APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 3
HCA/2025/000443/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

By

HIS MAJESTY'S ADVOCATE

Appellant

against

MICHAEL PATRICK HARVEY

Respondent

Appellant: Keenan, KC (Sol-Adv) AD; the Crown Agent
Respondent: Findlay KC; John Pryde & Co SSC

---

22 January 2026

Introduction

[1] This is a Crown appeal against a sentence of 9 years' imprisonment imposed on the respondent on 18 July 2025 after he was found guilty in the High Court of Justiciary at Glasgow of two charges including a sustained assault amounting to attempted murder. The

Crown maintain that the sentence was unduly lenient given the repetition of the respondent's actions, the period over which the assault occurred and, particularly, its consequences for the complainer. Secondly, the Crown state that the judge erred in refraining from passing an extended sentence.

The charges

[2] The respondent was convicted of the following:

> "(001) on 1 October 2023 at Waterloo Street, Accident and Emergency Department, Glasgow Royal Infirmary, Castle Street, and Room 305, Ibis Hotel, West Regent Street, all Glasgow you MICHAEL PATRICK HARVEY did assault [the female complainer], your partner, … and did:
>
> a) at said Waterloo Street, Glasgow, act in an aggressive manner towards her, shout and swear at her, pull her from a window ledge there, throw her to the ground, repeatedly seize and throw her to the ground, repeatedly seize her by the body, pin her against a bus stop and strike her head against said bus stop, seize her by the body and drag her along the ground, cause her head to repeatedly strike the ground, … throw an object at her and thereafter repeatedly seize and throw her to the ground, cause her head to repeatedly strike the ground and cause her to lose consciousness;
> … and
>
> c) at said Room 305, Ibis Hotel, West Regent Street, Glasgow, strike her on the head and body and cause her to lose consciousness,
>
> and all this you did to her severe injury, permanent disfigurement, permanent impairment and to the danger of her life and did attempt to murder her;
>
> and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner;
>
> (007) on 1 October 2023 at Room 305, Ibis Hotel, West Regent Street, Glasgow you MICHAEL PATRICK HARVEY, having committed the crime libelled in Charge (001) hereof and being conscious of your guilt in respect thereof, did pretend that [the complainer], your partner,…had sustained her injuries by falling in a shower, the truth being that you knew you had committed said crime, and this you did to conceal, alter or destroy evidence in connection with said crime and to avoid detection, arrest and prosecution in respect thereof and with intent to defeat the ends of justice and you did thus attempt to defeat the ends of justice."

The jury, whose verdict on both charges was unanimous, acquitted the respondent of part (b) of charge 1 alleging that he forced the complainer to leave the Accident and Emergency Department of Glasgow Royal Infirmary without obtaining medical attention. The implication is that the jury considered that it was her decision to leave, and we can understand why they reached it given the content of the hospital CCTV footage.

[3] On charge 1 the judge imposed a sentence of imprisonment for 9 years including one year for the domestic aggravation. On charge 2, he imposed a concurrent sentence of 2 years' imprisonment. The Crown withdrew certain other charges.

The circumstances of the offences

[4] The complainer did not testify, and the Crown established its case through CCTV evidence capturing much of what was alleged, supplemented by the testimony of witnesses to certain events.

[5] The parties were at the early stages of an affair and had met at a hotel in Glasgow city centre, checking in shortly after midnight. They drank alcohol and played pool in the bar area, returned to their room and then left the hotel shortly after 02:00 hours. From around 02:25, the respondent became aggressive and shouted and swore at the complainer who was sitting down, close to the ground on the bottom ledge of a shop front window. Whilst in his report the judge used the words of the libel of charge 1 to describe what occurred, we note from our viewing of the recordings, coinciding with the language used in the Crown's written submissions, that the respondent appeared to pull the complainer up and drop her, causing her to fall on the pavement. He then picked her up, pinned her against a bus stop and may have struck her head against it. He seized her by the body and dragged her along the pavement, causing her head to strike the pavement repeatedly. When

she was again sitting on the ground, he threw an object at her before repeatedly seizing hold of her and causing her to fall to the ground by letting her go as she was standing, such that her head repeatedly struck the ground and she lost consciousness.

[6] Two women stopped in a car and came to assist, finding that the complainer had blood on the left side of her head. The respondent was frantic about the situation, and they called the police, who attended at 03:09, by which time the respondent and complainer had crossed Waterloo Street where the complainer fell. The police spoke to both, concluded that no crime had been committed and took the complainer and respondent to hospital, leaving them at Accident and Emergency at 03:47. Whilst the respondent sought to check-in the complainer, she fell to the ground as she tried to sit down in the waiting area, striking her head. They left 25 minutes later without the complainer being seen.

[7] They took a taxi back to the hotel, arriving there at 04:35. As they got out of the taxi, the complainer fell and struck her head on the ground. The respondent then carried her into the hotel. The recording shows that she had blood on the back of her head and her hair was soaked in blood. They took a lift and entered their room. At about 05:00 another guest heard loud banging and a male voice making a violent threat and further banging about an hour later. The same male voice was heard shouting. A second guest heard a male voice and thought he was punching a door and then throwing himself at the door. He shouted words including "throttle," "fucking" and "head" at a time when there was banging.

[8] The respondent left the room at 06:20, returned and banged on the door before getting a key card from reception and returning to the room at 06:24. He bought certain items in the dining area at 07:19 and was helped to re-enter his room by staff.

[9] The complainer and respondent did not check out in time and when management investigated what was happening, they learned that the respondent had told staff that the

complainer had collapsed. A manager found the complainer lying on the floor and the respondent said he had found her lying on the floor of the shower and had pulled her out and covered her. She did not appear wet and she was unconscious.

[10] Many pertinent facts were established in a joint minute. The complainer was taken by ambulance to the Queen Elizabeth University Hospital. It was agreed fact that she had sustained certain injuries: nasal fracture; acute minimal depressed fracture through anterior wall; clot on right side of brain; clot on left side of brain; posterial fossa (mid brain injury); subtle fracture to side of skull; fracture to spine; broken clavicle right; broken T1 bone; and pulmonary embolism – upper lung lobe.

[11] The complainer underwent a decompressive craniectomy whereby part of her skull on the left side was removed to relieve pressure. The blood clot on the left was evacuated and the wound closed. There was no treatment to the blood clot on the right side. In November 2023 the complainer underwent a cranioplasty to reconstruct her skull following the decompressive craniectomy. She was still in Gartnavel Hospital on 7 March 2024.

Victim information

[12] The complainer's sister prepared a statement on her behalf. The complainer has had to learn to walk and talk again after her repeated operations. She has a deficit in her senses of taste and smell. She has a visible dent in her head and a large surgical scar on her stomach. She had been an active full-time mother of 7 school-age children but is now dependent on carers for self-care and child-care. At times, her children have to stay with her sister. The complainer suffers from seizures, headaches, needs a lot of sleep and hardly goes out. She can no longer read and write. She suffers panic attacks, is afraid and her life has

become very limited. The judge correctly characterised the consequences of the assault as life-changing for the complainer.

Previous convictions

[13] The respondent has a significant number of previous convictions dating from 2009.

[14] Most of his convictions relate to crimes of disorder, including impeding police officers in the execution of their duty. He has road traffic convictions, drugs convictions and a conviction for theft by housebreaking. He has broken bail conditions. He has twice served periods of imprisonment following appearance on indictment:

- 20 months in 2018 for dangerous driving along with short concurrent sentences for offences including having a knife in a public place and a drug trafficking offence (ecstasy)
- consecutive 12-month sentences for having a knife in a public place and a drug trafficking offence (heroin).

He was subject to a community payback order supervision requirement imposed for driving whilst disqualified when he assaulted the complainer.

[15] We note that he has no convictions carrying a domestic abuse aggravation or recorded as constituting domestic abuse. This has some significance given the basis on which the reporting social worker came to propose the making of an extended sentence.

The circumstances of the respondent and justice social work report

[16] The respondent explained that he and the complainer had argued when she was unwilling to provide money for her son when he called to ask her for help. His version of events as captured on CCTV involved both minimisation and denial. The social worker

proposes a high-level of planning which, frankly, we find unconvincing. So did the judge, who properly rejected the proposition in his sentencing remarks. We consider that the respondent showed some, limited, victim empathy.

[17] The respondent had a positive upbringing and still has a good relationship with his parents but began offending at 18. He has had three long term relationships. His current partner is still supporting him. They have two children together who are now being cared for by their maternal grandmother. There have been five police call-outs amid concerns of domestic conflict.

[18] The respondent has ADHD and left school at 15 with no qualifications. He had several jobs before becoming self-employed, doing house renovations until he was remanded in these proceedings.

[19] The respondent's physical health is good, but he has had some mental health issues. He has had prescription medicines for ADHD and to help him sleep. He reports a diagnosis of anxiety and depression, with a prescription no longer available to him on remand. He sought to end his life by cutting his throat whilst remanded. Alcohol abuse has not been a problem, but drugs have been. He had been drinking and had taken both cocaine and street Valium when he assaulted the complainer.

[20] In assessing the risk of violence presented by the respondent, the social worker construed offences under section 41 of the Police (Scotland) Act 1967 and section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 as crimes of violence. That is not entirely apt. The former offence was constituted by any of the following actions: assaulting, resisting, obstructing, molesting or hindering police officers in the execution of their duty. The latter offence is met simply by having a knife in a public place without reasonable excuse. It can be contrasted with the offence in section 47 of the Criminal Law

(Consolidation) (Scotland) Act 1995 which penalises having an offensive weapon in a public place. An offensive weapon is one made or adapted to cause personal injury or intended by the carrier to be used for causing personal injury. The social worker erred in characterising the s 49 convictions as relating to offensive weapons.

[21] In assessing risk, the social worker anticipated a high likelihood of further domestic offending by conflating the police call-outs for domestic incidents as coming from two relationships, with his current partner and with the complainer, when the narrative in the JSWR is that there were call-outs only in his relationship with his current partner. A later conclusion that there have been difficulties across multiple relationships according to Police Scotland and Children and Families Social Work is not supported by the preceding content of the report. The social worker proposed that the judge should consider making an extended sentence, at least in part, because of "a history of weapon use and violent offences." For the reasons we have explained, this is something of a gloss.

Plea in mitigation before the judge

[22] Senior counsel explained that a good friend of the respondent had been murdered not long before these offences and it had a considerable impact on him and increased his drug-taking. The respondent regretted what he did.

Reasons for the sentences imposed

[23] The judge recognised the full scope of what the respondent had done and its full consequences. He carefully noted what the respondent's criminal record did (and did not) contain. He rejected that the offence had been planned, as the social worker proposed, but properly found the respondent's culpability to be high. There was an exceptionally high

level of harm. He recognised that the respondent's previous convictions and being subject to a CPO were aggravating circumstances. He considered the respondent's intoxication aggravating. He found no real mitigation in either the content of the report or what was said by senior counsel. Taking account of the gravity of the respondent's conduct, but also the sentencing principle that sentences should be no more severe than necessary, he imposed the sentences he did and, properly, backdated them to the start of the respondent's remand. He made a non-harassment order of indefinite duration in favour of the complainer.

Submissions in the appeal

Crown

[24] Whilst the respondent's conduct was not continuous it was prolonged and there was repetition. He repeatedly dropped the complainer on the pavement, such that she struck her head on the ground. He pulled her about and dragged her. The pattern of bloodstaining and damage to a kettle supported the inference that the respondent assaulted the complainer again in the hotel room, as the jury determined in convicting of part (c) of the charge. The complainer sustained serious injuries requiring repeated surgical intervention. The treating neurosurgeon's evidence was that the respondent's brain injury was severe and life-threatening. He had not expected her to survive. She had needed a long period of rehabilitation in hospital following her discharge from intensive care. The serious consequences for the complainer were spelled out in her victim statement.

[25] The judge did not properly apply the "Principles and purposes of sentencing" and "Sentencing process" guidelines. He had failed to grasp the full extent of the respondent's culpability given the complainer's vulnerable condition, the repeated acts of violence and

the period over which they were inflicted. The complainer did not appear to be intoxicated on the CCTV footage, and the respondent had impeded the possibility of earlier medical attention by misleading passers-by and the police. He should have told the police she had sustained head injuries. The respondent was culpable for causing all the complainer's injuries and their consequences because he had caused her to be in such a condition that she was stumbling and falling. The judge erred in considering otherwise.

[26] The court should apply the test in *HM Advocate* v *Bell* 1995 SCCR 244, find it met, impose a more severe sentence to protect the public, and provide guidance for sentencers generally. The judge demonstrated in his report that he misdirected himself:

- at para 43 in his discussion of the respondent's culpability for falls following the initial assault
- at para 44 in observing that it was not inevitable that the jury would have found the respondent's assault to be murderous
- at para 45 in his observations about the assault in para (c)
- at para 46 in observing that the initial assault was spontaneous, that the respondent did not hit the complainer and that no weapon was involved
- at para 47 in suggesting that we would be assisted in resolving the appeal by viewing the CCTV footage.

[27] Certain sentencing precedents support the view that the sentence imposed on charge 1 was unduly lenient: *HM Advocate* v *Budge* [2025] HCJAC 27, 2025 JC 368; *Shankly* v *HM Advocate* 17 December 2024 (unreported) and *HM Advocate* v *Cairney* 9 August 2024, an unreported first instance decision. Given the contents of the JSWR, the judge should have imposed an extended sentence. It was his responsibility to determine if the statutory criteria

were met but he had underestimated risk by focussing on the absence of directly relevant previous convictions.

Respondent

[28] Senior counsel reminded us that he had conducted the respondent's defence and acknowledged that the verdict meant that the jury attributed responsibility for causing all the harm that befell the complainer. The court should understand that the ledge on which the complainer had sat was very low to the ground. The hospital CCTV showed the respondent repeatedly and unsuccessfully seeking to get immediate medical attention for the complainer, rather contradicting the Crown's proposition, itself speculative, that the respondent had deliberately sought to obstruct her getting medical attention for selfish reasons. The judge provided a clear and accurate explanation of the evidence in his report. In both his sentencing remarks and his report, he demonstrated his careful and sound reasoning in passing sentence. He plainly took account of all material considerations. The Crown was doing little more than expressing disagreement and dissatisfaction with the sentence passed and offered no justification for the contention that the sentence was unduly lenient.

Decision

[29] There can be no doubt that the respondent caused the complainer extremely serious harm and that his culpability was considerable. The complainer's life and, we infer, the lives of her children and other members of her family, have been fundamentally changed by the consequences of what the respondent did. The extreme harm caused was an important

feature and we take full account of it in determining the question we require to answer: whether the sentence was unduly lenient.

[30] Parties agreed that we should apply the approach of the Lord Justice General (Hope) in *Bell*:

> "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."

[31] Scottish sentencing practice is now incorporated in the first two guidelines issued by the Scottish Sentencing Council under the Criminal Justice and Licensing (Scotland) Act 2010 section 3 and approved by the court under s 5: "Principles and purposes of sentencing" and "The Sentencing process." A sentencer must have regard to applicable sentencing guidelines, s 6(1). If a sentencer decides not to follow such guidelines, he or she must give reasons, s 6(2).

[32] "Principles and purposes" states as a core principle that sentences must be fair and proportionate. It requires that a sentencer considers all relevant factors, including seriousness, impact on those affected by a crime and the circumstances of the offender. It also requires that sentences should be no more severe than necessary to achieve the appropriate purposes of sentencing in each case. A sentencer should give reasons as clearly as the circumstances permit. Sentencing decisions must be made according to the law and having regard to any applicable guidelines. There should be no discrimination. Sentencing decisions should treat similar cases in a similar way.

[33] This guideline identifies the primary purposes of sentencing as: protection of the public; punishment; rehabilitation; giving an offender an opportunity to make amends; and expressing disapproval of offending behaviour.

[34] "Sentencing process" offers a detailed route map of how a sentence might be reached but the process starts with ascertainment of the seriousness of the offence. It is determined by the level of culpability (or blameworthiness) and the degree of harm caused. The guideline states in its introduction:

> "C. The sentencing decision may be made swiftly and in many cases the court may appear to consider some or all relevant factors at the same time. Where a court does not expressly take any individual step, that does not in itself amount to a decision not to follow the guideline.
>
> D. A court may choose to explain aspects of a sentence it has passed by reference to a specific part of this guideline. It does not have to give full reasons as to how each part of the process has affected the sentence."

[35] The Lord Justice Clerk (Dorrian), Chair of the Sentencing Council for Scotland when the first four guidelines were approved, explained in delivering the opinion of the court in *HM Advocate* v *GH* [2023] HCJAC 45, 2024 JC 95, at para 14, that the Sentencing process guideline does not impose:

> "…a requirement on judges to set out in detail the method by which they arrived at the final sentence, or … to approach the issue of sentence by approaching the factors in question in a prescribed order."

Her Ladyship continued at para 15:

> "When faced with an argument that a sentencing judge has not followed a guideline the court will not approach that matter as if the judge were required to set out a template or tick sheet showing his workings. The guidelines are just that: guidance. They do not impose a rigid framework on the judge. Sentencing remains an essentially holistic exercise and whether a sentence may be described as excessive or unduly lenient will be determined according to the whole approach taken by the trial judge, and it is not be to be assumed that simply because a specific step is not recorded, or not mentioned, that it has not been taken into account."
>
> [Emphasis added]

[36] This is consistent with the law concerning sentencing appeals generally, whether instigated by the Crown or the person convicted. In determining any appeal against sentence, the court examines the sentence ultimately passed and will not determine that a sentence is a miscarriage of justice, or unduly lenient, only on account of viewing one or more steps in the sentencing process in isolation even if they were erroneously taken: *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; *Barnes* v *HM Advocate* [2024] HCJAC 23, 2024 JC 364.

[37] The court expects the Crown to exercise considerable care before inviting this court to increase a sentence on grounds of undue leniency. It should bear firmly in mind the general principles governing sentencing. It should also bear in mind the observations of the Lord Justice General in *Bell*. It is not enough to persuade this court that we would have imposed a greater sentence. The Crown must show that the sentence was unduly lenient and, in making that assessment, we must bear in mind the advantages of the judge who hears and sees the evidence at first instance. That advantage remains in this case despite the existence of CCTV footage because we did not hear from the witnesses featuring in it.

[38] There plainly were aggravating features in this case and the sentencing judge took account of them. Whilst we recognise that the jury deleted the averment that the respondent caused the complainer to leave Accident and Emergency, he had caused her to be in the condition that in turn caused her to continue to fall and strike her head. Accordingly, the jury were entitled to conclude that he bore criminal responsibility for all the injuries sustained. It cannot be known if they reached that conclusion, but we do know from their verdict that the jury found the respondent criminally responsible for all the consequences of the assault. Nevertheless, that responsibility was more direct in the case of some injuries

than others and we consider that the judge was meaning no more than that in his comments on the grounds of appeal at para 43 of his report.

[39] The sentencing exercise was not straightforward. Whilst the jury determined that the respondent's actions constituted attempted murder, they are not typical examples of the way in which that crime is committed. No weapons were used. There was no kicking or stamping. That is what we consider the judge had in mind in stating what he did at para 44 of his report. The level of violence used was modest compared to most cases of attempted murder, but it was inflicted on someone who was in a vulnerable condition and her vulnerability was increased by the consequences of the respondent assaulting her. Whilst the libel refers to the respondent striking the complainer (in the hotel room, part (c)), it is not known that he punched or kicked her, although he may have done, and we are not persuaded that the judge's observations at para 45 of his report have the significance contended for by the Crown. The repetition of these actions and the period over which they were repeated were also aggravating features and the judge took account of them.

[40] We found it helpful to view the CCTV footage as doing so gave us a different impression of events from descriptions in the wording of the charge, reports and submissions. The ledge on which the complainer was sitting, and from which the respondent pulled her to start with, was barely above the height of the ground. Whilst the wording of the charge, adopted by the judge in his report, refers to the respondent throwing the complainer to the ground, for the most part he appeared on the CCTV footage to drop her or let go of her after trying to raise her from the ground. We have noted that "dropping" was how the Crown described certain of his actions in their written submissions and the Advocate Depute confirmed that that was the Crown's view. Accordingly, we found no force in the criticism of para 47 of the judge's report. Bearing in mind that the judge was

referring to the initial events at para 46, there is no force in the criticism of its terms. Even if we had found one or more errors, for the reasons explained at paras [35] and [36] above, it would not readily follow that the sentence imposed was unduly lenient.

[41] We consider that it would be somewhat indiscriminating to view this crime as if it was an attempted murder by shooting, knifing or repeatedly driving a car over somebody, as the respondent did in *Budge*.

[42] We note that the respondent had no previous convictions for assault and none for domestic abuse. What happened in this case cannot be seen as part of a pattern of his typical behaviour. The increase in sentence, on account of the domestic aggravation, appears appropriate. The judge afforded the complainer protection by imposing an NHO of indefinite duration. Whilst an attempt to defeat the ends of justice will sometimes reasonably attract a consecutive sentence, the Crown have not challenged the decision to make it run concurrently. The respondent's actions in that regard were reprehensible but had no material effect on events. The force of the criticisms that the respondent should have done more to assist the complainer is modified by his actions in trying to accelerate her being treated at the hospital and her choosing to leave hospital. The jury rejected the respondent bearing criminally responsibility for that.

[43] None of this means that we underestimate the extent of the terrible harm done to the complainer and its permanent and profound consequences, but these considerations form a necessary part of a fair evaluation of events.

[44] We note that in *Shankly*, there was a course of serious domestic abuse pursued by the appellant for over two years before he pushed the complainer over a banister, causing her to suffer catastrophic injuries including a permanent spinal cord injury with severe incomplete paraplegia. She required to use a wheelchair. On appeal a bench of two judges reduced a

14-year extended sentence with a 13-year custodial term to a 14-year extended sentence with an 11-year custodial term. The time over which Mr Shankly abused his partner, the varied and serious ways that he did so, and the even greater consequences of his most significant assault are clearly distinguishing features.

[45] In *Budge*, in sustaining a Crown appeal, the court selected a headline sentence of 14 years and 6 months, including 18 months for a domestic aggravation, for a crime that was materially worse than the case we are considering. Mr Budge used his car as a weapon to strike the complainer and then deliberately drove over her as she lay on the ground. His offence was seriously aggravated by being committed in the presence of the complainer's niece and a young child. This was a materially more serious crime with substantially higher culpability than the present case. We note also that the court declined the Crown's suggestion of imposing an extended sentence where there was no information to entitle the judge to conclude that normal licence arrangements would not be sufficient to protect the public from serious harm.

[46] In *Cairney*, the judge selected an extended sentence of 13 years and 6 months with a custodial term of 12 years (before reducing it by 18 months for his plea of guilty) for a domestic attempted murder with substantially higher culpability, committed by a man with 33 previous convictions including violent offences involving assault, and assault and robbery. Those are significantly distinguishing features.

[47] Having viewed the CCTV footage and having considered carefully all the circumstances of this difficult case, we are not persuaded that the sentence imposed fell below the range of sentences which a judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Accordingly, it does not meet the test for undue leniency. We refuse ground of appeal 1.

Ground 2

[48] Section 210A of the Criminal Procedure (Scotland) Act 1995 provides, so far as relevant to this case, that for a violent offence such as charge 1, if the court is going to impose a prison sentence of four years or more and considers that the period for which the offender would otherwise be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender, it may impose an extended sentence. Such a sentence comprises a custodial term and an extension period during which the offender would be on licence.

[49] We have carefully analysed the reasoning on which the reporting social worker reached the conclusion that an extended sentence may be appropriate. We identified, at paras [16], [20] and [21] above, certain flaws and errors in that reasoning. It was, in any event, for the judge to determine if the criteria were met for making an extended sentence: *McGowan* v *HM Advocate* [2005] HCJAC 67, 2005 1 JC 327; *HM Advocate* v *McMahon* [2025] HCJAC 34, 2025 SCCR 344. We consider that the absence of convictions for assault and domestic abuse was a relevant consideration in the judge's assessment. Whilst this terrible crime was sustained over periods of time in the early hours, and it involved repetition, it is not clear that it is truly part of any wider pattern of behaviour. In the particular circumstances of this case, the judge was entitled to refrain from finding that an extended sentence was necessary to protect the public from serious harm from the respondent. We refuse ground of appeal 2.

[50] The observations we make in the following paragraphs are relevant only in the context of the criteria for imposing an extended sentence where the court is enjoined by Parliament to consider whether ordinary licence conditions are sufficient to protect the public from serious harm. Our observations do not detract or depart from the principle

expounded by a bench of three judges in *McKnight* v *HM Advocate* [2008] HCJAC 62, 2009 JC 33, applying the two-judge decision in *Shovlin* v *HM Advocate* 1999 SCCR 421. In *McKnight*, at para 26 of its opinion, the court confirmed that in selecting the appropriate sentence, a sentencing judge should not take account of early release provisions, including the change of status from a short-term to long-term prisoner. The court acknowledged that the position is different for life sentences and orders for lifelong restriction where Parliament has made special provision.

[51] We observe that since he is a long-term prisoner, the respondent is not entitled to unconditional early release, as most prisoners serving custodial terms of less than four years are. The effect of the Prisoners and Criminal Proceedings (Scotland) Act 1993 s 1(3) is that the respondent could be released on licence (with conditions) after serving half of his sentence if the Parole Board for Scotland so recommended. In considering whether to make such a recommendation, the Board is concerned with the management of an offender's risk in the community. It will take account of the nature and circumstances of the offence; the offender's conduct during the sentence; the risk of the person committing an offence or causing harm if released on licence; what the person intends to do if released on licence and the likelihood of those intentions being fulfilled; and the effect on the safety or security of any other person, particularly any victim or member of family of both victim and the offender: Parole Board (Scotland) Rules 2022/385 (Scottish Statutory Instrument).

[52] For a long-term prisoner such as the respondent, automatic early release would only come six months before the end of the sentence imposed: 1993 Act s 1(2A).

[53] Whilst it is entirely for the Parole Board for Scotland to determine whether to recommend the respondent for release on licence , given the absence of any previous convictions for assault, even allowing for breaches of bail conditions and this offence being

committed when the respondent was subject to a community payback order, we cannot rule out that he might be released on licence conditions. The effects of the long-term sentence imposed, and the resources available to him in prison, have the potential to persuade the respondent to address his offending. These would have been legitimate considerations for the trial judge in considering the criteria in s 210A and that is what we understand he was communicating, albeit concisely, in his report in commenting on this ground of appeal.