APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 39
HCA/2024/318/XC

Lord Doherty
Lord Armstrong
Lord Beckett

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Crown Appeal against Sentence

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CM

Respondent

Appellant: P Harvey AD; Crown Agent
Respondent: S Gilbride; Keith Leishman & Co

24 September 2024

Introduction

[1] The respondent was convicted of four charges of rape. On 27 May 2024 (the day before the court issued its opinion in *HM Advocate* v *Fergusson* [2024] HCJAC 22, 2024 SLT 573, 2024 SCCR 267) the trial judge sentenced him to an *in cumulo* sentence of 6 years' imprisonment.

[2] The Crown appeals in terms of sections 108(1)(a) and 108(2)(b) of the Criminal Procedure (Scotland) Act 1995 against that disposal on the ground that it was unduly lenient.

The circumstances of the offences

[3] Charges 1 and 2 were committed against the respondent's partner. Each charge involved rape on a single occasion by penile penetration of the complainer's vagina. They had been in bed together and the complainer had responded negatively to the respondent's sexual advances, but he had ignored that and had gone on to have intercourse. He had used a condom. The complainer had "frozen" while this was happening.

[4] Charges 4 and 5 each concerned rapes on various occasions of a subsequent partner. Both charges contained aggravations in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. These rapes were committed during two periods. During the first period there were various times when the respondent initiated sexual intercourse and the complainer said that she was too tired or "not tonight", but the respondent continued and the complainer "just let it happen". On these occasions the respondent knew that the complainer did not want to have sex. It happened perhaps once or twice a week for about 6 months until the complainer was 3 months pregnant and she returned to live with her parents. The second period began with a rape when the complainer was heavily pregnant. She had told the respondent that she did not want to have sex because she was concerned it might harm the baby. The respondent said that he had done a google search and that it would be okay. The complainer said sex occurred "because she had no other options". The next rape took place between 4 and 6 weeks after the baby's birth. The

respondent indicated to the complainer that he wished to have sex, but she was still uncomfortable after the birth and said she did not want to. She had had an episiotomy and she still had stitches. Undeterred by her negative response, the respondent attempted to penetrate her vagina, ultimately managing to do so. This caused the complainer pain and distress. There were two or three further occasions when he had sex with her when she did not want to. On one of those occasions he said that she could not deny him.

[5] The respondent's evidence was that all sexual relations with the complainers had been consensual. He was aged 19 at the time of the offences against the first complainer. He was 23 during the first period of offences against the second complainer and 24 during the second period. He was aged 27 at the time of sentencing.

The criminal justice social work report and the victim statement

[6] The criminal justice social work report indicated that the respondent had a pro-social background. He retained the support of his parents, his brother, his grandfather, and his current partner of some 18 months. He had no previous convictions or outstanding matters. He had a good employment record. He had no prior issues with alcohol or drug abuse. The risk of further offending was assessed as being moderate. A victim statement by the first complainer dated 23 May 2024 stated that after the rapes she felt worthless. She thought about suicide. She self-harmed. She was diagnosed with post-traumatic distress disorder and was prescribed anti-depressants. She was signed off work for a month, and for some time after her return to work she worked reduced hours. She attended counselling, which she said made her realise she was a survivor. Before that she had blamed herself and felt ashamed and embarrassed, but she no longer felt that way. She realised the respondent was

to blame, and that nothing she could have said or done would have changed what he did. There was no victim statement from the second complainer.

The appeal

The judge's report

[7] In the judge's view the offences were very serious. There was significant psychological harm caused to the first complainer. The judge took account of the respondent's culpability and the likely harm caused. He had regard to the statutory aggravations to charges 4 and 5 in arriving at the sentence, but he did not indicate whether the sentence he imposed was different from the sentence which he would have imposed had those offences not been so aggravated. He took account of the respondent's age at the time of the offences - particularly his young age at the time of the offences against the first complainer. He also had regard to the respondent's pro-social background, his supportive family, his supportive partner of almost 18 months, and the absence of previous or subsequent offending. He had a son with the second complainer and was eager to build a relationship with him. While because the respondent was 27 at the date of sentencing the Sentencing Young People guideline did not apply to him, in the whole circumstances it remained relevant to take account of his age and maturity at the time of the offences and to have regard to the prospects of rehabilitation.

[8] With the benefit of hindsight and further reflection, and having now had the advantage of considering *HM Advocate* v *Fergusson,* the judge acknowledged that the sentence was lenient. Whether it was unduly lenient was a matter for this court.

Submissions for the Crown

[9] The sentence was unduly lenient for three reasons.

[10] First, it was not suggested that the judge had erred in having regard to the mitigating factors which he mentioned in his report, but he failed to give due weight to the seriousness of the respondent's course of conduct against two ex-partners and to the serious harm which the first complainer suffered. Inadequate weight was given to the large number of rapes of the second complainer, and to the fact that two of them occurred when she was particularly vulnerable, not long before and soon after she gave birth. In short, the judge had failed to have sufficient regard to the facts (i) that the rapes of the first complainer caused a high level of harm; and (ii) that the respondent's culpability for the rapes of the second complainer was high.

[11] Second, although an *in cumulo* sentence had been appropriate, the judge had not applied the guidance provided in *HM Advocate* v *Fergusson*. He ought to have identified suitable sentences for each of the charges, aggregated them, and then reduced the total to reach a fair and proportionate *in cumulo* sentence. Had he done that the sentence would have been higher.

[12] Third**,** the judge had not taken proper account of the 2016 Act aggravations in charges 4 and 5 (*McGowan* v *HM Advocate* 2024 HCJAC 20, 2024 SLT 635; *AP* v *HM Advocate* 2024 HCJAC 31). He had not identified the extent to which the sentence was different from the sentence which he would have imposed had there been no such aggravations. He had been bound to state that, identify the extent of the difference and give reasons for it (or give reasons why there was no difference in sentence) (section 1(5)(d) of the 2016 Act). There ought to have been increases similar to those in *AP*.

[13] Recent cases in which there had been rapes of two complainers where longer sentences had been passed suggested that the sentence was unduly lenient. Reference was made to *Ibbotson* v *HM Advocate* 2022 SCCR 265 (effectively a sentence of 9 years); *Simion* v *HM Advocate* 2023 SLT 647 (10 years); *HM Advocate* v *LB* 2023 JC 97 (8 years for the respondent JI); and *HM Advocate* v *AP* [2024] HCJAC 31 (8 years). Moreover, a cross-check with the Sentencing Council for England and Wales rape guideline suggested that each of the charges would fall into category 2B, with a starting point of 8 years' imprisonment and a range of 7-9 years. The starting point and range would be higher in the case of an *in cumulo* sentence for all four charges.

Submissions for the respondent

[14] The sentence may have been lenient, but it was not unduly lenient. It did not fall outside the range of sentences which the judge, applying all the relevant factors, could reasonably have considered appropriate (*HM Advocate* v *Bell* 1995 SLT 350, p353I, 1995 SCCR 244, at p 250D). At the time of charges 1 and 2 the respondent was only 19 and was in his first real relationship. The judge had appropriate regard to all of the aggravating and mitigating circumstances. Even if the sentence could be said to have been unduly lenient, this was not a case where it was necessary for the court to exercise its discretion to impose a more severe sentence (*HM Advocate* v *Bell*, 1995 SLT 353 at p353L-354A, 1995 SCCR 243 at pp 250G-251A).

Decision and reasons

[15] The issue is whether the sentence is unduly lenient, applying the test set out in *HM Advocate* v *Bell* 1995 SLT 350, LJG Hope at p353I; 1995 SCCR 244 at p250D. Does it "fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate?"

[16] The judge did not have the benefit of the court's opinion in *HM Advocate* v *Fergusson.* As a result, in arriving at the sentence he did not indicate what appropriate sentences would have been for individual charges or groups of charges had they stood alone.

[17] The judge states that he had regard to the 2016 Act aggravations when fixing the sentence. However, he did not comply with the statutory direction in section 1(5)(d) of the 2016 Act which provides:

> **"1 Aggravation of offence where abuse of partner or ex-partner**
>
> (1) This subsection applies where it is—
>
> (a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and
>
> (b) proved that the offence is so aggravated.
>
> …
>
> (5) Where subsection (1) applies, the court must—
>
> …
>
> (d) state -
>
> (i) where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
>
> (ii) otherwise, the reasons for there being no such difference."

The judge ought to have complied with that direction.

[18] The respondent was 27 at the date of sentencing. The Sentencing Young People guideline did not apply to him. Hence the particular emphases given in that guideline to (i) consideration of the age and maturity of a young person at the time the offences were

committed; and (ii) the sentencing purpose of rehabilitation, were not applicable. Nevertheless, the respondent's age and maturity at the time of offending remained a relevant factor bearing on culpability (*HM Advocate* v *RM* 2024 JC 81, Lord Justice Clerk Dorrian at para [38]); and the sentencing purpose of rehabilitation (Principles and Purposes of Sentencing guideline, para [5]) was one of several purposes to be considered, though in the respondent's case it did not deserve much weight

[19] In this case we find it helpful to consider what appropriate *in cumulo* sentences would have been for (i) charges 1 and 2; and (ii) charges 4 and 5, had we been considering each pair of offences on its own.

[20] Charges 1 and 2 each involved a single rape. The harm to the complainer was serious. On the other hand, when assessing the respondent's culpability the judge was right to take account of his youth and lack of maturity at the time. Had these charges stood alone we think an appropriate *in cumulo* sentence would have been 5 years' imprisonment.

[21] Charges 4 and 5 involved frequent rapes over a significant period. Two of them were aggravated because of the complainer's particular vulnerability when they were committed. The respondent was aged 23 and 24 at the time of the offences. Age and lack of maturity were not considerations of any real weight in relation to these offences, and the persistent nature of the offending points to a higher level of culpability than in respect of charges 1 and 2. Each of the charges had a 2016 Act aggravation. Had charges 4 and 5 stood alone an appropriate *in cumulo* sentence would have been 7 years 6 months' imprisonment, 9 months of which would have been attributed to the aggravations.

[22] A sentence of 12 years 6 months' imprisonment would be disproportionate. The totality principle requires that the sentence here be significantly less than that aggregate

figure. It points to a fair and proportionate sentence being of the order of 9 years' imprisonment.

[23] We have not relied solely on that approach. We have also compared this case to other recent sexual offence cases involving more than one complainer, of which there are a considerable number. It is sufficient to mention three of them.

[24] In *HM Advocate* v *RM* 2024 JC 181, RM deserved a higher sentence than the respondent. There were three complainers. The rapes were oral, vaginal and anal. The offending extended over a 10-year period with an escalating pattern of violence accompanying the sexual offending. Two of the three charges had 2016 Act aggravations. The court quashed an *in cumulo* sentence of 8 years and replaced it with an *in cumulo* extended sentence of 13 years with a custodial term of 10 years.

[25] In *HM Advocate* v *AP* [2024] HCJAC 31, AP had been convicted of one charge of sexual assault and two charges of rape to injury. Each charge involved a different complainer and each had a 2016 Act aggravation. Two of the charges also had bail aggravations. The court quashed the *in cumulo* sentence of 5 years' imprisonment and substituted an *in cumulo* sentence of 8 years' imprisonment. While the number of rapes was fewer than in the present case, countervailing factors were that there were three complainers; the rapes involved significant force and they caused injury; and the respondent was a fully mature adult in his mid-30s at the time of the offences, with a prior conviction for a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018.

[26] *HM Advocate* v *LB* 2023 JC 97 dealt with three Crown appeals against sentences. The respondent JI had been convicted of three charges relating to two complainers. The charge involving the first complainer was of indecent assault by penile penetration of the

complainer's anus. Had it occurred after the commencement of section 1 of the Sexual Offences (Scotland) Act 2009 it would have been rape. The first charge concerning the second complainer was of assault to injury and danger to life on various occasions over a 3-year period. The final charge was an anal rape, 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 restricting her breathing. The trial judge sentenced JI to 3 years' imprisonment for the indecent assault and to 4 years *in cumulo* on the remaining charges, which sentences were concurrent. The court quashed those sentences and substituted an *in cumulo* sentence of 8 years' imprisonment. While, unlike the present case, there was only one sexual attack on each complainer, the rape of the second complainer formed part of a pattern of violent behaviour towards her and was itself accompanied by violence. The behaviour against the second complainer occurred when JI was a mature adult aged 25-29. He had been aged between 22 and 24 at the time of the indecent assault against the first complainer.

[27] In our opinion comparison with these cases indicates that an appropriate sentence for the respondent is 9 years' imprisonment, of which we would attribute 7 months to the 2016 Act aggravations.

[28] In the circumstances of this case we derive more assistance from the *Fergusson* exercise and the comparative analysis, and from our judgement and experience as sentencing judges and as appellate judges, than we do from the figures referred to by the advocate depute by way of a cross-check using the English Sentencing Council rape guideline.

Conclusions and disposal

[29] The sentence passed by the judge is unduly lenient. The nature and gravity of the offending call for a more severe sentence.

[30] We shall allow the appeal, quash the *in cumulo* sentence of 6 years' imprisonment, and substitute an *in cumulo* sentence of 9 years' imprisonment, of which 7 months is attributable to the 2016 Act aggravations. As before, that sentence runs from 24 April 2024.