APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 23
HCA/2024/000487/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

KYLE BEVERIDGE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ms Ogg, sol adv; MJS Solicitors, Dunfermline
Respondent: McLean AD; Crown Agent

21 May 2025

Introduction

[1] The appellant was found guilty in the High Court of Justiciary of a number of charges of domestic abuse and rape committed against three female partners between 4 June 2013 and 30 April 2021. The judge imposed, *in cumulo,* an extended sentence of 16 years with a 12-year custodial term. In appealing against conviction on charges 1 and 5 on the final version of the indictment (charge 5 was originally charge 6 on the record copy

indictment), the appellant challenges the decision of the trial judge to admit hearsay evidence of witness DD under section 259 of the Criminal Procedure (Scotland) Act 1995 in response to a late notice given by the Crown on the fourth day of the trial. The appellant founds on the limited information before the trial judge as not justifying his decision to admit hearsay. In the event, the Crown conceded that the trial judge erred in allowing the late admission on such a paucity of information but supported the conviction on the basis that it had not caused a miscarriage of justice. The appellant also appeals against sentence, but only to the extent of challenging the 12-year custodial term of the extended sentence.

The charges

[2] At the start of the trial, the indictment contained 11 charges but the Crown accepted a plea of not guilty on charge 5. Accordingly, the remaining charges 6, 7, 8, 9, 10 and 11 on the record copy indictment were re-numbered as charges 5, 6, 7, 8, 9 and 10 for the purposes of the jury. We shall use the final charge numbering as the trial judge did in directing the jury and in his reports, and as parties did in the appeal. Charges 1 and 5 involved complainer AA; charges 6, 7 and 8 involved complainer BB; and charges 9 and 10, complainer CC. Each complainer spoke to her experience at the hands of the appellant at the material times.

[3] Charge 1 involved repeated occurrences between June 2013 and June 2017 of threatening or abusive behaviour including uttering abusive, derogatory and controlling remarks, sending abusive messages, coercing AA with threats to send him intimate sexual images which he also threatened to send to others, and engage in sexual activity (section 38(1) Criminal Justice and Licensing (Scotland) Act 2010). Charge 5 involved a single

occasion within the same time-period when the appellant raped AA whilst she was sleeping and after she awoke.

[4] Charge 6 carried a domestic aggravation and involved a single occasion of rape of BB between August 2018 and October 2019. Charge 7, another section 38 offence, involved various occasions between August 2017 and March 2019 when the appellant made derogatory remarks and sought repeatedly to coerce her to engage in sexual activity with a third party. Charge 8, brought under the Domestic Abuse (Scotland) Act 2018 section 1 spanned April 2019 to October 2019. It involved an abusive course of behaviour featuring intimidating remarks, derogatory name-calling, controlling behaviour, repeated attempts to coerce her to engage in sexual activity with a third party and compelling her to send intimate images of herself.

[5] Charge 9, between January 2020 and April 2021, was also brought under DASA section 1. It involved threatening and intimidating remarks, repeated name-calling, controlling CC's behaviour, repeatedly attempting to coerce her to engage in sexual activity with a third party, posting an intimate image of her online without her consent, refusing to delete it, taking her mobile phone and monitoring its contents, repeatedly compelling her to send the appellant intimate images and threatening to end their relationship if she did not comply. Charge 10, carrying a domestic aggravation, featured two instances of raping CC between January and October 2020.

Routes to verdict

[6] The Crown case generally depended on mutual corroboration between the three complainers. On charge 1, the Crown proposed a second route to verdict, namely acceptance of the complainer's account of the appellant's criminal conduct and

corroboration via a police officer speaking to hearsay evidence of DD, AA's grandmother, about occasions when DD observed AA's distress and heard her make remarks *de recenti* about incidents within the scope of charge 1. The trial judge reported that on charge 5 the route to verdict lay in mutual corroboration but that the grandmother's hearsay could broadly assist the jury in their assessment of the credibility and reliability of AA's evidence on charge 5. The transcript of his charge confirms that was not how he directed the jury on charge 5. He told them that charge 5 required acceptance of AA's evidence and their finding support by mutual corroboration. He made no mention to the jury of DD's evidence in relation to charge 5.

The judge's reports

[7] We note that it is not clear that parties drew to the judge's attention the requirement for there to be good reason (section 259(6)(b)) to consider a notice to admit a hearsay statement presented on the fourth day of the trial. Section 259(5) stipulates, generally, the giving of notice before trial. Nor was that issue clearly focussed in the note of appeal. Perhaps that was because as the transcript demonstrates, the only objection was to the paucity of information, not the timing of the application. The judge explains that information in the doctor's letter furnished by the Crown, allied to the well-known effects and progressive nature of Alzheimer's disease, permitted him to infer that the witness remained unfit to give evidence. He granted the application.

Conviction

Appellant

[8] The solicitor-advocate for the appellant offered detailed written submissions in support of her contention that the trial judge erred in allowing late notice when there was no good reason to do so, and that the information before the judge was insufficient. The Advocate Depute conceded this point, and we proceeded on that concession. We say no more about this.

[9] The court might consider that in the passage of the judge's charge where he dealt with charge 1, he directed that the hearsay of DD offered a source of corroboration not just on charge 1 but also on charge 5. The verdicts do not disclose the route taken by the jury. The hearsay evidence could have a generally supportive effect on the quality of the evidence of AA on both charges 1 and 5. Accordingly, the judge's decision has occasioned a miscarriage of justice.

Crown

[10] The erroneous admission of evidence did not necessarily cause a miscarriage of justice, even on charge 1. The trial depute had only identified to the jury the hearsay evidence as relating to charge 1. He invited mutual corroboration amongst charges 1, 7, 8 and 9 (domestic abuse and threatening and abusive behaviour in a domestic context) and amongst charges 3 (the jury acquitted of sexual assault of AA), 5, 6 and 10 (sexual offences). Whilst the trial judge directed the jury that the hearsay testimony could provide corroboration on charge 1, he did not suggest it offered corroboration on any other charge. The appellant was wrong to suggest that the hearsay of DD could provide corroboration on charge 5 or that the trial judge directed the jury to that effect.

[11] The only route to verdict on charge 5 was mutual corroboration and the hearsay evidence could not provide it. The jury must have accepted the evidence of AA on charge 5. In his directions, the judge had made it clear that the only route to verdict on charge 7 was mutual corroboration from charge 1. Accordingly, the verdict on charge 7 necessarily demonstrates that the jury found mutual corroboration between charges 7 and 1.

[12] The hearsay was of limited scope even on charge 1 and defence counsel had used it to undermine some of the evidence of AA on charge 1 and, in one respect, had taken the opportunity to question the witness speaking to DD's hearsay about a prior inconsistent statement by BB. The judge had given appropriate warnings to the jury about the inherent limitations of hearsay and such weight as the jury might attach to it. These directions mitigated the effect of its wrongful admission. Since the jury must have accepted the evidence of AA on charges 1 and 5, and those who could provide mutual corroboration, there had been no miscarriage of justice. The reasoning of the court in *Glass* v *HM Advocate* 2019 JC 17 supported there being no miscarriage of justice.

Sentence

Grounds of appeal

[13] The appellant founds on his lack of previous convictions, that he had not previously served a prison sentence and that no other allegations of sexual misconduct have been made. The social work report revealed adverse childhood experiences. He had a good work record and was in a relationship lasting 3 years in which there were no difficulties. He had offended when he was between 17 and 24 years old and a young person. The lack of maturity associated with those ages was a relevant mitigating factor. A large number of favourable character references vouched his rehabilitation as an adult. Consideration of the

principles proposed in *HM Advocate* v *Fergusson* 2024 JC 376 demonstrates that given there was but one instance of rape on two charges and two instances on the third, the sentence imposed was unfair, disproportionate and excessive.

The judge's response

[14] The trial judge has provided the full text of his detailed sentencing remarks, setting out his reasons for passing the sentence he did. He reports that he recognised that the appellant had no previous convictions, that he had not been to prison before and the other mitigating remarks made on his behalf. He took account of the appellant's family circumstances, and his adverse childhood experiences, his employment history and army service. He took into account the favourable character references presented and the appellant's youth when he committed the offences.

[15] The judge also had regard to the period, in excess of 7 years, during which the appellant was mistreating three different women, each his domestic partner. All three of them suffered domestic abuse and the appellant raped all three. As he was bound to do, he took account of victim statements provided by two of the complainers. They had suffered devastating, ongoing and long-term consequences with detrimental effects on their health and the quality of their lives, physically, emotionally and psychologically. There was no suitable alternative to imprisonment. The reporting social worker assessed the appellant as presenting a very high risk of repeating these behaviours. Accordingly, an extended sentence was necessary, which the appellant does not challenge. On the evidence, he found the appellant to have been manipulative and controlling.

[16] The judge performed the exercise proposed in *Fergusson* and explained his treatment of the individual charges:

- Charge 1, imprisonment for 3 years;
- charge 5, imprisonment for 4 years and 6 months;
- charge 6, imprisonment for 5 years including 6 months for the aggravation;
- charge 7 and 8, *in cumulo,* imprisonment for 3 years;
- charge 9, imprisonment for 2 years;
- charge 10, imprisonment for 8 years including 6 months for the aggravation.

In order to avoid a disproportionate and excessive total, he instead imposed an extended sentence of 16 years with a 12-year custodial term.

Submissions

[17] In adopting the contentions in the note of appeal and written submissions, the solicitor advocate for the appellant put particular emphasis on the appellant being between 17 and 24 at the time when he committed the crimes as well as his previously good character, supported by numerous favourable references. The sentence imposed might have been justified for an adult aged 25 or over when the crimes were committed but was excessive given his age at the time with its implications for his culpability. The 21 favourable references vouched that he has matured. In so far as the custodial term might be intended to deter, it was important that the appellant had been in a subsequent relationship for 3 years. The judge should have given this more weight and it undermined his reasoning in imposing such a long custodial term. The trial judge, in common with other judges, had misinterpreted the reasoning in *Fergusson* and imposed a longer sentence than was appropriate.

Decision

Conviction

[18] The judge's directions and the remarks he made about DD's hearsay as a possible source of corroboration came in a passage where he expressly referred to charge 1, summarised the conduct alleged in it and explained the effect of a witness observing the complainer's distress and hearing her statements *de recenti*. It is entirely clear that these directions related to charge 1 only. The position is more certain still given the judge's directions on corroboration on charge 5. The transcript (6 August 2024, page 65) confirms that the only source of corroboration he identified for the jury on charge 5 was mutual corroboration.

[19] The transcript confirms that the trial judge's reported recollection that he directed the jury that the evidence of DD on charge 1 was available generally to support the credibility and reliability of AA is wrong. He did not give that direction.

[20] Whilst it would have been open to the judge to suggest that there were two groups of offences for the purposes of mutual corroboration, the sexual offences forming one and the DASA and section 38 offences the other, that is not how he approached matters in his directions on the routes to verdict on the charges. Whilst he told the jury that the Crown identified two groups of charges for the purposes of mutual corroboration, in his directions the judge identified three groups: the sexual offences; the DASA section 1 charges; and the section 38 charges. This is significant because the judge directed that before they could convict on any charge, the jury must accept the evidence of the complainer about it (page 53). He directed that mutual corroboration for charge 1 could be found in charge 7 (page 64) and for charge 7 from charge 1 (page 65-66). He identified no other route to verdict on charge 7. In light of these directions, the verdict of guilty on both charges 1 and 7 necessarily

infers that the jury accepted the evidence of the complainer on each of charges 1 and charge 7 and found mutual corroboration between these charges. In these circumstances, the erroneous admission of hearsay evidence does not give rise to a miscarriage of justice on charge 1 far less charge 5.

Sentence

[21] 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. This court makes its evaluation on the sentence ultimately imposed. If it is not excessive, an appellant will not succeed merely by demonstrating some error in the process undertaken: *Barnes* v *HM Advocate* 2024 JC 364 at para [24] citing *Murray* v *HM Advocate* 2013 SCCR 88; *McGill* v *HM Advocate* 2014 SCCR 46; *Miller* v *HM Advocate* 2024 JC 253.

[22] In *Fergusson,* the court did not intend that this principle should change. It identified the difficulties inherent in sentencing an accused person on multiple charges on one indictment. Imposing appropriate sentences on each charge but ordering them all to run concurrently may fail to do justice and result in an unduly lenient or derisory sentence. Imposing an appropriate sentence on each charge and ordering each to run consecutively may well result in an unfair, disproportionate and excessive total. These difficulties are not new. Lord Sutherland identified them in delivering the opinion of the court in *McDade* v *HM Advocate* 1997 SCCR 52. The emergence in more recent times of large numbers of indictments containing multiple charges against multiple complainers brings a sharper focus on the problem.

[23] In *Fergusson*, the court was concerned to ensure a higher degree of transparency in sentencing for the benefit of all concerned including accused persons, complainers and the public and to provide a means of guarding against the passing of sentences that were either insufficient to do justice or excessive.

[24] Where there are several charges featuring a number of different complainers, a judge may either identify an appropriate sentence for each group of offences associated with a complainer or on each individual offence against each complainer. If imposing a cumulative sentence, the sentencing judge should explain what the individual sentences, or grouped sentences relating to that complainer, would have been and why the cumulative sentence was lower than their total. Adopting this approach should allay any concern that a sentence on a particular charge exceeded a statutory maximum. It was competent to impose a cumulative sentence in excess of such a maximum penalty on a particular charge provided the judge explained that had the charge stood alone the sentence on it would not have exceeded the maximum.

[25] This court, in *Fergusson*, performed the exercise proposed reaching a total of an extended sentence with a custodial term of 21 years. In order to avoid disproportion and unfairness, it reduced the custodial term by one third to 14 years. It did not prescribe a reduction of one third as always appropriate. Subsequent experience is that courts have applied lesser or greater reductions according to the particular combinations of offences and sentences. This appeal is an example. Whilst the judge selected individual sentences and not groups, the total of the individual sentences was a custodial term of 25 years and 6 months. In reducing it to 12 years, he made a 51% reduction. In doing so, he achieved what the court in *Fergusson* intended.

[26] We do not accept Ms Ogg's submission that *Fergusson* has caused a wholesale or inappropriate increase in the level of sentences imposed in multiple complainer/charge cases. That was certainly not the court's intention. The Lord Justice General explained at para [29]:

> "In an era in which the court is regularly faced with having to select a sentence for multiple offences, but in the context of a course of conduct, often over many years, the choice of a cumulative extended sentence will often be the only practical option which is both fair and proportionate."

[27] In his detailed sentencing remarks, the sentencing judge demonstrates that he took scrupulous care in considering all relevant mitigating and aggravating features of a case where he heard all the evidence. He was bound to take account of the harm caused to the complainers. In the case of two complainers, he had victim statements demonstrating very substantial harm consequent on the appellant's offending. The appellant's relatively young age at the time of the offending mitigates culpability but it does not mitigate harm. Despite his absence of previous or subsequent offending, and the many favourable testimonials provided, the appellant subjected three different domestic partners to a course of sustained, demeaning and controlling domestic abuse. He raped each of them. This combination of grave offending merited a substantial sentence of imprisonment. The appellant presented a high risk of causing serious harm and, as conceded, an extended sentence was necessary to protect the public from serious harm. Even if there were merit in a complaint about any individual sentence, and that was not the basis of the appeal, the substantial reduction of the total would balance it out.

[28] We are unable to say that the 12-year custodial term of a 16 year extended sentence in the circumstances of this case was excessive, inappropriate or a miscarriage of justice.

Disposal

[29] For the reasons we have given we refuse the appeal against conviction and sentence.