APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 2
HCA/2025/000489/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

ROBERT MARKWARD

Respondent

Appellant: Harvey, AD; the Crown Agent
Respondent: Bendle; Bridge Legal Ltd

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16 January 2026

Introduction

[1] This is a Crown appeal against a sentence of 9 years' imprisonment imposed on the respondent on 12 August 2025 after he was found guilty in the High Court of Justiciary at Kilmarnock of ten charges. Nine were crimes of dishonesty involving fraud and/or theft and the tenth was assault to injury.

[2] The Crown's sole contention is that the sentencing judge erred in passing a sentence that was unduly lenient, and that she ought to have imposed an order for lifelong restriction on charge 9. It states:

> "(009) on 24 March 2023 at Homebriar House, Barns Park, Ayr you ROBERT MARKWARD did assault Robert Bushell, born 10 February 1956, an employee there, c/o Police Service of Scotland, King Street, Ayr and did push him on the body, attempt to punch him on the head, punch him on the body and strike him on the body with a gate, all to his injury."

The circumstances of the offences

[3] Except for charge 9 and charge 15 (28 March 2023 in Prestwick, theft of a parcel from a doorstep the owner being 22 years old), the charges disclosed a pattern of the respondent targeting elderly victims, some in their nineties, living in sheltered accommodation or retirement complexes. He used deception to gain entry to the complainers' homes by pretending to be a person of trust such as a carer, nurse, handyman, electrician or a person known to friends or family of the complainer. He distracted some of the complainers whilst he stole items such as bank cards, bus passes and money from their home. On other occasions he gained access to the homes of elderly people by fraud but failed to steal anything. He would sometimes reinforce the plausibility of his false representations by using pieces of information such as the name of a relative of his victim, or a local worker's name likely to be known to the victim. His doing so implies that he gathered such information for his dishonest purposes. The total of the sums of money stolen on charges 2, 5 and 7 was about £600.

[4] Charge 2 occurred on 8 December 2022, and the sum stolen from a 62-year-old woman who lived in sheltered housing because of restricted vision, and who used a trolley for mobility, was £350. The circumstances are illustrative of his *modus operandi* (his typical

ploys and techniques). He claimed to be a handyman named Stevie and, on that pretence, gained access to the complainer's home to steal. Charges 4, 5, 6, 7, 8 and 9 all occurred on 24 March 2023. Charges 4, 5 and 6 occurred at different houses in a complex at Carrick Road, Ayr and charges 7, 8 and 9 occurred at various units within a sheltered accommodation complex and at its exit.

[5] Charge 9 was a charge of assault to injury. During the morning of 24 March 2023, the respondent had fraudulently accessed some flats in Homebriar House, a retirement complex in Ayr. Mrs Doreen Bushell was the house manager and, at that time, her husband, Mr Robert Bushell would come regularly to help her. Mr and Mrs Bushell worked as a team and, in March 2023, they were both 67 years old. At about 11.00am on 24 March 2023, Mrs Bushell received a phone call from one of the complainers to say that a man had come into her flat and had stolen money. Mr and Mrs Bushell went towards the complainer's flat. They were standing at the lift when the respondent came around a corner and said that he was looking for someone called Mrs Jordan or Mrs Jardine. Mrs Bushell said that there was nobody of that name in the property. The respondent pushed past. Mr and Mrs Bushell got hold of his arm and asked him whether he had been in somebody's flat. The respondent went to punch Mr Bushell, who put his hand up to stop him. At that point, a lot of paperwork fell from the respondent's jacket. Mr Bushell tried to pull the respondent back and there was a tussle. They went down to a gate, and the respondent swung it, striking Mr Bushell on the leg with it. During the altercation, the respondent said, "If you don't leave me, I'll stab yous." Mr Bushell was concerned that the respondent might have a knife, stood back and let him go. There was no evidence that the respondent was carrying a knife. Mr Bushell then followed the respondent for at least quarter of an hour, filming him and

taking a photograph of him before the respondent was lost to sight. Mr Bushell sustained a bruise and his trousers were torn.

[6] Charges 12 and 13 occurred at two addresses in the same street in Prestwick on 27 March 2023 and went no further than the respondent making fraudulent representations to gain entry to the homes of one woman of 84 and another of 96. On charge 12, the householder shouted on him to come downstairs and asked him to leave which he did, without resistance. On charge 13 he was escorted out by a middle-aged female carer to whom he offered no threat and no violence.

Previous convictions

[7] The respondent has a criminal record extending from 1986 when he was 25 following his release from institutional containment. Crimes of dishonesty constitute the majority of his offending, although he also has convictions for breach of the peace, breaches of bail, vandalism and attempting to pervert the course of justice. He has one previous conviction for assault, on summary complaint in 1987, and 14 previous convictions under section 41(1)(a) of the Police (Scotland) Act 1967 between 1986 and 1994. It is not possible to know what his conduct was as the provision was intended to protect police officers from a person who "assaults, resists, obstructs, molests or hinders" them in the execution of their duty. Resisting arrest by struggling is a very common mode of committing this offence.

[8] The respondent has attracted some substantial prison sentences for crimes of theft on indictment:

- 1993, imprisonment for 18 months
- 1994, imprisonment, 2 years
- 1996 High Court, Hospital Order with restrictions

- 2002 High Court, imprisonment, 4 years
- 2005 High Court, imprisonment, 6 years to run concurrently with the 2002 sentence
- 2010 High Court, (theft and fraud) imprisonment, 7 years to follow a return order of 12 months
- 2016 High Court, imprisonment, 7 years to follow a return order of 517 days.

The sentencing process

Procedure

[9] The sentencing judge had regard to the nature and seriousness of the offending, the terms of a Justice Social Work Report prepared in advance of the sentencing diet, senior counsel's plea in mitigation and victim impact statements prepared on behalf of two of the complainers.

JSWR

[10] The sentencing judge described the JSWR as "sorry reading." It was reported that the respondent experienced very serious problems in his childhood, including being involved in a serious road accident at the age of 4, when he suffered a head injury, and neglect and physical abuse. The respondent reported that at the age of 7 his father threw him out of a window. At that point, he was taken into care and, on his 8th birthday, admitted to the Royal Scottish National Hospital, where he remained for 18 years. He left the hospital when he was 25 years old, and that is when he began offending. He has spent most of his life in institutional care, specifically hospitals and prisons.

[11] The respondent has health concerns, including type 2 diabetes and high blood pressure. He has, in the past, experienced significant mental ill-health. He has been made subject to hospital orders. During an admission period at Lennox Castle Hospital in 1996, he was transferred to the State Hospital following reports of assaults on other patients and staff. Once there, he displayed violent behaviour and was said to have engaged in self-harm. It was reported that he was involved in sexual predatory behaviour, although the respondent denies this conduct. The JSWR erroneously recorded the number of previous convictions as totalling 153. However, the author of the report explained that the respondent continued to deny his offending, including any violent offending. He previously disclosed that he would prowl the streets until he identified his victims and that he would experience a "buzz" from offending.

[12] In the author's assessment, should the respondent be in the community, he would almost certainly commit further offences. The sentencing options set out in the JSWR ranged from a community payback order to obtaining a psychological assessment with a view to imposing an order for lifelong restriction. The report also referred to the possibility of imposing an extended sentence, however given that the violent offence (charge 9) was not so serious as to merit a sentence of 4 years' imprisonment, the sentencing judge considered this approach to be incompetent.

Plea in mitigation

[13] Senior counsel confirmed that the respondent continued to deny his offending and adopted the author of the report's observations about the respondent's chaotic and traumatic upbringing. Whilst the respondent had spent time in psychiatric institutions, his last release was a long time ago and there were no concerns about his present psychiatric

health. His physical health was commensurate with his age, although there was a possibility that his foot might require amputation. He had no difficulties with drugs or alcohol. Notwithstanding the length of the respondent's schedule of previous convictions, his convictions for violent crimes were limited and of some vintage.

Victim information

[14] The victim impact statements relating to charges 2 and 5 disclosed that the complainers felt shaken and less confident following their experience. The complainer on charge 2, who is registered blind and walks with the aid of a trolley, had suffered a serious stroke some years previously and felt that her recovery was substantially set back. She could not persevere with certain paid activities, diminishing her sense of self-worth. She no longer felt able to go out alone. The loss of her cards and a significant amount of money had caused her practical difficulty. The complainer in charge 5, aged 90, had lost trust in people she does not know, felt stupid for allowing the respondent in and violated by what happened. The sentencing judge also had regard to the evidence of Mr Bushell, who did not give the impression that the assault had caused him any real difficulty.

Reasons for the sentence imposed

[15] The sentencing judge considered that only a substantial custodial sentence was appropriate. She considered the observations in the report about risk and making a risk assessment order but determined that the statutory test for making a risk assessment order with a view to making an order for lifelong restriction was not met. Whilst there was a very high likelihood that the respondent would continue to commit crimes of dishonesty on release from prison, the risk that future offending would be violent did not come close to the

statutory threshold. Whilst there was some violence in charge 9, it was not, on the evidence, a serious assault. There was no suggestion in the evidence that the respondent had assaulted or attempted to assault anyone other than Mr & Mrs Bushell. The general pattern of behaviour was that of deception, and the respondent simply left the premises at any sign of confrontation. The respondent's schedule of previous convictions disclosed only one previous conviction for assault, at summary level in 1987. His High Court convictions were exclusively for theft or fraud. Whilst there were several section 41 convictions, they had all occurred more than 30 years ago. It could not be assumed that the offending amounted to assaults, rather than resisting, obstructing, molesting or hindering an officer. There had been no convictions under the successor provision in section 90 of the Police and Fire Reform (Scotland) Act 2012.

[16] Whilst the author of the JSWR had suggested an OLR as a potential disposal, he had conflated the general risk of re-offending and the risk of serious harm to members of the public at large resulting from violence. The author had also proceeded from an erroneous calculation of the number of previous convictions. Whilst aspects of the respondent's offending could result in psychological trauma, the elderly complainers in the instant case spoke to being "a bit shaken". That was not the sort of risk that an OLR was intended to meet. The sentencing judge concluded that, overall, the JSWR conveyed a sense of frustration that the respondent was a habitual and determined thief and that, throughout his life, custodial sentences had not succeeded in deterring him. Whilst that frustration was understandable, an OLR was not appropriate to resolve the serious problem with the respondent's behaviour.

Note of appeal

[17] The sentence imposed was unduly lenient because the judge erred in refraining from imposing an OLR on charge 9. The respondent had a pattern of committing similar offences, seen across his convictions on indictment over many years, interrupted only by periods in prison. The return orders imposed in 2010 and 2016 demonstrated that he had offended whilst subject to early release. He had now escalated to violence when interrupted and charge 9 demonstrated a preparedness to injure a member of the public when thwarted in his attempt to defraud and steal. An OLR was a competent disposal under s 210B(1)(a)(ii) of the Criminal Procedure (Scotland) Act 1995. The social worker had noted concerns that the respondent might react violently if challenged or cornered when trying to steal and charge 9 was just such a development. Even if the respondent serves all but 6 months of his 9-year sentence, he will still present a danger to the public on his release. His age then in his early seventies will make him more able to deceive elderly people. This was why the reporting social worker had invited consideration of a risk assessment order. The sentence imposed was unduly lenient as it failed to protect the public. The only way to do so was to impose an OLR and it is competent to do so in this appeal: *HM Advocate* v *LB* [2022] HCJAC 48, 2023 JC 97 at para 88.

Submissions

Crown

[18] The court will impose a more severe sentence in this kind of appeal where it is necessary for the protection of the public *HM Advocate* v *Bell* 1995 SCCR 244 at 251A. The judge accepted that the respondent was almost certain to re-offend on release from prison. The risk criteria in s 210E of the 1995 Act are whether there is a likelihood that, if at liberty,

the respondent would seriously endanger the lives, or physical or psychological well-being, of members of the public at large. Future offending did not need to be violent for the risk criteria to be met: *Johnstone* v *HM Advocate* [2011] HCJAC 66A, 2012 JC 79; *McFadyen* v *HM Advocate* [2010] HCJAC 120, 2011 SCL 337. A mature and persistent offender in the medium risk category could meet the statutory risk criteria: *Ferguson* v *HM Advocate* [2014] HCJAC 19, 2014 SLT 431. What the court said in *Kinloch* v *HM Advocate* [2015] HCJAC 102, 2016 JC 78 about a necessary link should be seen in light of the particular circumstances of that case where the qualifying offence occurred in prison and there was no risk to members of the public at large. The case has no wider significance.

[19] In any event, there were sufficient indications that the respondent had a propensity to commit violent offences. The assault in charge 9 caused bruising and torn clothing and was accompanied by a threat to stab the complainer that carried sufficient conviction that the complainer let him go. The respondent had admitted to the author of the JSWR that he would "prowl the streets" to identify victims. His schedule of previous convictions disclosed 14 convictions under section 41. In evidence during the trial, the respondent had admitted to assaulting police officers. There was evidence of previous violence when the respondent was incarcerated. The risk of serious harm required by the statutory criteria was made out on the different forms of violent behaviour that the respondent had engaged in over the years.

[20] The sentencing judge had erred in her overall assessment of the JSWR. The author of the report was the respondent's community based social worker and had been for four years. He was uniquely placed to assess the respondent and to opine on the risk he posed and was plainly concerned about the risk the respondent posed to the community. The judge should have followed his suggestion of making a risk assessment order. It would

have revealed whether there was more than a risk of crimes of dishonesty and a propensity to respond with violence when challenged or discovered whilst committing such crimes.

[21] Noting what was said by the court in *LB*, the Crown had commissioned a psychology report from the eminent Risk Management Authority risk assessor, Professor David Cooke. Whilst he did not meet the respondent, he did speak at some length with the reporting social worker who has considerable experience of working with the respondent. On the information available to him, Professor Cooke considered it more likely than not that a risk assessor would find that the respondent meets the RMA criteria for presenting a high level of risk. Crimes involving burglary and home-invasion can cause serious psychological harm such as acute stress symptoms, particularly given the vulnerability of the people the respondent targets. Professor Cooke had insufficient information to perform the optimal HCR-20-V3 structured professional judgement protocol but made his assessment using half of the measures it stipulates, namely 10 historical risk factors. Nevertheless, these may be crucially relevant in understanding a person's current and future risk for violence. The respondent appeared to meet 8 of the 10 historical risk factors. Professor Cooke could not identify any protective factors. Given the limitations on the exercise he could carry out, the court should make a risk assessment order so that it can ascertain if the risk criteria are met and an OLR should be imposed. If so, the sentence that was imposed must be unduly lenient.

Respondent

[22] Counsel invited us to refuse the appeal on the basis that the sentence imposed was fully reasoned by the judge who heard the evidence. It did not meet the test for undue leniency. The respondent's age when he is released bears on any potential risk he may then

pose, as the judge recognised. The court should accordingly go no further. If it was contemplating making a risk assessment order it should not proceed to do so as the criteria in s 210B are not met.

Decision

[23] Section 210B provides:

> **"210B Risk assessment order**
> (1) This subsection applies where it falls to the High Court to impose sentence on a person convicted of an offence other than murder and that offence—
> (a) is (any or all)—
> (i) a sexual offence (as defined in section 210A(10) of this Act);
> (ii) a violent offence (as so defined);
> (iii) an offence which endangers life; or
> (b) is an offence the nature of which, or circumstances of the commission of which, are such that it appears to the court that the person has a propensity to commit any such offence as is mentioned in sub-paragraphs (i) to (iii) of paragraph (a) above.
> (2) Where subsection (1) above applies, the court, at its own instance or (provided that the prosecutor has given the person notice of his intention in that regard) on the motion of the prosecutor, if it considers that the risk criteria may be met, shall make an order under this subsection (a "risk assessment order") unless—
> (a) the court makes an interim compulsion order by virtue of section 210D(1) of this Act in respect of the person; or
> (b) the person is subject to an order for lifelong restriction previously imposed.
> …
> (6) There shall be no appeal against a risk assessment order or against any refusal to make such an order."

[24] Section 210E of the 1995 Act provides that:

> "…the risk criteria are that *the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour* are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large."
> [Empasis added]

[25] There can be no appeal against the judge's decision not to make a risk assessment order: s 210B(6). What the Crown is seeking to persuade us to do was foreshadowed in *LB* and *Mitchell* v *HM Advocate* [2024] HCJAC 8, 2024 JC 284. In *LB,* in delivering the opinion of the court at para 88, the Lord Justice Clerk (Dorrian) envisaged that in a Crown appeal such as this, if the court were persuaded that the sentence was unduly lenient and it determined to impose a different sentence, then the court could make a risk assessment order. Indeed, we note from the terms of s 210B(2), that the court would be bound to do so if it considers that the risk criteria may be met. In *Mitchell*, the court rejected the appellant's appeal against an extended sentence and resolved to impose a different sentence. On considering that the risk criteria might be met, the court made a risk assessment order and, in due course, imposed an order for lifelong restriction.

[26] This is why the Crown has sought to persuade us that the sentence is unduly lenient because, unless it can do so, there can be no challenge to the judge refraining from making a risk assessment order. Undue leniency is the first question we shall have to decide. Even if we are satisfied that the sentence imposed was unduly lenient, there would be a further question as to whether there is a proper basis for us to make a risk assessment order. We shall address these issues in turn.

[27] Parties agreed that we should apply the familiar test expounded by 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."

The court also noted that even if that test is met, the court retains a discretion whether it should then impose a more severe sentence. Resolving that question is the context in which his Lordship proposed that guidance for sentencers generally, or a need to protect the public, might be reasons for imposing a more severe sentence. Although the court considered the sheriff's sentence to be unduly lenient, it did not consider it appropriate to impose a more severe sentence.

[28] In both her sentencing remarks, and in her detailed, well-reasoned and helpful report, the judge, who saw and heard the evidence, makes it abundantly clear that she carefully considered all the information before her and applied her mind to all relevant sentencing factors. For crimes of this kind, the sentence was a substantial one, but it was appropriate against the background of the respondent's history of repeated offending in this way. We are not persuaded that it was unduly lenient and that is sufficient to refuse the appeal.

[29] The Crown faces another difficulty. Charge 9 is the only qualifying offence under section 210B(1). Neither the nature of, nor the circumstances of, the offence in charge 9 persuades us, either of itself or as part of a pattern of behaviour, that it is demonstrated that we should consider that it may be that there is a likelihood that the respondent, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large. This comparatively minor assault, albeit attended by some aggravating circumstances, is not sufficient. It was not a vulnerable householder that the respondent assaulted but a person who had some connection with the premises and sought to intervene as the respondent sought to leave, having committed the crimes in charges 7 and 8. We are

not persuaded that taking it along with the respondent's violent encounters with the police more than 30 years ago and events in hospital in 1996 can provide a pattern of behaviour signalling endangerment to the lives, physical or psychological wellbeing of members of the public at large.

[30] If we consider the theory that the respondent might in future respond more violently on being checked whilst attempting to steal from old and potentially vulnerable people, we note that it did not happen when he was confronted whilst committing the crimes in charges 12 and 13. On the contrary, the respondent did what he was told, left and offered no violence.

[31] We are unconvinced by the Advocate Depute's attempts to persuade us that the risk criteria may be met because the respondent has committed a qualifying offence (assault) and his dishonest conduct could, given certain observations in the JSWR and by Professor Cooke, in future cause serious psychological harm. Even if we were persuaded that, in the future, the respondent's dishonest offending could have serious psychological consequences, we are not persuaded that we can look at charge 9 as a qualifying offence and then use potential harm in respect of a different kind of offending, that does not qualify under s 210B, as a reason to find that the risk criteria may be met. The wording we emphasised in s 210E, above, strongly suggests that there must be a link between the qualifying offence (either its nature, circumstances or as part of a pattern of behaviour) and the future risk of serious endangerment.

[32] We are fortified in our view by consideration of the opinion of the court delivered by the Lord Justice Clerk (Carloway) in *Kinloch* v *HM Advocate* [2015] HCJAC 102, 2016 JC 78. In that case the appellants both had bad criminal records and, as prisoners, had taken another prisoner hostage and made demands of the prison authorities. His Lordship

explained, at para 27, that not only does the legislation require there to be a serious risk posed by the respondent, there also requires to be a link between the qualifying offence and that risk. In sustaining their appeals against the imposition of OLRs, he explained at para 28:

> "The risks of repeat offending by these appellants do not flow from the offence, but from their general recidivist tendencies. The problem with this, in terms of the statutory criteria, is that, while both appellants have significant records, it is not possible to fit this offence into a pattern of behaviour within the scope of the risk criteria. The offence is not similar to those in the appellants' records, other than in the most general of terms. It may be that Mr Kinloch has accumulated a record for possessing weapons, but he appears to have only one limited conviction for using one; that being dealt with by a short custodial sentence in 2007. Mr Quinn does have a serious record involving violence, but it is limited and linked to domestic circumstances. It is not linked to the incident in prison. In the circumstances, the risk criteria are not satisfied and the statutory test for the imposition of an order for lifelong restriction [is] not met."

As we have noted above, the respondent has one previous conviction for assault, in 1987, and we have no basis to conclude that it resembles the qualifying offence, charge 9, and, even if it did, it would not persuade us that the risk criteria may be met.

[33] We find no support for the Crown's submissions in either *McFadyen* or *Johnstone*. In *McFadyen*, a court of two (albeit eminent) judges was dealing with theft by housebreaking in the middle of the night at a house occupied by three women when the appellant stole female underwear and other feminine items. He had a history of stealing female clothing. He told the police he was a cross-dresser and other female clothing was found in his house. He had previously been convicted of assault to severe injury and permanent disfigurement of a woman whose house he had burgled. He attacked her by forcing her to the floor, sitting astride her, attempting to strangle her and stabbed her repeatedly, kicked her, stole her handbag and left. It appeared that his conduct was motivated by gratification. For that conviction he was made subject to a hospital order confining him from 1993 to 2005. Whilst

their Lordships did not require to spell it out in terms as it was not the focus of the appeal, we deduce that the sentencing judge must have considered the offence to demonstrate a significant sexual aspect to Mr McFadyen's behaviour in committing the offence, qualifying it under s 210A(10)(xxvii) as a sexual offence under s 210B(1)(A)(i); or that his offence (and other previous convictions) demonstrated a propensity to commit a violent or sexual offence under s 210B(1)(b).

[34] In *Johnstone*, the appellant had no previous violent convictions, but the qualifying conduct was extremely concerning and obviously presented danger. The appellant, who was charged with breach of the peace, had, over a period of more than two years, stalked a doctor from whom he was receiving psychological care, culminating in his possessing a key to the complainer's home, his possession of thousands of images of the complainer, including some to which he had added statements of a sexual nature and his possession of five canisters of pepper spray as reflected in another charge. Put short, there was an obvious link between the offence, qualifying under s 210B(1)(b), and the risk criteria. The circumstances of the present case are not comparable with those of either of these two cases.

[35] For all of these reasons, the appeal is refused.