APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 48
HCA/2022/000306/XC
HCA/2022/000340/XC
HCA/2022/000308/XC

Lord Justice
Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK in the

Crown Appeals against

Sentence by

HIS MAJESTY'S ADVOCATE

Appellant

against

(1) LB; (2) JI; (3) JT

Respondents

Appellant: Lord Advocate, KC, AD; R McTaggart; M Way First respondent: D Findlay, KC, A Black; Paterson Bell, Solicitors
Second respondent: D Findlay KC, V Young; Faculty Services Limited Third respondent: F Mackintosh KC, C Miller; Faculty Services Limited.

20 December 2022

[1] This opinion concerns three linked cases of rape of domestic partners, LB, JI, and JT, in which the Crown maintain that the sentences passed were unduly lenient. It is also maintained that the circumstances of these cases provide an opportunity for the court to issue a guideline decision in respect of suitable ranges of sentences for cases of rape, which

the Crown asserts is urgently desired and needed. This opinion consists of four sections. We deal first of all with the appeals in respect of the individual sentences. We then address the Crown's contention that a guideline judgment is urgently required.

1. **LB**

[2] The respondent pled guilty to a series of offences against former partners. There were 11 charges over a 5 year period: 3 charges of assault, one to injury; 3 charges of rape;

2 charges of threatening and abusive behaviour; 2 charges of engaging in a course of abusive behaviour towards a partner; and 1 charge of sexual assault. There were three separate complainers, PM, BA and HD.

PM

[3] The respondent was convicted of repeated assaults over a 20 month period, threatening/abusive behaviour in terms of Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (over the same period), and rape (charges 1,2 and 4). The latter charge libelled the aggravation of abuse of a partner. PM and the respondent had co-habited at PM's home. PM spoke to the respondent's controlling and abusive behaviour towards her during their relationship. He frequently pushed and kicked her when she attempted to cuddle him, called her names, accused her of cheating and threatened to kill himself. This escalated to his cutting his arm with a razor and threatening to kill himself. When police attended he said it was all the complainer's fault. He threw a mobile phone at her, and read her messages. On one occasion after reading a message where she commented on another boy's looks, he destroyed her makeup and makeup brushes, using them to write "cheating bitch" on her desk. The rape occurred in her home. They were lying on the bed. She had refused his request for sex. He pressed his penis against her

back. She continued to say "no" and tried to close her legs tightly but the respondent achieved penetration, whilst holding his arm over her chest and shoulders to restrict her movement.

BA

[4] The respondent was convicted under section 38(1) of the 2010 Act, over a three month period (charge 6), with the aggravation of abuse of a partner; engaging in a course of abusive behaviour towards BA over a two year period, contrary to section 1 of the Domestic Abuse (Scotland) Act 2018 (DASA) - (Charge 7); assault - (Charge 8); and rape on various occasions over a five month period, when she was asleep or incapable of giving consent - (Charge 10). Both latter charges libelled the aggravation of abuse of a partner.

[5] The relationship lasted about a year. There was a hiatus while the respondent was tried on an earlier charge under section 38(1) of the 2010 Act involving the complainer, but the relationship resumed immediately following his conviction. The respondent was given a two year CPO for this offence. The subsequent behaviour involved name-calling, for example calling her stupid, fat, ugly, a cow, a cheat. The respondent would chase and kick BA's vehicle, causing numerous dents. He cut up her clothes and threw her shoes in the bin. When she attempted to end the relationship he would send her photos of his self-harm, involving cuts on his arm. When she did end the relationship, she received hundreds of calls from him, which turned to his creating fake email and Facebook profiles to contact her when she blocked his calls. He followed her in his car whilst she was driving. On the occasion of the common law assault, BA had attended a family party without the respondent. Later, he disclosed that he had read messages in her phone and suggested she had lied to him about her whereabouts. He proceeded to straddle her on the bed and repeatedly punch her in the face. She fell asleep and awoke when she felt pressure on top of

her. She realised he was penetrating her vagina with his penis. She shouted "no". He replied that he "deserved it" and told her that he had penetrated her and ejaculated whilst she was sleeping on previous occasions.

HD

[6] The respondent was convicted under section 1 of the 2018 Act, over a three month period (charge 11); sexual assault by digital penetration of the vagina whilst the complainer was asleep, intoxicated and incapable of giving consent (charge 13); rape on various occasions over a 2 year period, when the complainer was asleep or incapable of giving consent, one instance of which was photographed by him (charge 14); and assault (charge 15). All three latter charges libelled the aggravation of abuse of a partner.

[7] HD said that over the duration of the relationship the respondent was verbally abusive and controlling towards her, called her derogatory names, and said she was disgusting and crazy. He accused her of cheating and threatened to commit suicide. He monitored her mobile phone and repeatedly called her, even after the end of the relationship, when he left abusive voicemails on the complainer's phone. He called her a "lying cunt" a "slag" and a "fucking bitch". On an occasion after the relationship had ended, he called at her home without warning.

[8] The sexual assault occurred when the respondent accused HD of having had sex with someone else. He disclosed that the previous evening, whilst she was asleep, he had touched her vagina, which was wet, which he claimed showed she had cheated on him. HD had been unaware of his having done so, and was shocked.

[9] The rape to which she spoke took place on an occasion when they had gone to bed, after consuming alcohol. HD was awoken by something touching her lips and a few seconds later became aware of the respondent thrusting his penis inside her vagina. She asked,

"what are you doing?" but received no reply. Shortly thereafter the respondent left. HD began to cry and called a friend to tell her what had happened. On another occasion HD went to sleep wearing shorts and a t-shirt and woke the next day wearing only her top. The respondent told her that he had been masturbating over her face, had tried to penetrate her mouth with his penis and had ejaculated on her face. The complainer checked his phone and found a photograph of her asleep with a cloudy fluid on her face she believed to be semen. When challenged, the respondent said "I flipped you over and fucked you, then came on your face".

[10] The common law assault took place shortly afterwards when they were staying in an hotel. The respondent said that he had checked HD's phone and found that she was speaking to another man. He erroneously believed her to be pregnant to another man, and punched her in the stomach and face, causing a black eye.

Victim impact statements

[11] The sentencing judge was presented with statements from all three complainers, indicating the harm caused to them by the respondent's behaviour. Each of them spoke to loss of confidence and lack of trust in others resulting from the respondent's treatment of them.

Sentences imposed

[12] Concurrent sentences were imposed on all charges as follows, the figures in brackets reflecting the period which would have been imposed but for the pleas of guilty in terms of section 196 of the Criminal Procedure (Scotland) Act 1995:

Re PM: Charge 1: 5 (6) months; Charge 2: 7 (9) months; Charge 4: 3 years, 6 months of which was attributable to the aggravation ["ATA"] (4 years).

Re BA: Charge 6: 7 months, 3 months ATA (9 months); Charge 7: 9 months (1 year); Charge 8: 7 months, 3 months ATA(9 months); Charge 10: 45 months, 6 months ATA (5 years).

Re HD Charge 11: 9 months (1 year); Charge 13: 18 months, 6 months ATA (2 years); Charge 14: 45 months, 6 months ATA (5 years); and Charge 15: 9 months, 3 months ATA (1 year).

[13] The net effect was a *cumulo* custodial sentence of 45 months.

[14] The judge also passed a Sexual Offences Prevention Order requiring the respondent to live in approved accommodation, report new relationships to his supervising officer, and undertake such offence-based work as his supervisor might direct, all until further order of the court.

The CJSWR

[15] The report contained the following comments:

(a) In relation to his sexual offending [he] explained he felt a sense of entitlement to sexual intercourse with his victims as they were in an intimate relationship.

(b) [He] accepted full responsibility for his offending and did not make any attempt to deny or minimise his behaviour. The behaviour across all three relationships is similar in nature, which would indicate a level of planning and awareness about his actions. Elements of [his] behaviour such as threatening suicide, controlling behaviour and damaging property are considered to be planned ways of causing fear and intimidation to the victims.

(c) During interview [he] discussed his patriarchal and misogynistic views against women and it became apparent he felt entitled to act in both a physically and sexually

abusive way due to his view that men have more control and power over women … there were also other identified concerns such as his inability to control anger and his desire to inflict hurt on his partners as a form of revenge for his belief that they were causing him frustration. He was honest about his lack of respect toward women but was unsure of where this stemmed from.

(d) He blamed his behaviour on being young, selfish and struggling with his anger. He told [the social worker] he was unaware that his sexual offending was characterised as rape as it was his understanding that he was entitled to sex due to his relationship status.

(e) He advised all of his relationships have been characterised by physical and emotional domestic abuse.

(f) He said he understood the impact of his behaviour on his victims but when asked how it was harmful his answers lacked any depth of description, he repeatedly apologised to [the social worker] as opposed to discussing the harm caused to the victims. This may be an indication that his remorse and alleged understanding lacks sincerity and he actually does not have any real level of recognition of the impact of his offending.

(g) Chronic intimate partner violence : [his] IPV had early onset at the age of 14 years. It is persistent and has occurred across multiple relationships. Escalating IPV: [his] IPV is becoming more diverse and severe as the risk of harm to his victims is increasing.

(h) Taking into account the early onset and consistent nature of [his] behaviour associated with IPV and having conducted an assessment of risk identifying a large number of risk factors indicate that, without targeted intervention, [he] is highly likely to appear before the Courts again for further offences of a domestic and/or sexual nature.

(i) [He] was subject to a Supervision Requirement and undertaking offence-focused

work during the time he committed the index offence, this may indicate a level of false compliance throughout the supervision process which acts as a barrier for managing the risk [he] poses to women. This risk is increased as [he] spoke of two incidents where he breached bail conditions in place to protect the victims of his offending. It would suggest that [he] is not manageable in the community.

(j) There is evidence of an entrenched pattern of behaviour in relation to physical, sexual and emotional abuse that [he] has inflicted on all three of his victims. Risk assessments have highlighted a range of risk factors associated with both sexual and domestic offending along with negative and hostile core beliefs relating to women.

[16] The report indicated that consideration might be given to an extended licence period to provide an opportunity to monitor risk, enable robust risk management through weekly supervision meetings, to address anger management, and to conduct offence focused work. The report also raised the possibility of a Supervised Release Order with conditions which might include requirements: to stay in accommodation as approved by his supervising officer at all times; to inform his supervising officer of any new relationships; not to approach or communicate with, either directly or indirectly, the complainers, or to attempt to do so, without prior approval of his supervising officer and subject to any restrictions that his supervising officer might impose - and immediately to report any unavoidable or inadvertent approach or communication; to undertake offence focussed work, in particular around domestic abuse and sexual offending. The suggestion of a SRO was incompetent, but of course the conditions proposed could have been attached to an extended sentence.

The Judge's report

[17] The sentencing judge in his appeal report noted that the respondent had accepted full responsibility for his offending, demonstrated insight into what he had done and acknowledged the need for his attitudes to change. This accorded with the contents of a handwritten note from him which his counsel had provided to the court on 31 May 2022. The respondent had a difficult family background, had ADHD, ADD and ODD and suffered from anxiety and depression. The judge stated:

> "[6] It was obvious from my observations of him in court that he was a rather bewildered young man without very much at all in the way of mental resource to call upon."

He was the paradigm example of the individual to whom the Sentencing Council for Scotland's Guideline on the Sentencing of Young people applied, "a young person with a lower level of maturity and a greater capacity for change and rehabilitation, than might otherwise be the case".

[18] In para 8 of his report, the judge noted the generally serious nature of the charges, that only in charge 15 was injury alleged to have been caused (a black eye ...), and that certain details were informed only by the respondent's own admissions. He added that

> "while it was true that, apart from his sexual offending, he had used various manipulative and unpleasant practices towards the complainers, on deeper analysis that behaviour seemed to me properly to be categorised as attention-seeking, petulant and childish, rather than as in any true sense equivalent to the much more sinister means by which coercive and controlling behaviour is often manifested by those for whom it is an inherent rather than merely an ancillary element of their dysfunctional relationships."

[19] The judge stated at the time of sentencing that the decision to make the sentences concurrent is not one he would have made had he not been persuaded that the respondent's

emotional immaturity was "the single underlying cause" of his offending. Elaborating on this in his report he explained that he came to the conclusion that the offences in question properly fell to be regarded as the product of a single course of conduct actuated by one cause, lack of intellectual and emotional maturity. The important aim of promoting rehabilitation would be hampered, if not indeed effectively stultified, by the selection of a materially longer sentence.

[20] As to the CJSWR he had some difficulty in accepting that the respondent actually had "patriarchal and misogynistic" views as suggested, stating:

> "The young man I observed in court appeared to me to lack the powers of ratiocination necessary to form and maintain any sort of consistent or cohesive belief system of that (or any) kind – pure speculation. An infinitely more obvious and simple explanation for his conduct was that his psychological immaturity led him to prefer the satisfaction of his own emotional and sexual needs over the wishes of others."

He had reflected the issue of future risk by the imposition of a "severe" SOPO, which was an integral part of the overall disposal. The issue of the appropriateness of such an order, or the terms thereof, was not addressed in the original written submissions, but was raised by the court at the outset of the hearing. The parties agreed to provide further written submissions about these issues subsequent to the hearing, and the court is grateful to them for doing so.

Crown submissions

[21] It was maintained that the sentences were unduly lenient, under reference to the following submissions:

(a) The SSC Guideline on the Sentencing of Young Persons applied, making it appropriate to assess culpability by reference to intellectual and emotional maturity at the time of the offence(s), as well as the level of harm caused. The latter was unaffected by

considerations of the respondent's maturity. The judge erred in concluding that the respondent's "emotional immaturity was the single underlying cause of [his] offending" in the absence of any evidential foundation or submissions in that regard.

(b) The CJSWR provided clear, cogent and evidence-based reasons for concluding that the respondent presents a significant risk to any female with whom he enters into a relationship and holds patriarchal and misogynistic views. The judge erred in (i) refusing to accept, and pay any deference to, the assessment conducted by the social worker and (ii) apparently disregarding the terms of the libel and of the Agreed Joint Narrative.

(c) The judge failed to attach sufficient weight to previous convictions and history of violence towards the second complainer (BA) and the recording of his offending towards the third complainer (HD) by taking a photograph. He thus failed fully to appreciate the background of control and coercion. Para 8 of the appeal report unduly minimises the respondent's conduct.

(d) Although referring to the "great deal of harm and distress" caused by the respondent, the judge gave insufficient weight to this. He failed to recognise, and attach appropriate weight to factors such as the vulnerability (being asleep) of, and degradation or humiliation (the ejaculation onto HD's face and the taking of the photograph) suffered by, the complainers.

(e) A cross check with comparable jurisdictions identifies the likelihood of a greater sentence being imposed within those countries.

[22] As to the SOPO, the submissions for the Crown may be summarised thus:

1. A SOPO imposed in terms of section 104(1)(b) of the Sexual Offences Act 2003 is

a criminal order forming part of the total sentence imposed

2. The touchstone for its imposition is that it is necessary to protect the public from serious sexual harm from the accused.

3. A SOPO may be imposed with, or instead of, other orders or sentences such as an extended sentence, and can run in parallel with the accused's being made subject to the notification requirements as a sex offender. However, as the court in *R* v *Smith* [2012] 1 WLR 1316 noted (para9)

> "it must be remembered that a defendant convicted of sexual offences is likely to be subject to at least three other relevant regimes. No SOPO is needed if it merely duplicates such a regime."

4. Although it was open to the sentencing judge to impose a SOPO it was inappropriate for him to do so in this case because:

a The sentencing judge had no information in the CJSWR about the practical consequences of the order he was planning to make.

b He did not ask for submissions from either party and only had a brief exchange on the subject with counsel for the respondent.

c The terms of the order do not reflect the fact that the criminal justice social workers would only be involved with the respondent during a period of licence and that thereafter the monitoring of the respondent as someone subject to a SOPO would fall to the police.

5. A SOPO is a very significant order with serious consequences. Breach of the terms of an extended sentence may result in recall to prison during the currency of the extension period. However breach of a SOPO is in itself a criminal offence carrying the possibility, on solemn conviction, of a custodial sentence of up to 5 years.

6. The making of a lifetime SOPO is a significant step, and in the case of someone of

the respondent's age was inappropriate, having regard to the prospects of rehabilitation. This issue was considered in *Laing* v *HMA* (HCJAC, unreported 23 January 2013), where the court said

> "We do however recognise that there is force in the submission which was made concerning the imposition of a Sexual Offences Prevention Order for a period of 15 years on an offender who is presently only aged 20. When the appellant comes to be released, either on parole licence or at the expiry of the custodial period of his extended sentence, he will remain on licence for the entire outstanding period of that extended sentence. The appropriate licence conditions necessary to manage the risk which he poses at the stage of release will be identified by the Parole Board for Scotland on advice from those with up to date information about his management and risk. In our opinion, that is a process which is likely to provide a more effective risk management regime than can be identified by the sentencing judge so far in advance. Equally, at the expiry of the extended sentence licence, it will be possible, if necessary, to apply for a Sexual Offences Prevention Order to be imposed at that stage.

7. This was a case which was apt for an extended sentence, the conditions of which would have provided the necessary public protection. If at the end of the custodial term and extended period there remained a risk to be managed it would be open to the Chief Constable to apply for a SOPO at that stage, when all involved would be in a better position to assess any ongoing risk.

Defence submissions

[23] To be unduly lenient, a sentence must fall outside the range of sentences which the judge at first instance, applying their mind to all the relevant factors, could reasonably have considered appropriate (*HM Advocate* v *Bell* 1995 SCCR 244 at 250D). A sentence may be lenient, without being unduly so (*HMA* v *May* SLT 753 at p755 E-F; *HMA* v *Cooperwhite* 2013 SCCR 461 at [16]).

[24] The Crown submissions manifestly fail to recognise that in addition to imprisonment, the respondent was made subject to a SOPO for an indefinite period, itself a

significant punishment with a serious impact on him well beyond the end of the custodial sentence.

[25] The SSC Guideline on the Sentencing of Young People, requires the judge to have regard to the interests of the young person, their maturity and the prospect of rehabilitation; and states that if a custodial sentence is imposed on a young person, it should be shorter than that which would have been imposed on an older person for the same, or a similar, offence.

[26] Whether to impose a consecutive, concurrent, or *cumulo* sentence is a matter of discretion for the sentencing judge (*Nicholson* v *Lees* 1996 JC 173). The judge gives cogent reasons for making the sentences concurrent, namely the respondent's lack of intellectual and emotional maturity, and the important aim of promoting rehabilitation. The process of sentencing is case-sensitive, and comparisons may be of limited value, particularly regarding decisions made before the introduction of the young person's guideline. Even if relatively lenient the sentence cannot be said to be unduly so.

[27] In relation to the SOPO, the defence took issue with very little in the Crown submissions relating to the nature of such an order, and emphasised that it was properly to be regarded as part of the overall sentencing disposal. Reference was made to *R* v *Smith*, para 2, where it was observed that:

> *"It is properly to be regarded as part of the total protective sentencing package".*

[28] That was precisely the point made by the sentencing judge in his appeal report. The defence- notwithstanding the serious consequences for breach of a SOPO – did not seem to have concerns about its imposition save in regard to the lifelong extent of it. Overall, senior counsel for the respondent submitted that while the custodial sentence may be described as lenient, it could not be said to be unduly lenient, when taken with the

SOPO.

Analysis and decision

[29] In the case of *LB* we are satisfied that the test in *Bell* has been met and the sentences imposed are, overall, unduly lenient. This is a serious case, involving as it does three complainers subjected to a pattern of abusive and controlling behaviour which stretched over a total of 4 years, and encompassed physical and sexual violence. Apart from the general pattern of abusive and violent behaviour, PM spoke to rape on one occasion; BA also spoke to one occasion, but the respondent admitted having raped her on a prior occasion when she was asleep; and HD spoke to the section 3 assault which the respondent told her about; a subsequent rape; and the incident when he had tried to rape her orally, had ejaculated over her face and taken a photograph on his mobile phone afterwards. These offences are particularly serious when it is recognised that they occurred against the background of abusive and controlling behaviour and physical abuse. Further aggravating factors include the degrading element of the photographing in respect of HD, the vulnerability of the complainers by virtue both of the effect of the controlling and abusive behaviour and, in two cases, by virtue of having been asleep at the time of the offences, and the prior convictions under section 38(1) of the 2010 Act in respect of BA, and for vandalism in respect of HD. It is clear that the effect on each of his victims was significant in terms of loss of confidence and lack of trust in others.

[30] The sentencing judge was right to identify that as the respondent is under the age of 25 it is necessary to have regard to the Sentencing of Young People Guideline. There are two areas of particular relevance - assessment of culpability, and prospects of rehabilitation.

[31] As the judge observed in his sentencing statement, the effect of that guideline is that the court must recognise that in a young person's case culpability may well be less than that of an older person being sentenced for the same offence. However, assessment of culpability requires to be based on relevant material placed before the court at least suggesting the manner in which immaturity may be considered to have been a contributing factor in the offending behaviour. Whilst not setting out an exclusive list, paragraph 10 sets out the main reasons why the culpability of a young person is lower than it would be for an adult. Age is not a determinant factor, and an individualised approach is required. The reasons listed include that young people:

- are generally less able to exercise good judgement when making decisions;
- are more vulnerable to negative influences such as peer pressure and exploitative relationships;
- may be less able to think about what could happen as a result of their actions, including the impact on any victim and others affected by those actions;
- may take more risks.

The only factor which appears to be present in this case is the third, insofar as it applies to a lack of empathy for the victims of one's behaviour.

[32] Para 15 of the SYP Guideline states that:

> "The court should ensure that it has sufficient information to assess the maturity of the young person and to identify and impose the most appropriate sentence."

[33] There follows a non-exhaustive list of issues about which the court may seek information and reports. The CJSWR provided a very limited amount of information about these issues, and did not suggest that lack of maturity was a significant element in the

offending. The CJSWR did refer to ADHD, ADD and ODD but this amounted to recording that the respondent had received these diagnoses around the age of twelve and had received no treatment. There was no information as to the current or longer term effect of these conditions or how they might impact upon culpability for the offences.

[34] All of this seems to have been recognised by senior counsel for the respondent since in his plea in mitigation he observed that the charges represented a serious pattern of offending, that the mitigation which he could advance on the basis of youth was relatively limited, and that the respondent was expecting an extended sentence with a significant custodial component.

[35] The respondent himself blamed his behaviour on being young, selfish and struggling with his anger. The trial judge appears to have accepted this, on the scantest of evidence, going as far as to say the behaviour was properly categorised as "attention-seeking, petulant and childish rather than equivalent to the more sinister means by which coercive and controlling behaviour is often manifested by those for whom it is an inherent rather than merely an ancillary element of their dysfunctional relationships". This is entirely at odds with the assessment in the CJSWR, which painted a clear picture of a manipulative and controlling individual. It is also at odds with the judge's view that it was necessary to impose a lifelong SOPO. It is to be recalled that when the respondent became aware of the police involvement, he initiated contact with the first complainer by messaging her "if they come asking you questions, don't say a fucking word, I'll pay you". It is impossible to reconcile the judge's assessment with the persistence of the behaviour over many years, in the face of a CPO for a conviction under section 38(1) in respect of BA, not to mention a prior conviction for stalking an earlier domestic partner. It is notable that the CPO contained a Supervision Requirement and that the respondent was actually undertaking offence-focused

work during the time he committed the offences against BA.

[36] In this regard it is relevant that the jury were satisfied that the aggravations under section 1 of DASA applied, meaning that the respondent either intended his behaviour to cause the complainer to suffer physical or psychological harm, or was reckless as to whether it had that effect. There is also the deliberate nature of the behaviour in general, and of the aggravations noted above. Against this background we cannot see that the sentencing judge had an evidential basis to consider that emotional immaturity "was the single underlying cause of [his] offending". This, together with his comments regarding his assessment of the respondent's thought processes, is pure speculation. The observations in the CJSWR bearing on culpability were detailed and carefully thought through views reported to the court by a professionally qualified criminal justice social worker. They were entitled to receive a good deal more weight than the judge gave them.

[37] The sentencing judge was somewhat critical of the conclusion of the social worker that the respondent had patriarchal and misogynistic views towards women, largely on the basis that in his assessment ratiocination to this extent was beyond the respondent. It may no doubt be true that the words patriarchal and misogynistic are not part of his vocabulary but there is no reason to doubt the social worker's report of what he actually said about his entitlement to sex because he was in a relationship, and his lack of respect towards the women involved. The judge considered that the respondent's immaturity led him to prefer the satisfaction of his own emotional and sexual needs over the wishes of those satisfying those needs, which the judge thought was "a long way from a manifestation of patriarchal and misogynistic views in any meaningful sense". However this ignores the totality of the evidence, and in particular the violent, controlling, and abusive behaviour which was the hallmark of the respondent's attitudes to the complainers. It ignores the respondent's view

that "he felt entitled to act in both a physically and sexually abusive way due to his view that men have more control and power over women", reflected in his comment to BA that he "deserved" to have sex with her. It also ignores his stated desire to inflict hurt onto his partners as a form of revenge, and the statutory aggravations. Taken with the prior convictions it is clear that the social worker was perfectly entitled to reach the conclusion she did in characterising the respondent's attitudes, and the judge was not entitled to conclude that emotional immaturity "was the single underlying cause of [the] offending", reducing culpability. In light of all the factors we have noted, culpability remained high, and the selection of the custodial sentence has not reflected that. In making all the sentences concurrent the trial judge has failed to reflect the totality, gravity and persistence of the respondent's offending behaviour. This has resulted in the sentences being out of line with well-established sentencing practice. In deciding whether to make sentences concurrent, consecutive, or a mixture of the two a sentencing judge requires to carry out a careful balancing exercise to achieve a sentence which is fair and proportionate in all the circumstances.

[38] On the question of risk, the judge did recognise that the respondent presented a risk of serious harm to the public, as highlighted in the CJSWR. The judge considered that there was scope for rehabilitation in this case, noting the admissions of guilt and the recognition by the respondent that his attitudes and behaviour would have to change. The judge obviously accepted the suggestion that without targeted intervention, the respondent was highly likely to commit further offences of a domestic and/or sexual nature. The risk assessments demonstrated a range of risk factors associated with both sexual and domestic offending along with negative and hostile core beliefs relating to women.

[39] The custodial sentence imposed by the sentencing judge means that the respondent

would be regarded as a short-term prisoner, entitled to release on licence as soon as he has served half his sentence. It seems unlikely that significant progress could be made in terms of reducing risk during the 22.5 months he will spend in custody. The period of licence is therefore critical to addressing the risk which he poses. We are entirely satisfied on the basis of the offences and the terms of the CJSWR that the period of licence resulting from the sentence imposed is insufficient to protect the public from serious harm from the respondent. We are satisfied that the test for an extended sentence has been met.

[40] We will allow the appeal, quash the sentences imposed by the judge and impose a *cumulo* extended sentence of 8 years, with a custodial part of 6 years, reduced from 8 to reflect the guilty pleas. In doing so we should make it clear that, notwithstanding that the CJSWR was unable to identify any protective factors in terms of risk, we recognise that the respondent's admissions of guilt, the absence of any attempt to minimise his responsibility, his recognition, however lacking in depth, of the wrongfulness of his conduct and of the need to change his beliefs in connection with relationships with the opposite sex, and his youth, whilst having only limited effect on culpability do suggest that there may be greater scope for rehabilitation than for a mature adult, who might have expected the headline element of the custodial part of the sentence to be in the region of 10-12 years for these offences.

[41] As to the SOPO we do not consider that such an order was necessary or appropriate in this case. We accept entirely that a sentence must be looked at as a whole but equally in considering whether to impose a SOPO the court requires to address the practical consequences, bearing in mind how those would be applied in the case of a civil order. According to the submissions for the Crown, when the police bring an application a detailed report (including risk assessment) will be supplied with the application. The precise terms

of the order sought will be included within the craves of the summary application, with the justification being provided within the articles of condescendence, making clear to the court the rationale for the order and the necessity of any particular condition, and seeking to satisfy the court that any conditions imposed would be manageable. If the court intends to make an order *ex proprio motu* it is to be expected that it would satisfy itself that it had all the necessary material to make the order.

[42] In the present case the CJSWR did not make any reference to a SOPO; and there was no motion from the Crown that one should be imposed. The CJSWR wrongly raised the possibility of a SRO, which was clearly incompetent but it also raised the possibility of an extended sentence, which senior counsel recognised would be appropriate at the stage of the sentencing hearing. The judge raised the issue of a SOPO during the plea in mitigation but there seems to have been very little discussion of the matter. He did not ask for submissions from the Crown. The quality of the transcript is very poor and it is difficult to identify the rationale of or the need for a SOPO. At one point the judge observed:

> "[an] extended sentence will…, be finite, be limited, come to an end and he'll have to go out into the world when that extended sentence is up, ready or not. Whereas the benefit of a Sexual Offences Prevention Order will operate when he is in the community and he will be supervised while in the community."

[43] Of course the whole purpose of an extended sentence is that it will operate as an additional period of licence once the offender is returned to the community. The judge went on to say:

> "What I can do is I can give him a SOPO which has pretty much the same effect as a supervised release order, and that would be maintained and he would be kept an eye on, more than kept an eye on, in the community, along the lines suggested by the social worker in terms of as you say this incompetent SRO."

[44] As we have noted already, there is a significant difference between a SOPO and either an extended sentence or a SRO, should one have been competent, in that breach of the

former constitutes a criminal offence with the potential for a further lengthy custodial sentence. Moreover, this passage does not recognise that conditions do not require to be specified in an extended sentence because such a sentence only applies to someone who is already on licence.

[45] The reason that section 209 of the 1995 Act envisages that detailed conditions will be included in a SRO is that such a sentence applies only to those who have otherwise been released unconditionally and are thus not subject to conditions of licence. An extended sentence applies to offenders who will only be released on conditions of licence, and the extension prolongs that period.

[46] We do not think it necessary to lay down any specific procedure to be followed when the court is considering making a SOPO, although the Crown submitted that there may be utility in doing so. However, clearly any sentencing judge thinking of making a SOPO must be satisfied that they have adequate information to justify the making of an order, in particular as to:

- the necessity for the order

- the suitability, proportionality, and practicality of the conditions, bearing in mind the observations in *R* v *Smith* (para 7) that it is to:

> *"the prevention of the commission of such offences that the reach of a SOPO must be tailored; it may not prohibit unusual, or socially disapproved, sexual behaviour unless such is likely to lead to the commission of scheduled offences. Further, there must be a real, not remote, risk of harm at this level occurring in consequence."*

[47] Leaving aside the issue of whether the sentencing judge considered that he had the requisite information, this court has concluded that an extended sentence should have been imposed. The terms of sections 210E were clearly satisfied. We do not see any necessity, respecting such a young person, in imposing a SOPO in parallel therewith. The

respondent is a young man and there is at least some hope that he may be rehabilitated. An extended period of post-release supervision giving continuity to any work carried out during the custodial term is likely to give the respondent a better prospect of rehabilitation than a SOPO.

2. JI

[48] The respondent was convicted of three offences against two former partners, SW and KM.

SW

[49] The charge relating to SW (charge 3) was one of indecent assault by penetrating her anus with his penis. SW and the respondent commenced a relationship sometime in 2004 and began cohabiting in November 2004. The offence occurred on an occasion when SW refused the respondent's request for anal sex. He asked her to get on all fours, saying he would not penetrate her. She did so but he proceeded to penetrate her anally with his penis without her consent. SW was in pain and crying. He did stop when she told him to- SW's evidence in chief was that:

> "He took it out and was like that, all right well, "fine, fuck you", kind of thing …. I turned round and cried myself to sleep."

KM

[50] The charges relating to KM were one of common assault on various occasions over a three year period, the libel of which included seizing her by the neck and compressing same, thereby restricting her breathing, causing her to fall to the ground, kicking her, dragging her by her hair, and punching her on the face, to injury (charge 6) ; and one of rape by anal penetration in the course of which the respondent physically assaulted the

complainer, *inter alia* by repeatedly punching her on the head and body, and placing his hands around her neck, thereby restricting her breathing (charge 7).

[51] KM and the respondent began a relationship in 2009, with KM moving from England to Inverness to live with the respondent. The relationship ended in February 2012, following the rape. However, when KM discovered that she was pregnant with the respondent's child she moved back to live with him. The child was born in October 2012. KM later ended the relationship, in early 2013.

[52] The respondent was controlling and physically violent, pushing her, strangling her, punching her in the face and throwing things at her. On one occasion he pushed her to the ground in the street, and then dragged her along by the hair. Several times he put his hands round her throat and compressed it, restricting her breathing. She described these occasions as very scary and she thought she was going to die. The conviction on these various assaults (charge 6) contained the aggravation of injury and danger to life.

[53] The rape (charge 7) occurred after a Valentine's Day dinner. The respondent became angry when KM told him not to put his hand up her skirt in public. Later, when they were in bed, he started touching her anus with his fingers. KM told him not to. He carried on doing it, and she told him to stop, saying she felt he was forcing her into something. He became angry and he pushed her over to her front, pressed her face into the pillow, got on top of her and penetrated her anus with his penis without her consent. He said something along the lines of "I'll show you what it means to be forced". He punched her in the head. He hit her on the head, back, and ear, near her ear piercing, which was very sore and which left her bruised. He also put his hands round her throat and compressed her breathing at one point. She locked herself in the bathroom and phoned the police. After this the relationship broke up but resumed briefly once she discovered she was pregnant.

Contact between the complainers

[54] SW gave evidence that she had said nothing about the incident for at least a decade, until she was approached by KM, who was looking for information about the respondent to use to his disadvantage in a child contact dispute. In her evidence KM said that she had made a complaint to police after the incident in charge 7, and had broken up with the respondent. It is not clear why her complaint was not taken further, although as noted she briefly reconciled with the respondent sometime after making the complaint. She accepted that it was their child contact dispute seven or eight years later that had caused her to contact SW with a view to marshalling material harmful to the respondent for use in that dispute, and this was the context in which she had renewed her complaint.

Victim Impact Statements

[55] No victim impact statements were placed before the court, although such statements were made by both complainers and were provided during the appeal process. Notwithstanding their absence, in sentencing the respondent the trial judge remarked that the offending must "have caused considerable harm and distress" to the complainers, having heard a degree of evidence about the effect on them. As the trial judge noted, it is difficult to isolate the comments made in the VIS from SW, or her evidence about these matters, from the detailed allegations of physical abuse which were rejected by the jury.

[56] Having had the opportunity to examine KM's VIS, the trial judge notes her understandable feelings of emotional discomfort in specific circumstances, but also her acknowledgement that as a psychologist she has the means to deal with them. She considers she has had the strength to address these matters more effectively than others might have been able to do. The trial judge concluded that the effects of the offences had

been within the normal range of impacts of serious crimes against the person, such as he had taken into account.

Sentences imposed

[57] The respondent is 39 years old and has no previous convictions. He was self-employed as an electrician. He was sentenced to 3 years imprisonment on the indecent assault, and 4 years in *cumulo* on the remaining charges, the sentences to be served concurrently.

The CJSWR

[58] The report noted that the respondent continued to deny the commission of these offences, alleging confabulation and collusion by the complainers.

[59] As to risk, he scored low in relation to sexual recidivism and treatment needs, but scored as presenting a continuing risk to intimate partners of sexual and domestic violence/abuse. This would seem to be self-contradictory, and in reality there is nothing in the contents of the report to justify the conclusion that the risk is anything other than low.

The Judge's sentencing statement and report

[60] The judge's sentencing statement noted that the offences were serious sexual and violent offences against two domestic partners. The respondent's refusal even now to acknowledge his guilt made it difficult for very much to be said in mitigation, although it was noted that he was a first offender. He had been relatively young at the time of the offending (22-24 at the time of the offence against SW; then 25-29 at the time of the offences against KM). He did not seem to have engaged in any further criminal behaviour in the *interim*.

[61] The CJSWR assessment of risk suggested that any sentence did not have to contain a material element for public protection, although punishment and deterrence remained relevant. The low assessment of risk, coupled with the many letters of character reference, including those from female friends of the respondent who had no concerns regarding his behaviour towards them, enabled the trial judge to treat the offences as being very much out of character, also leading to the conclusion that sentences with a material element of public protection were not required.

[62] Commenting on the grounds of appeal, the trial judge notes that no special vulnerability had been suggested in respect of the complainers, who seemed capable and well-adjusted individuals. In his report he records the view, based he says on the evidence and character references, that:

> "the offences … were the product of specific aspects of his relationships with the complainers, in particular KM, which caused him to act in ways in which he was not otherwise generally inclined to behave".

Concurrent sentences would achieve the appropriate relativity with the totality of the offending behaviour.

[63] The trial judge doubted that there was any real utility in using guidelines from other jurisdictions, when it is by no means apparent that they bear any very close relation to what sentencing practice is or ought to be in Scotland. In any event he did not accept that the case fell into the range proposed by the Crown, once the full and true circumstances were appreciated and properly digested. Comparison with Ireland in particular was difficult having regard to what seems to be a general practice of suspending a part of the headline sentence.

Submissions for the Crown

[64] It was maintained that the sentences were unduly lenient, under reference to the following submissions:

[65] The judge's failure to understand the evidence meant that he minimised the actions of the respondent, whilst attaching too much weight to the apparent motives of the complainers. The latter should not have been taken into account. The judge failed to recognise that KM was vulnerable by virtue of moving away from her home in England, and by virtue of the physical domestic abuse to which she was subjected. It was irrelevant to consider that the Crown had made "the prosecuting power of the State available for the furtherance of the oblique purposes of" KM; the prosecution of the respondent was in the public interest and the jury were satisfied of his guilt.

[66] Concurrent sentences were inappropriate. In a case of rape, a charge reserved to the High Court of Justiciary, the minimum sentence should be 5 years, absent exceptional circumstances. The sentences imposed were excessively lenient when considered against decisions in other jurisdictions, including the home nations and New Zealand.

Submissions for the respondent

[67] In advancing the submission that there should be a minimum term absent exceptional circumstances the Crown had not identified what the nature of such circumstances might be. It was legitimately open to the trial judge to form a view on any parts of the evidence which were relevant to sentence, such as the degree of force in an assault or the impact upon a victim. The trial judge clearly recognised that there had been serious sexual violence towards both complainers, causing considerable harm and distress. No VIS were presented to him to draw attention to any specific harm. He

properly recognised that the respondent was a first offender and that there had been no offending in the *interim.* He was entitled to consider that the actions were out of character. There is no clear inference that the trial judge took into account his view of motivation in imposing sentence.

Analysis and decision

[68] In relation to SW a charge alleging abusive and controlling behaviour towards her over a period of three years was withdrawn by the Advocate depute. The jury acquitted of a further charge of assault. The charge of which the respondent stands convicted does not therefore fall within a pattern of abuse towards that particular complainer. The picture is different in relation to KM where the rape charge is not only part of a pattern of violent behaviour towards the complainer, but, as shown by charge 6, was itself accompanied by violence. The respondent quite deliberately set out to overcome the complainer's resistance stating his intention to do so by force.

[69] The trial judge does not seem to have given weight to this latter point. In fact in his report he noted that

> "the offences … were the product of specific aspects of his relationships with the complainers, in particular KM, which caused him to act in ways in which he was not otherwise generally inclined to behave".

It is very difficult to understand what he intends this to mean. The respondent and the respondent alone is responsible for his own behaviour. It seems also that the trial judge gave insufficient weight to the relative vulnerability of KM, perhaps because, as a professional person trained in psychology she felt she had at her call resources to deal with what had happened to her which may not be available to others. However that is quite a different matter to considering her to be anything other than relatively vulnerable at the

time of the offences. She had moved from England, leaving her family, friends and job behind. She was living in a house owned by the respondent. She gave evidence that she knew no-one in Inverness. That this was the context of the offences committed against her seems to have been overlooked by the trial judge.

[70] The trial judge concluded that the behaviour was out of character for the respondent, based on the fact that there had seemingly been no repetition of offending since the last incident on the indictment, and various character references presented to him. Whether it is correct to say that the offences were out of character, or rather that the years have caused him to amend his behaviour, may be a moot point. In any event, the judge was satisfied that the respondent did not pose a risk. He was entitled to that view given the conflicting assessments in the CJSWR, and the existence of several protective factors, bolstered by other information. However, in his selection of the appropriate custodial sentences it seems that he overestimated the element of an ordinary determinate sentence which is normally included for public protection.

[71] The trial judge considered that it was open to him to take account of the apparent motivation of KM in contacting SW and renewing her complaint to the police, but he does not say how he took this into consideration nor what impact it had on the sentences selected. He also noted that it seems SW would not have complained to the police without having been contacted by KM. This is another aspect of the trial judge's reasoning which is not easy to comprehend. Whatever may have driven KM to contact SW and renew her complaint to the police, the fact remains that the respondent committed these serious offences. It is the actions and motivation of the respondent which should draw focus, not the motivation of the complainer, which is irrelevant. The important issue is whether the offences occurred and whether the complainers are telling the truth, not what their

motivation may or may not be. So far as SW is concerned no inference can be drawn from the fact that she had not hitherto complained to the police. There are many possible reasons why a complainer may – or may not- report an offence, and her motivation in doing so is beside the point. In fact we cannot understand why the trial judge allowed a late section 275 application on this issue.

[72] The end result is that in our view the test in *Bell* has again been made out, and the sentences imposed are outwith a reasonable range of sentences for the circumstances. The sentence on charge 3 may be viewed as relatively lenient, but not unduly so. The sentences on charges 6 and 7 are clearly unduly lenient, as is the overall effect of concurrency. In the circumstances we will allow the appeal, quash the sentences and impose a *cumulo* sentence of 8 years.

3. JT

[73] The respondent was convicted of 7 charges of rape against three complainers, JB (charge 1), LS (charges 6 ,7, 8 and 9) and CC (charges 14 and 15). The complainers were all former domestic partners of the respondent. All charges save charge 6 were aggravated by involving abuse of his partner or ex-partner.

JB

[74] JB formed a relationship with the respondent shortly after meeting him. After living elsewhere they moved to a flat in Perth. On the day they moved in, the respondent asked the complainer for sex. When she refused he pulled her from the sofa to the floor, pulled her trousers and underwear down to her knees and held her down with his hand. She tried to kick and struggle but could not get away. The respondent proceeded to penetrate her vagina with his penis. He eventually withdrew after she told him several times to stop. He

later apologised. The incident marked the end of the relationship.

LS

[75] LS met the respondent through an internet dating site. Their relationship lasted from November 2016 until July 2017. She planned to spend Hogmanay 2016 to 2017 with him at his flat in Perth. As midnight approached the respondent became affected by alcohol. He was "hyper" and jumping around. At about 1.00am the complainer went to bed, in reality a makeshift affair on the floor. She fell asleep but woke when the respondent entered the room. He said it was a tradition in his family to have sex on Hogmanay. She refused, saying she wanted to sleep. She was sitting cross-legged. He pulled her onto her back and pulled down her pyjama bottoms. She said no, she did not want this. He started to undress himself and lay on top of her, pinning her arms above her head so that she could not move. He proceeded to penetrate her, to ejaculation, despite repeated protests. After he ejaculated the respondent got dressed and went through to the living room. The complainer phoned her sister who came to collect her and her children who were in the flat at the time.

[76] The next day he apologised and promised it would not happen again. The complainer was upset and confused, but agreed to keep seeing him. In July 2017, the events giving rise to charges 7, 8 and 9 occurred. The first of these was when the respondent was staying at the complainer's house. He had "gone in the huff" when she refused to have sex with him. She went to bed and fell asleep. She woke about 2.00 or 3.00am because the respondent was on top of her. She realised that her pyjama bottoms had been taken off and he was moving back and forth with his penis inside her. She asked why he was having sex with her, and he replied "because I want to." She told him she did not want it. He withdrew without ejaculating and left the room, annoyed. During the

early hours of Sunday 23 July 2017 the respondent once again tried to have sex with the complainer. She said she did not want to but he insisted and held her arms above her head. He also put his hand around her throat, choking her. He then proceeded to penetrate her. He then dragged the complainer by the hair through to the living room, pushed her against the couch and penetrated her from behind. This was rough and not like normal sex. He then pushed the complainer through to the kitchen, attempted to penetrate her there and opened the door saying he wanted to have sex outside. However it was raining heavily so he took her back to the bedroom and pushed her down and penetrated her anally.

CC

[77] CC's relationship with the respondent lasted between July 2019 and March 2021. Charge 14 occurred when they stayed at a hotel for the night. The respondent drank throughout the evening. The complainer did not. The respondent became drunk and angry. They argued about his drinking. When the complainer went to leave the room the respondent grabbed her from behind, threw her on to the bed, ripped her dress up to her stomach and proceeded to penetrate her. She kept saying "no", telling him to get off, but he told her she would enjoy it. She screamed, but no one heard. After ejaculating he went to the bathroom. When he came out he kept saying he was sorry and that he had blacked out. He begged the complainer not to go to the police.

[78] Charge 15 occurred when the complainer was living at her mother's house, behind which there was a barn in which she would meet the respondent. There was a "fisherman's rope" in the barn. On one occasion when she met the respondent there she remembered kissing him. The next thing she remembered was "coming to" in an upright position with her hands tied above her head and a noose around her neck. Her top half was clothed but

her pants and trousers were around her ankles and she felt sore around her vagina and the top of her legs. The respondent was pulling up his trousers and sorting out his boxer shorts. The conviction on this charge included a libel of injury and danger of her life.

Victim Impact Statements

[79] JB and CC spoke of a lack of trust, anxiety and depression, sometimes making it difficult for them to cope. CC also speaks to taking an overdose of iron pills for which she was hospitalised. The trial judge took these into account, noting that the VIS from CC in particular was eloquent of the long term impact of these offences upon her.

Sentences imposed

[80] The respondent is 34 years of age. His relevant previous convictions include convictions in 2015 for assault to injury, aggravated by being domestic in nature, and for sending communications of a grossly offensive, indecent, obscene or menacing character. The judge imposed a *cumulo* sentence, being an extended sentence of 12 years 6 months, consisting of a custodial part of 9 years 6 months, and an extension period of 3 years. The respondent had been on remand for 1 year 315 days. To account for this the trial judge reduced the custodial term to 5 years 10 months, in effect she discounted the custodial term to be served by double the period on remand.

CJSWR

[81] The risk assessments utilised suggested that the respondent posed a very significant risk of analogous re-offending. The cited behaviours present as entrenched and characteristic of how the respondent conducted himself in intimate relationships. The author of the report concluded that the offences were undertaken primarily to satisfy JT's

sexual desires which included a lust for violence and humiliation of the complainers. This latter assessment was based on the respondent's assertion that in these relationships he had sex three to five times a day. The respondent acknowledged an interest in sado-masochistic practices, but maintained this was consensual within the relationships. His upbringing had been characterised by dysfunctional relationships and he had been the victim of sexual and physical abuse as a child. He had a history of substance abuse, both drugs and alcohol. On eventual release he would pose a risk which would require robust management.

Judge's sentencing remarks/appeal report

[82] The trial judge considered the whole circumstances of the offences, the CJSWR, the need for post release supervision and the SSC Guideline on the Principles and Purposes of Sentencing. She had regard to recent sentencing decisions including *HMA* v *Peter Renton* (10 March 2022); *HMA* v *Hisham Awad* (27 January 2022); and *HMA* v *Matthew Watson* (17 January 2022). For the purposes of a cross check, she had regard to the English Definitive Guidelines on rape. Recognising that the respondent had never served a sentence of imprisonment she selected the headline extended sentence described above. She considered the terms of section 210E but did not think the criteria were met to justify ordering a risk assessment report under that section. The primary risk presented by the respondent was to future domestic partners.

[83] Taking the view that the charges represented a single course of conduct systematically pursued by the respondent, the trial judge considered it appropriate to impose a *cumulo* sentence, rather than to select each charge in isolation. (*Nicholson* v *Lees* 1996 SCCR 551; *Fleming* v *Munro* 1997 SCCR 527 and *Minto* v

Harrower 2010 SLT 440).

Submissions for the Crown

[84] The trial judge erred in failing to make a Risk Assessment Order at her own instance, as was open to her, the risk criteria having been met. It made no difference that the Crown had not asked for such an assessment. She erred in seeming to dismiss the possibility on the basis that the risk presented by the respondent was to domestic partners. The reference in the legislation to risk to the public "at large" is "primarily intended to exclude those offenders who pose a risk to an individual or individuals as distinct from posing a general danger to persons, such as young girls, whoever they may be" (*M* v *HM Advocate* 2012 SLT 147).

[85] The trial judge erred in her treatment of time spent on remand. The respondent spent 326 days on remand prior to 24 June 2018, when he was released, one of the complainers being unable to attend trial due to pregnancy. He later spent 354 days on remand "due to [his] failure to attend court diets on 5 March 2020 and 2 July 2021". In respect of the first period, on the basis of the decision in *HM Advocate* v *Jake James O'Doherty* [2022] HCJAC 31 the trial judge ought to have backdated the sentence to a notional commencement date 326 days prior to the date of sentencing. As to the second period, the trial judge erred in giving a reduction in sentence for time wholly attributable to the respondent's failure to attend prior court hearings, notwithstanding the withdrawal of charges thereanent.

Submissions for the respondent

[86] The appeal regarding the making of a RAO is incompetent. Section 210B (6) of the Criminal Procedure (Scotland) Act 1995 specifically provides that there shall be no appeal against a RAO or against any refusal to make such an order – see *Ferguson* v *HM Advocate*

2014 SLT 431, para 85. The headline sentence does not sit outside the range of sentences imposed at first instance or by the High Court after successful Crown appeals.

[87] The issue of how to reflect a period of remand in an eventual sentence is recognised as an area where the sentencer has a wide discretion (*Wojciechewski* v *McLeod* 1992 SCCR 563). It was open to the trial judge to take the approach she did to the second period of remand. It is acknowledged that the decision to double the period deducted cannot stand, although at the time of sentence the trial judge would not have had the advantage of seeing *HM Advocate* v *O'Doherty* 2022 SCCR 253.

Analysis and decision

[88] We reject the submission that the sentences in this case were unduly lenient. It is to be noted that the basis of the appeal in this case is very limited in scope. Although originally touched on in the grounds of appeal, the submissions did not suggest that the trial judge had failed to take account of relevant considerations, or had given too much, or too little, weight to particular factors. This is hardly surprising given the obvious care and attention given by the trial judge to all relevant factors. The submission was limited to the argument that the trial judge erred in failing to make a Risk Assessment Order. It is difficult to see how this can be a proper ground of appeal alleging an unduly lenient sentence. Of course, as senior counsel for the respondent pointed out no appeal may be presented from the decision of a judge not to make a RAO, but that does not necessarily mean that, in the context of an unduly lenient sentence appeal the issue of whether an Order for Lifelong Restriction would be appropriate could never be a live one, especially where a Crown motion for a RAO had been refused by the judge. However, in such a situation the basis of the appeal would not be that a RAO should have been made but that an OLR should now be

made, the original sentence being unduly lenient. In such a circumstance one would at least expect the Crown to have obtained a detailed psychological report, and to make a motion for a RAO at some stage during the appeal process. Equally, if an unduly lenient sentence were otherwise made out in the circumstances of the case it would surely be open to the appeal court to order an RAO or to consider an OLR, whatever the judge at first instance had done, but again that is not the position here. The Crown has not produced material to suggest that the risk presented by the respondent is such that an OLR should have been made. We recognise that the trial judge appears to have erred in applying too narrow an interpretation to the phrase "public at large" but that is beside the point in the absence of a valid argument that an OLR should have been imposed. The trial judge's conclusion that a lengthy period in custody, together with post release supervision, would be a proportionate disposal is not one with which we can disagree.

[89] As to the periods of remand, it is of course open to a judge to consider not to allow for a period on remand if that has been brought about solely by the actions of the accused. However, in this case the charges of failing to appear without reasonable excuse were withdrawn, so the judge had no way of assessing whether and to what extent the respondent may have been responsible for this. The proper approach where remand has been interrupted is as set out in *O'Doherty*. In our view the judge was entitled to give credit for the whole period, but should simply have reflected the whole period on remand by backdating to a suitable notional date. We will therefore allow the appeal to the extent only of increasing the custodial term of the extended sentence to 9 years and 6 months and ordering the sentence to run from 20 August 2020.

4. MOTION FOR A GUIDELINE DECISION

Submissions for the Crown

[90] In 2021 the World Health Organisation described IPV and non- partner sexual violence towards women as "public health problem of pandemic proportions", affecting 31% of women aged 15-49. Such violence is a "major contributor to women's mental health problems (particularly depression and suicidality), sexual and reproductive health problems, and to injuries and other chronic health conditions" (page 36, WHO (2021) "Violence Against Women Prevalence Estimates, 2018"). The written submissions for the Crown states:

> "The Crown would therefore seek to align itself with the World Health Organisation's conclusion that 'the prevalence of violence against women remains unacceptably high everywhere, and action to eliminate it must be accelerated.'"

[91] In Scotland, from 2012-13 to 2021-22 reported crimes of rape and attempted rape have increased by 71%, with figures showing an appreciable increase between 2019-20 to 2021-22 an increase which may be projected forward. The mean sentence for rape in the year 2020-21 was 2435 days (i.e., 6 years 8 months), which may indicate a reversal of a trend for such sentences to increase generally from 2011 to 2020.

[92] The Crown, for the purposes of these appeals, obtained a report from Professor Stuart Brody, Chartered Psychologist, outlining the various harms prevalent amongst victims of sexual violence, including inter alia: psychiatric or psychological issues; impact on physical health; and social stigmatisation (perceived or real). It is with no disrespect to Professor Brody that we observe that this is generally within judicial knowledge.

[93] The Lord Advocate noted that Guideline sentencing judgments in relation to the offence of rape have been issued in New Zealand (*R* v *AM* [2010] NZCA 114) and Ireland

(*DPP* v *FE* 2019 IESC 85). In 2014, the Sentencing Council for England and Wales published "The Definitive Guidelines for Sentencing Sexual Offences". These were intended to reflect developments since implementation of the Sexual Offences Act 2003 and to provide up-to-date guidance against the background of an increased volume of cases. A key issue arising from the Council's research was

> "a strong desire on the part of victims for the criminal justice system, and in particular the sentencing process, to demonstrate an accurate understanding of the overarching and long-term harmful effects of sexual violence and abuse, and how this impacts on the life of the victim and their family". (Rook and Ward on Sexual Offences, 6th Edition, page 1791).

[94] Now is an opportune time for the Scottish Court to issue guidance reflective of a greater understanding of the impact of sexual offending and to ensure that sentences meet the overarching objectives of protecting the public, punishment, rehabilitation, deterrence and expressing society's disapproval of the offending behaviour, drawing on guidance issued in England and Wales, Ireland and New Zealand. It is already recognised that guidelines from England and Wales provide a "useful comparator" which might be "cross-checked to see if any major disparity appears" (*HM Advocate* v *AB* 2016 SCCR 47). The "Methodological Challenges of Comparative Sentencing Research" commissioned by the SSC states that whilst in different jurisdictions the crime of rape may be dealt with under differing statutory regimes, these are "in many ways functionally similar". One of the authors of that paper has prepared a report "Comparing Sentences between Jurisdictions" for the purposes of this appeal. He suggests that England and Wales, Ireland and New Zealand appear to be "logical choices" for use, and that whilst each have distinct features "in terms of rape, they could be useful comparators for the purposes of a cross-check of the type envisaged in *HM Advocate* v *AB* 2016 SCCR 47" (page 9). The offence of rape is sufficiently similar in definition to justify comparison. The Crown submitted that

proportionality is a central principle of sentencing in all three jurisdictions, where judicial discretion is also central.

[95] In the Definitive Guidelines for Rape in England and Wales three categories of harm and two of culpability are identified, with a standard sentencing range from 4 to 19 years in custody, although for certain severe cases upwards of 20 years may be appropriate.

[96] In *DPP* v *FE* the Supreme Court of Ireland identified five categories of sentence: suspended sentence for cases which were "wholly exceptional"; "below the norm", generally involving young people; the "ordinary headline sentence", which should commence at about 7 years; "more serious cases", involving a more than usual level of degradation or violence and which merit a sentence of 10-15 years; and cases requiring up to life imprisonment, which may involve special violence, more than usual humiliation, additional and gratuitous sexual perversions, breach of trust and deception, planning or multiple offenders.

[97] In *R* v *AM*, in New Zealand, the court identified four rape bands as follows: one, 6-8 years, for lower level offending in which aggravating factors were absent or limited; two, 7-13 years, for a moderate scale of offending, violence and premeditation or a vulnerable victim, acting in concert with others or two or more relevant aggravating factors present; three, 12-18 years, serious offending involving culpability to a high degree, such as a particularly vulnerable victim and serious additional violence - particularly cruel, callous, or violent single episodes will fall into this band; four, 16-20 years, likely to apply to multiple offending over considerable periods of time, for example repeated rapes of one or more family members over a period of years, offending of this kind involving children and teenagers will attract starting points at the higher end of this band.

[98] There is now desire for, and urgency requiring, the Court to consider issuing a

guideline judgement.

Submissions for the respondent LB and JI

[99] There is no legitimate or logical basis for the assertion that because a crime is reserved to the High Court of Justiciary it must always, or even as a generality, attract a minimum sentence of 5 years, that being the maximum sentence which could be imposed in the Sheriff Court in solemn matters. An appeal to the High Court of Justiciary is not the forum where minimum sentences should be created.

[100] The World Health Organisation Report, whilst it may throw some light on the scale of the problems of violence towards women globally, offers little assistance for determination of the issue before the court. It is well recognised that sexual violence may have a significant and long lasting impact on a victim regardless of the sex of that victim. The report in this connection from Professor Brody, referred to by the Crown, which illustrates this, contains material, the generality of which is already well-acknowledged by the courts. It is obvious that rape can have a significant, indeed lifelong, impact on complainers as well as an impact on others (for example family, friends or subsequent partners of complainers), or society as a whole.

[101] Sentencing remains "a delicate art based on competence and expertise" (*Gemmell* v *HM Advocate* 2012 JC 223 at 59, LJC Gill). The Crown submission that "appropriately severe custodial sentences are a way in which this court can take steps to protect the public and deter future offending" proposes a link between cause and effect which is highly questionable, and for which no evidential basis is produced.

[102] Sentencing policy, and decisions, in foreign jurisdictions may be interesting but not necessarily helpful. Using such cases for the purpose of comparison may fail to reflect

the full procedural and practical contexts of the relevant decisions. It has been noted in respect of the English Definitive Guideline on Sexual Offences

> "It must be borne in mind that in England and Wales there are statutorily defined sentencing purposes (Criminal Justice Act 2003, s142) which are not directly applicable in Scotland." (*HMA* v *AB* 2016 SCCR 47 at [13]).

It is notable, in respect of the case of the respondent LB, that it is not suggested that the foreign jurisdictions referred to have the same guidance as is contained in the Sentencing of Young People guideline applicable in Scotland.

Submissions for the respondent JT

[103] The request is inappropriate and premature. In particular, where the thrust of the Crown submissions is not so much that these individual sentences fall outwith a reasonable band for such offending, but that sentences across the board for such offending is generally too lenient, the court should be wary of the invitation to issue a guideline judgment with the aim and effect of increasing sentencing this way. This is a matter which should be left to the SSC, which is far better placed than the court to (i) commission research; (ii) ingather the necessary information required in the devising of sentencing guidelines; and (iii) consult widely on proposed guidelines. It should be borne in mind that the Council has, among its broad membership, "one person appearing to the Scottish Ministers to have knowledge of the issues faced by victims of crime." There is no such voice in this appeal.

[104] The SSC has already commenced work on Guidelines on rape, and sexual assault. A draft Guideline for rape is likely to be available in 2024. In considering the exercise of its power to issue a Guideline Judgment the court should (i) note that this work is already underway by the SSC; and (ii) take account of its power under section 8 of the 2010 Act to direct the Council to produce a fresh guidance where it deems it necessary. The Court

should be careful to act when the Council has already began its own work in this field.

[105] In addition, when the Crown seek Guidance intended to increase the level of sentences, with concomitant effects on the prison population, the Court should hesitate to act when the more involved and consultative forum of the SSC is seized with the issue, and where Scottish Ministers can have their input into the resource implications of any proposed changes.

[106] In any event, a degree of guidance already exists. There are presently (i) evident patterns in terms of sentencing methodology adopted by first instance judges, and (ii) safeguards as to the appropriate sentencing ranges offered in reported decisions on appeal. Guidance exists in relation to the weight to be attached to: the age and maturity of an offender at the time of the offending (*Tough* v *HM Advocate* [2012] HCJAC 119; *E* v *HM Advocate* [2018] HCJAC 12; *Barbour* v *HM Advocate* [2018] HCJAC 36; *Greig* v *HM Advocate* [2012] HCJAC 127; and *HJL* v *HM Advocate* [2003] SCCR 120); the nature of the relationship between the victim and the offender (*HM Advocate* v *Cooperwhite* [2013] HCJAC 88; *Petrie* v *HM Advocate* [2011] HCJAC 1; *Ramage* v *HM Advocate* [1999] SCCR 592; and *HM Advocate* v *Shearer* [2003] SLT 1354); the fact that a case involves multiple rapes or courses of conduct involving rape (*HM Advocate* v *T* [2005] JC 86; *M* v *HM Advocate* [2013] HCJAC 20; *M* v *HM Advocate* [2016] HCJAC 80; and *Petch* v *HM Advocate* [2011] HCJAC 50); the use of violence or exploitation of a position of trust in the context of the crime of rape (*McC* v *HM Advocate* [2001] SCCR 576; *Murray* v *HM Advocate* [2013] HCJAC 3).

[107] There are clear and obvious dangers in attaching excessive weight to an international comparative analysis. The research and information underpinning guidance, from consultative bodies or from courts, may significantly differ having regard to (i) social, legal, and political considerations; (ii) definition and perception of particular crimes; and

(iii) the correlation between crime rates and the effectiveness of any existing guidance in achieving the sentencing objectives. The Crown submissions are silent as to the operation of early release and parole schemes in the countries with which it seeks to make comparison. All of this means that comparisons may be made without a full understanding of the practical effect of the sentences referred to.

[108] For example, the New Zealand decision of *R* v *AM* was informed by several factors unique to that jurisdiction, which has no sentencing council, and where a prior Guideline judgment had been superseded by emerging sentencing methodology. There was also a structural distinction between "rape" and "unlawful sexual connection" as the means of perpetration of a statutory offence which had not been clarified in terms of sentencing.

[109] The Supreme Court of the Republic of Ireland decision establishing guidelines for rape (*DPP* v *FE*) was issued in a context where the Sentencing Guidelines and Information Committee was only established in the year the decision was issued.

[110] In Scotland clear patterns are readily identifiable from the jurisprudence regarding the crime of rape, as well as the relevant weight to be attached to various mitigating and aggravating factors relevant to sentencing decisions. Judges in Scotland are thus well-placed to reach consistent and well-informed decisions as to the appropriate sentence to pass in cases before them, bearing in mind also that each case hinges on its own facts and that the appropriate balance between the sentencing objectives of retribution, rehabilitation and deterrence can vary considerably on a case-to-case basis.

[111] The Crown asks for Guidelines not simply to seek clarity in sentencing but to reflect cumulatively longer sentences for rape, particularly where repeated or involving multiple victims. Whilst it is open to the court to seek to deter certain types of offending, especially when relatively novel, by sentencing mechanisms (eg cannabis cultivation *in Lin*

v *HM Advocate* 2008 JC 142), there is no data to suggest that the increase in prosecutions for rape and attempted rape demonstrate an increasing number of rapes rather than a welcome increase in reporting and in police investigations. It is at best debatable whether (i) the court is the correct forum to debate the scale of change needed to reduce violence against women in society, and any perceived social acceptability of such violence; (ii) an increase in sentencing ranges is an appropriate, or even a likely means, of reducing this epidemic of offending.

[112] In the case of the individual respondent, JT, the Crown does not argue that the headline sentence imposed was unduly lenient by reference to any court decisions or by any very detailed statistical analysis. The authors of the Literature Review on Sexual offences involving rape submitted to the Council in July 2020 and published in February 2021, identify a mid-range of sentences for rape ranging from five to ten years imprisonment. The mean determinate custodial term in the period of 2015 to 2019 shown in the tables produced by the Crown is just over seven years. Care should be used in addressing figures for the years 2020 to date as these have clearly been skewed by the effect of the pandemic on reducing the number of cases reflected in the figures from which mean sentencing levels may be deduced. Against that background the sentences imposed in the present case do not present as unduly lenient, and provide no support for the submission that a guideline decision is urgently needed.

Analysis and decision

[113] Guideline judgments can be defined as judgments of appellate courts which go beyond the facts of the particular case before the court by articulating sentencing principles, and in particular guidance as to the sentence or disposal which might be

appropriate in a range of similar cases or in respect of specific aggravating or mitigating factors. This court may issue such judgments under its inherent power to do so or under section 118(7) of the 1995 Act. To date these powers have been used sparingly in the High Court (see *Du Plooy* v *HM Advocate, 2003 SLT 1237; Lin* v *HM Advocate 2008 SCCR 16; HM Advocate* v *Boyle and others; HM Advocate* v *Graham 2011 JC 1* and *Spence* v *HM Advocate 2007 SLT 1218).* Nevertheless guidance may be derived from other appeal decisions, in relation to specific kinds of case or specific factors, for example in *HM Advocate* v *Collins* 2017 SLT 23 or in cases of successful Crown appeals against unduly lenient sentences: eg *HM Advocate* v *McPhee*, 1994 SLT 1292; *HM Advocate* v *Bell,* 1995 SCCR 244 at 249D; *HM Advocate* v *Brough*, 1996 SLT 1015; *Fleming-Scott* v *HM Advocate*, 1991 SCCR 748; *Henderson* v *HM Advocate*, 1996 SCCR 71.

[114] It should be borne in mind that the observations in *HMA* v *Graham* (para 21) as to the use of sentencing guidelines apply with equal force to guideline judgments: they provide a structure and framework for sentencing without removing judicial discretion. They assist the court in categorising the offence in question; reflecting the facts of the case, including the aggravating and mitigating factors, and placing it appropriately within the relevant range or, if the circumstances should require, outside it. This approach has been confirmed in various cases, most recently in *Neill* v *HMA* [2014] HCJAC 67 at para.11. See also: *Mitchell* v *HMA* 2012 JC 13; *Jakolev* v *HMA* 2012 JC 120 and *Rippon* v *HMA* 2012 SCCR 699.

[115] The question then arises: when is it necessary or appropriate for a court to

issue a guideline judgement. The circumstances may vary enormously. It may be appropriate to issue such a judgment because a particular type of offence is novel, especially where there is no early prospect of a Guideline from the Sentencing Council (*Lin* v *HMA,* decided before the institution of the Scottish Sentencing Council*);* where there is disparity in sentencing decisions, including a divergence in prior cases *(Gill* v *Thomson* [2010] HCJAC 99); where there is an unmet public interest in how particular offences are sentenced, and where it seems that the current sentencing regime may be inadequate or produce uncertain results, or where the sentencing principles especially relevant to a particular offence have not clearly been enunciated: examples include *HMA* v *Graham*, where the court considered itself hampered by the inadequacy of the Crown submissions (paras 60-60), a point to which we will return; *Foster* v *PF Edinburgh* [2019] SAC (Crim) 16 and *McLellan* v *PF Glasgow* [2019] SAC (Crim) 9; where the public perception of the seriousness of an offence is not reflected in the sentencing decisions being made (*R* v *Guilfoyle* [1973] 2 All ER 844 and *R* v *Boswell* 1984 1 WLR 1047); or where sentencers may require to be "reminded" by a superior court, of the appropriate sentences relative to certain offences (*R* v *Billam and others* [1986] 1 WLR 349). There may also be circumstances where it would be preferable for the court to issue guidance rather than wait for the Sentencing Council to do so. Examples include where a sharp but discrete issue requires to be resolved, or an issue of sentencing procedure (*HMA* v *O'Doherty* [2022] HCJAC 31).

[116] We turn, then to address the question whether the Crown has persuaded us that there is an urgent need for such a decision in relation to the sentencing of rape, particularly when the Scottish Sentencing Council has already commenced work on guidelines in this

area. The Crown arguments in support of the application centre on (i) the prevalence of sexual crime; (ii) the alleged disparity between the sentences issued in Scotland and those in some comparative jurisdictions and (iii) the fact that the guidelines to be prepared by the SSC are unlikely to be approved prior to 2024.

[117] The statistical evidence produced by the Crown here is sparse and the other evidence relied upon largely relates to comparative jurisdictions. The statistical evidence consisted of a table showing the mean sentence for all cases of rape over a ten year period. There was no attempt to break these statistics down, or to present cases comparatively by means of common features such as number of complainers; rape of domestic partners; a background of abusive and controlling behaviour; the use of physical force; planning; breach of trust; particular vulnerabilities such as age, disability or being asleep; and other aggravating – or mitigating factors (eg youth) so that the impact of these factors within the sentencing process might be identified. This is despite the fact that at a procedural hearing on 29 September the court made it clear that submissions should address, amongst other things (a) the appropriate and necessary issues to be addressed by guidance, (b) why the matter should not be left to the Sentencing Council, (c) a consideration of first instance material, (d) and a distillation of the cases cited by reference to the particular features which may be viewed as having broad significance in sentencing terms. The importance of detailed statistical analysis, comparison of similar cases, and reference to research whenever a guideline judgment is sought has been commented on in several cases. In *HMA* v *Graham*, the court referred to the need to consider pertinent authorities, and to understand all the issues involved (paras 60 and 61). The Irish Supreme Court in *People (DPP)* v *Tiernan* [1988] I.R. 250. at 254, observed that:

> "The specific purpose of this form of multiple appeal in the case of *R* v *Billam* was to seek from the Criminal Division of the Court of Appeal a broad statement on policy, almost amounting to a range or tariff of appropriate sentences for rape of different kinds. Having regard to the absence of any statistics or information before this Court in this appeal concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction, general observations on such patterns would not be appropriate. Furthermore, having regard to the fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case (and very few criminal cases are particularly similar), and the particular circumstances of the accused, I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases."

[118] In *Tiernan*, an important reason for the court declining to take up the invitation to set out guidelines lay in the fact that it had not been presented with information relating to the pattern of sentencing for rape in that jurisdiction, the lack of reliable information meaning that the court was not in a position to make general observations about the issue. The same sentiment was later expressed by the Irish Court of Criminal Appeal *i*n *People (DPP)* v *Ryan* [2014] IECCA 11at 2.4

> "Finally, it is important to emphasise that such an exercise can only legitimately be carried out if the court has, as it had in this case, the opportunity, through the industry of counsel, to conduct a comprehensive review of the views on sentences which this Court has expressed and/or has available to it detailed information of sufficient quality on the type of sentences typically imposed by sentencing judges. To attempt to give guidance without such assistance would, in this Court's view, be inappropriate. Against that background, it is next necessary to turn to the approach to sentencing which any such guidance might permit."

[119] The Crown has markedly failed to analyse trends and patterns in rape sentences, to categorise cases in a rational format, or to set out meaningful conclusions on current sentencing practice in this jurisdiction. The scope, content and terms of the guidance sought by the Crown have not been made clear. In particular, factors bearing on culpability, level of gravity, aggravating factors, degree of harm, and mitigation have not been identified, nor has there been an attempt to analyse how such issues are reflected in sentencing within this

jurisdiction. The Crown referred to a paper it had commissioned from Dr Jay Gormley, one of the authors of a paper on the Methodological Challenges of Comparative Sentencing Research, in turn commissioned by the Scottish Sentencing Council. In section 3 of that new paper Dr Gormley highlights some of the problems of the available statistical material in Scotland, problems which the Crown has not sought to address in the current appeals: lack of discrimination in categorising offences; no reflection of multiple relevant factors, such as previous record and aggravations; no account taken of multiple offences on same indictment.

[120] However, although the Crown did not present any detailed analysis of sentences in relevant cases or appeal decisions, by reference to rape cases in general or by reference to specific aggravating or mitigating factors, a certain amount of material is available within the Literature Review published by the SSC. None of this supports the argument that sentencing in Scotland is significantly out of line with, in particular England and Wales, or the Republic of Ireland, especially when allowance is made for different sentencing regimes. It does not support the submission that there is an urgent need for a guideline judgment pending the production of guidelines by the SSC. The following information may be gleaned from the Review, in relation to the sentencing of rape in Scotland:

1. The overwhelming number of those convicted of rape receive custodial sentences, a significantly higher proportion than for any other offence.

2. In the year 2018-2019, 88% of those convicted received sentences of greater than 4 years. No further detailed breakdown is given, for that year or others, but some further information from an analysis of cases over several years and in respect of individual features reveals the information listed in the following paragraphs.

3. In general terms appeal decisions suggest that typically cases involving sentences

of 5 years or less involved young accused, even prior to the introduction of the SSC Guideline on the Sentencing of Young People.

4. Cases involving sentencing of 10 years and over typically involve aggravating factors such as rape of children, multiple rapes and abuse of trust.

5. Some of the highest sentences involve rape of children, examples being cited of sentences of 10 years (even when the offender was a child at the time of some of the offences – *T* v *HMA* [2014] HCJAC 31); 12 years (*M* v *HMA* [2013] HCJAC 20); and 13 years (*T* v *HMA* [2005] 1JC 86; and *M* v *HMA* [2016] HCJAC 80).

6. Serious threats of violence also attract higher sentences, examples being cited of 12 years (*Murray* v *HMA* [2013] HCJAC 3); 14 years (*McC* v *HMA* 2001 SCCR 576); and indeterminate sentences such as an OLR (*Byrne* v *HMA* [2016] SCCR 84).

7. Cases suggest that in cases of rape less weight is attached to expressions of remorse or admissions of guilt than in many other offences.

8. Research suggests that public perceptions of leniency may be wide of the mark.

[121] There are other factors to note in relation to the foreign jurisdictions relied upon by the Crown for comparative purposes. First of all, references to cases in these jurisdictions were not presented in a context which enabled a full understanding of the sentencing regime, including the practicalities of early release, parole, the use of suspended sentences and the like. In relation to the Republic of Ireland this is a particular issue since there seems to be a widespread practice of suspending part of a custodial sentence. Moreover, the Judicial Council subcommittee on Guidelines and Information was not established until 2020, the year after *DPP* v *FE* was reported, and New Zealand does not have a sentencing commission, so in each jurisdiction guideline judgments would

at the time have been the main way in which sentencing guidance could be given.

[122] Whilst it is undoubtedly the case that Guidelines issued in England and Wales may provide a useful cross-check (as used by the trial judge in JT), and they, and court decisions in that jurisdiction, may help illuminate specific aspects of sentencing and the impact thereof, that does not mean that these are therefore on their own a sound basis for the development of a guideline judgment in this jurisdiction.

[123] The true position is that the Scottish courts have extensive experience and collective knowledge of sentencing for this very commonly encountered offence. The Crown has not identified a pressing problem in sentencing terms. The absence of any real practical problem is demonstrated by the negligible number of Crown appeals; and the low number of defence appeals for which leave is granted. The three appeals in the present case are examples in point. The two successful appeals were decided by the same judge who clearly misdirected himself in sentence, defects which have now been corrected. This does not suggest a systemic problem with sentencing in these offences (cf *R* v *Lehd* [2022] NICA 51 para [88]).

[124] The Scottish Sentencing Council has commenced work on guidelines in relation to rape and may be expected to consult on a draft guideline next year. If there is to be any recalibration of sentencing in this area, the Council is in a far stronger position than the court to engage in a robust comparative analysis drawing on appropriate methodology and scholarship. It is also in a position to conduct meaningful public consultation so as to provide a proper evidence base for its recommendations to the court. This is an important step in the process. The Council has a diverse membership reflecting an appropriate range of stakeholders. Any guidance which it produces is liable to be more reflective of

society's views than a single court judgment informed by a few cases, and to be based on actual research and consultation rather than impressionistic assessment.

[125] For the reasons we have explained, the court is not persuaded that a guideline judgment should be issued.