APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 28
HCA/2025/000132/XC

Lord Justice Clerk
Lord Doherty
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

CALUM DONALD DENNIS MACGREGOR

Respondent

Appellant: The Lord Advocate (Bain KC); the Crown Agent
Respondent: McSporran KC, sol adv; Adams Whyte Solicitors

27 June 2025

Introduction

[1] This is a Crown appeal against a sentence of imprisonment for 4 years and 6 months imposed on the respondent on 27 February 2025 after he was found guilty of a charge of rape and sexual assault by penetration. The Crown propose that by failing to recognise the true gravity of his offending and giving undue weight to personal mitigation, the sentencing judge imposed an unduly lenient sentence.

[2] The respondent was convicted, after trial, of a charge stating:

> "On 14 December 2021 at [an address in Edinburgh] you CALUM DONALD DENNIS MACGREGOR did assault [the complainer]…push her on to the bed, kiss her on the body, seize her wrists and shoulder, restrain her, repeatedly grab her breasts, remove her clothing and underwear, lick her vagina, repeatedly sexually penetrate her vagina with your fingers, penetrate her mouth with your penis, and repeatedly penetrate her vagina with your penis, all to her injury, and you did thus rape her: CONTRARY to Sections 1 and 2 of the Sexual Offences (Scotland) Act 2009."

The circumstances of the offence

[3] The complainer was 25 years of age at the time of the offence. She gave her evidence on commission, transcribed for the appeal. The complainer met the respondent through online dating, exchanged messages with him and arranged to meet him for the first time at a restaurant in Edinburgh on 14 December 2021. They spent about an hour there before walking together towards her home. She thought she would be saying goodbye when they reached her garden gate, but they had not discussed that. When he followed her to her front door, she invited him in for a drink, showed him to the living room and took him a glass of water. The respondent put it down and kissed her, taking her aback. She did not object to kissing but he then pushed her down by the shoulders onto the sofa, lifted her dress and tried to put his hand inside her underwear. She grabbed his wrist and told him no, but he ignored her and carried on, putting his fingers inside and touching around her vagina. She repeated that she did not want this to happen and, when she managed to sit up, he moved his hand away.

[4] The complainer was not comfortable with this taking place in a room which people outside could see into. She wanted time to think so she suggested they go upstairs and took him to her bedroom. She felt more confident in her safe space and told him she did not want to do anything. He responded by pushing her onto the bed on her back, spreading her

legs, pushing her pants to the side and penetrating her vagina with his tongue. She said she did not want to do this and covered her vagina with her hand but he carried on, forcefully moving her hand, pinning it down on the bed saying, "it won't go any further than this." She replied that she did not want this and used her free hand to try to push his head away and again covered her vagina with her hand. He ignored her and resumed what he was doing before. She then managed to push his head back and again said "please stop." She managed to free her hand and again covered herself with it. She rolled onto her side and got into a foetal position with her knees up to her chest. When she tried to get up, he grabbed her by the shoulders and pinned her back down on the bed and they struggled. He held her down on her back with a hand on each of her shoulders. She could feel how strong he was. She was unable to move and saw no prospect of fighting him off and escaping. She was telling him she did not want this to happen.

[5] He began forcibly trying to remove her dress. She tried to make it difficult but gave up and he removed it. She did not know how else to show him she did not want this when she kept telling him and resisting. He walked across the room to get a condom from his wallet, returned, lay on top of her and penetrated her vagina. She cried out and exclaimed that it was really sore, crying. He ignored her and continued thrusting forcefully and aggressively. He continued and then turned her over by her hips into an all fours position and entered her vagina again from behind. He grabbed her breasts, very forcefully, causing her to exclaim and tell him it was hurting. Otherwise, she kept quiet, hoping it would keep her safe. When the respondent was about to finish, he pulled her to the end of the bed, turned her over so she was facing upward, removed the condom, penetrated her mouth with his penis and ejaculated.

[6] The respondent used her bathroom and the complainer took the opportunity to put her dress on. When he returned the respondent seemed surprised about that and he made a comment (not transcribed) which caused her to panic a little and prompted her to remove her dress. They cuddled for a bit and he penetrated her vagina with his fingers again. It felt awful but she could not recall if she protested. She faked an orgasm in the hope he would stop. She did not want any of this to happen. He then pulled her on top of him and again penetrated her vagina with his penis and had sex with her, again wearing a condom. When he stopped, he went to the bathroom again, got dressed and left the house.

[7] The following day she went to work. Her friend and work colleague, TH, asked her about her date. The complainer said she did not want to have sex and burst into tears in the presence of TH and another colleague. They sought medical attention and the complainer was met by the police at hospital. She had bruising on her breasts. She was confused about what had happened and did not want to say that she had been raped.

[8] TH's evidence was that she collected the complainer to take her to work on the morning after and found the complainer unusually quiet. She did not respond on being asked about her evening. Once they were at work, another friend asked the complainer if she had had sex and the complainer burst into tears. She showed TH the bruising on her breasts and said it had felt like they were "being ripped off". The complainer was conflicted between knowing that she should report what had happened and not wanting to cause trouble for the respondent. The complainer's supervisor also saw her sobbing and crying at work. She would not say why but eventually disclosed she had been raped. A male colleague noted the complainer to be distressed and in shock.

[9] A police officer attended at their workplace and took some details, noting the complainer to be upset, shaken and bruised across both breasts. The next day, another

police officer attended at the complainer's home and found it difficult to communicate with her. The complainer did not want to participate in a police investigation.

[10] Dr Kranti Hiremath examined the complainer on 15 December 2021. She recorded the complainer as having extensive bruising to both of her breasts together with bruising on her left hip and thigh and to her right leg. She had a superficial abrasion to her genitalia, which was still bleeding. Dr Hiremath had not often encountered the level of bruising on the complainer's breast. It was more than she had ever seen, consistent with blunt force trauma inflicted by a moderate degree of force on a fatty area that is very sensitive to pain.

[11] The respondent gave evidence maintaining that everything occurred consensually. The jury plainly rejected his account.

Victim information

[12] The complainer completed a victim statement on 2 January 2025. She explained:

> "I was unable to work for 6 months following the crime due to poor mental health and I was diagnosed with PTSD. I continue to receive intensive therapy with a psychologist to help me cope with the aftermath. I developed a fear of crowded places and being in public which left me isolated and unable to engage in activities that I would have previously enjoyed. I became afraid of the dark and unable to sleep due to distressing flashbacks. This is something which I am still struggling with 3 years later.
>
> Due to being unfit for work following the crime, I had a loss of earnings."

Respondent's circumstances and Justice Social Work Report

[13] The respondent was 27 years of age when he raped the complainer and 30 when sentenced. His family remain supportive of him. He has no children and until recently had not had any stable relationships. He developed such a relationship in June 2024 with a partner willing to stand by him albeit he doubted their relationship could continue with him

in prison. He has no previous convictions. He is a university graduate and also graduated from the Royal Military College at Sandhurst. He is a Captain in the Royal Engineers regiment but he will be discharged from the army as a result of his conviction. He intends to pursue property development with a relative on release from prison. He is in good physical and mental health. He has many friends and uses his time productively.

[14] The reporting social worker noted that the respondent did not accept that his actions constituted rape or sexual assault and maintained his innocence. He presents a moderate risk of sexual offending and a moderate risk of sexual recidivism.

Character references

[15] A number of character references from male and female friends, family members, colleagues and his current partner, vouched for the respondent's general good character. He is highly regarded by people close to him and those who have worked with him. Some of his referees observe that the offending he is convicted of is "out of character" or "impossible to reconcile with" and "simply not compatible with" his nature.

Plea in mitigation

[16] The respondent's solicitor advocate could say nothing in mitigation of the offence since the respondent continued to deny his guilt. The conviction had a profound effect on the respondent's life and that of his family and friends. He is well educated and was an army captain in charge of and managing approximately 125 soldiers. His professional life in the army was at an end. There was no indication of any similar offending behaviour since the offence date in December 2021.

The sentencing judge's report

[17] There was no appeal against conviction and, for reasons that are not readily apparent, the judge narrated much of the cross-examination on behalf of the respondent, the detail of his own evidence of denial and potential weaknesses in the Crown case. She considered there to be significant personal mitigation and noted the impact of the loss of his career.

[18] The judge states that she applied the Scottish Sentencing Council's "Principles and purposes of sentencing" guideline. Despite its unfinished status, and that the High Court has not been invited to approve it, she purported to apply the SSC's draft, "Sentencing guideline for rape," assessing both culpability and harm at the lowest level. The only potentially aggravating feature was ejaculation into the complainer's mouth, a condom being used for vaginal penetration. The judge also considered the Sentencing Council for England and Wales "Sexual offences: Definitive guideline" for rape, again assessing both culpability and harm at the lowest level. She proposed that the latter guideline provides that, as she reported it: "A positive character and/or exemplary conduct is a specific mitigating factor in England."

[19] The judge was aware that the court sustaining a sentence in a Crown appeal as lenient, but not unduly lenient, is not a reliable guide for sentencing purposes. She referred to the unsuccessful appeal by the Crown in a case of rape where the respondent was a doctor of previous exemplary character, *HM Advocate* v *MG* 2023 JC 68, on whom the trial judge imposed a 4-year prison sentence. The court's assessment was that it was lenient but not unduly lenient. She also noted that a number of potentially aggravating features present in that case are absent in the respondent's case.

[20] At para 88 of her report, she proposed that certain features were important as bearing on the level of harm:

- the complainer took the respondent upstairs;
- she and the respondent, "cuddled up after the first episode" and chatted after the second;
- shortly after the respondent left she replied to a friend who was asking after her, "I'm alive. All good haha;"
- when she told her friends the next day that she had sex and had not wanted it, they involved the police and not her;
- the complainer's apparent uncertainty about whether or not she had been raped suggests the incident was not traumatic;
- there were possible innocent explanations for the complainer's injuries and those to her breast appeared to have been caused towards the end of the encounter according to the respondent.

[21] The judge also took into account that the respondent had been significantly punished by the loss of his career, status and life in the army. A sentence of 4 years and 6 months imprisonment was no more than was necessary to achieve the purposes of sentencing which were, in this case, punishment, protection of the public and rehabilitation of the respondent in a custodial setting.

Note of appeal

[22] The Scottish sentencing guidelines the judge was bound to apply were not specific to rape. They were the generic guidelines "Principles and purposes of sentencing" and "The sentencing process." In this case, the prevalence of online dating justified the use of sentencing as a measure of society's concern about, and expression of disapproval of, rape in this context. Serious features included the repeated nature of offending, the causing of significant injury and the severe psychological harm caused. A longer sentence was required.

Submissions

Crown

[23] The trial judge underestimated culpability and harm and gave undue weight to such mitigating factors as there were. The complainer was 5 feet 5 inches tall and the respondent was at least 6 feet tall. He is an army officer and a fit and strong young man. He forcefully restrained the complainer and pinned her down in the face of her repeatedly saying she did not want to have sex and despite her repeated acts of physical resistance. He subjected her to a variety of forms of sexual assault as specified in the charge. He forcefully removed her clothes, ignored her protest that he was causing her pain before grabbing her breasts so hard as to cause significant injury and then ejaculating in her mouth. The judge failed to recognise the significance of the respondent raping the complainer twice. It is well known that people who are raped do not respond in any particular way yet the judge focussed unduly on some of the complainer's decisions in a traumatic event. Insofar as the trial judge suggested that events were not traumatic for the complainer, she was in error.

[24] The witnesses who spoke to complainer's distress painted a picture of the serious impact of his offending in the aftermath. The complainer's victim statement revealed a serious level of harm. The respondent's actions had a profound impact on the complainer's work, her wellbeing and her enjoyment of life. Relying on the sentence imposed at first instance in *MG* was not appropriate: *HM Advocate* v *TJ* 2024 JC 1.

Respondent

[25] There is no doubt that the sentence was lenient. It may be that it was at the very lowest point on the acceptable range but it did not fall below it. If, as appears, the judge did treat the complainer's actions before and after the offence as reducing culpability and harm then that would be an error. The judge's apparent view that harm was at the lower end of

the scale was not one senior counsel could support. Nevertheless, the judge was entitled to evaluate the particularly punitive effect of a prison sentence on the respondent. He had a pro-social background and an impressive career. These circumstances offered particularly compelling mitigation.

[26] The phenomenon of online dating was not a reason to increase the sentence. In the absence of some particular feature, it is hard to see why the culpability of a person who commits rape having met a complainer online should be treated more harshly than one who meets a complainer in a nightclub. The sentence imposed properly met the requirements of punishment, deterrence and the objective of rehabilitation. The sentence imposed was not unduly lenient. The appeal should be refused.

Decision

[27] In *HM Advocate v Bell* 1995 SCCR 244, the Lord Justice General (Hope) in delivering the opinion of the court expounded a test for undue leniency that continues to apply:

> "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."

[28] In this case, we are not convinced that the sentencing judge applied her mind to all relevant factors. There was significant personal mitigation that she properly took account of, but there is a limit to its weight when considering an offence of this kind. To suggest, as the judge did in her report, that the English guidelines recognise the absence of previous

convictions and the presence of "previous good character and/or exemplary conduct" as potentially mitigating factors is correct but incomplete. The guideline goes on to state:

> "Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.
>
> In the context of this offence, previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence."

What this is intended to convey is not entirely clear. We do consider that there was significant personal mitigation in this case, but we also note that the respondent being a successful army officer made it harder for the complainer successfully to resist his attack on her.

[29] We note that in *TJ*, in delivering the opinion of the court, the Lord Justice Clerk (Dorrian) found the decision in *MG* of no assistance, first because of the difference in circumstances and, secondly:

> "…it was a case where the court clearly indicated that the sentence imposed was one which it considered lenient. Cases where a Crown appeal fails because the sentence is lenient, but which does not meet the high test for undue leniency do not provide any sort of benchmark and must be treated by sentencing judges with caution."

[30] There is another reason for caution before using *MG* as a benchmark, explained at paras 11 and 12 of that opinion. The sentencing judge thought the appropriate sentence was imprisonment for 5 years based on an analysis of other sentences in similar cases. He then reduced it to 4 years because of personal mitigation in the form of MG's previous good character and the loss of his profession. The court observed that the judge had failed to appreciate that in those other cases, the sentencing judges would have considered personal mitigation in selecting the sentence imposed. Accordingly, there was a risk of double

counting in *MG*'s favour. Since there was no ground of appeal identifying this error of law, the judge had not had an opportunity to comment and the court left it out of account in reaching its decision.

[31] In *TJ*, the sentencing judge reduced a prison sentence of 5 years to 4 years and 6 months following a late plea of guilty to a single charge of rape on a first offender of previously good character who had shown remorse. On appeal, the court increased sentence to 8 years and 6 months from a notional starting point of 9 years. There were numerous serious features, some of which do not feature in this case eg planning, targeting of the victim, uninvited entry to the locus and the commission of the offence in the presence of a child. The court also considered the location (the complainer's home), the respondent's persistence in a relatively sustained attack using a degree of force as serious features.

[32] Whether they are considered as features of culpability or aggravating features, particular considerations in sentencing in this case ought to have included:

- events occurring in the complainer's home;
- the respondent's persistence in the face of resistance;
- his use of force;
- causing significant and painful injury to the complainer's breasts;
- the different forms of sexual assault inflicted including oral rape;
- vaginally raping the complainer twice;
- ejaculating in her mouth.

A charge containing two or more acts of rape will generally be more serious than a charge containing one. This court has recognised that repetition usually makes a crime more serious, certainly in the cases of sexual offences: *HM Advocate* v *JT* 2005 1 JC 86 at para 45; *HM Advocate* v *Cooperwhite* 2013 SCCR 461 at paras 11 and 16, both involving crimes of rape.

[33] The trial judge misdirected herself in assessing harm as being "at the lower end of the scale." She should not have used a draft guideline as if it were in force, but in doing so

she misapplied it in evaluating harm. To the extent that she took account of the English guideline, she misapplied it in her assessment of harm. In each case, she envisaged it featuring in the lowest category.

[34] In *HM Advocate* v *RB* 2025 SCCR 164, the sentencing judge had not considered the harm caused to be severe. The court disagreed. A victim statement revealed that a young child raped by her father three years previously had only recently gone out to play with her friends again, and continued to feel terrible and scared. In delivering the opinion of the court, LJC Dorrian considered that, if using the English guideline as a cross check, this was clearly category 2, severe psychological harm.

[35] In this case, the complainer could not work for six months because of poor mental health (with loss of earnings) and was diagnosed with PTSD. She became afraid of crowded places and being in public, leading to isolation and disengagement from previous activities. Even three years later, she remained afraid of the dark, had difficulty sleeping because of distressing flashbacks and continued to receive intensive psychological therapy. We cannot accept that this was harm at the lower end of the scale. It can reasonably be considered severe psychological damage.

[36] In all the circumstances, even allowing for mitigating circumstances, a sentence of imprisonment for 4 years and 6 months was unduly lenient. We pass sentence of new and impose a sentence of imprisonment for 6 years and 6 months. As before, sentence is backdated to 30 January 2025.

Post-script

[37] We did not consider that the mere fact that the complainer and respondent met through an online dating platform indicated a higher sentence than would otherwise be

appropriate. Today huge numbers of people, especially young people, contact each other using such platforms. There was no suggestion that the respondent's use of the platform was predatory. Nevertheless, in light of what happened in this case, it is important to spell out the law on consent to those who use dating services, and particularly sites promoting an expectation of sexual activity.

[38] The law on sexual offences in Scotland is intended to protect each person's sexual autonomy. Everyone is entitled to choose what happens to their own body. The complainer was free to choose whether, or not, to engage in sexual activity. She consented only to kissing and no more. Unless she gave consent to it, meaning free agreement, any other sexual activity was criminal. Consent to one form of sexual activity does not infer consent to another form of sexual activity.

[39] A person cannot "pre-book" consent and then insist that sexual activity occurs. A person who was going to consent to sexual activity is entitled to change their mind. Even when a person is consenting to sexual activity, they can withdraw consent at any time. Once a person has withdrawn consent, for another person to touch them sexually is a serious crime. If it involves penile penetration of the vagina, anus or mouth it is rape.