentences to reflect the totality principle. Starting from that principle, and imposing a cumulo sentence reflecting the degree of culpability and criminality of each accused as a whole would have avoided that difficulty."

The problem identified in *Wilding* and in *Gartshore* is perfectly illustrated in the present case where the trial judge's approach to the sentences on charges 2 and 7 in particular manifestly

and significantly underestimated the respondent's criminality, and resulted in a total sentence which could not be described as other than unduly lenient.

Decision on sentence

[48] The sentence imposed by the trial judge meets the test of undue leniency. The case is one which requires the imposition of a *cumulo* sentence reflecting the totality and severity of the respondent's criminal behaviour. It is also very clearly a case where the terms of section 210A of the 1995 Act are met, where an extended sentence is necessary for the protection of the public from serious harm. We will quash the sentences and impose an extended sentence of 13 years, consisting of a custodial period of 10 years and an extension period of 3 years. We make no separate attribution of the sentence to the aggravations in charges 7 and 9. In determining the *cumulo* sentence we have taken account of all the circumstances of the offences including the fact that these charges are aggravated by involving the abuse of the complainer's partner or ex-partner.

Non Harassment Orders

[49] The Crown made a motion under section 234A of the 1995 Act for a NHO in respect of the first complainer. This section enables the court to make such an order if it is satisfied that it is appropriate to do so in order to protect the victim from harassment, or further harassment. The trial judge declined to impose such an order, stating that he was not satisfied that the complainer's concerns arose from charge 2. He suggested that in pages 1 and 2 of her VIS the complainer referred only to the earlier physical assaults on her. This is incorrect. After making reference to the assaults, she then states: "I would often have irregular bleeding due to the sexual abuse I endured throughout my relationship with the accused." In any event, in considering this issue the court is not restricted to looking at the

events forming the charge(s) on the indictment, but may have regard to previous convictions. (subsection 2A). The complainer spoke to numerous incidents of actual harassment by the respondent towards her, causing alarm or distress. There is an ample basis for considering that a NHO would be appropriate.

[50] Section 234AZA is in similar terms, but where it applies (charges 7 and 9 here) the court must consider making an order *ex proprio motu*. In addition, the court must make such an order unless the court concludes that there is no need for the complainer to be protected by such an order. The trial judge declined to make such orders on the basis that there were no indications that the respondent had contacted the complainers or that he feared he would do so, and that the second complainer now lives in England. Given that the respondent would be in prison for a lengthy period of time he "did not consider an order appropriate". This, of course, is not the test. As noted in the Sheriff Appeal Court:

> "Marrying those provisions together, the court must make a non-harassment order unless it concludes that there is no need for the victim to be protected by such an order. In other words, the court must make an order unless it is positively able to conclude that there is no need for the victim to be protected by such an order. If the court, on the information before it, is not able to so conclude, the order must be made." (*Finlay v Corrins* [2020] SAC (Crim) 1 para 11).

[51] Moreover, the fact that the legislation speaks of protecting against harassment or further harassment makes it clear that prior incidents of harassment, communication or contact are not prerequisites for the making of an order. The complainer on charge 2 may have left Scotland, but she remains in the UK, in a directly adjoining jurisdiction, and no doubt retains friends and family in Scotland. She will remain contactable through modern means of communication and social media. The VIS of the third complainer refers to panic attacks even when seeing a car similar to that which the respondent owned, or seeing someone with similar features. She felt compelled to buy a new bed after her experience

with the respondent. Applying the correct statutory test, we are unable to say that there is no need for these complainers to be protected by such an order. We will therefore make an order in each case for a period of 15 years.