APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 46
HCA/2021/325/XC

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

CROWN APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant

against

MICHAEL McCARTHY

Respondent

Appellant: A Prentice QC (sol adv) AD; the Crown Agent
Respondent: McSporran QC (sol adv); Central Court Lawyers, Livingston

26 October 2021

[1] On 6 August 2021, at the High Court of Justiciary in Edinburgh, the respondent Michael McCarthy was sentenced to a total of 5 years imprisonment, having been found guilty after trial of five offences. These were, as follows:

> Charge 1: the attempted rape of a male, contrary to section 1 of the Sexual Offences (Scotland) Act 2009;
>
> Charge 3: sexual assault of a second, 17 year old, male, contrary to section 3 of that Act;
>
> Charge 4: taking indecent photographs of a child (the male in charge 3), contrary to section 52(1)(a) of the Civic Government (Scotland) Act 1982;

Charge 5: possession of such photographs, contrary to section 52A(1) of the same Act; and

Charge 6: distributing such photographs, contrary to section 52(1)(b) of that Act.

The respondent was sentenced to imprisonment for 5 years on each of charges 1 and 3, 2 years on each of charges 4 and 5, and 3 years on charge 6, all to be served concurrently and backdated to 19 August 2019, when he was first remanded in custody. The appropriate certification was made in terms of the Sexual Offences Act 2003.

The Crown now appeal against these sentences on the grounds of undue leniency.

The circumstances of the offences

[2] PD, the complainer in charge 1, was aged 32 and had known the respondent as an acquaintance for many years. He had a significant drug problem. In summer 2019, he was homeless and spent a lot of time sofa-surfing. Having received a benefit payment, he went to see the respondent. The respondent had helped him out in the past and he heard that he was struggling, so he bought some stuff with part of his benefit payment. He and the respondent then went to the *locus* to clean it up. He understood that the tenancy was about to be signed over to the respondent. The complainer fell asleep on a bed, fully dressed. When he awoke it was getting light. He could hear the respondent talking to people on his phone and saw that he was walking up and down the corridor completely naked, with a black handled knife in his hand. The complainer pretended that he was asleep and felt that he was stuck in the house. He heard a noise, which he recognised as being from an aerosol can of deodorant or hairspray or the like. The button on the can was pressed and the spray was set alight. The complainer rolled off the bed and cowered into his jacket to block the flame but it went down the side of his back, his jacket and the side of his face. He knew that the respondent was trying to burn

his jacket and thought that he was trying to scare him. Then the respondent cuddled into him, stroking his hair and making noises as if to console him. He discarded the knife, but he still had the deodorant in his hand. After stroking the complainer's hair for a minute or two he urinated on his head and body. The complainer was disgusted and terrified and wanted to get away, but he did not wish to do anything which would aggravate the respondent. Nonetheless, he pleaded with the respondent, saying that he had not done anything wrong. Then the respondent tried to put his penis in his mouth. He turned his face away but felt the penis on his head. The respondent was masturbating at the same time. He touched the side of his face and head at his cheek with his penis and the complainer, who was crying and pleading, thought that the respondent wanted him to suck it. When he did not comply, the respondent pinned him down, but eventually he managed to get away.

[3] The complainer in charge 3 was 17 in August 2019. On 14 August he had a drink and took an Ecstasy tablet. A message came through from the respondent inviting him to his house to have some drugs. When he got to the respondent's house, a former co-accused LH was there. LH told him to sit on the bed and put him in a hold with his hands behind his back. He asked why that was happening, but got no response. The co-accused then hit him with a baseball bat in the stomach and he and the respondent stripped the complainer naked. He was tied up with a cable or something similar round his wrists, behind his back. The co-accused said, "Give him a cold shower". At that, the respondent took him through to the bathroom, turned the shower on him and poured water down his throat. The showerhead was pushing down into his mouth so that he was coughing up water. This went on for 5 or 10 minutes. He was not sure if blood was coming out of his mouth and he was struggling to breathe. The respondent told him that he was going to murder him. The complainer had no idea why this was happening. After the shower hose was used for about 10 minutes, the

respondent told him to get on his knees, and said, "I'm going to fucking piss all over you", but the complainer knew that it was not urine which landed on his back. He was facing the wall the whole time, but he looked round and saw the respondent's erect penis. He was masturbating and ejaculated on the complainer's right shoulder. He was still in the shower at the time. The shower was then turned off and he got his clothes together and walked out. While he was in the shower, the respondent had said, "This is what you fucking deserve". He replied that he had not done anything. He was crying and asking the respondent to stop. The whole thing went on for about 30 to 35 minutes.

[4] The complainer was aware that when he was on his knees the respondent was filming him with his phone. At the end of it all he said, "You can fucking leave now, don't tell no cunt". Some of his friends told him later that they had seen the video which the respondent had taken.

[5] LH gave evidence and, amongst other things, said that the respondent had pulled the complainer into the bathroom and secured the door behind him, saying something about teaching him a lesson. Although LH tried to get in, the respondent said, "This is too fucking sick for you to see".

[6] In due course, the respondent's mobile telephone was seized and police were able to see a video recording of the incident. It was agreed by joint minute that the footage had been sent from his phone to a number of other persons. There was a message on the phone indicating that the respondent was going to be taking the complainer hostage.

Subsequent Procedure

[7] When the advocate depute moved for sentence, he tendered a list of previous convictions. Amongst these convictions are the following:

In 2008, an assault to injury and permanent disfigurement, involving a glass, which resulted in detention for 9 months;

In 2009, an assault to injury and 'housebreaking' resulting in detention for 18 months and 7 months respectively;

In 2010, an assault to injury, which resulted in a probation order of 2 years duration and a compensation order in the sum of £500;

In 2011, a breach of probation, which resulted in detention for 51 months.

In the same year, an assault to injury, resulting in 45 months detention.

In 2014 in the High Court, convictions for assault by threats, involving a knife, theft by opening a lockfast place (an ATM) and fraud, resulting in imprisonment for 18 months, as well as a return order under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 for a period of 6 months;

In 2016, a contravention of section 5(1)(b) of the Firearms Act 1968, involving a handgun and attracting a sentence of imprisonment for 2 years.

In 2018, a contravention of section 21 of the Firearms Act 1968, resulting in 8 months imprisonment.

In 2018, a charge of attempted housebreaking, resulting in a 15 months community payback order.

In 2019, that order was breached and a sentence of 14 days imprisonment was imposed.

[8] The trial judge decided to call for a Criminal Justice Social Work Report, incorporating a Risk Assessment, for the purpose of considering an extended sentence, but the respondent declined to be interviewed during the first adjournment for that purpose. Following a further adjournment, the respondent's solicitor advocate informed the court that he did not wish to be interviewed and wished to be sentenced that day. The judge asked the respondent directly whether he would agree to be interviewed by a social worker if he adjourned sentencing further for that purpose and made it clear that if he did not co-operate in that way, the risk was that the custodial sentence imposed would be longer than it might otherwise have been the case. The respondent indicated that it was unlikely that he would see the social worker if there was a further adjournment and the judge concluded that no purpose would be served by one.

Mitigation

[9] The solicitor advocate said that the respondent's head was in something of a mess. It was clear that his engagement was not the same as it had been before the trial. He felt that he was a target in prison. Very properly, the solicitor advocate made available a previous Criminal Justice Social Work Report, which had been for a court hearing on 21 December 2018. He was content that the court should proceed to sentence on the basis of that report. We are grateful to him for making that same report available to us.

[10] As the trial judge tells us, the previous report was prepared in respect of a charge of attempted housebreaking with intent to steal. The respondent had said that he was drunk at the time. He reported how he had been diagnosed with ADHD and depression, but was not on medication. He was using a heroin substitute daily and diazepam regularly. He would also indulge in binge drinking and the occasional abuse of cannabis. The author of the report did not identify any current public protection issues, but said that the respondent's history of violent offending was concerning and there was a risk that he would cause further harm in the community. He had shown a capacity to commit serious offences and, unless he was prepared to address his issues with drugs and alcohol and significantly change his lifestyle, then further offending would appear highly likely.

[11] The judge was prepared to have regard to that report as background, but considered that it could not form the basis for an extended sentence, given the terms of section 210A(4) of the 1995 Act, which he considered required an up-to-date report.

[12] He was of the view that sentences of 5 years in total were sufficient to mark the gravity of the assaults, committed against victims who were vulnerable in different ways and in each case unable to escape. He took account of the degrading behaviour to which they were subjected. On the other hand, there was no physical injury libelled or proved, there was no

penetrative activity and the sexual contact, although clearly distressing and degrading, was limited to contact by the penis on the skin of the face and head, the removal of clothing in charge 3 and the emission of semen. He gave consideration to the imposition of concurrent sentences of 6 years, but concluded that 5 years was no more severe than was necessary to achieve the appropriate purposes of sentencing. He paid some regard to the Definitive Guideline of the Sentencing Council of England and Wales as a comparator or cross-check. While the Note of Appeal also makes reference to that, the advocate depute accepted that it was of limited assistance in this case. No reference was made to it on behalf of the respondent and we need say no more about it, since we agree with the advocate depute.

[13] The trial judge decided to impose concurrent rather than consecutive sentences on the basis that the disposal amounted effectively to a *cumulo* sentence. Had he made the sentences consecutive, they would have had to be shorter.

[14] In view of the fact that the charges relating to indecent photographs were aggravating features which he took into account in relation to charge 3, he ordered the sentences on those charges to run concurrently in order to avoid double counting. We do not understand the advocate depute to take any issue with that approach.

[15] In fairness to the trial judge, he told us that he appreciated that there might be a question whether the sentence imposed adequately reflected the totality of the offending and the need for public protection.

Submissions

Crown

[16] The foregoing sentence encapsulates the Crown's position in a nutshell. An extended sentence should have been imposed. The judge could have made use of the report which was

made available or called for another report, even if that had no input from the respondent. While the Note of Appeal suggested that the sentences should have been consecutive, a longer sentence imposed *in cumulo* would have been unobjectionable. It would not have been an answer just to impose a longer period in custody in place of an extended sentence. The whole point of the latter is that it gives an offender the opportunity to reintegrate into society while being subject to close supervision with, as it were, the Sword of Damocles hanging over him. If he were released from a longer sentence without such supervision, then he would effectively be on his own and there would be no, or an insufficient, element of public protection while he came to terms with life on the outside. Given the appalling nature of these offences and the respondent's record, the sentence was not only lenient, but unduly so, in that it was outwith the range which could reasonably be considered appropriate, as discussed in *HM Advocate* v *Bell* 1995 SCCR 244.

Respondent

[17] Mr McSporran accepted that the sentence was lenient; the question, of course, was whether it was unduly so. He took no issue with the suggestion that an extended sentence could have been based on the report which he submitted, or on a desktop report, without the respondent's co-operation. As a result of the respondent's attitude, he had asked his instructing agents if there was a previous report and that dated December 2018 was provided. He pointed out that it only pre-dated the offences on the indictment by a matter of months. The respondent was remanded in custody in August 2019, so his circumstances had not changed significantly. In short, there was sufficient material before the trial judge for an extended sentence to be imposed. He fully accepted that no accused could thwart the course of justice by refusing to co-operate. Whether or not the sentence was unduly lenient, as

opposed to merely lenient, was a matter for the court and he felt unable to make any meaningful submissions in that regard.

Analysis and decision

[18] It was entirely correct for counsel to point out that no accused person can, by his own hand, prevent the court from imposing an appropriate sentence, including an extended sentence. We are quite satisfied, having considered the appalling and degrading nature of charges 1 and 3 and the respondent's record, that the question of an extended sentence was one which the trial judge had to consider. The provision which caused him difficulty, namely section 210A(4) of the 1995 Act, is in the following terms:

> "A court shall, before passing an extended sentence, consider a report by a relevant officer of a local authority about the offender and his circumstances and, if the court thinks it is necessary, hear that officer."

It is customary for reports, which are prepared in contemplation of an extended sentence, to incorporate a Risk Assessment. While no doubt such assessments are prepared by social workers to comply with their own professional standards, it is not an absolute requirement before a court can proceed to impose an extended sentence. A report about the offender and his circumstances is all that is required. Where the offender refuses to cooperate in the preparation of a report this does not mean that a report should not be prepared. It can be based on the information available to the social worker. As it happens, there was a Risk Assessment in the December 2018 report and it made reference to the respondent's previous convictions. As counsel pointed out, it was relatively recent. In our opinion, it would have been open to the trial judge to rely on that report for the purposes of the statute. We have in fact decided that it is appropriate for us to do so. Whether a pre-existing report is a sufficient basis for an extended sentence will be a question of fact and degree. The passage of several

years, for example, might militate against it, as might any intervening major changes in an accused person's circumstances. In such a case, if an accused failed to co-operate, a desktop exercise could be undertaken.

[19] We note that there is no time limit expressed in section 210A(4), as there is, for example, in section 203(1A)(b).

[20] Having regard to the nature of these offences and the respondent's record, we are satisfied that the disposal was indeed unduly lenient. It remains for us to consider whether consecutive sentences should be imposed for charges 1 and 3, or whether a *cumulo* sentence would be more appropriate. We have decided that the latter is the preferable course. As was pointed out in *DS* v *HM Advocate* 2017 SCCR 129, an extended sentence may be imposed in respect of a *cumulo* sentence. It is clear to us, having regard to the content of the report, the nature of the offences and the respondent's record, that he represents a high risk of endangering the public. We are not satisfied that the conditions of an ordinary licence would be sufficient to protect the public when he is released from prison and accordingly an extended sentence must be imposed.

[21] We shall quash the sentences of 5 years imprisonment on each of charges 1 and 3 and in their place substitute, *in cumulo*, an extended sentence of 10 years imprisonment, consisting of a custodial element of 7 years and an extension period of 3 years. It will run from 19 August 2019.

[22] The sentences on the other charges will be undisturbed.