APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 11
HCA/2025/143/XC

Lord Justice General
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

SEAN KIRKUP

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Lord Stewart of Dirleton KC, Taylor; PDSO Edinburgh
Respondent: Lord Advocate (Bain KC), McLean KC AD, Harvey AD; the Crown Agent

27 March 2026

Introduction

[1] On 5 February 2025 the appellant was convicted by a jury at the High Court of Justiciary at Edinburgh of four sexual and domestic abuse offences against two former partners. The charges may be summarised as follows:

Charge (1) Sexual assault of HR by touching her vagina over her clothing and attempting to kiss her.

Charge (2) Contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 on various occasions between 1 October 2020 and 30 November 2020 involving violent and abusive behaviour towards HR including uttering derogatory and abusive comments about her clothing and appearance and seizing her by the hand and bending her fingers.

Charge (4) Contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 on various occasions between 1 October 2020 and 31 August 2021 involving abusive and violent behaviour towards LM of various kinds including repeatedly texting her, shouting, swearing, uttering threats, demanding money, seizing her by the body, punching her and seizing and compressing her throat and restricting her breathing to her injury; and

Charge (5) Sexual assault of LM by seizing hold of her, pushing her, pulling her hair, punching and slapping her on the body, striking her on the body with a whip and a paddle, seizing and compressing her throat and restricting her breathing to her injury.

[2] On 26 March 2025 the trial judge imposed an extended sentence of 6 years, comprising a custodial term of 4 years and an extension period of 2 years.

[3] Although the appellant advances one ground of appeal against conviction, it comprises two main parts. First, he contends that the preliminary hearing judge erred by refusing him permission to lead general evidence of a BDSM style relationship between him and the complainer LM. Second, and more specifically, he argues that the preliminary hearing judge erred by refusing such permission in relation to the parties' prior agreement on a "safe word".

[4] The appellant has raised a compatibility issue within the meaning of section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995. He submits that the effect of the preliminary hearing judge's decision was to deny him a fair trial as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

[5] He also appeals against sentence on the basis that the sentence imposed by the trial judge was excessive.

[6] Since the issue before the court is one of fairness, we must examine the full circumstances of the trial, including the procedural history, the evidence led, speeches made to the jury and the judge's directions before turning to consider the circumstances in which it is contended that the trial was unfair.

Procedural history

Original indictment

[7] The appellant was first indicted on the following seven charges:

Charge (1) Threatening and abusive behaviour on various occasions towards his partner, NR.

Charge (2) Domestic abuse of NR.

Charge (3) Sexual assault of his partner, HR.

Charge (4) Domestic abuse of HR.

Charge (5) Violent rape of HR.

Charge (6) Domestic abuse of his partner, LM; and

Charge (7) Violent rape of LM.

The indictment also contained a docket, giving notice of the Crown's intention to lead evidence of a further instance of violent and abusive conduct towards LM.

Section 74 appeal

[8] The case first called for a preliminary hearing on 20 November 2023. Charge (7) was libelled in the following terms:

> "[O]n various occasions between 1 October 2020 and 30 August 2021, at ... Edinburgh and elsewhere you ... did assault [LM], and did seize hold of her, push her, pull her hair, punch and slap her on the face and body, seize her by the throat and compress same thereby restricting her breathing and penetrate her vagina with your penis and

> you did thus rape her to her injury; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

It will be noted that there was no reference to the use of a whip and paddle in charge (7) as it was presented to the preliminary hearing judge.

[9] The appellant lodged a special defence of consent in respect of charge (7) as follows:

> "[The appellant] pleads not guilty to the charges on the indictment and specially and without prejudice in respect of said plea, hereby intimates that in respect of charge 7 on the indictment, insofar as he slapped [LM] to the face and body, seized her by the throat and restricted her breathing, and penetrated her vagina, he did so with her consent and with the reasonable belief that she was so consenting."

[10] At a continued preliminary hearing on 12 February 2024 the judge held that consent was not available as a defence to charge (7) insofar as it averred deliberate acts which had the potential to cause serious harm, such as seizing and compressing LM's neck or slapping her on the face or head. Such a defence was available in respect of the averments of slapping on the body, where such acts did not have the potential to cause serious harm and could be equated with scratching or the infliction of love bites. Such actions fell within the margin of appreciation afforded to national authorities under Article 8 of the Convention by which private and consensual acts inherent in, or associated with, consensual sexual activity were not criminalised.

[11] The preliminary hearing judge's decision was upheld by this court on appeal under section 74 procedure on 27 June 2024 (*HM Advocate* v *Kirkup No 1* [2025] HCJAC 9; 2025 JC 135). It followed that the appellant's defence of consent to the conduct libelled in charge (7) was only available in relation to those averments in the charge which did not have the potential to cause serious harm. Consent was not available as a defence against the averments of slapping LM on the face, seizing her by the throat and restricting her breathing.

The section 275(3) application

[12] In support of his defence to charges (6) and (7), the appellant sought to adduce two categories of evidence at trial. Since both categories were declared inadmissible by the provisions of section 274(1) of the 1995 Act, the court's permission was required by application under section 275(3).

[13] Part 1(a) of the application sought permission to elicit evidence that the complainer LM was violent towards the appellant and that some of the conduct libelled in charge (6) was both reasonable and in self-defence.

[14] Part 1(b) of the application sought to adduce evidence in support of the appellant's defence to charge (7) that during the course of his relationship with LM, the parties enjoyed consensual sexual role play with a dominant/submissive theme, which involved the use of sex toys, including a whip and a spanking paddle. Moreover, the parties had agreed a safe word which could be utilised by LM when the activities reached a point at which she was no longer prepared to consent to the sexual activity.

[15] Submissions on the application were heard at a continued preliminary hearing on 12 January 2024. It was argued for the appellant that part 1(b) of the application was relevant to his defence of consent. The jury could infer that LM's failure to use the safe word indicated that she was consenting to the sexual activity. Furthermore, such failure allowed the appellant a defence of reasonable belief in consent. The Crown had sought the views of LM in advance of the continued preliminary hearing. Her position was that the appellant's version of events was simply untrue, they had not agreed a safe word. While there had been some consensual sexual activity which could be described as "rough sex" involving sex toys, the charges on the indictment came later when she had determined that she did not wish to be involved in such activities.

[16] On 12 February 2024, the preliminary hearing judge allowed part 1(a) of the application and refused part 1(b). Valid consent could only be given at the time of sexual activity, or at least very close to it. The law did not view any kind of relationship as a binding contract which permanently fixed the issue of consent (*Stallard* v *HM Advocate* 1989 SCCR 248; *GW* v *HM Advocate* [2019] HCJAC 23, 2019 JC 109). Consent required to be present at the time of the sexual activity (*R* v *Cooper* [2009] UKHL 42; [2009] WLR 1786). That was consistent with the requirement under section 15 of the Sexual Offences (Scotland) Act 2009 for consent to be continuous and specific to each element of sexual activity. The evidence was collateral at common law and, in any event, lacking in sufficient probative value.

Amendment of the indictment

[17] Charges (1) and (2) were withdrawn by the Crown at a further continued preliminary hearing on 20 January 2025. Thus charges (3), (4), (5), (6) and (7) on the original indictment became charges (1), (2), (3), (4) and (5) on the final jury indictment. We shall refer to the renumbered charges.

[18] Following the court's decision in *Kirkup No 1,* the Crown amended the new charge (5) to include averments of striking LM with a whip and a paddle. The appellant did not oppose the Crown's motion for this amendment to be made. The special defence of consent to charge (5) was amended and further amended following discussion with the trial judge prior to the ballot. Its final terms, so far as relevant, were as follows:

> "insofar as he penetrated the complainer's vagina with his penis and engaged in sexual acts with her which did not have the potential to cause serious harm, he did so with her consent and with the reasonable belief that she was so consenting."

No further application under section 275(3) was made by the appellant to either a preliminary hearing judge or to the trial judge.

[19] The Crown made further amendments to the indictment throughout the trial. Deletions were made to charges (2), (3), (4) and (5) as the evidence progressed.

The evidence

HR

[20] HR's evidence was taken on commission on 1 December 2023 when she was aged 34. She gave evidence that she met the appellant in August 2020 when he messaged her on a dating site. They arranged to go on a date at a restaurant in Edinburgh. They had a fair amount to drink and when they were finished the appellant invited her to his flat which was nearby. She was in the flat for around 4 hours during which time they ordered food and drank alcohol. At one point she went to the kitchen for some water. The appellant followed her, before standing in front of her, invading her personal space. He pushed her against the kitchen sink with his body and started kissing her. She backed off but he put his hands on her crotch area on the outside of her leggings and rubbed her vagina. He then put his hands down her pants. She told him that she didn't want that to happen and that it was too soon. When she tried to return to the living room, he forcefully grabbed her right hand. She took a taxi home soon after.

[21] The following day the appellant apologised to HR and asked her for a second chance. She agreed and they formed a relationship which lasted a few months. When their relationship started he was very charming, kind and caring although that stopped very quickly. He started to make derogatory remarks degrading her body and the way she looked, saying that he wouldn't be seen in public with her. On one occasion, when she was

watching television with the appellant, he grabbed two of her fingers and bent them back. He knew she had carpal tunnel syndrome and that it would cause her pain. He said to her "it hurts, doesn't it?"

[22] In evidence ultimately rejected by the jury, HR adopted a statement given to DC Caroline O'Donnell to whom she recalled letting the appellant have sex with her so he would leave her alone. She described being disassociated during the sex and that her body language would have made it clear that she did not want to have sex. When put to her by the Advocate Depute, she did not accept that the appellant had seized her by the throat and restricted her breathing during sex.

[23] In cross-examination HR accepted that she had been invited to and had joined a Facebook Messenger group called "Sean Kirkup must die". She also accepted that the group included the complainer LM and that the messages passing through the group were those of ill feeling. It was put to her that she had written a message insinuating that she was going to "ruin [the appellant's] life". She denied that she had any interest in revenge against the appellant.

LM

[24] LM gave evidence on the second and third days of the trial by way of live television link together with a supporter. She was aged 31 when she gave her evidence.

[25] LM explained that she met the appellant in 2020 on a dating site. From October 2020 she would visit the appellant most weekends at his flat in Edinburgh. In time, the relationship deteriorated. The appellant used to gamble his money away and he would ask her for money every other day. When he asked for money he was polite and kind, although when she asked for the money back he would accuse her of leaving him with nothing and

unable to eat. He called her horrible names, and he could be quite violent. In support of the conduct libelled in charge (4), LM spoke to various occasions when the appellant was violent and abusive towards her, including occasions when he strangled her. In support of the docket appended to the indictment, LM spoke to an occasion in December 2020 when she had gone to the appellant's flat with a friend after lunch. The appellant soon returned with another female friend, AA. He became very angry and strangled LM on the kitchen floor. He shouted at her and called her a slut. AA tried to get the appellant off LM and called the police. LM spoke to continuing her relationship with the appellant simply because she did not want to argue with him. When the relationship ended, he texted her repeatedly, even though she told him to stop. Some of the messages propositioned her for sex.

[26] LM spoke to occasions when the appellant was violent towards her during sex without her consent. She explained that there were times when the appellant pinned her down, slapped her across the face and choked her until she could not breathe. He mainly used his hands to hit her although sometimes he used a leather paddle and a leather whip, which caused her to bruise. She made it clear to the appellant that she was not consenting. She tried to push the appellant off and begged him to stop but he told her to shut up and take it. She would cry because of the pain. In evidence rejected by the jury, LM spoke to the appellant penetrating her vagina with his penis during these occasions when it was made clear to him that she did not want him to do so.

[27] In cross-examination it was put to LM that she had, in fact, consented to being slapped, spanked and choked by the appellant during sex. She accepted that she "didn't mind" being spanked. She did not consent to being slapped or choked. She initially consented to being hit with the whip and the paddle although she changed her mind because of the brutality of it. She denied that the whip and paddle had been introduced at

her request. LM accepted that there were some occasions when she and the appellant would have consensual sex.

[28] LM also accepted that she had been part of the group chat entitled "Sean Kirkup must die".

Appellant

[29] The appellant elected to give evidence on his own behalf. He denied the conduct complained of by HR. When asked about his relationship with LM, he described it as "friends with benefits". He denied that he had been violent and abusive towards LM, accusing her of being jealous and of being violent towards him. He denied the conduct spoken to in support of the docket. On the day in question, he had returned home with the intention of having sex with AA. LM was very drunk and became angry, she shouted and swore at him before trying to kick and punch him. He straddled her in the kitchen in an attempt to restrain her. He told AA to call the police.

[30] When asked about his sex life with LM, he maintained that everything was consensual. He accepted that he struck, or spanked, LM on the body and that he, on one occasion, put his hands on her throat during sex. He explained that he knew he had consent to do these things because he and LM had spoken about it. The whip and the paddle were delivered to his flat in a box addressed to LM. At all times LM consented to use of the whip and the paddle. At no point had she changed her mind, nor did she make any complaint about use of the whip and paddle. In both examination-in-chief and in cross-examination he vehemently denied that LM was in a lot of pain during use of the whip and paddle, that she was crying, that she begged him to stop and that she told him "No". He was adamant that all of the sexual conduct between them was consensual.

Speeches

Crown

[31] The Crown case was that the appellant was a controlling and abusive partner who was unsympathetic to the feelings of the complainers and only concerned with his own sexual gratification. The Advocate Depute invited the jury to find that there were clear similarities in the evidence of both LM and HR. The basis for any conviction was mutual corroboration. He invited the jury to find that the offending spoken to by the complainers was similar in time, place and circumstances such that there was a systematic pursuit of a course of abusive conduct. He invited them to find that the complainers were credible. He highlighted passages of the complainers' evidence which supported that conclusion, such as LM explaining the difficulty of giving her evidence, her embarrassment about the injuries she sustained and HR's evidence which did not attempt to paint the appellant in as bad a light as possible. The Advocate Depute attacked the appellant's evidence as being vague and lacking in detail.

Appellant

[32] Senior counsel's main focus was on charges (3) and (5), which were at that stage charges of rape. His main theme was to attack the complainers' credibility and reliability. He highlighted that, notwithstanding her evidence of being repeatedly raped, LM continued to go back to the appellant. That did not make sense. There was a considerable and unexplained delay in her reporting the abuse. There were clear inconsistencies between LM's parole evidence and her police statements. He questioned whether HR had spoken to being raped at all, recounting her evidence that she had let the appellant have sex with her so he would leave her alone. He invited the jury to find that not wanting sex was different

to a lack of consent. There were also inconsistencies between HR's police statements and her evidence. She, too, delayed disclosure of the offending. The Crown case was obfuscated and unclear.

[33] The Crown case relied on mutual corroboration. Senior counsel reminded the jury that if they did not believe one of the complainers, they could not find corroboration for the account of the other.

[34] Senior counsel did not raise the difference in testimony between the appellant and LM surrounding the averments of seizing, slapping, choking and the use of a whip and paddle in charge (5). No reference was made to LM's account that she initially consented to use of the whip and paddle, nor did he advance the proposition that, on the evidence, LM was the instigator of the whole thing. Indeed, no positive case was advanced by senior counsel that LM had consented to the sexual conduct at all.

The judge's directions

[35] The appellant enjoyed the presumption of innocence. To convict of any charge the jury would have to accept the substance of the evidence of the complainer relating to that charge, accept it to be credible and reliable and find corroboration. The standard of proof was beyond reasonable doubt. The jury could accept parts of a witness's testimony and reject other parts. To convict on charge (5) as libelled the jury had to be satisfied that the appellant penetrated LM's vagina without her consent. It was not open to the jury to consider reasonable belief in consent for charge (5) since it did not arise on the evidence. If the jury accepted the evidence of LM that she was crying, trying to push the appellant off and begging him to stop then reasonable belief would not arise. If they did not accept that evidence, they ought to acquit.

[36] If the jury accepted LM's evidence that the appellant seized her by the throat and restricted her breathing, or that he punched and slapped her on the face, it was not open to them to consider a defence of consent. The dividing line between acts which could be consented to and those which could not be consented to was whether the conduct had the potential to cause serious harm. Consent could be given to striking with a whip and paddle.

[37] For each sexual charge, mutual corroboration from the evidence of the other complainer on another sexual charge was the only potential source of corroboration. Thus, to convict of the sexual charges the jury had to accept the essential parts of both complainers' testimony, find it to be credible and reliable and accept that the conduct was so closely linked in time, character and circumstances such that the appellant was systematically pursuing a single course of conduct.

[38] It was open to the jury to delete averments and convict of any charge as amended. Charge (5) could be reduced from a charge of rape to a charge of sexual assault where the jury accepted the complainer's testimony of non-penetrative sexual acts without consent but not that she was raped.

Jury verdict

[39] The jury convicted the appellant on charges (1), (2), (4) and (5). They made a number of alterations and deletions to the charges before them, including a reduction of charge (5) from a charge of rape to one of sexual assault. They also made further extensive deletions to charges (2) and (4). They acquitted the appellant of raping HR, as libelled in charge (3).

Ground of appeal

[40] The preliminary hearing judge erred in refusing to allow part 1(b) of the application under section 275(3). The effect of such refusal was to exclude relevant evidence which was of evidential significance. The evidence, if admitted, would have had a bearing on whether the complainer LM consented to the sexual conduct in charge (5) as amended.

[41] Had part 1(b) of the application been allowed, the appellant's reasonable belief in consent would have been a live issue at trial.

[42] The net effect of the refusal of part 1(b) of the application was a violation of the appellant's right to a fair trial as guaranteed by Article 6 of the Convention.

Submissions

Appellant

[43] The preliminary hearing judge's approach prevented the appellant from leading evidence at trial of a BDSM style relationship between the parties. Moreover, he was prevented from leading evidence that a safe word had been agreed in advance of the sexual conduct libelled in charge (5). Where a safe word was said to exist in a relationship, it would always be relevant to the issue of consent between the parties during sexual activity. Had the jury had an opportunity to hear evidence of the safe word, it would have been open to them to accept that LM consented to the sexual conduct by way of her refraining from using the safe word, or that the appellant reasonably believed that she so consented.

[44] In his written case and argument, the appellant submitted that the approach taken by the preliminary hearing judge was undermined by the subsequently issued judgment of the United Kingdom Supreme Court in *Daly & Keir* v *HM Advocate* [2025] UKSC 38; 2025 SLT 1253. Evidence of prior BDSM activities and the use of a safe word was intimately

linked, and thus relevant, to assessing whether or not the complainer would have consented to the acts libelled. The rule of law that consent could not be "pre-booked" had no bearing on the question of whether prior expressions of a desire to engage in sexual activity with the appellant may be relevant to the question of consent or reasonable belief in consent (*Daly & Keir*, Lord Reed of Allermuir PSC at [134]; *R* v *A (No 2)* [2001] UKHL 25; 2002 1 AC 45 at [63]-[70]).

[45] The credibility of LM was central and decisive. While evidence of BDSM activities between the parties was raised in evidence, the defence had been unable to present those matters in context as something the complainer was actively interested in and might choose to pursue actively and enthusiastically. Had the jury heard evidence that the complainer was an active and enthusiastic participant in such behaviours, it would have been an easier proposition for the jury to accept that all the matters charged were consensual. Such active participation was relevant to the likelihood of her consenting to the conduct libelled. The effect of the preliminary hearing judge's decision was that the jury were left with a partial and incomplete picture of events.

[46] Evidence of a BDSM lifestyle would have provided a broader context for the parties' relationship as a whole. It could have explained the use of certain language, such as the word "slut", which was presented as an abusive and controlling term. Such context would have had a bearing on other charges, such as charge (4).

[47] The trial judge was correct to direct the jury that, on the evidence led, the issue of reasonable belief in consent did not arise; however had evidence of the safe word been admitted, the position would have been significantly different. In that scenario, the jury would have been entitled to conclude that the complainer was either consenting, or that the appellant had a reasonable belief in her consent since she did not deploy the safe word.

[48] In his oral submissions senior counsel acknowledged that the correct approach to the question of whether the evidence ought to have been admitted by the preliminary hearing judge was to apply the rules set out in sections 274 and 275 of the 1995 Act. The provisions set out therein allowed for proper consideration to be given to all the pertinent questions.

[49] In an argument not made in his case and argument, senior counsel submitted that the appellant's position was that LM was the instigator of the BDSM conduct rather than simply a passive participant. The effect of the preliminary hearing judge's decision was that this context could not be put to the jury. That submission faces the difficulty that in the application it was asserted that the complainer would generally take the submissive role.

[50] In all the circumstances, the appellant had been denied his right to a fair trial as guaranteed by Article 6. The decision of the preliminary hearing judge prevented the appellant from leading relevant evidence which was central to his defence that LM consented to the sexual conduct libelled in charge (5), which failing he had a reasonable belief in her consent.

[51] Should the appeal against conviction be allowed, the proper approach was to quash the conviction on all four charges and to grant authority for the Crown to bring a new prosecution under sections 118 and 119 of the 1995 Act.

[52] The sentence imposed by the trial judge was excessive. Charge 1, in context, was a minor offence which, if dealt with in isolation, would have attracted a non-custodial sentence. The sentencing judge erred in her attribution of weight to the appellant's mitigating circumstances. He had a limited history of offending behaviour and was, up until his incarceration, generally in gainful employment and with a generally pro-social history and lifestyle.

The Crown

[53] In her written argument the Lord Advocate submitted that it was open to the appellant to have submitted a fresh application under section 275(3) upon amendment of the indictment to include reference to the whip and paddle in charge (5). The decision not to do so was a tactical one since consideration had clearly been given to the extent of questioning permitted without the court's permission under section 275(1).

[54] There required to be a modified approach to the common law of relevancy (*Daly & Keir* v *HM Advocate* at [134] and [181]). Such an approach required to allow the appellant to put before the jury evidence which was obviously relevant in the ordinary sense of the word which, if accepted, would significantly strengthen his defence (*ibid* at [179]).

[55] Even on an approach consistent with the Supreme Court's guidance, evidence of the safe word was properly excluded. Consent could not be lawfully given in advance (*HM Advocate* v *MacGregor* [2025] HCJAC 28; 2025 JC 358, Lord Justice Clerk (Beckett) at [39]). There could be no question of standing consent, given once and for all time. The appellant's application under section 275(3) failed to specify how the prior arrangement applied to the circumstances in respect of which evidence was sought to be led. It followed that the evidence would have properly been excluded on a proper assessment of relevancy under section 275(1)(b) of the 1995 Act. In her oral submissions the Lord Advocate submitted that the probative value of the safe word amounted to very little, if anything at all. On the evidence, the jury would have held it to be obvious that LM had withdrawn her consent because she was crying.

[56] In any event, there had been no miscarriage of justice. The appellant had received a fair trial and there was no real possibility of a different verdict had the evidence been admitted. There had been a full exploration of the appellant's defence on the sexual

relationship with the complainer, including their BDSM lifestyle. LM had given evidence that she did not mind being "spanked" and that she initially consented to being struck with the whip and paddle. Her position in evidence was that she withdrew her consent when she considered use of the whip and paddle too brutal. She would have denied that she and the appellant had a BDSM lifestyle and that she had agreed a safe word. Even had there been a safe word, it would only have been deployed when the hitting became so brutal as to cross the threshold of criminality for assault (*Kirkup* v *HM Advocate No 1*). The trial as a whole had been fair. While credibility of the complainers was critical to the issue at trial, the appellant was not prevented from attacking the complainers' credibility. Senior counsel advanced various compelling reasons to the jury for why they should have been regarded as incredible and unreliable. In addition, LM's credibility could be assessed in light of HR's evidence.

Analysis and decision

Preliminary matters

[57] The appeal relates only to charge (5). It is settled law that consent, or reasonable belief in consent, is not available as a defence to averments in a charge under Part 1 of the 2009 Act which have the potential to cause serious harm (*Kirkup No 1*, *supra*). So far as the other parts of charge (5) are concerned, the significance of the evidence about the safe word must be considered in the light of the whole evidence led at the trial. It follows that the only averments with which the court is now concerned in this appeal are those relating to seizing hold of LM, pushing her, pulling her hair, punching and slapping her on the body and striking her on the body with a whip and paddle.

[58] Parties in their oral submissions were at one that the correct approach to the question of admissibility of evidence declared inadmissible by section 274(1) of the 1995 Act was an

assessment under the tripartite test set out in section 275(1). The court agrees: *SC* v *HM Advocate* (currently unpublished and embargoed, 4 March 2026 per Lord Justice General (Pentland) at [30]). The court is therefore concerned with the preliminary hearing judge's decision to refuse part 1(b) of the 275(3) application on the basis of a failure to meet the test in section 275(1)(c).

[59] For the avoidance of doubt, the court is not concerned in this case with whether the evidence in question was relevant. The preliminary hearing judge refused to admit the evidence on a section 275(1) assessment on the basis of its insufficient probative value. The tests set out in section 275(1) are cumulative. The preliminary hearing judge must have necessarily, therefore, accepted that the evidence would have been relevant under section 275(1)(b) before proceeding to apply the tests set out in section 275(1)(c).

[60] Since the appellant has raised a compatibility issue within the meaning of section 288ZA of the 1995 Act, the questions for the court are whether the exclusion of evidence as lacking in probative value gave rise to an unfair trial under Article 6 and whether there has been a miscarriage of justice.

Convention compatibility of the scheme in sections 274 and 275

[61] The law has long recognised that evidence declared inadmissible by section 274(1) may be properly excluded whilst ensuring an accused enjoys a fair trial. As Lord Hope of Craighead DPSC said in *DS* v *HM Advocate* [2007] UKPC D1; 2007 SC (PC) 1:

> "[27] The sections seek to balance the competing interests of the complainer, who seeks protection from the court against unduly intrusive and humiliating questioning, and the accused's right to a fair trial. They lean towards the protection of the complainer. The protection is very wide. It extends to questions and evidence about the complainer's sexual behaviour at any time other than that which forms part of the subject-matter of the charge. It extends also to behaviour which is not sexual behaviour at any time other than shortly before, at the same time or shortly

> after the acts which form part of its subject-matter which might found the inference that the complainer consented to those acts or is not a credible or reliable witness. But the court is permitted, in the accused's interest, to admit such evidence or allow such questioning if it is satisfied that it passes the three tests which are set out in sec 275(1).
>
> [28] The important point to notice is that such questioning or the admission of such evidence will only be permitted if the court has been persuaded that it passes those three tests. The purpose of sec 275 is to ensure that the accused will receive a fair trial, notwithstanding the restrictions that are imposed by sec 274. The three tests are designed to achieve that purpose consistently with the proper administration of justice which, as sec 275(2)(b) makes clear, includes the appropriate protection of the complainer's dignity and privacy. A court which is satisfied that all three tests are met will have concluded that the questioning or evidence relates only to specific matters which are relevant to establishing whether the accused is guilty and are of significant probative value. To deny the appellant the opportunity of questioning or the admission of evidence which passes all three tests risks denying the accused a fair trial."

[62] An accused will only be denied a fair trial, therefore, where all three tests set out in section 275(1) are met but the evidence is nevertheless excluded.

[63] In *Judge* v *United Kingdom* 2011 SCCR 241 the European Court of Human rights considered the statutory scheme set out in sections 274 and 275 as a whole. The court said:

> "27 As the court has frequently stated, the admission of evidence is a matter for domestic courts. It is also for the domestic courts to decide what evidence is relevant to criminal proceedings and thus to exclude evidence which is considered to be irrelevant. The same is true for witnesses. Article 6(3)(d) does not guarantee the accused an unlimited right to secure the appearance of witnesses in court, it is for the domestic courts to decide whether it is appropriate to call a witness (*Ubach Mortes v Andorra* …). A fortiori, an accused does not have an unlimited right to put whatever questions he wishes to a witness; it is entirely legitimate for domestic courts to exercise some control of the questions that may be put in cross-examination to a witness and an issue would only arise under article 6(3)(d) if the restrictions placed on the right to examine witnesses were so restrictive as to render that right nugatory.
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> 28 This is not the case for sections 274 and 275. The statutory scheme enacted by the 2002 Act was the result of careful deliberation by the Scottish Parliament (the Parliament). The Parliament was fully entitled to take the view that, in criminal trials, evidence as to the sexual history and character of a complainer in sexual offences was rarely relevant and, even where it was, its probative value was frequently weak when compared with its prejudicial effect. It was also entitled to find that a number of myths had arisen in relation to the sexual history and character of a complainer in sexual offences and to conclude that these myths had unduly affected the dignity

> and privacy of complainers when they gave evidence at trial. Having reached these conclusions, it was well within the purview of the Parliament to take action to protect the rights of complainers and, in doing so, to prohibit in broad terms the introduction of bad character evidence of complainers, whether in relation to their sexual history or otherwise.
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> 29 The statutory scheme which the Parliament enacted is careful and nuanced. It does not place an absolute prohibition on the admission of such evidence but allows for its admission when that history or character is relevant and probative. As such the scheme gives appropriate weight, on the one hand, to the public interest in excluding irrelevant questioning of complainers and, on the other, a defendant's right to a fair trial. As the High Court of Justiciary observed in *M (M) v HM Advocate* 2004 SCCR 658; 2005 JC 102, the legislation recognises that there may be circumstances in which such questioning is necessary for the proper conduct of the defence; instead of prohibiting such questioning, it places it under judicial control and accords a margin of discretion to the presiding judge in allowing such questioning. In this court's view, it is quite proper for the presiding judge to be given that margin of discretion, subject to guidance given in *M (M)* as to how that discretion should be exercised. Admittedly, the prohibition in section 274 is not limited to matters relating to the complainer's sexual history but, as in the present case, will exclude other forms of evidence which are intended to cast doubt on the character of the complainer. However, in giving the guidance he did in *M (M)*, the Lord Justice Clerk recognised that there may be strong reasons for allowing such evidence. The examples given at paragraph 35 of *M (M)* (see above) clearly indicate that, subject to a test of relevancy, the prohibition should not be applied without due regard for the right of the defence to challenge effectively the evidence of a complainer.
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> 30 In short, the court agrees with the conclusion of the Lord Justice Clerk in *M (M)* that sections 274 and 275 are a reasonable and flexible response to the problem of questioning of complainers in sexual offences cases and are a legitimate means of achieving the objectives pursued by the legislature when it enacted this provision."

[64] There is no question, therefore, that the scheme in and of itself is Convention compatible. As the European Court of Human Rights observed, it is careful and nuanced.

Probative value

[65] Evidence assessed to be relevant under section 275(1)(b) may, nevertheless, be excluded if its probative value is insignificant and is unlikely to outweigh any risk of prejudice to the proper administration of justice arising from its admission having regard to

the appropriate protection of a complainer's dignity and privacy; and ensuring that the facts and circumstances of which a jury is made aware are relevant to an issue which is to be put before it and commensurate to the importance of that issue to the jury's verdict.

[66] Relevant evidence ought not to be excluded under section 275(1)(c) where to do so would deprive the accused of a fair trial. A fair trial is one which respects the right of the accused to present a full answer and defence to the charge against him (*Daly & Keir* v *HM Advocate* per Lord Reed PSC at [171]). That depends on his being able to call the evidence necessary to establish his defence and to challenge the evidence called by the prosecution (*ibid*). The Supreme Court distilled the test at paragraphs [138] and [179]: an approach will be liable to violate Article 6 rights where it "deprive[s] the accused of the opportunity to put evidence before the jury which is obviously relevant, in the ordinary sense of the word, and which would, if accepted, significantly strengthen his defence."

[67] However, a person's right to defend himself does not provide for an unlimited right to use any defence arguments (*Y* v *Slovenia* (2016) 62 EHRR 3). Evidence should not be admitted where it is unnecessary to enable the accused to present his defence and may merely prejudice the jury against the complainer (*Daly & Keir* at [172]). If the sole or main purpose of leading evidence of prior sexual history is simply to suggest that this made it more likely that the complainer consented on the day in question, or that her evidence to the contrary lacks credibility, it should not be admitted into evidence (*J* v *HM Advocate* [2020] HCJAC 18; 2020 SLT 642, Lord Malcolm at [23] citing *R* v *A (No 2)*, *supra*, Lord Hope of Craighead at p 77, para [76]). The jury's fact-finding process should not be distorted by the admission of evidence whose probative value to the defence is outweighed by the risk which its admission presents to the proper carrying out of that process (*Daly & Keir* at [176]). There is a difference between the accused's being able to mount a proper defence, such as one of

consent or of a reasonable belief in consent, and the accused's trying to secure an acquittal by prejudicing the jury against the complainer (*ibid*). Section 275(1)(c) requires the court to guard against that risk.

Evidence of a general BDSM relationship

[68] The court finds no difficulty in determining that there has been no unfairness resulting from the preliminary hearing judge's approach to evidence of a general BDSM relationship. The evidence at trial was that the complainer accepted that she had sometimes consented to being "spanked" and struck with the whip and paddle. That the parties had a proclivity to BDSM style activities was not in dispute and was put before the jury. Those activities to which the complainer denied consenting (i.e. the choking and hitting on the head) could not be consented to in any event. The evidence was that the complainer cried and begged the appellant to stop abusing her when the beating became too brutal. The appellant maintained that this had not happened and that she was a willing and active participant. It is difficult to understand how further evidence of prior BDSM style acts would have bolstered his defence, particularly since the jury were well aware that the complainer had initially consented but later withdrew her consent. Put another way, evidence of a prior BDSM style relationship would not have assisted the jury in resolving the issue that was truly in dispute, namely whether the complainer screamed, cried and begged him to stop or was a willing and active participant.

[69] It might have been different had the section 275(3) application sought to adduce evidence that the crying, screaming and begging to stop were all typical of the parties' BDSM role-play and that the appellant accepted her account that she reacted in this way but thought it was all part of the game. That would have been significant for a defence of

reasonable belief in consent. But this was not the appellant's account when he gave evidence.

[70] For these reasons, it cannot be said that the probative value of the evidence about a BDSM relationship was of such significance that it would outweigh the risk to the proper administration of justice and there has been no unfairness in its exclusion.

[71] Moreover, there can be no valid complaint in relation to the use of the whip and paddle. When the section 275(3) application was debated, there was no reference in what was then charge (7) to a whip and paddle. At that time the evidence sought to be elicited was sexual behaviour not forming part of the subject matter of the charge. No specification was provided as to whether use of the whip and paddle was close in time and circumstance to the conduct in the charge. That the parties consensually used a whip and spanking paddle on unspecified occasions did not make it any more or less likely that the complainer would have consented to the violent rape averred on a specific occasion when her evidence was that she was screaming out, crying and begging him to stop. The probative value of the evidence at the time was not sufficient to outweigh the risk to the proper administration of justice having regard to the dignity and privacy of the complainer. In any event, any error in the preliminary hearing judge's approach was cured by the Crown's subsequent unopposed amendment to introduce specific reference to use of the whip and paddle later in charge (5). By that time, the evidence sought to be adduced on the whip and paddle (that she was an active and willing participant in its use) was not covered by section 274(1) since it was sexual conduct specified in the charge. The evidence could be, and was, competently elicited. Had the appellant wished to lead further evidence about the whip and paddle which was covered by section 274(1), he ought to have lodged a new section 275(3) application. He failed to do so.

Safe word

[72] The appellant sought to adduce evidence that the parties had agreed a safe word in advance of their BDSM style activities. We were informed by senior counsel for the appellant that a safe word in this context was a distinct code agreed in advance of sexual activity between willing participants which could be used to indicate the end of consent. He impressed on us that the existence and use of a safe word represented "best practice" among those engaging in BDSM activities and urged us to hold that use of a safe word ought to be "encouraged".

[73] As noted above, this appeal concerns the application of section 275(1)(c) rather than any question of relevancy. Nonetheless we would wish to make clear that we do not accept the appellant's submission that evidence of a safe word used in BDSM sexual practices will always be relevant to the question of consent between the parties. As with any evidence rendered inadmissible by the provisions of section 274(1) of the 1995 Act, the evidence must be assessed in accordance with the tripartite test set out in section 275(1).

[74] The appellant contends that evidence of the safe word, if admitted, would have enabled him to rely on a defence of reasonable belief in consent. We disagree. As narrated above, the position of the complainer in her testimony was that she consented to some "spanking" and striking with a whip and paddle. She withdrew her consent during the conduct when she cried and begged him to stop. In sharp contradistinction, the appellant's testimony was that the complainer did not cry and did not beg him to stop. He said that she was an active and willing participant throughout. The difficulty with the appellant's approach is that what he wishes to do is advance a line of defence which is fundamentally different from the one he adopted throughout the proceedings. For a defence of reasonable

belief in consent to arise in this case, evidence of agreement of a safe word would have had to have been accompanied by an acceptance that the complainer cried and begged him to stop but he nevertheless thought she was consenting since she did not use the safe word.

[75] By their verdict, the jury must have accepted the account given by the complainer about the fact that she was crying and begging him to stop and rejected the appellant's contrary account. Their verdict was a discerning one; they clearly accepted the judge's directions on mutual corroboration, credibility and their ability to accept parts of a witnesses' testimony and reject other parts. That can be seen since they acquitted the appellant of charge (3) and made substantial deletions to the remaining charges, including charge (5) which they reduced from a charge of rape to one of sexual assault. In that light, it is difficult to understand why evidence of a safe word would have assisted the jury further in determining which account to believe.

[76] While it is undoubtedly correct that it is possible for evidence of prior sexual history between parties to be relevant to a defence of consent, there remains the rule of law that consent to sexual activity cannot be given in advance (*R* v *Cooper*, *supra*, Baroness Hale of Richmond; *Daly & Keir* at [134]; *GW* v *HM Advocate, supra*; *HM Advocate* v *MacGregor, supra*, Lord Justice Clerk (Beckett) at [39]). Since evidence of the prior agreed safe word could not be taken as evidence of prior given consent, the only real effect of the evidence would have been to identify the complainer as someone who participated in BDSM style activities. Such evidence would serve only to smear her character and prejudice the jury against her. That is precisely the type of evidence that ought to be prohibited (*J* v *HM Advocate*, *supra*, Lord Malcolm at [21]). The appellant had the opportunity to challenge the credibility of the complainer by cross-examination, in his own evidence and in the closing submissions made on his behalf.

[77] Taking these considerations together, it is clear that the probative value of the evidence of a safe word was not so significant as to outweigh the risk it posed to the proper administration of justice. It was properly excluded under section 275(1)(c) and there has been no unfairness to the accused.

[78] We were not addressed on the public policy reasons for why a safe word may properly support a defence to a charge under Part 1 of the 2009 Act, particularly in light of the court's jurisprudence on the requirement for contemporaneous consent. For that reason, we go no further than to suggest that there are myriad reasons why it may not be tolerable for that to be the case. As demonstrated by this case, BDSM activities have the potential to be brutal and cause serious physical and psychological harm. It would be very troubling for society to expect a person subjected to such brutal harm to indicate their lack of consent by use of a code word, rather than a natural outpouring of emotion caused by pain and distress, as happened in this case. It would be even less satisfactory for such distress to be simply ignored as an indicator of a withdrawal of consent.

Conclusion on appeal against conviction

[79] For these reasons we determine the compatibility issue in the negative, in that the decision of the preliminary hearing judge did not violate the appellant's right to a fair trial under Article 6. It follows that there has been no miscarriage of justice. The appeal against conviction is refused. In terms of their verdict on charge (5) the jury convicted the appellant *inter alia* of seizing and compressing LM's throat and restricting her breathing. As a matter of law, the complainer could not have consented to this conduct since it amounted to a deliberate act having the potential to cause the complainer serious harm. The evidence

concerning the use of a safe word can have no bearing on that aspect of the sexual assault of which the appellant was convicted.

Appeal against sentence

[80] The appellant contends that an extended sentence of 6 years, comprising a custodial term of 4 years and an extension period of 2 years was excessive.

[81] The appellant is 37 years of age. He has ten relatively minor previous convictions, the most serious of which was disposed of by way of a £400 fine. He was disqualified from driving for 12 months in 2019 following a conviction for driving whilst under the influence of alcohol. Two convictions are domestically aggravated: a charge of threatening and abusive behaviour and a breach of bail conditions, both in 2021.

[82] The Justice Social Work Report records that the appellant continues to deny the offending. He continues to blame the complainers for being violent towards him and maintains that they are jealous of him for being in contact with other women and that they formed a conspiracy to ruin his life.

[83] The report explained that the risk assessment tools indicated that the appellant presented a significant risk of sexual offending. Given that he did not accept accountability and had made no identifiable changes to his behaviour, there was nothing to suggest that his risk of engaging in further domestic abuse and sexual offending had diminished. As such, he presented a high risk of committing further offences of domestic abuse or sexual violence. In view of his attitude, he was considered to be unmanageable in the community.

[84] The issue in an appeal against sentence is whether there has been a miscarriage of justice. That will be so where the court concludes that the sentence actually imposed was excessive or inappropriate (*Beveridge* v *HM Advocate* [2025] HCJAC 23 per Lord Justice Clerk

(Beckett) at [21]). The court makes its evaluation on the sentence ultimately imposed. If it is not excessive, an appellant will not succeed merely by virtue of some error in the process undertaken (*Barnes* v *HM Advocate* [2024] HCJAC 23; 2024 JC 364 at [24] citing *Murray* v *HM Advocate* [2013] HCJAC 3; 2013 SCCR 88; *McGill* v *HM Advocate* [2013] HCJAC 150; 2014 SCCR 46; *Miller* v *HM Advocate* [2024] HCJAC 3; 2024 JC 253).

[85] The sentencing judge approached the sentencing process in accordance with the Scottish Sentencing Council *Sentencing Process Guideline*. She assessed the seriousness of the offending having regard to the appellant's culpability and the harm caused. In selecting the sentencing range, she took account of the statutory maximum sentences for each offence together with Scottish sentencing precedent. She considered mitigating and aggravating factors before selecting headline sentences for each offence per the approach approved in *HM Advocate* v *Fergusson* [2024] HCJAC 22, 2024 JC 376. In light of the totality principle, she imposed a *cumulo* sentence which she considered appropriate. The test for an extended sentence was met in terms of section 210A of the 1995 Act.

[86] We are satisfied that the sentence was not excessive. Charges (4) and (5) involved domestic abuse and sexual violence over a significant period of time. We consider that charge (5) was especially serious because the appellant seized and compressed the complainer's throat, restricting her breathing. The appellant had a record of offending which included two domestic abuse aggravations. He was assessed as presenting a high level of risk. The sentencing judge took account of all the relevant considerations, including the mitigating factors: the absence of previous sexual offending, the appellant's difficult background, his history of service in the Royal Navy and good work record, and his family ties with his son.

[87] The appeal against sentence is refused.

Motion for late production

[88] At the outset of the appeal hearing, senior counsel for the appellant sought to found on an additional ground of appeal asserting that the trial judge erred in refusing to receive a defence production some 14 months late. That ground of appeal was refused by the sifting judge, and again on appeal to three sifting judges. The appellant's further appeal under section 107(8) of the Criminal Procedure (Scotland) Act 1995 was refused by this court on 27 August 2025. Senior counsel argued that, in light of the judgment of the Supreme Court in *Daly & Keir* the court ought to hear the merits of the appeal notwithstanding the decision made by the court under section 107(8) procedure.

[89] We refused senior counsel's motion. Even if it had been competent for this court to reconsider the decision of a previous three judge bench (which it was not), there was no merit in the motion. It could not be said that the production (a screenshot of a profile from a website called "Fabswingers") related to LM. It had been posted on the internet some years after the events libelled. It related to a woman aged 31 whereas LM was 27 or 28 at the material time. It could not be said that the trial judge had erred in the exercise of her discretion in refusing the late production.