



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 62  
HCA/2018/000344/XC

Lord Menzies  
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

ADAM TONKIN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant:** Gravelle (sol adv); Paterson Bell Solicitors, Edinburgh for Beltrami & Co., Glasgow  
**Respondent:** H Carmichael, AD; Crown Agent

18 September 2018

[1] The appellant Adam Tonkin is now 26 years old. He pled guilty by section 76 procedure to an indictment which narrated that he engaged in unlawful sexual activity with a 14 year old girl which included sexual intercourse on two occasions. Despite the fact that the case was dealt with by procedure designed to expedite the process, the offences in fact took place between February 2016 and March 2016, when the appellant was 24 years old.

The time delay appears not to have been explained in the facts presented to the sentencing sheriff. The appellant has no other convictions.

[2] Having obtained a Criminal Justice Social Work Report the sentencing sheriff imposed an extended sentence with a custodial part of 12 months imprisonment and an extension period of 12 months. The custodial part would have been 18 months but for the appellant's early plea.

[3] The appellant has appealed against the sentence imposed but the appeal is restricted to the imposition of an extended sentence. On the appellant's behalf criticisms were advanced concerning the sentencing sheriff's reasons for deciding to impose an extended sentence. Attention was drawn to what was said at page 5 of the report, where the sheriff stated that she wished the appellant to be subject to post-release supervision. It was observed that, on its own, this would not be sufficient to entitle the imposition of an extended sentence and reference was made to the case of *Wood v HM Advocate* 2017 JC 185.

[4] It was also observed that in any event the appellant would be subject to a period of post-release supervision in light of the provisions of section 1AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993. This is not something which has been acknowledged in the sheriff's report. Attention was drawn to the terms of section 210A of the Criminal Procedure (Scotland) Act 1995 in which it is provided that an extended sentence may only be imposed if the court considers that the period for which the offender would otherwise be subject to licence would not be adequate for the purpose of protecting the public from serious harm from the offender. It was submitted that at no stage in the sheriff's report does she address this test or explain why she concluded that the period for which the appellant would otherwise be subject to licence would be inadequate.

[5] Various other criticisms were also advanced in the written case and argument of the sheriff's approach to sentencing. No account appears to have been taken in the assessment of risk posed by the appellant of the fact that the offending conduct occurred two years before the imposition of sentence and that the appellant had kept out of trouble in that period. A number of criticisms were also advanced in the written case and argument concerning the Criminal Justice Social Work Report. It appeared from the content of that report that the authors had not been provided with a summary of the evidence or a copy of the Crown narrative. The two authors of the report proceeded upon the basis that the appellant had pled guilty to sexual assault. His conduct was described throughout the report as sexual assault. On page three the authors observed that the sexual assault which he perpetrated was illegal also in terms of the complainer's age, in fact the child's age reflected the sole element of criminality. It was therefore plain, it was submitted, that the authors had proceeded upon an important misunderstanding as to the nature of the criminality which the appellant had displayed. It was submitted that this undermined the value which the sentencing sheriff could place on the risk assessment and the other views expressed by the authors of the report.

[6] It is important to recognise that the sheriff made plain in her report to this court that she appreciated that the appellant had not pled guilty to an offence of sexual assault and she appreciated that the terminology in the Criminal Justice Social Work Report was inappropriate. Nevertheless, the sentencing sheriff did take account of certain parts of the content of that report. The statutory provision which authorises the imposition of an extended sentence requires the court to take account of a report of this sort and it is unfortunate that in this case the narrative of events appears not to have been provided to the social workers tasked with the exercise. As a consequence it is correct to observe that they

appear to have laboured under an important misunderstanding as to the nature of the offending to which the appellant pled guilty. We agree that in these circumstances the value of the report to the sentencing sheriff was diminished.

[7] We also consider that there is some merit in the concerns identified as to the sentencing sheriff's overall approach. She does not explain that she took account of the fact that the appellant would be released on licence in any event, she does not at any stage of her report refer to the test provided for by section 210A of the 1995 Act and she does not explain why the period for which the appellant would be subject to licence would not be adequate. Furthermore, the sheriff does not explain why she concluded that the public required the ongoing form of protection she identified, despite the lengthy passage of time between the commission of the offence and the date of the sentencing.

[8] In all of these circumstances we are persuaded that the appeal ought to be granted and we shall quash the extended sentence imposed. In its place we shall impose a sentence of 12 months imprisonment reduced from the period of 18 months to reflect the guilty plea and sentence will date from the same date selected by the sheriff.