APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 85
HCA/2019/357/XC

Lord Justice General
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

by

JAMES CAMPBELL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Gilfedder McInnes (for McCusker McElroy and Gallanagh, Paisley)
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

14 November 2019

General

[1] On 29 January 2019, at a Continued Preliminary Hearing at the High Court in Glasgow, the appellant pled guilty to a charge which libelled that:

> "on 16 August 2018 in a lane between West Nile Street and Nelson Mandela Place, Glasgow, you ... did assault [CM] ... and did seize her, kiss her on the mouth, repeatedly push and pull her, pull down her lower clothing penetrate her vagina

with your fingers and penetrate her mouth and vagina with your penis, and you thus did rape her, all to her injury; CONTRARY to sections 1 and 2 of the Sexual Offences (Scotland) Act 2009."

[2] On 17 June 2019, the sentencing judge imposed an Order for Lifelong Restriction, with a punishment part of 3 years.

The appellant's background

[3] The appellant has had an extremely difficult upbringing and recent history. He was born in April 1987 and is now 32 years of age. He was the youngest of three children of his parents, although there were ten children in total from his parents' relationships. These parents separated when he was only 2 years of age. His mother had mental health issues. He was placed in foster care because of disruption and violence at home. Thereafter, much of his childhood was spent in residential settings, characterised by his frequent absconsions and disruptive behaviour.

[4] The appellant attended special needs schools in Paisley. He was assessed as having a borderline IQ, but not being learning disabled. He was expelled from school because of inappropriate sexual behaviour with a female pupil. When he was only 13, he was placed in the Lomond Unit; a specialist centre for the care of young persons with sexually problematic behaviours. It would appear that, as young as that age, he was groping women in the street, had "dry" (clothed) sex with a younger girl and had persuaded two boys to take a vulnerable girl to a secluded spot at which he could expose himself to her. He engaged in frottage behaviour (touching or rubbing against the clothed body of another in a crowd) in swimming pools. He was leering at girls and licking his lips in a menacing manner. Although not convicted, at one point he acknowledged that he had raped a vulnerable

younger girl in 2002, when he would have been about 15 years old. The appellant was referred to the Pathways Project; a specialist service dealing with sexually harmful behaviours and offending. He had been involved in incidents directed towards female staff and young vulnerable females. A report from that era stated that the appellant viewed females purely from a sexual perspective. There was a concern that he might sexually offend in the future.

[5] The appellant developed a problem with drug and alcohol abuse, including ingesting cocaine and heroin. He left school with no qualifications. He has only ever had one job, at Burger King, when he was aged 18. He was dismissed shortly after starting because of an altercation with a customer. Thereafter, his income came from his regular occupation as a beggar in Glasgow City Centre, particularly Buchanan Street, for which he dressed himself in Celtic FC attire and flags. This apparently attracted between £40 and £100 per day, which he spent on alcohol, food and occasionally drugs. Although at various points he had engaged with adult services on a voluntary basis, he eventually stopped doing this. On his release from an extended sentence (*infra*), he was given temporary accommodation in Renfrew. He did not use it. He either stayed with his mother in Foxbar, Paisley or slept rough in Glasgow. The reason for this appears to have been a history of him having been bullied. He wanted to avoid Paisley, where he had difficulties with some of the locals. He felt lonely and unsure of his ability to live on his own. His personal independent payments were stopped. He expressed the view that he enjoyed the lifestyle of a homeless beggar, being well-known and liked by buskers and by other homeless persons.

Previous convictions

[6] The appellant's previous convictions are numerous. The first was for culpable and

reckless conduct, at the age of 17, in September 2004. His first custodial term was imposed in November 2005 when he was detained for 2 months for an assault and robbery involving a knife. Thereafter, he committed various breaches of the peace and was placed on probation for 2 years. In April 2006, shortly after the imposition of probation, he served 4 months detention for possession of a knife. Further breaches of the peace followed. In October 2006, he was convicted of housebreaking. In March 2007 there was another breach of the peace conviction. Short periods of detention were imposed.

[7] Eventually, on 19 February 2008, the appellant was convicted of assault and attempted robbery, together with a contravention of the Firearms Act 1968, with a racial aggravation. He was given an extended sentence, consisting of a 76 month custodial term with 3 years post release supervision. On 9 December 2011, he was released on licence. His custodial term would have been due to expire in January 2014, but the extended element lasted until 2017. There were various conditions of his licence, including that he should live in supported accommodation, undertake focused work, and attend anger management, problem solving, attitude to violence and racial issue courses. He was to be assessed by the community health services. As a result of breaches of his licence conditions, he was recalled on 6 June 2012. The breaches included failures to attend supervision appointments, shoplifting, and failures to comply with drug support and to take psychiatric medication. His statutory supervision was altogether unsuccessful. He served out the remainder of his sentence until his eventual release at the end of the extended term on 3 February 2017. It was noted, in January 2017, that the appellant had taken part in 20 sessions involving adapted work with psychology and social work, at the end of which he was unable to recall concepts or apply his learning. He continued to show violent and manipulative attitudes towards women.

The offence

[8] The offence to which the appellant pled guilty was caught on Closed Circuit Television; the images from which were played to the sentencing judge. The incident had also been observed from a window by a solicitor, who had phoned the police. The police effectively caught the appellant in the act of rape.

[9] The complainer was a homeless person. She was aged 57, only 5'1" in height and 6 stones in weight. She had never met the appellant before. She had noticed him at about 6.15pm, sitting in Buchanan Street. He was leaning against a lamp-post. He was not wearing a top, even although it was both cold and raining. She was concerned about him and therefore approached him to ask if he was alright. He told her that he had broken up with his girlfriend and was heartbroken. This was not true. The complainer spoke to him for some time, before saying that she had to go. He had asked her to go for a drink with him, but she had said that she did not drink alcohol. She started to walk away. He followed her. She wanted to be rid of him as he was "talking nonsense". They both turned into Nelson Mandela Place. The appellant stopped at a large archway and told the complainer that this was where he had been sleeping. He asked for a cuddle, but she refused. He then put his arms round her, squeezing her so tightly that he hurt her ribs. He said that he loved her and wanted her to be his girlfriend. She told him not to be daft, since she did not even know him. At this point, he became angry and seized her with both hands.

[10] Despite the complainer's protestations, the appellant pushed her forwards, put his hand down her trousers and digitally penetrated her. She told him repeatedly to stop, as he was hurting her. He did not do so, but pulled her trousers down, told her to get onto her knees where, after further unpleasant demands, he "rammed" his penis into her mouth. She

managed to stand up and pull her trousers up. The appellant pulled them back down and told her to lie on her back on a yellow ramp. He pushed her onto her back and, after struggling with her clothing, managed to force his penis into her vagina. By this time the complainer was exhausted and having difficulty breathing with the appellant on top of her.

[11] The police arrived. On being arrested and cautioned, the appellant maintained that the sexual activity had been instigated by the complainer.

The Risk Assessment

[12] The Risk Assessment Report contains a detailed history of the appellant, notably his adverse childhood experiences (ACES) which met the WHO diagnostic criteria for a Complex Post Traumatic Stress Disorder. The risk assessor reported that there were many periods when the appellant would feel lonely and unhappy. He would have symptoms of depression, anxiety and paranoia. He had some history of suicidal ideation. There were several enduring traits, which had an adverse effect on his life. These were that he was: antisocial, self-centred, poor at solving life's problems, lacking intimacy in his relationships and impulsive. He met the diagnostic criteria for an Antisocial Personality Disorder and a Borderline Personality Disorder. There were a number of risk factors pointing to the prospect of further sexual and non-sexual violence. These warranted serious attention with a variety of treatment programmes and risk management plans. The factors were: his being a victim of child abuse; the chronicity and diversity of his sexual violence; his personality disorder; his problems with intimate and non-intimate relationships; substance abuse; and his problems with planning and responding to supervision. He would be at high risk of reoffending sexually, unless he made substantial improvements in his approach to life in general, his relationships and any rehabilitation opportunities. He was prone to misusing

alcohol and drugs, having pro-criminal associates and attitudes and committing impulsive acts.

[13] Overall, the risk assessor was of the opinion that the appellant presented a medium risk in terms of sections 210B and C of the Criminal Procedure (Scotland) Act 1995. The reasons for his opinion were summarised as follows:

> "1. The nature, seriousness and pattern of [the appellant's] behaviour indicate a propensity to seriously endanger the psychological well-being of the public at large, for example, his assault and attempted robbery offence in 2007 and his index offence in 2018.
>
> 2. He has characteristics that are problematic, persistent and pervasive, for example being poor at managing his emotions and using sex to solve life problems. However there is reason to believe that he may be amendable to change and complete in-depth interventions programmes in prison that directly target (a) the adult consequences of the complex trauma he suffered as a child sex offending (*sic*) and (b) risk of sex offending. He has not received either of these to date.
>
> 3. There is some evidence of protective factors. For example, he expresses remorse for his actions and shows insight into the need to address his sex offending risk directly.
>
> 4. He appears to have the capacity and willingness to engage in appropriate intervention, for example, his response to a bespoke programme of work in prison re general and persistent offending indicates that this was reduced post release.
>
> 5. He may be sufficiently amendable to supervision, for example, he might be amenable to licence conditions that require him to reside at a specific address (i.e. not be homeless), allow compliance checks with mental health interventions (e.g. medication, community psychiatric nursing support), and support legitimate employment instead of begging."

On this basis, the risk assessor considered that measures short of an Order for Lifelong Restriction might be sufficient to minimise the risk of serious harm to others.

The judge's reasoning

[14] The sentencing judge determined that, while intervention from psychological services in prison may assist the appellant, his history was such that it was likely that, even

on his release under supervision, he would still present a risk to the safety of the public. She noted that a period of licence in 2011 had resulted in a breach and recall. In-depth work had been undertaken during the period of recall but had not been successful. The appellant displayed attitudes, some of which were indicative of violence. He had manipulative views towards females. After his release in 2017, the appellant had been referred to adult services in the community by the prison. He had not engaged with these, but slept rough most of the time. He chose the lifestyle of a beggar because he found it conducive. The offence had been a violent and prolonged attack on a vulnerable woman, whom he had falsely maintained that he knew. The judge had no confidence that the appellant would change his lifestyle on release. She therefore imposed an OLR.

Submission

[15] The appellant submitted that, based on the risk assessor's report, there was reason to believe that in-depth intervention programmes could target the consequences of the appellant's complex child trauma. These programmes had thus far not been used. The risk assessor had accepted that the appellant would pose a high risk of reoffending sexually unless he made substantive improvements in his approaches to various matters.

[16] It was accepted that it was for the judge and not the assessor to decide whether there was likely to be serious endangerment to the public at the point when, but for the imposition of the OLR, the appellant might have been predicted to be at liberty (*JR* v *HM Advocate* 2017 SCCR 402 at para [14]). The risk assessor's categorisation of an offender's risk as being high, medium or low was only a tool for use by the sentencing judge (*Ferguson* v *HM Advocate* 2014 SCCR 244 at para [105]; *JR* v *HM Advocate* (*supra*) at para [20]). Nevertheless, the judge

ought to pay particular attention to the views of the assessor, and to the categories of risk, before reaching a decision (*Ferguson* v *HM Advocate* (*supra*) at para [106]).

[17] The sentencing judge had to bear in mind the demanding nature of the risk criteria and the possibility of a reduction in risk as a result of maturity and rehabilitation. The judge required to assess the risk posed at the time of sentencing and to decide whether any custodial or post release regime, short of an OLR, would have any material impact on that risk. If the judge considered that no material reduction would occur, then he or she would be entitled to find that any likelihood, of serious endangerment at the time of sentencing, would be, for practical purposes that which would exist on release from custody (*Ferguson* v *HM Advocate* (*supra*) at para [101] and *JR* v *HM Advocate* (*supra*) at para [14]).

[18] The offence of which the appellant had been convicted was a serious one, but not one which would normally attract the imposition of an OLR. It was the appellant's first conviction for a sexual offence. The sentencing judge erred in determining that no custodial or post-release regime, short of an OLR, would have made a material impact on the appellant. The absence of any previous in-depth interventions with the appellant meant that the judge could not have found that rehabilitation within a custodial setting would not have an affect upon him. The assessor's view was that the extent of the appellant's behaviour as both a child and an adolescent had merited an in-depth programme of work, but that resources had not been available to achieve this. The appellant had underlying drug, alcohol and mental health problems, but these too had not been targeted by intervention. The assessor considered that the appellant may be amenable to change and to completing in-depth programmes. He acknowledged that the appellant did have a history of non-compliance with court orders and that his response to any interventions had been limited.

Decision

[19] Section 210F of the Criminal Procedure (Scotland) Act 1995 provides that the High Court may make an Order for Lifelong Restriction if it is satisfied that the risk criteria are met. In terms of section 210E, the criteria are that:

> "...the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large."

In determining whether the criteria are met, the sentencing judge will have regard to the Risk Assessment Report (s 210F), which will have categorised the risk which is posed by the convicted person as "high, medium or low" (s 210C(3)).

[20] As explained in *Ferguson* v *HM Advocate* 2014 SCCR 244 (LJC (Carloway) at para [105]), there is no statutory guidance on what the court is to make of the categorisation. This accords with the general principle that whether to impose an OLR is a matter for the sentencing judge, who may disagree with the risk assessor's view having regard to his or her own knowledge and experience or because the risk assessor's view, is not supported by the facts. However, given that, once made, an OLR is not capable of review, the judge must be conscious of the "demanding nature of the risk criteria" (*JR* v *HM Advocate* 2017 SCCR 402, LJC (Lady Dorrian) at para [20], citing *Ferguson* (*supra*), Lord Drummond Young at para [129]).

[21] In the present case, it is clear that the sentencing judge applied herself correctly to the guidance in both *Ferguson* (*supra*) and *JR* (*supra*); especially in relation to the task of predicting, albeit in broad terms, the risk posed by the appellant, were he to have been made the subject of a fixed custodial term (including that in an extended sentence), on release from prison (*Ferguson* (*supra*), LJC (Carloway) at para [101]). The judge did take into account

what might be achieved, should the appellant be amenable to engaging with rehabilitation programmes (including whether he would be so amenable) and the effect of any post release supervision.

[22] The difficulty for the appellant is, first, that he is no longer a young man whose offending might be expected to decline as a result of any maturing of his general approach to life and, in particular, his offending. The prospects of him adopting a fresh attitude are limited. Secondly, the appellant has been the subject of several programmes in the past, some of them specific to sexual offending, including his time in the Lomond Unit and participation in the Pathways Project. In relation to whether the appellant would engage in future programmes or respond to supervision in the community, it is important to take note of his previous failures: to abide by his conditions of release, when the custodial element of his extended sentence had expired; to attend his adult services sessions; and to respond satisfactorily to post recall programmes.

[23] In these circumstances, the sentencing judge was entitled to form the view that it was unlikely that the appellant would either engage with rehabilitation programmes or, if he did, that he would respond positively to them. The judge was equally entitled to the view, given the appellant's age, that the risk he would pose on release from a determinate sentence would be the same as that which he posed at the time of sentencing. That risk was amply illustrated by the nature of the offence itself.

[24] The appeal is refused.