APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 24
HCA/2024/000673/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

NS

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Moggach KC; Burnett Criminal Defence, Aberdeen
Respondent: Stalker AD; the Crown Agent

27 May 2025

[1] On 29 November 2024, the temporary judge imposed an order for lifelong restriction on the appellant, a young offender, following his conviction on indictment on two charges arising from the same incident in July 2022 at the appellant's flat in the north of Scotland. The appellant challenges the imposition of an OLR, primarily on account of his youth. He was 18 at the time of the offences and 20 when sentence was passed. He had shown signs of maturing and demonstrated good engagement with interventions and supervision whilst remanded in custody. In light of this progress, the appellant contends that since he is

assessed to present a medium risk on the Risk Management Authority scale, the sentencing judge underestimated his capacity to change. Accordingly, it was excessive to impose an OLR.

[2] Charge 1 involved abduction, assault and robbery of a male complainer after the appellant invited him to spend the night at his flat following a party. The appellant, with his face masked, presented a BB handgun at the complainer, repeatedly threatened to kill him, punched him on the head and body and robbed him of a mobile phone. Charge 2 involved sexual assault by compelling the complainer to remove his clothing, touching and masturbating the complainer's penis, compelling the complainer to masturbate the appellant and oral rape.

[3] The judge fixed a punishment part of 4 years, backdated to 7 December 2022 following the appellant's remand in custody and its interruption by a sentence of detention for 9 months for another charge of assault and robbery.

Circumstances of the offences

[4] The complainer was 18 and is disabled with paraplegia and weakness on his left side resulting from cerebral palsy. He attended a small party at the home of a female friend at 9.45pm. The appellant arrived later. The group drank alcohol until midnight when the party broke up. The complainer had intended to stay the night at the party house but there was no bed left. He accepted the appellant's invitation to stay at his flat, arriving there at about 1am. The appellant showed him to the living room and went elsewhere.

[5] The appellant returned wearing a balaclava and holding a BB gun. The complainer thought it was real. The appellant's behaviour was threatening and aggressive, calling the complainer "a cripple bastard" and telling him the gun was real. The complainer was

terrified, fearing for his life. The appellant told him he could not leave as he would go to the police. The appellant took the complainer's mobile phone and kept it.

[6] In his evidence, the complainer said that the appellant repeatedly hit him about the head whilst holding the gun. The sentencing judge reports that he left this out of account on passing sentence as it did not feature in the wording of the charge and the prosecutor did not move to amend the charge. The complainer also said that the appellant presented a machete at him and held it against his neck but the jury deleted these references from the charge on returning their verdict. Accordingly, the judge also left this aspect out of account.

[7] In response to the appellant's threats that he would beat him again, the complainer undressed completely. The appellant appeared to use his mobile phone to film the complainer. The appellant began to touch the complainer's penis, whilst continuing to threaten him and mock him for his disability. The appellant said he was "horny" but the complainer begged him to stop, he did not want any of this to happen. The appellant responded that he did not care. The appellant masturbated the complainer, stopped, beat him up again and then resumed the sexual assault. The complainer's ordeal went on for hours. The appellant repeatedly struck him to the ground, punched him in the stomach and knocked him out a few times. The appellant forced the complainer to suck his penis, holding the complainer's hair as he did so. The appellant compelled the complainer to masturbate him and then resumed orally penetrating the complainer. When the complainer asked him to stop the appellant, repeatedly, said "just fucking take it."

[8] The appellant kept repeating these behaviours throughout the night. When the complainer became unconscious, the appellant would pour water on him to wake him, explaining that he was checking he was still alive. The appellant would then carry on doing the same things as before. It ended when the appellant compelled the complainer to

masturbate him to ejaculation. At about 7 or 8 am, when the appellant went to the bathroom, the complainer took his chance to escape. The appellant still had the complainer's mobile phone. In the course of these events, the appellant had twice told him to go and shower to wash off any traces of their physical contact.

The appellant's evidence

[9] The appellant maintained that he had acquired the balaclava from someone a week or so earlier. He put it on and presented the gun, saying it was real, as a prank, to see how the complainer would react. The complainer had grabbed the gun but the appellant retained it and "tapped the complainer across the cheeks" with it. He made threats as a joke but stopped after a few minutes. The complainer seemed to be all right, the appellant made food for the two of them and they watched TV. The appellant then said he wanted to explore his sexuality, prompting an awkward silence before the complainer asked him what he wanted to do. The complainer removed his trousers and allowed the appellant to touch his penis. The appellant asked the complainer to masturbate him and the complainer agreed. The complainer willingly performed oral sex on the appellant for 5-10 minutes until the appellant ejaculated.

[10] They spoke for a while and the complainer asked to use the shower and did so. The appellant went to bed and was annoyed when the complainer came through to ask him for a cigarette. He pushed the complainer out of the room and punched him, knocking him out, so he used water to revive him. He took the complainer's phone because he was in debt. This happened about an hour before he left at 9am. He accepted that he had pointed a gun at the complainer but all sexual activity was consensual.

The effect on the complainer

[11] On his return home, the complainer's family observed that he was highly distressed. The complainer was bruised, scratched and bleeding from his lip. He had marks behind his ear and on his eye and pain in his head. In a victim statement, he said his physical injuries healed within a month but it was almost a year before he could return to work. He suffers night tremors and has panic attacks. He became a recluse, avoiding family and friends, could not communicate with people and began to self-harm.

Previous convictions

[12] The appellant was fined for culpable and reckless conduct at Aberdeen Sheriff Court in September 2022 and for vandalism in December 2022. He was convicted of assault and robbery of a boy of 15, attracting a sentence of detention for 9 months on 5 December 2022, served during the course of his remand. The offence occurred on 19 May 2022. Whilst they are not convictions, for what it is worth the risk assessor recorded that the appellant had come to the attention of the police on 42 occasions, mainly for vandalism, public disorder, theft and resisting arrest.

Criminal Justice Social Work Report

[13] The appellant gave a somewhat sanitised version of his evidence to the reporting social worker, adding that he had smoked cannabis at the party and drunk some alcohol there and at his flat. He expressed surprise that he did not injure the complainer more seriously or break any bones. He denied the element of abduction and maintained that all sexual activity was consensual. Nevertheless, he could recognise the impact that sexual offending would have on a victim. Social work records disclose a history of poor parenting

and the appellant spent some years in the care of the local authority. His formal education was problematic and petered out in the first year of secondary school. He had engaged constructively whilst remanded. He believes he suffers from depression and receives Mirtazapine to help him sleep (the risk assessor records that he receives medication for depression). He was using cannabis heavily when at liberty. As he presents a high risk of causing serious harm, on the Stable and Acute 2007 risk assessment tool, he is eligible to participate on the Moving Forward: Making Changes programme. Post-custody supervision is necessary to enhance public protection whilst also facilitating his reintegration into the community.

Risk assessment report

[14] Rachel Roper, forensic psychologist and RMA risk assessor, records that the appellant showed aggressive behaviours from the age of 3 and was excluded from school. Social workers became involved with him from the age of 11. His young parents could not manage him and his grandparents allowed him to do what he wanted. He had a difficult relationship with his father. When he was 12, his sister, aged 6, reported that the appellant had been sexually abusing her for around a year, leading to his being accommodated in a children's home. The circumstances are detailed at 3.3.14-15 of the RAR. The appellant had asked her to "do sex with him every night" and, on several occasions when she was aged 5, penetrated her vagina and mouth with his penis. Records suggest it continued for about a year. He admitted this conduct at the time and confirmed to Ms Roper that he had done it more than once. His sister's accounts were that he could be forceful and restrain her when she resisted but he denied this. File notes disclosed that the appellant had admitted his sexual urges were sometimes overwhelming.

[15] The appellant displayed physically aggressive behaviours throughout his time in a children's home, using his large physique to intimidate people. He was verbally aggressive, made sexually derogatory comments to female staff and frequently smashed property and belongings. He physically and sexually assaulted a female member of staff in the home and physically assaulted a male member of staff. These incidents were dealt with in the children's hearing system. Members of staff told Ms Roper that the appellant was mostly verbally aggressive and intimidating but was also physically violent. Very few incidents were reported to the police. He displayed a lot of sexualised behaviours. He would masturbate when he knew staff would walk in. He masturbated many times a day and female staff were uncomfortable around him. He would often wear a mask or hat to hide his face when misbehaving and, on one occasion, threw a knife at a staff member. On another, he chased a staff member with a knife. He denied these incidents to Ms Roper.

[16] The sexual assault is detailed at para 3.3.16-17. The appellant, then aged 14, attempted to smother the staff member with a cushion many times when he was alone with her, grabbing her breasts before he left the room. He accepted that he did this at the time and to Ms Roper but said it occurred in the context of a pillow fight. The staff members Ms Roper interviewed refuted that.

[17] The appellant would respond to distress by behaving aggressively and would comfort and self-soothe by gaming, watching pornography and masturbating, providing instant gratification. Despite considerable support, care and nurturing from staff his dysregulated behaviours continued and treatments to help him understand his sexualised behaviours were ineffective. He has had difficulty forming peer relationships and has had no intimate relationship. He has limited skills to manage conflict. He has never learned

how to tolerate or manage distress. His aggressive and sexual behaviours are not linked to substance misuse. Ms Roper reports:

> "[NS] has developing personality pathology which includes narcissistic and emotionally unstable traits. A diagnosis of personality disorder cannot be undertaken due to his young age and the observable traits might not develop into a disorder, but NS likely has complex trauma resulting from his experiences and his attitudes and behaviours present as aggression."

[18] His previous sexual offending occurred when he was angry, things were not going his way and he was not able to manage his emotions. He used sex to self-soothe. Ms Roper notes that his victims have been vulnerable in some way. She considers interventions designed to address offending behaviour from 23 March 2017 onwards at 3.5.23-32. She records that at an early stage of these interventions, the appellant made observations about concealing his identity when committing sexual offences as a means of avoiding detection, observing "No face, no case." He was worried he would be unable to stop himself from touching people sexually in the street.

[19] The appellant's care ended on 10 November 2021 because, following a number of violent incidents, it was not considered safe for care staff to live with him. He continued to receive support and was given a permanent address with support a few weeks before the offences on the indictment occurred.

[20] Ms Roper offers a more favourable view of the appellant's time on remand. Custody has been positive with no aggressive or violent behaviours, he has a small group of friends and has engaged in purposeful activity including different forms of employment. He reports being less sexually preoccupied because he is kept busy. He has shown some insight into many of his behaviours, accepting that he was dangerous. He says that he did not previously care about the impact of his actions on others but does now. His parents and grandparents agree. He appears to prison staff to have matured. In custody, he has shown

he can walk away from situations and keep busy engaging in purposeful activity. Accordingly, he has some protective factors, notably his youth and the associated potential for rehabilitation. She sums up her assessment in the following conclusions of her executive summary:

> "2.15. [NS's] most relevant risk factors are: emotional dysregulation, sexual preoccupation, lack of intimate and non-intimate relationships, lack of responsibility, lack of insight/self-awareness, and problems with stress/coping. His general and sexual violence can be disinhibited by substances which can destabilise him although he can equally offend without them. His inability to manage his emotions, impulsivity, disregard for the rights and feelings of others, mistrust and inability to tolerate distress are all relevant for his offending and NS needs time to learn how to understand and manage himself. Due to the levels of harm caused within his offending, it is difficult to argue that NS does not have the propensity to seriously endanger the lives, physical or psychological well-being of the public at large. However, there has been an observable change in NS's insight, attitudes and behaviours which has not previously been present. NS continues to minimise his behaviours and is denying the sexual convictions within his index offence. However, he has displayed a level of insight into his other behaviours and accepts he was sexually preoccupied and only focussed on his own needs.
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> 2.16. This assessment has concluded that NS has characteristics that are problematic, persistent and/or pervasive but there is reason to believe that they may be amenable to change. There is evidence of some protective factors and now that he is older and understands the ramifications of his situation, NS is willing to engage in appropriate intervention and has the capacity to do so. Furthermore, he is more willing to engage in supervision with criminal justice staff as he holds no antagonistic views towards them. Age is also a significant protective factor for NS. Research indicates that many juvenile offenders grow out of antisocial behaviour and that the process of desisting from crime, even serious crime, is linked to the process of brain development, which does not reach maturity until an individual is in their mid-twenties. NS is 20. He has not yet reached full brain development and whereas this does not mean he is not fully responsible for his actions (he certainly is), research reveals there is a higher chance of him desisting than if he were over the age of 25. Measures such as an extended sentence and a Sexual Harm Prevention Order may be sufficient to minimise the risk of serious harm to others. Under the RMA definitions, he therefore poses a medium risk."

[21] Ms Roper did note, at para 3.1.4, that the appellant's denial of his sexual offending and his difficulty in talking about it made it difficult to formulate his case. His denial of this sexual offence suggests an absence of insight and lack of self-awareness. His continued sexual offending suggests attitudes supportive of sexual violence. She noted that in the

children's home he had targeted female members of staff according to his perception of their vulnerability. Her attempts to explain his smothering the female staff member with a pillow (at 3.12.9) appear somewhat strained. She omits what might seem the most likely conclusion: that he sought to exercise physical control over a woman he was trying to sexually assault. She does infer that making the complainer shower, and wearing gloves whilst masturbating the complainer, along with the appellant's use of a balaclava, was suggestive of planning to avoid detection. The most likely scenario for repetition of sexual offending is the appellant targeting a vulnerable individual.

[22] In assessing risk, Ms Roper notes that the appellant's sexual offending has been enduring and escalating. Part of the complexity of assessing him arises from the limits imprisonment has placed on triggers, and opportunities, for him to offend. He has made some friends, looks for work to do, and has a good relationship with his personal officer. He is perhaps encountering real consequences for his actions for the first time. The most significant protective factor is his age, as many juvenile offenders grow out of offending behaviour. He has a higher chance of doing so than if he was offending at 25. Whilst he has a propensity seriously to endanger the lives, physical or psychological well-being of the public at large through sexual and physical violence, his problematic and persistent characteristics may be amenable to change. He is willing and able to engage in appropriate interventions and is not antagonistic to criminal justice workers in the way he is to family and child social workers. He meets the criterion for medium risk under the RMA definitions.

[23] Ms Roper makes the following observations about his manageability as part of a Risk For Sexual Violence Protocol:

> "4.2.7 Problems with Treatment and Supervision are relevant for future risk management as NS has not benefited from any treatment he has undertaken thus far.

> Problems with supervision are present as he has continued to offend despite being on a compulsory supervision order."

She does also note that, although he maintains denial, he is willing to complete sexual offending work.

[24] At paras 4.2.18-25, there is a detailed assessment of what will be necessary in terms of monitoring, supervision and treatment through his sentence and on release if his risk is to be managed.

The judge's reasons

[25] It is apparent from his report that the judge carefully considered all of the information before him, notably the evidence and the detailed RAR. He concluded that the risk criteria were met. His sentencing remarks demonstrate that he considered all relevant factors. In particular, he noted the history of sexual offending in different contexts, but generally involving a vulnerable person or a person in a position of some vulnerability, over a number of years and that, at least until now, the appellant has not responded to treatment for it. He took full account of the appellant's age and its implications, not least the prospect of rehabilitation, but remained doubtful that at the point when the appellant would be released from a determinate sentence his characteristics would have been adequately addressed. He anticipated that the appellant will require supervision and monitoring indefinitely following release from prison. He was satisfied that the risk criteria were met and considered himself bound to impose an OLR. He was not invited to make a sexual harm prevention order. Senior counsel suggested that on the appellant's release the police could apply for an SHPO to the sheriff court on such conditions as may then seem appropriate.

[26] In response to the note of appeal, the judge explains that the appellant's circumstances in Polmont, where he is responding well, do not provide strong reassurance about his future conduct in the community. He considered the appellant's denial an obstacle to successful rehabilitation against the background of his entrenched and enduring history of sexual offending, his preoccupation with sex and his behaviours since the age of 3.

Submissions

[27] The appellant was 18 when he committed the crimes, 20 when sentence was imposed and a young offender. The separate offence of assault and robbery referred to by the judge occurred two months before these offences. In that case, no weapon was involved when the appellant robbed a boy of 15, a drug user who owed him money for drugs, by seizing him by the body. The judge placed undue weight on his view that the appellant's continued denial of the sexual offence reduces his capacity to respond to rehabilitative measures in determining that only an OLR was appropriate. Whilst it was for the judge to determine the level of risk, he erred on the significance of denial. The appellant's circumstances are different to those of the appellant in *Moreno* v *HM Advocate* [2024] HCJAC 27 where the court sustained the imposition of an OLR on a young offender. In particular, the risk in that case lay between medium and high and the circumstances carried a very strong implication of planning.

[28] In this case, the appellant's use of cannabis might have been a precipitating factor, albeit it had to be accepted that this was not a sudden, spontaneous offence. Whilst the offending spanned a number of hours, there were interludes without violence. The court should not place undue weight on what the appellant did to his sister when he was younger. It was dealt with in the children's hearings system.

[29] The risk assessor had identified a number of protective factors on which to build successful rehabilitation. The appellant's constructive response in prison strongly supported his ability to change. A sentence of detention such as that envisaged by the judge (8 years as part of an extended sentence of 13 years) would have been sufficient.

Decision

[30] Section 210E of the Criminal Procedure (Scotland) Act 1995 defines the risk criteria. They 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 a case such as this, where the judge had before him a risk assessment report, his task was to evaluate if, in light of that report and the information before him including the evidence he heard at trial, on a balance of probabilities, the risk criteria were met. If so, a judge must make an order for lifelong restriction: section 210F.

[31] The RMA provides criteria for the assessment of risk as high, medium or low. As this court explained in *Ferguson* v *HM Advocate* 2014 SCCR 244, it is for the judge to determine the level of risk, taking careful account of the expert assessment of risk in the RAR. A judge is not bound by the rating of risk in the RAR but would not make an OLR if risk was assessed as low and agreed. Where risk is assessed as high or medium, and the judge accepts it, it is for the judge to determine if the risk criteria are met.

[32] The RMA criteria changed, slightly, in 2018 and the current version published on the RMA website defines high and medium risk as follows:

> **"Risk Rating – High Risk**

The nature, seriousness and pattern of this individual's behaviour indicate a propensity to seriously endanger the lives, physical or psychological well-being of the public at large. The individual has problematic, persistent, and pervasive characteristics that are relevant to risk and which are not likely to be amenable to change, or the potential for change with time and/or intervention is significantly limited. Without changes in these characteristics the individual will continue to pose a risk of serious harm:

- There are few protective factors to counterbalance these characteristics
- Concerted long-term measures are indicated to manage the risk, including restriction, monitoring, supervision, and where the individual has the capacity to respond, intervention
- The nature of the difficulties with which the individual presents are such that intervention is unlikely to mitigate the need for long-term monitoring and supervision.

In the absence of identified measures, the individual is likely to continue to seriously endanger the lives, or physical or psychological well-being of the public at large.

Risk Rating - Medium Risk
The nature, seriousness and pattern of this individual's behaviour indicate a propensity to seriously endanger the lives, physical or psychological well-being of the public at large. The individual may have characteristics that are problematic, persistent and/or pervasive but:

- There is reason to believe that they may be amenable to change or are manageable with appropriate measures
- There is some evidence of protective factors
- The individual has the capacity and willingness to engage in appropriate intervention
- They may be sufficiently amenable to supervision
- There are other characteristics that indicate that measures short of lifelong restriction may be sufficient to minimise the risk of serious harm to others."

[33] In this case the judge recognised that signs of encouragement arose primarily from the appellant's positive and constructive response to the regime in Polmont where he is incarcerated and his opportunities to offend in the ways he has done in the community are limited. His concern was for the future when the appellant is no longer in prison. In light of all of the information before him, he concluded that if the appellant is at liberty and unconstrained by licence conditions he would continue seriously to endanger the lives, or physical or psychological well-being of the public at large. He considered that long-term supervision and monitoring would be necessary. The risk criteria were met.

[34] We are not persuaded that the circumstances or reasoning in *Moreno* assist the appellant. Although the assessment was that risk lay between medium and high, Mr Moreno had no convictions and no history of sexual misconduct. He did have a history of disruptive behaviours and there was evidence of his writing about seriously harming and killing people before he assaulted a stranger with intent to rape her, having assembled and carried a kit of materials to assist him in his plan. Mr Moreno's assault was over very quickly as the complainer escaped from him shortly after he accosted her in public.

[35] We take a very serious view of the charges in this case. The acquisition of a balaclava and BB gun and the circumstances in which they came to be used are redolent of premeditation. The appellant showed forensic awareness in committing these crimes. He subjected the complainer, vulnerable by virtue of his disability, to an ordeal of abduction, assault and sexual offending that endured for hours. The appellant continues to minimise the extent of what he did. He denies abduction and that sexual activity was non-consensual. Persistence in denial at this stage does not necessarily rule out successful rehabilitation but it presents an impediment. The trial judge was not alone in thinking so. As we have noted, at para [20] above, it presented considerable difficulty to the risk assessor. The trial judge viewed denial alongside the appellant's history of sexual offending and other behaviours. There is no reference to the judge's treatment of denial in the note of appeal and there should have been if the appellant wished to found on it when the judge identified it as a consideration in his sentencing remarks.

[36] We do not consider the appellant to match the illustration offered at para [107] in *Ferguson* of a person who would not meet the risk criteria. The court envisaged a young person, or a person whose actions on the particular occasion were not prompted by

underlying personality traits but by ingestion of intoxicants and who had prospects of changing as a result of maturity or rehabilitative measures.

[37] The appellant accepts that he has sexually offended in the past, against his younger sister, and he plainly did so seriously and repeatedly, and against a female member of staff in a children's home before he committed the serious crimes on this indictment. We do not consider that his premeditated offending, sustained over hours, resulted from his taking intoxicants, even if he had consumed some alcohol and cannabis. Neither he nor anyone else suggests it prompted his behaviour and we reject senior counsel's suggestion it might have done.

[38] The account of the appellant's behaviour from November 2021, when it was no longer safe for staff to look after him in care and he was accommodated in the community, with support, does not bode well for his eventual return to the community. We recognise that there are some encouraging signs in his attitude and response to the regime in Polmont. We acknowledge that his personality is not fully formed and he may mature considerably. If he does, this may reduce the risk he presents. The judge had to weigh such favourable indications against the appellant's history of serious sexual misconduct. He was correct to envisage that long-term supervision and monitoring will be necessary on the appellant's release from prison and that the appropriate means of achieving it, where he was satisfied on a balance of probabilities that the risk criteria were met, was an OLR. The appeal is refused.