APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 34
HCA/2025/000135/XC
HCA/2025-000136/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

(FIRST) ANDREW MCMAHON AND (SECOND) CHRISTIAN LAMBERT

Respondents

Appellant: Harvey, AD; the Crown Agent
First Respondent : Cloggie; PDSO, Edinburgh
Second Respondent: Ogg, Sol Adv; PDSO, Edinburgh

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12 August 2025

Introduction

[1] This opinion concerns two cases of rape of a young child, section 18 of the Sexual Offences (Scotland) Act 2009. In each case, the Crown has appealed on the ground that the sentence imposed was unduly lenient. In doing so, the Crown invites the court to confirm

that, as a generality, the crime of rape of a young child is more serious and merits a higher sentence than rape under section 1. Mr McMahon accepts that the sentence was unduly lenient but urges the court, when increasing his sentence, to impose a sentence no longer than necessary. Mr Lambert opposes the Crown appeal.

[2] We will address the individual circumstances of the two cases in turn but first summarise the Crown's submission on the general proposition:

- The sentence for rape of a young child ought generally to be higher than a sentence for rape under section 1 of the Sexual Offences (Scotland) Act 2009: *A* v *HM Advocate* [2015] HCJAC 105, 2016 SCCR 51; *Rae* v *HM Advocate* [2021] HCJAC 13; *Attorney General's References Nos 11 and 12 of 2012 (Roshane Channer and Ruben Monteiro)*, [2012] EWCA Crim 1119, [2013] 1 Cr App R (S) 43; *HM Advocate* v *Collins* [2016] HCJAC 102, 2017 JC 99; *HM Advocate* v *RB* [2025] HCJAC 7, 2025 SCCR 164. This reflects the increased harm and culpability of an adult offender deciding to engage in penetrative sexual activity with a child under 13 years of age.
- The 2009 Act itself recognises the particularly serious nature of sexual offending against young children. Part 4 of the Act features sexual offences against children under the age of 13. The Scottish Law Commission recognised that sexual activity with young children is never permissible and that such activity ought to be a distinct form of wrong: Report of the Scottish Law Commission: *Rape and other Sexual Offences* 28 November 2007 SLC 209 at para 4.7.
- The English approach to sentencing for sexual offending against young children recognises increased harm and culpability in such cases. The Sentencing Guidelines for England and Wales provide for, at the very lowest end of the scale, a sentencing range of 6-11 years imprisonment for rape of a young child with a starting point of

> 8 years imprisonment. In contrast, the Sentencing Guideline for rape under section 1 of the Sexual Offences Act 2003 provides for, at the lowest end of the scale, a sentencing range of 4-7 years imprisonment with a starting point of 5 years imprisonment.

Mr McMahon

[3] On 14 March 2025 the judge imposed an extended sentence of 7 years with a custodial term of 5 years after he was found guilty of two charges of rape of a young child. The essential parts of the charges were these:

> "(005) on an occasion between 28 March 2023 and 17 August 2023…at [an address in], Edinburgh you ANDREW MCMAHON did assault [the complainer aged 12]… and did penetrate her mouth with your penis and you did thus rape her: CONTRARY to Section 18 of the Sexual Offences (Scotland) Act 2009;
>
> (006) on 18 August 2023 at a wooded area … Edinburgh you ANDREW MCMAHON did assault [the same complainer] … and did seize her by the body and pull her, push her onto her knees, push her head, and penetrate her mouth with your penis, instruct her not to tell others and threaten her, and you did thus rape her: CONTRARY to Section 18 of the Sexual Offences (Scotland) Act 2009."

The Crown propose that by failing to recognise the true gravity of the offending, the judge imposed an unduly lenient sentence.

The circumstances

[4] The complainer's evidence comprised a joint investigative interview, transcribed for the appeal. She was 12 years old at the time of the offending. She has moderate learning disabilities. An adaptive behaviour assessment found her developmental age range to be between 2 years 9 months and 5 years old.

[5] The complainer had known the respondent for 3 or 4 years. He was her neighbour and she and her mother, who is disabled, often went to his house. She trusted him with her daughter, who would often visit the respondent alone to see his dog. The complainer enjoyed walking his dogs with him. The respondent used to take the complainer, alone, to visit the beach and the park. She enjoyed going on buses and trams with him. When she visited his house he would let her do activities she liked, such as painting. The respondent often told the complainer that he loved her.

[6] The offences came to light after the commission of charge 2. On 18 August 2023 the complainer, her mother and the respondent travelled across town by taxi so her mother could visit a relative, leaving the respondent to take the complainer to a local park. Once there he went into some nearby bushes and told her to follow him. She refused but the respondent pulled her onto her back and dragged her into the bushes. He pushed her to her knees and told her to close her eyes and open her mouth. He had his trousers down and he put his "thing" in her mouth. He told her that he loved her. Some boys saw what was happening and called the respondent a paedophile. He told the boys that he was doing a pee. He said this so he would not "get battered" but the boys attacked him anyway.

[7] The boys described seeing the man committing the offence in the woods and noticed him pulling up his trousers and walking out of the woods. One of the boys commented that it was wrong and disgusting. The man said he was urinating. The boys got the girl to leave with them. She seemed to be defending the man, saying he was just a friend and she wanted to stay with him.

[8] The child's mother learned something was amiss when a person who had heard what happened from the two boys approached her to ask if she knew the respondent and if she trusted him. When the complainer returned, she said that the respondent had had his

penis out and that he had been "peeing." The complainer was distressed because she thought she was in trouble. The police were contacted. The complainer initially told them nothing had happened, before disclosing that the man had put his penis in her mouth twice, once at his house and then in the bushes near the sports centre. In due course her DNA was found in the respondent's pants.

[9] Charge 1 arose from the complainer's description of an earlier occasion, when she went to the respondent's house to see his dog. He was in his bedroom and lying on his bed. He was wearing only a t-shirt and had no pants on. He shouted her name and asked her to get into bed with him. She refused to do so but the respondent proceeded to put his penis into her mouth. After one of the crimes, he told her not to tell anyone, implying that her windows would be smashed if she did.

Victim information

[10] The complainer's brother and carer completed a victim statement on her behalf, augmenting it with information from CAMHS and a community learning disability nurse. She has a moderate learning disability and the developmental age of a pre-school child. Her ability to keep herself safe is that of a 3 year old. It had not been possible to discuss with her the physical impact of the abuse due to the trauma and distress she suffers because of these crimes. She was referred for specialist input from Barnardo's sexual exploitation team but could not engage with the work required. She finds it difficult to have too many people in her life and she trusts only a small group of family members together with certain health, social work and school professionals. She is unable to attend school full time due to the trauma she experienced and the dysregulated behaviours she displays as a consequence. These include the use of highly sexualised language, violence towards her peers and staff

and the inappropriate use of IT. She has also exhibited inappropriate sexualised behaviours towards her peers, and she is unaware of the boundaries between pupils and staff. These difficulties have resulted in her having to have some time away from school to keep herself and others safe. She finds it very difficult to engage with classwork relating to relationships, puberty and sex education. She has spoken about what happened in class and her peers are now aware of the offending. She did not previously display any of these behaviours or use sexualised language.

Respondent's circumstances and Justice Social Work Report

[11] The respondent was 67 when he raped the child and 69 when sentenced. He is single and retired. Whilst he has diabetes and some associated visual impairment, he has no mental health difficulties or substance issues. He has one adult child with whom he has had no contact for many years and no contact with any other family members. He has no friends but is acquainted with fellow dog walkers. He lived alone prior to his remand in 2023. He spent a lot of time with the complainer, seeing her most days. He described her as being like a sister and he took her on the tram, on trips to the airport to watch aeroplanes and trips to the beach. He has one previous conviction for dog fouling.

[12] The respondent continues to deny his offending, denying particularly the coercive elements of the charges and maintaining that the complainer twice inflicted sexual behaviour on him without his consent. He also denies that there had been any previous sexual interaction between them. He said he believed the child had learned inappropriate sexual behaviours from another family friend, now deceased. He says he could not have committed the crimes as he has erectile dysfunction.

[13] The respondent took no responsibility for his offending and blamed a vulnerable child with developmental difficulties for instigating it. He scored towards the high end of the scale in relation to risk of sexual recidivism. The respondent poses a risk of a very high level of harm raising public protection issues. An extended sentence would be appropriate.

The judge's report

[14] The judge had regard to the circumstances of the offence, the contents of the victim statement, the child's age and vulnerability together with the contents of the report and the respondent's age, background and what was said in mitigation. She noted that in *HM Advocate* v *AB* [2015] HCJAC 106, 2016 SCCR 47 the court quashed a sentence of 3 years imprisonment for the oral rape of a 14-year-old girl and substituted a sentence of 5 years. She also considered the terms of the Scottish Sentencing Council's Draft Sentencing Guideline for Rape of a Young Child and used the Sentencing Council for England and Wales Guidelines for the rape of a child under the age of 13 as a cross check. She considered the level of culpability could be categorised as Level B and the level of harm as Level 3. She did not consider that the offending had involved grooming, describing it as opportunistic.

Note of appeal

[15] The sentence imposed fell outside the range of sentences a judge, applying her mind to all the relevant factors, could reasonably have considered appropriate.

[16] The sentencing judge did not properly assess the seriousness of the offence with reference to culpability and harm, leaving out of account a number of factors that increased the respondent's culpability and the harm he caused. A more severe sentence was necessary.

Submissions

Crown

[17] The judge erred in assessing culpability. Her reasoning left important factors out of account. There was a significant age gap between the respondent and the complainer. She was 12 with a much younger developmental age. The offence was committed in breach of the trust the complainer's mother had placed in the respondent by virtue of the relationship she had with him. The respondent threatened the child and used force beyond that inherent in the offence. He blamed the child for what had happened.

[18] The judge erred in holding that the offending was opportunistic. The two offences constituted a course of conduct. The court had recently identified seven hallmarks of grooming in *HM Advocate* v *LM* [2025] HCJAC 3 [34], 2025 SLT 385 at para 34. The offending in the present case met each of those hallmarks. This was a particularly vulnerable victim. There was a pattern of escalation in the respondent's behaviour, culminating in a course of conduct with two instances of rape. He took advantage of the child's love of dogs to engage with her and build up her trust, and her mother's, to gain unsupervised access to the complainer in his home and elsewhere. He emotionally manipulated the complainer telling her he loved her and that she must not tell anyone. He used threats to keep his offending a secret. The behaviour was planned and systematic and the respondent took advantage of the many hours he spent with the child. The respondent was in a position of trust and power over the child, albeit one less formal than that featuring in *LM*.

[19] The judge erred in assessing the harm caused. She reported that, "Although a serious offence had been committed against her, she did not appear to have been unduly upset by it at the time." In considering the English sentencing guidelines the judge wrongly selected the lowest level of harm. She failed to take into account the content of the victim

statement describing the deep and profound trauma and distress suffered in consequence of the respondent's offending. The child's behaviour had changed so much that she was unable to attend school. There was no reason for the trial judge to disregard it.

[20] The judge erred in her reliance on *HM Advocate* v *AB*, *supra*. It concerned a single offence against a 14-year-old girl where there was no information on the psychological effect of the offence.

[21] Had the judge taken into account the factors she had omitted from her sentencing decision, and had she carried out a cross check against the English sentencing guidelines in light of them, she would have recognised that the culpability of the respondent fell to be categorised as Level A and the harm as Level 2. In England, that would yield a sentencing range of between 11 years and 17 years imprisonment.

Respondent

[22] The sentence selected by the judge was unduly lenient. It followed that a higher sentence would be imposed but it ought to be no more severe than is necessary and the court should find some significant mitigating factors. The respondent is 69 with no significant previous convictions. He had accepted advice, and provided instructions, that counsel would not cross-examine the child, who did not have to give evidence on commission. Her joint investigative interview constituted her evidence. Accordingly, the child was not re-traumatised by the court process. It is a material utilitarian benefit. Such a consideration merits a reduction in sentence by analogy with a reduction for a plea of guilty under section 196 of the Criminal Procedure (Scotland) Act 1995: *Hutchinson* v *HM Advocate* 2007 SCCR 477. The court reduced a sentence of imprisonment for 3 years imposed after trial by 3 months. The court recognised that it was not a formal reduction under s 196 but

considered it appropriate where a very substantial joint minute reduced the trial's duration from weeks to days. In imposing sentence of new, the court should consider taking the same approach.

Analysis and Decision

[23] The accepted test in a Crown appeal against sentence was explained by the Lord Justice General (Hope) in delivering the opinion of the court in *HM Advocate* v *Bell* 1995 SCCR 244:

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it 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. Weight must always be given to the views of the trial judge, especially in a case which has gone to trial and the trial judge has had the advantage of seeing and hearing all the evidence. There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it at the request of the Lord Advocate."

[24] We consider that the sentencing judge failed to take account of material circumstances:

- the course of grooming sustained over a period of years is itself highly aggravating and demonstrates that the judge's assessment that these crimes were opportunistic was untenable;
- the sexual exploitation by an adult of an extremely vulnerable child of 12 with a developmental age of a child under 5;
- the repetition of the respondent's conduct;
- the force used in charge 2;
- telling the complainer she must not divulge and threatening her with consequences if she did.

[25] Accordingly, the judge did not apply her mind to all relevant factors. She materially erred in her assessment of the harm disclosed in the victim statement prepared on behalf of the complainer. She erred in finding mitigation in the child not appearing frightened and

wishing to stay with the respondent after he raped her for the second time. It is common knowledge that there is no default presentation of a complainer in any case of rape. This was a child with very limited understanding, targeted by the respondent and substantially dependent on him when her mother was elsewhere and had entrusted her care to him.

[26] The judge should not have used a draft guideline as if it were in force, but in doing so she misapplied it in evaluating both culpability and harm. To the extent that she took account of the English guideline, she misapplied it in her assessment of both harm and culpability. She envisaged the lowest category in each respect.

[27] Using the decision in *AB* as a yardstick was inappropriate in this case involving a very significant level of psychological harm with consequences for the complainer's education when *AB* was a case where the court had no information about psychological harm. Further, the commission of two crimes of rape was another material point of distinction from the single offence in *AB*.

[28] This case involved the repeated rape of a young child with attributes of an extremely young child, as the respondent well knew. He groomed her and exploited her extreme vulnerability before raping her twice. Unsurprisingly, it has had very serious psychological, social and educational consequences for the child. The respondent has shown no remorse whatsoever, engaged in extraordinary victim blaming and there is almost no mitigation.

[29] Whilst it is open to us to take account of the avoidance of cross-examination as general mitigation, it is not appropriate to make a formal reduction of sentence: *HM Advocate* v *McNamara* [2012] HCJAC 54, 2013 JC 53. In delivering the opinion of a court of three judges, Lord Carloway determined that a reduction under s 196 is appropriate only where there is a plea of guilty to the offence of which an accused person is convicted. Such utilitarian benefits as may arise from avoiding a witness testifying or the agreement of

evidence are not related to a plea of guilty but can be reflected with other mitigating factors in selecting the appropriate sentence. The decision in *McNamara* must prevail over the two-judge decision in *Hutchinson.* Recognising that utilitarian benefits may have some mitigating weight does not single them out from the multitude of other mitigating factors such as remorse, previous good character etc for which no specific deduction is made in passing sentence. Making a reduction for a plea of guilty is different. In enacting s 196, Parliament required courts to take into account a guilty plea, and when it was tendered, when sentencing a person who has pled guilty. Subsection (1A) requires the court to state what sentence it would otherwise have imposed where a reduction is made. If it does not make a reduction it must explain why.

[30] Whilst we do not suggest such factors as agreement of evidence and responsible conduct by counsel have no mitigating weight, and they do have utilitarian value, care is required in evaluating and applying them in the sentencing process. So far as agreement of fact by joint minute is concerned, it is always to be encouraged. It benefits witnesses not called. It can assist juries in their task. It can materially shorten trials, increase court capacity and reduce delays in other cases. Nevertheless, it is important to recognise that agreement of facts where appropriate is a duty imposed by Parliament in s 257 of the 1995 Act. It is also a requirement of proper professional practice: *Hunter* v *Brown* [2012] HCJAC 42, 2012 SLT 665, *HM Advocate* v *B* [2012] HCJAC 13, 2012 JC 283. Agreement often serves the interests of the accused.

[31] Whilst there was some utilitarian value in foregoing cross-examination of the child, that too was responsible advocacy but no more than proper practice required in the circumstances. Practice Note 1 of 2019's protocol for child and vulnerable witnesses identifies as a general principle that:

> "The taking of evidence from child and vulnerable witnesses should entail the least number of questions consistent with the duties of counsel."

Where, as in this case, counsel agreed with the Crown a means of advancing his client's defence without needing to cross-examine, he was acting as responsible counsel should. Whilst it does not attract a specific reduction, we nevertheless take account of it along with the respondent's lack of any significant previous conviction at the age of 69 and his state of health.

[32] In determining sentence in a case of this kind where culpability is considerable and the harm caused severe, considerations of general and individual deterrence, protection of the public and punishment are prominent. The appropriate sentence across the two charges is imprisonment for 11 years. Counsel accepted that an extended sentence is necessary. There is an assessment of a significant risk of reoffending causing serious harm and we note the respondent's ability to inveigle himself into a trusted position with a vulnerable family. In these circumstances, ordinary licence conditions are not sufficient to protect the public from serious harm. Accordingly, we impose an extended sentence of 13 years with a custodial term of 11 years and an extension period of 2 years. As before, the sentence is backdated to 22 August 2023.

Mr Lambert

[33] On 27 February 2025 the judge imposed a prison sentence of 3 years and 4 months, reduced from 5 years, after the respondent pled guilty to a charge of rape of a young child under s 18 of the 2009 Act. The essential parts of the charges were these:

> "on an occasion on or between 27 March 2024 and 28 March 2024, at [an address in Edinburgh], you CHRISTIAN LAMBERT did assault [the complainer] … and did penetrate her vagina with your penis and you did thus rape her…."

The circumstances

[34] The respondent was 21 and lived in Edinburgh. The complainer was 12 and lived in the kinship care of a relative in Glasgow. The respondent and complainer connected over Snapchat and were in active communication for a week prior to the incident. The respondent told the reporting social worker they had been connected on Snapchat for around a year.

[35] On 27 March 2024, the complainer arranged to stay in Edinburgh with a friend. She travelled there from Glasgow but her arrangements fell through. She sent out a general message on social media asking for help to find overnight accommodation. The respondent replied, inviting her to stay at his flat, and she accepted. Meanwhile, the complainer's carer had become concerned about her whereabouts and contacted the police.

[36] The respondent knew that the complainer was 12. She had expected him to be a boy of 14 or 15. When they met, the respondent told her he was 16 and took her to his flat. When they arrived, the respondent smoked cannabis. They left at about midnight to go for a walk to a local park before returning. The following is taken directly from the strikingly sparse agreed narrative presented to the sentencing judge:

> "On their return to his home address, they kissed and cuddled. The complainer has a very vague recollection of the details of what happened, but recalled that she had been repeatedly falling asleep and recalled the accused penetrating her vagina with his penis. He also choked her during the course of the incident."

The complainer stayed at the respondent's flat overnight and remained in Edinburgh until the following afternoon. The police managed to locate her on a bus returning to Glasgow. On encountering police officers, she disclosed that the respondent had raped her. Forensic testing found his semen on her pants.

Victim information

[37] The complainer's relative completed a victim statement. The complainer has autism and ADHD. As a result of what happened, the complainer would not go out on her own due to being nervous and anxious. She became angry and easily upset and suffered from nightmares. She finds it difficult to trust people and her confidence is very low. She cannot cope with going to school and has found it difficult to communicate except with family members. She has to be home-schooled for two hours per week. She has attended sessions with a psychiatrist and a therapist twice per week and is prescribed Sertraline to help her cope with daily life. She is described as an intelligent girl who has lost her spark.

Respondent's circumstances and Justice Social Work Report

[38] The respondent was living in social housing, unemployed and receiving benefits. He has no previous convictions. He attended boarding school at the behest of his father with whom he now has a very limited relationship. He has no relationship with his mother. His father supported him financially but ceased to do so when, at 18, the respondent discontinued his formal education. He told the social worker that he had been the victim of racist bullying at school.

[39] The respondent said he knew that the complainer was "potentially vulnerable." He found some of her mannerisms and behaviour towards him odd. She had told him about difficult experiences in her life. He knew that she had no sexual experience of any kind because he had asked her about that. When he asked her whether she wanted her "first kiss," she was hesitant. He kissed her anyway. The complainer had asked to be choked and he did so, became aroused and asked her if she wanted to have sex. Again she was hesitant but responded affirmatively. He explained to the social worker that his motivation for

continuing to have sexual intercourse with a child when, on his account it was not pleasurable because of a lot of stopping and starting, was so he was "able to say he had taken someone's virginity." He described regretting his actions in the immediate aftermath not because he had raped a child of 12 but because it was not pleasurable for him. The social worker noted belated insight and genuine remorse. The respondent described his behaviour as "weird and disgusting" and acknowledged he had taken advantage of a vulnerable child when he ought to have shown her care and respect.

[40] Statistical analysis suggests that the respondent presents a high risk of sexual reoffending. He has moderate treatment needs. He displayed a deviant sexual interest in pubescent children and some emotional identification with them. The risk he presents is of sexual offending. There is no formal recommendation for an extended sentence. Whilst the social worker referred to no imminent risk of offending, we note the context of his being remanded in custody and her view that a prison sentence was inevitable.

The sentencing judge's report

[41] The sentencing judge did not consider that the respondent had groomed the complainer, nor did he identify a relationship of trust between the parties. There was no premeditation and the offence was opportunistic. The judge took from the social work report that the respondent admitted that he knew the complainer was 12 and that he offered accommodation in the hope that it would lead to sexual intercourse and he said he had wanted to take her virginity.

[42] In assessing culpability and harm the judge took into account the age disparity between the parties together with the respondent's use of deception as to his age. He considered the use of force, by choking, aggravating but was inclined to believe the

respondent's report to the social worker that the complainer asked to be choked. He noted that there was no mention in the narrative of injury or loss of consciousness resulting. He had regard to the content of the victim statement. Whilst emotional and psychological harm was eminently foreseeable, he considered that the respondent did not have enough information about the complainer's mental health to appreciate that his actions might lead to all of the consequences that emerged. The respondent did not know that the complainer had autism or ADHD. He lacked maturity and did not have the benefit of parental guidance throughout his formative years. Without those factors, the sentencing judge would have selected a headline sentence of 7 years imprisonment. Instead, he concluded that a headline sentence of 5 years imprisonment, reduced to 3 years and 4 months for the early guilty plea, was appropriate in all of the circumstances.

[43] The sentencing judge considered that, since the overall sentence was less than 4 years imprisonment, an extended sentence was incompetent. In any event, an extended sentence would not have been appropriate. The respondent had no previous convictions and there was no pattern of offending.

Note of appeal

[44] The judge failed to assess the seriousness of the offence with proper reference to culpability and harm. He did not give appropriate weight to significant factors:

- the respondent's exploitation of the complainer's vulnerability;
- premeditation and his motivation;
- the use of deception by the respondent to conceal his age;
- choking; and
- the physical, emotional and psychological harm caused.

The headline sentence of 5 years imprisonment fell outwith the range of sentences a judge, applying his mind to all of the relevant factors, could have reasonably considered appropriate. Using the English guideline as a cross check supported the same conclusion.

[45] The judge erred in failing to impose an extended sentence. The ordinary licence period was not sufficient to protect the public from serious harm from the respondent.

Submissions

Crown

[46] The Crown founded on the cases cited above in considering Mr McMahon's appeal and made the same submissions on the proposed general principle, all as set out at para [2] above.

[47] The judge had erred in holding that there was no premeditation. The respondent knew the complainer's age before he offered her a place to stay the night. He created a situation in order to carry out the offence. He could have helped her but instead, arranged for her to stay at his flat in the hope that it would lead to sexual intercourse.

[48] The respondent choked the complainer with the potential to cause serious harm that is not inherent in, or associated with, consensual sexual activity: *Kirkup* v *HM Advocate* [2025] HCJAC 9, 2025 JC 135. A particularly concerning feature that the judge failed to consider was that the respondent reported that he found this arousing. To the extent that the respondent was motivated by taking the complainer's virginity, this was a materially aggravating consideration. The judge failed to grasp its significance.

[49] The judge erred in his assessment of harm, notably the obvious potential for harm in considering the circumstances of the offence and confirmed by the information in the victim statement. The harm caused to a 12-year-old girl seeking a place of safety by a 21 year old

man was obvious: *HM Advocate* v *RB, supra*. He erred by assessing what harm the respondent ought to have anticipated or foreseen. Harm required to be assessed objectively with reference to the actual harm caused, the intended harm or the harm that might foreseeably have been caused: *R* v *Saunders* [2022] EWCA Crim 264 [13].

[50] The Sentencing Guidelines for England and Wales could be used as a cross check: *HM Advocate* v *Docherty* [2024] HCJAC 36, 2025 JC 31. The offence would have fallen within harm category 2 and culpability category B, resulting in a starting point of 10 years imprisonment with a sentencing range of between 8 and 13 years imprisonment. The sentencing judge ought to have noted the disparity with the headline sentence he identified, albeit the respondent's age was also a material consideration.

[51] The judge gave the mitigating factors advanced by the respondent undue weight. Parental neglect and bullying at school did not explain his commission of the crime.

[52] The judge erred in law in considering that, having selected a final sentence of 3 years and 4 months imprisonment, an extended sentence was incompetent. Section 210A(1)(a) of the Criminal Procedure (Scotland) Act 1995 distinguished sexual offences and violent or terrorism offences. It was competent to order an extended sentence in sexual offence cases where the determinative custodial sentence was less than 4 years.

[53] An extended sentence was appropriate in the circumstances. An ordinary licence period would not adequately protect the public from serious harm. The offence committed was extremely serious and nothing in the respondent's personal history provided an explanation for what he did. There was a statistically high risk of sexual reoffending.

Respondent

[54] The sentence imposed, even if lenient was not unduly so: *HM Advocate* v *Bell*, *supra*. Whilst the victim statement was a source of information on harm, assertions of fact about the circumstances of the offence beyond the scope of the very limited narrative and what was said by the respondent to the social worker about conduct libelled should be left out of account. There was no grooming and no premeditation. There was no breach of trust as conventionally understood. There was consensual kissing and cuddling. There was no information to contradict the respondent's report to the social worker that choking occurred at the invitation of the complainer. Caution was merited in considering the information in the victim statement when it came not from the complainer but her carer albeit it must be accepted that it adequately vouched a significant level of harm. There was compelling mitigation in the respondent's age at the time, 21 and so a young person for sentencing purposes, and rehabilitation was a primary consideration. He had no previous convictions, had a difficult background and was socially isolated. He had expressed remorse for the consequences of what he did. Regardless of the judge's error about its competence, the criteria for an extended sentence were not met.

[55] There is no sufficient evidence base of sentences on persons aged 21-24 for s 18 offences to suggest that the sentence imposed was unduly lenient or that there is a typical sentence for persons of this age. Whilst reported decisions support the view that rape of a young child is particularly odious and deterrence is a particularly important consideration in sentencing for it, none of the Scottish cases cited by the Crown supported a sentence at the level proposed by the Crown. The sentencing powers provided in the 2009 Act for rape under both s 1 and s 18 are the same. Accordingly, there is no justification for holding that a s 18 rape is generally more serious than rape under s 1. The examples of *Rae* v *HM Advocate*,

supra and *CA* v *HM Advocate* [2024] HCJAC 29, 2024 JC 389 support the decision of the trial judge. Even if English guidelines and Scottish case law may support moderately higher sentences for rape of a young child, they do not support significantly higher sentences.

Decision

[56] For the avoidance of doubt, the value of victim impact information is not diminished where it comes from a parent, relative or other person specified in the Criminal Justice (Scotland) Act 2003, s 14 as amended. They are entitled to provide a statement about the impact of a crime rather than the victim.

[57] The judge's comment that the respondent was not aware of the complainer's health conditions, and therefore could not foresee the harm actually caused to the complainer by his conduct, demonstrates that he misdirected himself in considering harm. The Sentencing process guideline states, at para 14:

> "Harm is to be interpreted broadly. It includes cases where actual harm was caused, and cases where there was a risk of harm but no actual harm resulted."

It is clear that when it comes to harm, foreseeability is not a pre-requisite for taking the consequences of a crime into account. It is consistent with the principle that a person takes his victim as he finds him.

[58] It is competent to impose an extended sentence for a sexual offence of any length, s 210A(1)(a)(i). The prerequisite of a sentence of imprisonment for 4 years or more for the making of an extended sentence applies to a violent or terrorism offence, s 210A(1)(a)(ii).

[59] Whilst a social work report is a prerequisite for the making of an extended sentence, s 210A(4), and a judge is expected to consider any recommendation on risk in a social work report, there is no requirement to accept it. Ultimately, the responsibility for determining

the level of risk and, in this case, whether the criteria for making an extended sentence were met, rested on the judge, not the social worker: *McGowan* v *HM Advocate* 2005 1 JC 327 at para 17. A judge should not refrain from imposing an extended sentence when the statutory criteria are met, even if a report contains no such recommendation.

[60] We note that in his assessment of harm the judge states:

> "The Crown narrative indicates that although she was not old enough to consent, *she agreed to sex with Mr Lambert*. The report indicates that *he thought she consented* albeit hesitantly. The lack of consent in this case is a product of the fact that she was under-age and could not consent."
> [emphasis added]

The narrative, quoted at para [36] above does not state that the complainer agreed to have sex. Consent is not a constituent of this crime nor is the absence of reasonable belief in consent. If questions of consent and absence of reasonable belief were live issues, merely thinking that someone was consenting would not constitute an absence of reasonable belief.

[61] We are not persuaded that the approach of the court in *Rae* supports the respondent's position. It was a somewhat special case where the judge at first instance made enquiry of the Crown, who accepted that, although it was not a defence to a s 18 charge, the complainer objectively did not look or converse like a 12 year old but like a girl of 16. The Crown had accepted that Mr Rae both genuinely and reasonably believed that to be so. In *Rae*, there was no choking, no force, the complainer was not falling in and out of sleep, was in a place where she chose to be, she was on the narrative plainly willing to engage in sexual intercourse and there was no vulnerability in her situation beyond her age. Mr Rae ejaculated but not internally. He was also two years younger than the respondent.

[62] The court did not consider that the accepted presence of "consent" was a truly mitigating factor. It was more appropriate to suggest its absence aggravates culpability. The significance and weight it might have would vary according to the particular

circumstances. The purpose of the legislation is to protect children from themselves as well as those who would exploit them. Given their vulnerability to exploitation, they require protection. This indicates the importance of (general) deterrence.

[63] The decision in *CA* arose from offending when CA was aged between 13 and 16 and sentence was passed 10 years later. CA had been a useful and productive citizen and was caring for his mother. He presented a low risk of offending. Whilst accepting that the respondent is a young offender, we consider that offending by the 21-year-old respondent in the circumstances of this case is markedly different in itself from that by a person between 5 and 8 years younger and he can offer substantially less mitigation.

[64] No doubt this court can, where appropriate, take account of English guidelines, primarily as a cross check, but there have been numerous appeal decisions from this court over the last few years on sentencing for sexual offences. Sentencing policy is not always the same north and south of the border and there can be differences in the substantive law and provisions and practices governing release. English guidelines are generally more prescriptive. In Scotland, judges ought to apply the Principles and purposes guideline, and the Sentencing process guideline. Application of these resources, growing learning about the effects of trauma on the victims of sexual crime and its potential to cause harm and the increasingly common availability of victim statements allowing the court more understanding of harm actually caused to complainers has had some effect. These developments appear to have prompted a greater appreciation of the true gravity of sexual offending. This court has started to impose higher sentences than may have been common previously and has approved others imposed at first instance.

[65] We mention some examples, none matching the precise circumstances of the respondent's case. Such examples never do precisely match a later case but they illustrate

both a general trend and the court's recognition that some cases are of such extreme gravity that hitherto unprecedented sentences have been imposed and approved.

[66] Examples of recent appeal decisions on particularly serious sexual offending against children include:

- *Miller* v *HM Advocate* [2024] HCJAC 3, 2024 JC 253. The court identified a headline sentence of imprisonment of 24 years, i*n cumulo*, as appropriate for the abduction and repeated penetrative sexual assault of a girl of 11 and causing her to look at indecent images by watching pornography and fetish videos in her presence. He was also charged with possession of indecent photographs of children over a considerable period prior to his abusing a child directly.
- In *HM Advocate* v *RB, supra,* the court increased a sentence for a single instance of rape of the respondent's daughter, aged 10, from 6 years' imprisonment to 10 years.
- In *HM Advocate* v *LM, supra,* the court increased an extended sentence of 7 years with a 5 year custodial term on charges of communicating indecently with a child aged 13-15 (ss 33 and 34 2009 Act) and repeated instances of rape and sexual assault when she was 15 (ss 1, 2 and 3). It was appropriate to impose sentences on these and two other charges *in cumulo* but the court considered that the two charges specified merited an extended sentence of 11 years with an 8 year custodial term if standing alone.
- *HM Advocate* v *TJ* [2023] HCJAC 23, 2024 JC 1 involved an adult woman. The trial judge imposed a sentence of 4 years and 6 months reduced from 5 years for a plea of guilty. This court increased the sentence to 8 years and 6 months reduced from 9 years for a single instance of rape with a number of

> aggravating circumstances, including the presence of the complainer's child aged 7 during a sustained incident, violence and some pre-meditation.

[67] In delivering the opinion of the court in *TJ*, the Lord Justice Clerk (Dorrian) stated an important principle aligning closely with the Principles and purposes and Sentencing process guidelines:

> "[23] In the course of argument, reference was made to a number of sentencing decisions in other rape cases. We do not dispute that this may be a valuable exercise in assisting the court to identify a sentencing range for the circumstances of an individual case. However, it must be borne in mind always that each case is unique, and it is always necessary to consider the individual factors which are present and which reflect either the culpability of the offender or the harm to the complainer or both…"

[68] Against that background, we consider the circumstances of this case. The two most significant mitigating features are the respondent's guilty plea and age, 21, at the time. The latter brings him within the scope of the guideline, Sentencing young people. On the former point, whilst the Crown did not attack the level of discount for the respondent's guilty plea in the note of appeal, if we find the sentence imposed unduly lenient and resolve to pass a different sentence we must apply the law correctly.

[69] We reiterate that there is no entitlement to any particular level of reduction for a plea of guilty: *Gemmell* v *HM Advocate* [2011] HCJAC 129 [29 and 30], 2012 JC 223 at paras 29 and 30. The governing principle is that the earlier the plea, the greater the reduction is likely to be, potentially up to one third for a truly early plea, *Gemmell* at paras 41, 78 and 79. There is no rule that a s 76 plea always merits a reduction of one third: *Geddes* v *HM Advocate* [2015] HCJAC 43 [21], 2015 SCCR 230 at para 21. The purpose underlying reducing a sentence for a guilty plea lies exclusively in the utilitarian value of the plea. That is at its highest at or shortly after first appearance. A plea tendered and accepted at this stage informs any witnesses that they will not have to give evidence. It avoids the Crown

spending resources on preparation and disclosure. Resolving prosecutions at a very early stage is of most value to the administration of justice. Time is not on the side of an accused person so far as a reduction for a plea of guilty is concerned. We note that in *Geddes*, when this court imposed sentence of new on a charge of causing death by dangerous driving, the three-month delay from first appearance to intimation of a guilty plea did not merit a reduction of one third and the court made a reduction of one quarter.

[70] Those representing persons accused of crimes in solemn proceedings should understand that if a case is capable of resolution by plea of guilty, it is in their client's interest that they intimate the plea at the very earliest opportunity. It is only in such circumstances that the court will be contemplating a reduction of, or approaching, a third.

[71] With an ever-growing caseload in solemn courts, and particularly the High Court of Justiciary, it is important that the Crown Office and Procurator Fiscal Service facilitates early resolution of solemn proceedings by ensuring that defence lawyers can ascertain the scope and effect of the available evidence at the outset of proceedings.

[72] We note that the respondent's culpability was considerable, having sexual intercourse with a girl of 12 and ejaculating internally. We find it hard to understand for what innocent reason a man of 21 was communicating online with a 12-year-old girl whilst pretending he was much younger. His deception is both concerning and aggravating. What is certain is that once he learned of her plight, he decided to see if he could engineer an opportunity to have sex with a girl he knew was 12. To that extent, there was a significant element of premeditation, even if the opportunity to plan arose spontaneously. The child, unsurprisingly given the time of night and his smoking cannabis in her company, was falling in and out of sleep. Even if it is correct that the child asked to be strangled, which we find highly improbable, to accede was to perform a seriously dangerous action with

considerable risk of causing serious harm, even death. Any act of choking another person is a serious crime with or without agreement and, for this crime, a highly aggravating feature. That the respondent found strangling the child to be sexually arousing is very concerning. His determination to continue to penetrate her in pursuit of his agenda to take a girl's virginity is also concerning. The respondent has caused considerable harm to a young child. It is substantially greater than the harm inherent in the offence itself. The respondent caused severe and enduring harm in the form of serious psychological, social and educational consequences for the complainer. Whilst there was no formal recommendation for an extended sentence, there was a statistical assessment that the respondent presented a high risk of sexual reoffending. The whole circumstances are redolent of motivation to commit a very serious crime against a young child in a very vulnerable situation. In the whole circumstances, this is a case where ordinary licence arrangements are not sufficient to protect the public from serious harm from the respondent.

[73] In all the circumstances, the sentence imposed was unduly lenient. Even allowing for the respondent's age and its implications, that he may be deemed less culpable than an older person and may have better prospects for rehabilitation, the appropriate sentence in this case is an extended sentence of 10 years with a 7 year custodial term. For a plea of guilty intimated four and a half months after first appearance on petition, we shall reduce the custodial term by one quarter. Accordingly, we impose an extended sentence of 8 years and 3 months with a custodial term of 5 years and 3 months and an extension period of 3 years. As before, the sentence is backdated to 10 January 2025.

The relative gravity of an offence under section 18

[74] The crime of rape generally is a particularly serious offence. It is apparent that in England, the guidelines have a higher starting point for rape of a young child than for an older person. Rape of a young child will generally be more culpable than rape of an older person, serious though both crimes are. It is also likely that there will be a higher level of harm. Courts in both England and Scotland have recognised that sexual exploitation of a young child may be comparatively easy to commit given the physical and intellectual advantages of an adult over a young child. Both individual and general deterrence is an important sentencing objective.

[75] Whilst there can be exceptional cases with exceptional circumstances, in general in the absence of exceptional circumstances, the appropriate sentence for rape of a child under s 18 will be significantly higher than for rape under s 1.