



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2026] HCJAC 39
HCA/2026/000241/XC**

Lord Justice Clerk
Lady Wise
Lord Clark

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CC

Respondent

**Appellant: Harvey; Crown Agent
Respondent: Culross; Paterson Bell Solicitors**

28 August 2026

Introduction

[1] The Crown challenges a sentence of imprisonment for 14 months imposed cumulatively on two charges on 7 April 2026 at Falkirk Sheriff Court on two grounds: first, that the sentence was unduly lenient; and, secondly, that the sheriff erred in declining to impose a non-harassment order.

[2] The charges in question are these:

“(001) between [late] 2008 and ... February 2024 ... [at six addresses and other places in Grangemouth and elsewhere] you ...did assault [his son DD aged between 3 and 18]... and did on various occasions shout and act in an aggressive manner towards him, repeatedly punch and strike him on the head and body with your hands and knee, repeatedly kick him to the head and body, seize hold of him, seize him by the neck, all to his injury;

(005) between ... January 2022 and... February 2024, both dates inclusive at [two addresses in] Grangemouth and elsewhere you ...did on various occasions assault [his daughter EE, aged between 11 and 13] ...and did repeatedly shout and scream at her, push her on the body, throw her to the ground, drag and pull her, kick her on the body, strike her head repeatedly against a couch, repeatedly seize her by her throat and compress same, thereby restricting her breathing, all to her injury and danger of life.”

The addresses in charge 5 were the same as two of the addresses in charge 1. The jury also convicted the respondent of three other charges that are not challenged in the appeal. The sheriff imposed a sentence of 3 months on charge 2 and a cumulative sentence of imprisonment for 3 months on charges 3 and 4, directing that they run concurrently with each other and the cumulative sentence on charges 1 and 5.

[3] The overall time to be served was 14 months. In summary, the other charges were these:

- Charge 2- neglect towards DD, EE and GG on 2 September 2017 under the Children and Young Persons (Scotland) Act 1937 section 12(1);
- Charge 3 – recording images of DD’s genitals, buttocks and underwear enabling him and someone else to look at the images on an occasion in the spring of 2022; Sexual Offences (Scotland) Act 2009 sections 9(1) and (4B); and
- Charge 4 – causing a woman to look at a sexual image, namely a picture of DD’s testicles, on an occasion in late 2023.

The circumstances of the respondent and justice social work report

[4] The respondent was 42 years old when sentence was passed. He is both DD and EE’s father. The respondent was between 25 and 40 when he committed charge 1. He has no previous convictions. He had a stable childhood and left school at 17 with some qualifications and has generally been in work, usually in the field of security over the last

few years. He was suspended when the allegations now established in the charges emerged. There was social work involvement with the respondent's household. He is no longer in contact with any of the complainers. He had been in a relationship with his co-accused, a former partner, but separated from her in 2022. He suffers from gout and is not satisfied with its treatment in prison. He has no history of mental illness.

[5] The respondent engaged in victim blaming and denied that he committed the crimes in charges 1 and 5, sought to blame his partner for charge 2, offered an innocent explanation for charge 3 and sought to minimise his conduct in charge 4. More generally, he sought to impugn his daughter's character and blame her for the emergence of the charges. The social worker reported of charge 1 that the repeated abuse of DD from the age of 3 "...will have caused pain and suffering along with significant emotional distress."

[6] The respondent is assessed as presenting a medium or average risk of further violent and sexual offending. The reporting social worker proposed a series of specific licence conditions that should be imposed in the event of a prison sentence. He could not be managed safely in the community until he takes full responsibility for his actions.

The circumstances of the offences in charges 1 and 5

Charge 1

[7] DD described the respondent smacking him on the bottom and lower back from the age of 3 or 4. Their relationship got worse when the complainer was in primary 7. From then onwards the respondent would punch DD's knees and ribs and kick his head if the boy did not comply with the respondent's requests. In 2020, DD awoke to find the respondent raining punches on him, accusing him of some wrongdoing. The police became involved and DD went to live with his mother.

[8] There was also evidence from a witness, FF, who was in a relationship with DD from August 2023 to August 2024 and would regularly attend at the respondent's house. The respondent would speak to DD about previous occasions when he had "battered" DD. She also witnessed multiple occasions when the respondent grabbed DD by the throat.

[9] EE's evidence in chief comprised two joint investigative interviews taken in early 2024 with cross-examination on commission in January 2026. She explained, generally, that her father would be violent when he was annoyed with her. He would slap her, scream at her and hit her on the face and body, causing bruising. In January 2024 she told a teacher, leading to a photograph being taken of her injuries and police investigation.

[10] There was an occasion, probably in early December 2023, when EE fell asleep on the couch at home, leaving the respondent locked out. When he got in, he grabbed her, slapped her face and slammed her head against the back of the couch twice, causing a bump to her head.

[11] EE described the respondent choking her, first when she was 12 years old and came home late. As punishment, the respondent stood in front of her, put his fingers around her neck and his thumbs against her windpipe and squeezed as hard as he could. She tried to push him off and tried to tell him to get off but could not speak. It lasted for about 30 seconds.

[12] The second time was when she had undertaken to let her father into the house after work but had gone to visit a friend and then went to DD's house. He told her the respondent was looking for her, and they went to the respondent's house. The respondent then arrived, "went mental" and choked her, only stopping when DD said that was enough. Her younger brother GG saw this happen and witnessed other acts of violence. DD said the

respondent was behind EE, put his forearm around her neck and held it there, choking her for about a minute and a half.

[13] EE described the respondent kicking her legs repeatedly on an occasion because a video recorder was not charged. He had shoes on and caused bruising on one of her legs. FF spoke of occasions when she saw the respondent booting EE's legs. On more than one occasion FF saw bruises on EE's arms and legs.

[14] The respondent would "brag to his pals" about hitting EE and the things he used to do to her and DD. More generally, EE explained that on most of the occasions the respondent was hitting her, GG, her younger brother was present. GG was 7 years old at the time of her first JII in January 2024 and therefore between 5 and 7 during the libel of charge 5. GG would "freak out" as he did not like watching the violence. He would hit himself and his school did not know how to deal with it.

[15] Both DD and EE spoke of the respondent discouraging them from reporting his violence. He told DD that he had friends who were police officers and no-one would believe him. EE reported the respondent saying that if she told people at school, he would say she was lying and everyone would be on his side. After she had gone to the police, he told her that she should not have done that. He said that her mother did not love her and he was going to send her into residential care.

Reasons for the sentence imposed

[16] The sheriff reports that the averment of danger to life on charge 5 persuaded her that only a sentence of imprisonment would be sufficient. She imposed a cumulative sentence of 14 months on charges 1 and 5 for what appeared to be similar patterns of abuse in the family

setting. She noted the respondent's previous good character and considered imprisonment for 14 months sufficient to reflect the seriousness of the offending.

[17] Having announced sentence, and as the respondent began to be led away, the prosecutor invited her to make a non-harassment order explaining only that it had been requested by the children's mother. Having regard to the terms of the Criminal Procedure (Scotland) Act 1995 section 234A, the sheriff considered that it came too late and, in any event, was given no reason why the order was necessary.

Note of Appeal

[18] The sheriff underestimated the gravity of offending which endured over 16 (*sic*) years against DD and two years against EE. In EE's case, it included two instances of manual strangulation to the danger of life. The sentence did not reflect the significant harm caused and, particularly, the considerable potential for serious harm involved in strangulation. Nor did it reflect the breach of trust involved and the age of the children concerned. The sheriff had not, as she ought to have done, pronounced individual sentences on charges 1 and 5. In the whole circumstances, the sentence met the recognised test for undue leniency. A more severe sentence should be imposed to express disapproval of such offending and provide guidance on sentencing for manual strangulation.

[19] The sheriff erred in failing to impose an NHO for DD and EE whose views had been conveyed *via* their mother and where it was appropriate to make the orders.

Submissions

Crown

[20] The Advocate Depute adopted the points made in the Note of Appeal as summarised above with particular emphasis on the age of both children (commencing at 3 for DD and for EE at 11) when assaulted; the period over which his offending occurred; the respondent deterring the complainers from reporting him; the breach of trust involved where the children lived in family with the respondent at the material times; that there were repeated assaults to the head; and, particularly, the inherent seriousness of repeated instances of manual strangulation which, for EE, was to the danger of life.

[21] The evidence was that the respondent's youngest child, GG, aged 7, was often present when she was assaulted, notably the second act of strangulation described at [12] above. The respondent discouraged DD and EE from reporting. There was abuse of trust. These are identified in the Scottish Sentencing Council's *Sentencing process* guideline as aggravating factors.

[22] The court has explained the gravity of choking and strangulation and that it is a materially aggravating feature of any crime: *HM Advocate v McMahon and Lambert* [2025] HCJAC 34, 2026 JC 1; *HM Advocate v MacDonald* [2025] HCJAC 52, 2026 JC 102. Similar views have been expressed elsewhere in the United Kingdom: in England, *R v Cook* [2023] EWCA Crim 452, [2023] 4 WLR 71; in Northern Ireland, *R v Allen* [2020] NICA 25.

[23] It was accepted that the prosecutor ought to have moved for NHOs before counsel addressed the sheriff in mitigation. Nevertheless, the judge erred in concluding that the application came so late that the sheriff was *functus* (had concluded the sentencing process and had no power to make any further order). The 1995 Act did not prescribe when a

prosecutor must make an application. The language suggests that an NHO is not a “sentence”.

[24] Whilst the prosecutor advised that the mother of DD and EE had communicated that they wished to be protected by an NHO, the Crown has now confirmed the position with them directly. DD would like to be protected from the respondent by an NHO for as long as possible. EE does not wish to see the respondent and wants an NHO for “a few years” and neither wishes the respondent to know where they are. The court should make an NHO of indefinite duration for DD and for five years in the case of EE.

Respondent

[25] Counsel accepted that the Crown’s written submissions were accurate in their account of the evidence and in identifying certain inaccuracies in the sheriff’s report. Nevertheless, the sheriff having heard the evidence, her judgment should be respected: *HM Advocate v Bell* 1995 SCCR 244; *HM Advocate v Fergusson* [2024] HCJAC 22, 2024 JC 376. Even if she erred in certain respects, the question was whether the sentence passed was unduly lenient. None of the cases founded on by the Crown showed that the sheriff imposed an unduly lenient sentence. It was accepted that strangulation is “a serious act and a ‘highly aggravating feature’” but that evaluation was for the sheriff to make on the evidence she heard. She took account of it in the process by which she determined sentence. Having heard the evidence, the sheriff must have recognised the aggravating features founded on by the Crown, even if she did not say so in terms for all of them in her report.

[26] The sheriff properly recognised that she should not impose a prison sentence unless there was no suitable alternative: 1995 Act, section 204. She noted the absence of previous convictions but nevertheless concluded that there was no suitable alternative and imposed a

sentence of imprisonment. Accordingly, it must be that the sheriff, who heard the evidence, properly considered the seriousness of the crimes. The sheriff properly recognised mitigating factors: the absence of previous convictions; a record of full-time employment; and ongoing caring responsibilities for children and financial support for one of them. One child is neurodivergent.

[27] On the question of an NHO, the respondent accepted that complainers' views can be before the court indirectly as was the position before the sheriff. The nature of the offending and the views of the complainers justified the making of an NHO on a balance of probabilities. The sheriff erred in concluding that it was no longer competent to make an NHO. In each case the sheriff should have made an NHO. Whilst it was a matter for the court, there was no objection to orders of the duration proposed by the Crown.

Sentencing precedents identified by the Crown

[28] The Crown made the following submissions on both reported and unreported appeal decisions:

“Stephen v HM Advocate, unreported, 17 November 2015:
two charges of assault on former domestic partners. The first charge was on various occasions between 1 January 1990 and 1 January 1999, with three particular occasions being specified, charge 2 was in respect of various occasions between 31 December 2000 and 31 December 2004, four particular occasions being specified. The danger-to-life aggravations in each charge related to occasions when the appellant had seized the necks of both complainers and restricted their breathing. A sentence of 5 years' imprisonment was not found to be excessive, the sheriff being right to attach importance to the danger-to-life aggravations.

HM Advocate v CJB [2019] HCJAC 45:
the Crown were unsuccessful in seeking a custodial sentence in place of a CPO for an offender who pled guilty to serious domestic assaults on his wife and two daughters over a lengthy libel period which included instances of seizing the complainers by the neck. Section 204(2) of the 1995 Act applied and no danger to life was libelled. Since this was a case of an unsuccessful Crown appeal, it carries the caveat noted in *HM Advocate v TJ* [2023] HCJAC 23, 2024 JC 1 (at paragraph 23) and approved in *HM*

Advocate v MacGregor [2025] HCJAC 28, 2025 JC 358 (at paragraph 29) that such cases do not provide any sort of benchmark and must be treated with caution; indeed, the Court itself regarded the sentence as lenient.

Forsyth v PF Paisley, unreported, 16 June 2021:

a summary complaint where no danger to life aggravation was libelled. The offence was a single incident, where the appellant assaulted his partner, including by compressing her neck and restricting her breathing. The Sheriff Appeal Court upheld a custodial sentence of 10 months' imprisonment.

Patyk v HM Advocate, unreported 1 March 2022:

the appellant pled guilty to three charges involving domestic abuse, one of which involved abduction and then manual strangulation such that it prevented the complainer from breathing, caused her to lose consciousness and caused her to urinate, to her injury and to the danger of her life. The Court quashed an extended sentence of 9 years and 4 months (with a custodial period of 6 years and 4 months) and substituted a *cumulo* extended sentence of 8 years and 5 months (with a custodial period of 5 years and 5 months).

Stuart Birtley v HM Advocate, unreported 27 September 2022:

a single incident of non-fatal strangulation during an argument, where the appellant had accepted responsibility immediately after the incident. The strangulation was apparently libelled as being aggravated to injury but not danger to life. The appeal against a sentence of 14 months' imprisonment was allowed (at a time when the appellant had served 6 months) and a CPO substituted.

O'Donnell v HM Advocate, unreported, 25 March 2025:

a guilty plea to a charge under section 1 of the Domestic Abuse (Scotland) Act 2018, which included various acts of violence and non-fatal strangulation, but without danger to life. The appeal against 18 months' imprisonment was allowed and a CPO imposed, but this against the appellant already having served four and a half months' of his sentence, and substantial mitigation, including genuine remorse.

HM Advocate v MacDonald, (see para [22] above):

a Crown appeal against sentence, in a case of one charge of threatening or abusive behaviour and one of assault to injury and danger to life, involving twice strangling the complainer (in one instance for around 30 seconds), dragging and punching her. In both charges the offence took place in the complainer's home. The Crown appeal was allowed; the CPO originally imposed was quashed and a custodial sentence of 3 years and 8 months, reduced from 4 years to reflect the timing of the plea was substituted."

In addition, we note that in *Neill v HM Advocate*, unreported appeal decision of 5 August

1998, GWD 1998 32-1586, the appellant (22), a first offender, was convicted of assaulting his girlfriend after she ended their relationship, to her injury and danger of life by knocking her

to the floor and compressing her neck, causing her to lose consciousness. There was considerable mitigation including the appellant's suicide attempts while on bail, serious depression, a serious grief reaction following a bereavement, the appellant's ongoing employment and the loss of his intended career in the police. The court held that a period of 30 months' imprisonment was not excessive.

Statutory provisions

Non-harassment orders

[29] The material parts of the 1995 Act section 234A provide:

- “(1) This section applies where a person is—
 - (a) convicted of an offence involving misconduct towards another person (“the victim”),
 - ...
- (1A) The prosecutor may apply to the court to make (instead of or in addition to dealing with the person in any other way) a non-harassment order against the person.
- (1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.
- (2) On an application under subsection (1A) above the court may, if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from harassment (or further harassment), make a non-harassment order.
- ...
- (2C) The court must give the person against whom the order is sought an opportunity to make representations in response to the application.
- (3) A non-harassment order made by a criminal court may be appealed against—
 - (a) if the order was made in a case falling within subsection (1)(a) above, as if the order were a sentence,...

Power of the court to excuse irregularities: 1995 Act section 300A

[30] The material parts of section 300A provide:

- “(1) Any court may excuse a procedural irregularity—

- (a) of a kind described in subsection (5) below; and
 - (b) which has occurred in relation to proceedings before that court, if the conditions mentioned in subsection (4) below are met.
- (2) In appeal proceedings, the court hearing the appeal may excuse a procedural irregularity—
 - (a) of that kind; and
 - (b) which has occurred in relation to earlier proceedings in the case that is the subject of the appeal, if those conditions are met.
- (3) A court may proceed under subsection (1) or (2) above on the application of the prosecutor or an accused person (having given the other an opportunity to be heard).
- (4) The conditions are that—
 - (a) it appears to the court that the irregularity arose because of—
 - (i) mistake or oversight; or
 - (ii) other excusable reason; and
 - (b) the court is satisfied in the circumstances of the case that it would be in the interests of justice to excuse the irregularity.
- (5) A procedural irregularity is an irregularity arising at any stage of proceedings—
 - (a) from—
 - ...
 - (b) from failure of—
 - (i) the court; or
 - (ii) the prosecutor or the accused, to do something within a particular period or otherwise comply with a time limit;
 - (c) from failure of the prosecutor to serve properly a notice or other thing;
 - ...
 - (e) from failure of—
 - (i) the court; or
 - (ii) the prosecutor or the accused, to fulfil any other procedural requirement....”

Decision

[31] Parties agreed that the correct approach in an appeal on the ground of undue

leniency was identified by the Lord Justice General (Hope) in *Bell* at p 250D:

“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.”

His Lordship explained that following a finding that a sentence is unduly lenient, the court has a discretion on whether to impose a different sentence. He gave some examples of situations where it should do so, including protection of the public [p 251A]:

“...or because the offence is a very serious one and a more severe sentence is required in order to provide guidance to sentencers generally.”

We note that the court has also increased sentences where greater punishment was required, deterrence and where it was necessary to mark the gravity of the offending and express society’s condemnation of it: *HM Advocate v O’Donnell* 1995 SCCR 745; *HM Advocate v Davidson* 1999 SCCR 729; *HM Advocate v JT* 2005 1 JC 86.

[32] In this case, we have the same joint investigative interview transcripts comprising EE’s evidence that were before the sheriff. Parties agreed that the sheriff erred in some respects in reporting on the evidence adduced by including references to evidence supporting deleted averments and omitting reference to significant and serious conduct, certain circumstances surrounding it and its consequences. At least in these respects, the sheriff did not make the most of her first-instance advantages.

[33] The averments of seizing DD by the neck and, in the case of EE, repeatedly seizing her by her throat and compressing it, restricting her breathing to the danger of her life, were conspicuously serious features. The court has sought to make clear in various contexts, eg *Kirkup v HM Advocate* [2025] HCJAC 9, 2025 JC 135, that actions of choking, neck

compression, strangling and similar conduct, whether occurring during a sexual encounter or otherwise, constitute a serious crime frequently posing at least potential danger to life.

[34] Whilst we are not concerned with a sexual offence, we take the opportunity to restate the court's ruling in *Kirkup*, that in Scotland, consent is not a defence to an assault. To intentionally choke, strangle or otherwise inhibit another person's breathing are forms of assault. Accordingly for conduct such as choking, strangling or inhibiting another person's breathing in any context, sexual or otherwise, consent is not a defence. Such conduct is always a crime.

[35] In *Kirkup v HM Advocate* [2026] HCJAC 11, 2026 SCCR 240 at [86], in disposing of the sentence appeal the Lord Justice General, in delivering the opinion of the court, noted conduct occurring over a significant period as a material consideration and that seizing and compressing the complainer's throat and restricting her breathing was particularly serious.

[36] In *HM Advocate v McMahon and Lambert*, [72] the court explained, in the context of rape of a young child, that to choke another person is:

"[T]o 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."

Similar observations were made by Lord Matthews in delivering the opinion of the court in *HM Advocate v MacDonald* [31] where he explained:

"[The] offence, with its repeated feature of strangulation, could easily have resulted in the complainer's death. Strangulation is an all-too-common feature of assaults in modern times and the court must visit it with appropriate penalties."

[37] The Court of Appeal Criminal Division was to similar effect in *R v Cook* at para [4]:

"The act of strangulation inevitably creates a real and justified fear of death. The victim will be terrified and often will be unconscious within a relatively few seconds if pressure is maintained. There is real harm inherent in the act of strangulation."

[38] Closer consideration was given in *R v Allen* at [47]-[49] where the Court of Appeal in Northern Ireland (Lord Chief Justice Morgan and Lord Justice Stephens, as he then was, the latter giving the judgment of the court) reached conclusions that we adopt and endorse entirely:

“47. Strangulation is a form of asphyxia (lack of oxygen) characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck. The neck is an unprotected and vulnerable part of the body. Relatively modest pressure is required over a short period of time to cause problems which can be fatal or non-fatal. On occasions when fatal the offender may not have had an intention to kill. Strangulation is an effective and cruel way of asserting dominance and control over a person through the terrifying experience of being starved of oxygen and the very close personal contact with the victim who is rendered helpless at the mercy of the offender. The intention of the offender may be to create a shared understanding that death, should the offender so choose, is only seconds away. The act of strangulation symbolizes an abuser's power and control over the victim, most of whom are female.

48. It is a feature of non-fatal strangulation that it leaves few marks immediately afterwards and this paucity and in some cases lack of observable physical injuries to the victim leads to its seriousness not being correctly assessed. Furthermore, in general there is no inevitable commensurate relationship between signs of injury and the degree of force used.

49. Non-fatal strangulation can lead to physical and psychological problems. For instance it can result in damage to anatomical structures within the neck, such as the muscles, blood vessels, vocal cords, hyoid bone or thyroid gland.”

[39] His Lordship noticed that studies from Australia and New Zealand found that strangulation is a significant factor in the risk assessment for homicide of women in the domestic context: [50]. He concluded that strangulation was to be treated as a substantial aggravating factor and that “the use of body force to strangle is not less heinous than the use of a weapon”: [52].

[40] It is within ordinary human experience that compression of the airways, as happens in acts of strangulation, choking, compression etc, deprives the brain of oxygen and can have unpredictable and dangerous effects. Scotland’s NHS Inform website explains that:

“Putting pressure on the neck in any situation can lead to serious medical complications like nerve damage or an increased risk of stroke. It can also cause damage to the windpipe that can continue after strangulation has taken place. Strangulation is serious and there is no safe way to be strangled. There’s a risk to life each time it’s done.”

[Emphasis added]

[41] It identifies symptoms occurring during strangulation as including:

- becoming unconscious
- neck pain
- finding it hard or painful to breathe or swallow
- blurred vision or loss of vision
- hearing problems like loss of hearing, or a ringing, popping noise in your ears
- losing control of your bladder or bowel
- burst blood vessels in or around your eyes.

Symptoms that can happen after strangulation include:

- headaches
- feeling sick or being sick (vomiting)
- voice changes – your voice may sound husky or deep
- feeling confused or irritable
- loss of memory – you may struggle to or not remember what happened during strangulation due to lack of oxygen to the brain
- finding it hard or painful to breathe or swallow
- neck pain or bruising
- burst blood vessels in or around your eyes
- changes to your mental health.

From the sentences imposed in the cases cited to us, we are not certain that all judges have always recognised the full implications of such conduct.

[42] For reasons we shall explain, we consider that the sentence imposed on charges 1 and 5 was unduly lenient. We consider that it is necessary to impose a different sentence for the protection of the public from the respondent, who has several children, for condemnation of his offending, to mark its gravity, for deterrence and punishment.

[43] We consider that courts in Scotland, if they are not already doing so, must recognise the gravity of choking, strangling and neck compression generally, and similar conduct, and

reflect its gravity in sentencing to deter conduct that is prevalent, insidious, harmful, often controlling and always extremely dangerous. Such conduct merits severe punishment. It is necessary to protect the public, and particularly women and children who are frequently the victims of such conduct, from people who would perform such actions.

[44] All the respondent's conduct was serious. Grabbing DD by the neck and, especially, his twice choking EE and restricting her breathing to the danger of life was extremely serious. The mitigating weight attributable to an absence of previous convictions should have been weighed against offending continuing for 15 years from when DD was 3 and for more than two years from when EE was 11.

[45] Kicking anyone on the head is a serious assault and to repeatedly do so to the child DD is a materially aggravating feature. We noted that on one occasion the respondent's violence prompted DD to leave to live with his mother, a clear indication of the impact on DD. The length of time over which these crimes were committed was a significant feature, even acknowledging that there were intervals when DD was not living with the respondent.

[46] In using sentencing guidelines, it is important to avoid double counting different implications of a feature. Doing so may produce an excessive sentence. Offending over a long period could be seen as increasing both culpability and harm. In the *Sentencing process* guideline, it features alongside repetition in a list of factors relevant to the assessment of harm at para 16, third bullet:

“a sustained offence or repeated offences against the same victim.”

[47] Repetition of criminal offending could also be seen as increasing both culpability and harm, but it is confined to harm in *Sentencing process*. In the *Rape* guideline, the means of avoiding double counting was to identify repetition neither under culpability nor harm but as an example of an aggravating factor. It has long been regarded as such: *HM Advocate v*

Macgregor [2025] HCJAC 28, 2025 JC 358 [32] citing *HM Advocate v JT* and *HM Advocate v Cooperwhite* [2013] HCJAC 88, 2013 SLT 975.

[48] It hardly needs to be stated that the victim of a crime being a child is always an aggravating circumstance. Nevertheless, there is authoritative confirmation from the Lord Justice General (Emslie) in *Walker v HM Advocate* 1987 SCCR 345. The appellant was 21 and of very low intelligence. He pled guilty to assaulting a child of 9 months on a single occasion with his hand or fist on the head, body and legs to severe injury but there were no long-term consequences. The court reduced a sentence of imprisonment from 4 years to 3 years because the court saw force in the argument, accepted in hindsight by the sentencing judge, that the appellant should not have been left alone with a child, a situation he was not equipped to manage. His Lordship explained, at page 347:

“It has to be understood, in order to give as much protection as the court can to very young children, that anyone who assaults a child to injury or to severe injury must expect severe punishment at the hands of the court.”

[49] The application of this principle is seen in *HM Advocate v Boyle* [2009] HCJAC 89, 2010 JC 66 where the Full Bench gave guidance on sentencing for murder, noting that, ordinarily, whereas a murder involving the use of a knife may attract a punishment part of 16 years or more, the murder of a child would attract a punishment part of about 20 years.

[50] In *HM Advocate v McMahon and Lambert*, the court explained at [74]:

“The crime of rape generally is a particularly serious offence. It is apparent that in England, the sentencing 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 Wales 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.”

We endorse those remarks and, on reflection, would add that an adult offending against a child enjoys not just physical and intellectual advantages over the child but generally will also enjoy social, situational and economic advantages.

[51] In addition to the age of the children and their consequent vulnerability, particularly at the start of the respondent's criminal conduct, the breach of trust involved in a parent so egregiously mistreating his children, was also a materially aggravating circumstance. The presence of other people when the respondent assaulted DD and EE, not least the child GG, was a further aggravating factor.

[52] Whilst it would have been better if the sheriff had followed the advice in *Fergusson*, the Crown's Note of Appeal specifically excluded charges 2, 3 and 4 from the specification of the basis of the appeal. Accordingly, having concluded that the sentence was unduly lenient, and that we should pass a different sentence, we shall follow the advice in *Fergusson* only on charges 1 and 5.

[53] We are not persuaded that different offending against two children, much of it at different times, should attract concurrent sentencing just because it occurred to children sharing a household with the respondent. His culpability is greater where there were two victims and so is the harm caused. Harm includes both actual and potential harm:

Sentencing process at para 14. The jury found that charge 5 involved at least potential danger to life.

[54] Taking account of the gravity of the respondent's offending, the period over which it was committed, the breach of trust involved, the vulnerability of the children given their age and situation, and such limited mitigating factors as there were, primarily the absence of previous convictions, we are in no doubt that the sentence imposed was unduly lenient and that it is appropriate to impose a different, and longer, sentence.

[55] Since we are sentencing afresh, we can consider afresh the question of NHOs.

Accordingly, and where it is conceded by counsel for the respondent in response to the Advocate Depute's motion for an NHO that it is appropriate that this court should impose NHOs, we need not examine what occurred at first instance in detail and reach a decision on it. We do make the following observations.

[56] Where, as in this case, there required to be a motion from the prosecutor if the court was to make an NHO, given the nature of the offending in this case, it is surprising that it was left so late. Fairness to the respondent required that the defence should have an opportunity to respond to the motion. In the event that happened, but in unfortunate circumstances. Our impression of the effect of the terms of s 234A, particularly subsections (1A) and (3), is that it remained open to the sheriff to hear a motion for an NHO even once sentence was pronounced. Even if that were not so, we find it difficult to understand why neither the prosecutor nor the sheriff, did not consider section 300A given that it was plainly a mistake, or oversight, by the prosecutor not to make the motion earlier.

[57] We have been moved to make an NHO in favour of the complainers in charges 1 and 5 and are satisfied, on a balance of probabilities, that it is appropriate to do so to protect those complainers from harassment from the respondent. We shall do so and on the following conditions:

The respondent must not approach, contact or communicate, or attempt to approach, contact or communicate with [DD] the complainer in charge 1, for an indefinite duration, and [EE] the complainer in charge 5 for 5 years.

[58] In the whole circumstances, for charges 1 and 5, we consider that appropriate sentences would have been, on charge 1 imprisonment for 2 years and on charge 5 imprisonment for 5 years to be served consecutively. Making the *Fergusson* proportionality adjustment, we impose, *in cumulo*, a sentence of imprisonment for 5 years and 6 months. As

before, the sentences on charges 2, 3 and 4 will be served concurrently with it. As before, all sentences will commence from 23 February 2026.