



APPEAL COURT, HIGH COURT OF JUSTICIARY

**[2023] HCJAC 4
HCA/2022/540/XC**

Lord Pentland
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND

in

Crown Appeal against Sentence

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CB

Respondent

**Appellant: Bain, K.C. (Lord Advocate) ; Gill,A.D; Crown Agent
Respondent: Crosbie; E Thornton & Co, Oban**

10 February 2023

Introduction

[1] This is a Crown appeal against sentence on the ground of undue leniency. Having heard oral submissions on 3 February 2023, the court allowed the appeal, quashed the sentence of 2 years' imprisonment imposed by the sheriff on charge 1 in the indictment and

substituted for it a sentence of 4 years' imprisonment. We now provide written reasons for our decision.

[2] At Dumbarton Sheriff Court on 5 September 2022 the respondent, who is 77 years of age, was convicted after trial of two charges in the following terms:

“(001) on various occasions between 30 September 1986 and 29 September 1996, both dates inclusive at [specified addresses] and elsewhere you CB did use lewd, indecent and libidinous practices and behaviour towards your daughter, [KG] and did seize hold of her, pull down her underwear and penetrate her vagina with your fingers, cause her to lie on a mattress, at which time you and said [KG] were naked, tickle her on the body, pin her down, touch her on the vagina and penetrate her vagina with your fingers, get into her bed naked, cause her to touch your erect penis, push her against a wall, cause her to lie down facing you and rub her on the body, cause her to pull down her underwear, rub cream on her vagina and penetrate her vagina with your fingers.

(002) on various occasions between 30 September 1986 and 21 January 1994, both dates inclusive at [a specified address] you CB did use lewd, indecent and libidinous practices and behaviour towards your daughter, [KB] and did cause her to lie on a mattress, at which time you and said [KB] were naked, tickle her on the body and on other occasions cause her to pull down her underwear, rub cream on her vagina and penetrate her vagina with your fingers.”

[3] Having deferred sentence to obtain a criminal justice social work report, the sheriff imposed a sentence of 2 years' imprisonment on charge 1 and 1 year on charge 2. He ordered that the sentences were to run concurrently from 18 November 2022, the date on which they were imposed.

[4] Although the Crown appeal was originally directed at the sentences imposed on both charges, it was ultimately restricted to challenging only the sentence of 2 years' imprisonment on charge 1.

The facts

[5] In the sheriff's report he summarised the evidence given at the trial. Subject to one particular point in relation to locus, which was clarified at the hearing of the appeal, the account of the evidence provided by the sheriff was accepted by the Lord Advocate and counsel for the appellant as being accurate.

[6] KG, the victim referred to in charge 1, is the respondent's younger daughter. She gave evidence that the respondent regularly sexually abused her over a period of about 10 years, beginning when she was 2 or 3. She said that he also abused her sister, but less frequently.

[7] As children, after their parents separated, and following a court custody dispute, the two sisters lived with their father in an island community. KG felt very close to her father and sister as she grew up. She described her father as the "parent who hadn't left". Despite this, she said that he was often angry and critical of her. She wondered if he blamed her for his wife leaving them. He always took great care to impress upon both girls that they must present well in all respects to the outside world, with a view to avoiding questions as to how their household operated and coped. He told his daughters that there was a risk that either they or he might be "taken away" if there were enquiries made into their circumstances.

[8] KG testified that the respondent would come into her bed, sometimes naked and sometimes clothed. He would then touch her vaginal area and make her touch his erect penis. On some of these occasions he would penetrate her vagina with his fingers. At the appeal hearing it was explained that KG said in evidence that this abuse happened on so many occasions that it would be impossible for her to list them. Essentially the abuse

became, she said, a normal feature of her life. She recalled that the incidents in bed, to which the respondent referred as "romps", tended to happen most Saturday mornings.

[9] KG also gave evidence that over a period of about a year the respondent was in the habit of regularly applying a cream to her and her sister's vaginas.

[10] In his report the sheriff provided some further details of the evidence given by KG at the trial. One of her most powerful memories was of an episode which happened when she was very young, before she started going to primary school. She had been taken by her father to a hotel. He was angry because she had not obeyed his instructions. He shouted at her, grabbed her, pushed her, pulled down her pants, and pushed his fingers into her vagina, causing her great pain.

[11] KG spoke to various other incidents of abuse, as set out in the first charge. The three most frequently repeated examples were, first, the respondent coming into her bed, touching her vaginal area and causing her to touch his penis; secondly, the daily application by the respondent, over a period of about a year, of a cream to her and her sister's vaginas; and, thirdly, what the respondent called "romps", when all three of them would be naked in his bed. What started as tickling would turn into abuse, extending to digital penetration of her vagina, when her sister was no longer involved.

[12] KG gave evidence that she was in effect being groomed and conditioned by the respondent into thinking that such behaviour was normal and that she was repeatedly instructed not to tell anyone about what went on in the family home because then she, her sister, or indeed the respondent, might be taken away.

[13] KB, the respondent's elder daughter and the victim in charge 2, described the isolated and austere childhood she and her sister endured. She spoke about the naked

“romps”, and how she would often leave her sister with the respondent. She said that the respondent put a cream on her and her sister’s vaginas. This had gone on routinely for about two years. She was able to recall thinking that she was old enough to apply the cream for herself if it was needed. If she and her sister had already dressed themselves in the morning, the respondent would make them remove their pants before putting on the cream. He said that it was a "soothing cream" but KB had no memory of either her sister or herself suffering from any medical condition in that area of their bodies. She too described digital penetration, which was explained by the respondent as "getting into all of the hard to reach bits".

[14] Neither victim made any disclosure to any other person or agency throughout their childhoods. As KG developed into a young adult, she increasingly spent time away from her home, finally leaving in 2004. She made a partial disclosure to her aunt in 2015, and finally reported what had happened to the police in 2018/19.

[15] In two victim impact statements KG powerfully described the profound and devastating effects of the abuse on her over the course of her entire life to date. She felt guilty and conflicted. She has had difficulties in sustaining relationships and in holding down employment. She has experienced nightmares, insomnia, flashbacks, isolation, mood swings, and suicidal ideation. She has required counselling. KG suffered two extreme episodes of mental health difficulties that necessitated the support and intensive care of a mental health crisis team.

[16] The criminal justice social work report advised that the respondent demonstrated a lack of responsibility for his commission of the offences; he attempted to justify his conduct by claiming that he had to apply cream to the victims’ vaginas over a period of months for

medical reasons. He displayed limited insight into his conduct and minimised his culpability by deflecting blame towards KG (the report states that blame was deflected onto KB, but it was accepted by parties at the hearing that the reference should have been to KG). The respondent showed no understanding of the impact of his behaviour on the victims or of the traumatic effects it had on them.

The sheriff's approach to sentence

[17] The sheriff took account of the lack of any relevant previous offending (the respondent had one minor road traffic conviction). He had regard to character references in positive terms. He recognised that the offending constituted a gross breach of trust. He acknowledged the devastating effect of the respondent's conduct on KG, exacerbated by the ordeal of giving evidence against her father. He concluded that no other sentence than one of imprisonment was appropriate.

[18] In response to the appeal the sheriff observed that it was difficult to identify the appropriate period of imprisonment in a case of this type. Having escaped detection for decades the respondent was now an elderly man, with no record of analogous offending. It seemed that over many decades, and in many ways, he had been a useful member of a small island community. It was certain that on his release he would not enjoy the remainder of his life in that community. The victim statement from KG made harrowing reading. The Crown could have indicted the case in the High Court, but chose not to do so. Until 2004 a sheriff's sentencing powers on indictment had been restricted to 3 years' imprisonment. It was not suggested in the note of appeal that he erred in making the sentences concurrent. In

the whole circumstances, the sheriff continued to believe that the sentences he imposed were appropriate, proportionate, and not unduly lenient.

Crown submissions

[19] The Lord Advocate submitted that the type of offending of which the respondent was convicted should almost always result in a sentence of imprisonment. In the Crown's written submissions it was said to be "reasonably asserted" that the tone of the sheriff's report indicated that he had been forced to sentence the respondent to imprisonment, and in this respect he had been diverted from an appropriate starting point and an appropriate length of sentence and consequently had failed to give adequate weight to the nature of the respondent's offending.

[20] The sheriff had not placed sufficient weight on a number of factors that were relevant to sentence in relation to the charge involving KG. These were:

- the particularly serious nature of the respondent's conduct, which involved digital penetration of KG's vagina;
- the repeated nature of the conduct which occurred over a period of libel that started when KG was pre-school age and lasted for about 10 years;
- the vulnerability of KG due to her young age and the fact that the respondent was her principal carer, having obtained full custody of KG when he separated from her mother and she moved to England;
- the associated and egregious breach of trust given that the respondent is KG's biological father;

- the psychological impact on KG, as described in the victim statements which she completed.

[21] The Lord Advocate further submitted that the sheriff had also failed to take the following factors into account:

- the steps taken by the respondent to prevent KG from reporting the offences - impressing upon her a risk that she or he might be taken away;
- the grooming behaviour employed by the respondent, such as applying cream to KG's vagina and describing parts of the abuse as "romps", to make KG view the offences as "normal";
- the respondent's refusal to accept his guilt for the offences of which he had been convicted;
- the respondent's failure to express remorse;
- the respondent's limited insight into his conduct;
- the respondent's minimisation of his culpability and efforts to deflect blame towards KG.

The Lord Advocate submitted that the sheriff misdirected himself by speculating on and then taking into account the circumstances the respondent will encounter on his release from custody.

[22] Although the sheriff stated that it was difficult to identify the appropriate period of imprisonment in a case of this type, there was guidance available in some case law. The Lord Advocate referred to: *RMV v HMA* 2018 SCCR 253; *JM v HMA* [2019] HCJAC 9; and *H v HMA* 2022 SLT 1295.

[23] While available to sentencers in Scotland as no more than a cross-check, the Lord Advocate submitted that the applicable sentencing guideline published by the Sentencing Council for England and Wales – *Sexual activity with a child family member/Inciting a child family member to engage in sexual activity* - provided a further source of guidance.

[24] In terms of that guideline, the respondent's offences would be category 1A offences because they involved: penetration of KG's and KB's vaginas with a part of the respondent's body; grooming behaviour used against the victims; specific targeting of particularly vulnerable children; and a significant disparity in age between the respondent and the victims. The starting point for a category 1A offence was 6 years custody with a range of 4-10 years' custody.

[25] In the charge involving KG there were several aggravating factors which would merit an upward adjustment from the starting point, namely: the resulting severe psychological harm; the exploitation of contact arrangements with the victim to commit the offences; the presence, at times, of another child (her sister) when the offences were committed; the steps taken by the respondent to prevent KG and KB reporting the offences; and the lengthy period over which the offences were committed.

[26] The Lord Advocate submitted that the sheriff's sentencing powers before 2004 were not relevant. The decision to indict the respondent in the sheriff court had been taken in the light of the sentencing powers that have been available since 2004 and the fact that it is open to the sheriff to remit the case for sentence to the High Court where he considers that his sentencing powers are inadequate.

[27] In conclusion, the Lord Advocate suggested that the appropriate sentence on charge 1 should have been between 4 and 5 years' imprisonment.

Submissions for the respondent

[28] In responding to the Crown's submissions, counsel for the respondent urged the court to take the view that the sentence on charge 1 fell within the range of sentences reasonably open to the sheriff. He had enjoyed the important advantages of having heard all the evidence at a trial which lasted several days and a full plea in mitigation in the light of a detailed criminal justice social work report.

[29] At the sentencing diet it had been made clear that the respondent was sincerely sorry for the pain and upset he had caused the complainers. Counsel accepted that this should be seen as a qualified apology since the respondent, as he was entitled to do, continued to maintain his innocence.

[30] The respondent had been assessed as presenting a low risk of further offending, including sexual offending.

[31] Given that the respondent had not previously served a custodial sentence the sheriff was correct to consider first whether there was no other form of disposal reasonably available. The criticism of the tone of the sheriff's report on this aspect was misplaced. It was well-established that imprisonment should be a last resort. The sheriff had correctly directed himself on this point.

[32] While the offences were serious, it was not the case that the sentence imposed on charge 1 was unduly lenient, particularly in view of the mitigating factors. The respondent had a strong work history. He had secure and stable housing. There was no suggestion of problematic alcohol or drug misuse. The sheriff was correct to take account of the respondent's previous good standing in the community. He had lost a previously good

relationship with his brother due to his arrest. The respondent had suffered public shaming and opprobrium. He had been identified and photographed in extensive national press coverage. He would be unable to resume his previous life in a tightly-knit island community. The respondent had a number of health issues, including Ménière's Disease, anaemia, high blood pressure, diverticular disease, and heart disease together with issues affecting his stomach and colon.

Analysis and decision

[33] The test which falls to be applied in a Crown appeal against sentence was set out in the opinion of the court delivered by the Lord Justice General (Hope) in *HM Advocate v Bell* 1995 SCCR 245, 250C-E:

“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.”

[34] We see no merit in the Crown's argument that the tone of the sheriff's report somehow implies that he was reluctant to impose a sentence of imprisonment and that he was deflected from taking an appropriate starting point by this attitude. The respondent had not previously served a sentence of imprisonment. The sheriff could not, therefore, impose a sentence of imprisonment unless he considered that no other method of dealing with the respondent was appropriate (Criminal Procedure (Scotland) Act 1995 section 204).

The sheriff correctly directed himself on and properly applied that well-known statutory test. There is nothing in the sheriff's report to support the proposition that he considered that he had been "forced" to sentence the respondent to imprisonment.

[35] We reject the Crown's suggestion that the sheriff misunderstood the extent of his sentencing powers. This proposition was founded on the sheriff's reference in his report to the fact that before 2004 the sentencing power of the sheriff court was restricted to a period of 3 years' imprisonment. We are satisfied that all that the sheriff was saying was that had the present offences been prosecuted in the sheriff court before 2004, bearing in mind that they had occurred between 1986 and 1996, the maximum sentence available in that court would then have been one of 3 years' imprisonment.

[36] Turning to consider the substance of the challenge to the sentence imposed on charge 1, and applying the test in *Bell* to the particular facts and circumstances of the present case, the court is satisfied that the sentence was unduly lenient. We consider that in selecting a sentence of 2 years' imprisonment the sheriff underestimated the seriousness of the offence. The respondent's culpability was very high. His sexual abuse of the victim was planned and deliberate. He was a mature adult at the time he committed the offence. The extent of the harm caused to the victim was enormous. The offending against her was sustained and repeated. As KG made clear in her victim statement, the psychological impact on her was immense; it has caused her great suffering and distress throughout her life to date.

[37] The court considers that the offence was aggravated by a substantial number of factors. The sheriff has not fully appreciated their importance, especially when they are viewed, as they should be, cumulatively. The victim was a vulnerable child whom the

respondent specifically targeted. She was in his sole care. The offence represented an egregious breach of the high degree of trust reposed in him as a parent and carer. There was evidence of significant grooming and psychological manipulation of the victim by repeatedly impressing on her the importance of not disclosing anything that happened in the family home; the respondent threatened the victim by causing her to believe that if she gave away what happened at home this was liable to lead to her, her sister or the respondent being taken away. There were in addition the efforts by the respondent to normalise the abuse by referring to the episodes in bed as being nothing more than innocent “romps”. A further aggravation lies in the fact that some of the offending took place in the presence of another child, the victim’s sister. Finally, there was no convincing evidence of remorse, regret, insight or victim empathy.

[38] When set alongside the numerous aggravating features, any mitigating considerations are of limited weight. The main one is that apart from the commission of the present offences the respondent has been of good character. We acknowledge that the respondent’s lack of criminal record is a relevant consideration. It is not an unusual feature of cases like the present one. While this factor should not be overlooked, we do not consider it to be of significant importance in the circumstances of the present case. The reality is that the respondent succeeded in evading detection and prosecution for many years by presenting himself as an outwardly respectable member of the community in which he pretended to be leading a normal life. He has benefitted from having been at liberty for many years despite being guilty of serious offending. As to some of the other factors relied on in mitigation, we accept that the respondent will be unlikely to be able to resume his previous lifestyle in the community where he committed the offences. This is not a factor

that should be given much weight. The respondent has brought this consequence on himself by his prolonged campaign of sexual abuse, which he chose to commit while living in that community. Similarly, the public shame and opprobrium experienced by the respondent cannot be said to be truly mitigatory; they are understandable consequences of criminality of this type. As to the respondent's advanced age and health issues, we have already observed that he has succeeded in evading detection and prosecution for many years, during which time he was able to enjoy a seemingly normal life. The fact that he is now an old man cannot, in the circumstances, count in his favour to any significant degree. The court proceeds on the well-established understanding that the respondent will receive all necessary and appropriate medical care while he is in the custody of the Scottish Prison Service. Ultimately, we consider the mitigating factors to be of no great significance.

[39] Taking account of the seriousness of the offence in charge 1 and of the aggravating and mitigating factors, the court had no difficulty in concluding that a sentence of 2 years' imprisonment was unduly lenient.

[40] The question of the appropriate sentence then became a matter that was at large for this court. Having regard to all the features of the case, the court considered that the right sentence was one of 4 years' imprisonment. When this is cross-checked on a broad basis against the guidance applying in England and Wales, we do not consider that such a sentence would be out of line with what might be considered to be the range of sentences considered appropriate in that jurisdiction.

[41] For these reasons we allowed the appeal and quashed the sentence imposed by the sheriff on charge 1 of the indictment. We substituted for it a sentence of 4 years' imprisonment. That sentence will run concurrently with the sentence of 1 year's

imprisonment imposed by the sheriff on charge 2. Both sentences will take effect from 18 November 2022.