APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 3
HCA/2023/553/XC

Lord Justice General
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT
delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

by

ANDREW GEORGE MILLER

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Dow; WSA Bannerman Burke, Galashiels
Respondent: Edwards KC; the Crown Agent

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31 January 2024

Introduction

[1] This sentence appeal concerns a number of different issues in relation to what was a crime of extreme depravity. Not only is the custodial element of the extended sentence under challenge but also the level of discount for an early plea. An additional question is

whether, instead of imposing a determinate sentence, the judge ought to have selected an Order for Lifelong Restriction.

The plea and sentence

[2] On 18 May 2023, at the High Court in Edinburgh, the appellant pled guilty, under the procedure set out in section 76 of the Criminal Procedure (Scotland) Act 1995, to the following charges:

> "(1) between 1 February 2004 and 6 February 2023 … at … Melrose you … did have in your possession indecent photographs or pseudo-photographs of children: CONTRARY to the Civic Government (Scotland) Act 1982 Section 52A(1);
>
> (2) on 5 … and 6 February 2023 at … Melrose you … did abduct [AB], born … 2012, … and did while dressed in female clothing, stop your motor vehicle … engage her in conversation, offer to drive her home, cause her to enter [your] motor vehicle, drive her to your home address at … Melrose, lock her in a bedroom, repeatedly refuse to take her home when she so requested and did detain her against her will;
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> (3) on various occasions between 5 … and 6 February 2023 at … Melrose you … did sexually assault [AB], born … 2012, … being a child who had not attained the age of 13 years, [redacted] sexually penetrate her vagina and anus with your fingers [redacted]: CONTRARY to Sections 19, 20 and 25 of the Sexual Offences (Scotland) Act 2009;
>
> and
>
> (4) on 5 February 2023 at … Melrose you … did intentionally cause [AB], born … 2012, … a child who had not attained the age of 13 years, to look at a sexual image in that you did watch pornography and fetish videos in her presence: CONTRARY to Section 23 of the Sexual Offences (Scotland) Act 2009."

[3] On 18 October 2023, having considered a Risk Assessment Report, the judge imposed a cumulative extended sentence of 28 years, with a custodial element of 20 years (discounted by 2 years for the early plea). No separate sentences were passed on charges (1) and (4) in which the statutory maximums are, respectively, 5 and 10 years. The appellant appealed. On 5 December, the court remitted the appeal to a bench of three judges with a view to considering, *inter alia,* whether an Order for Lifelong Restriction ought to have been imposed.

Statutory Provisions and Interpretation

[4] Section 210A of the Criminal Procedure (Scotland) Act 1993 provides that, where a court intends to pass a determinate sentence of imprisonment for a sexual offence, it may pass an extended sentence if it considers that:

> "(1)(b) … the period … for which the offender would … be subject to a licence would not be adequate for the purpose of protecting the public from serious harm …".

An extended sentence has a custodial element and an additional specified period of licence, which can be revoked in the event of re-offending.

[5] Section 210F provides that the court may make an Order for Lifelong Restriction when, on the balance of probability, certain risk criteria are met. These are that:

> "the nature of, or the circumstances of … the … offence … either in themselves or as part of a pattern of behaviour are such as to demonstrate … a likelihood that [the offender], if at liberty, will seriously endanger the lives, or physical or psychological wellbeing, of members of the public at large".

[6] It is primarily for the court of first instance to determine whether that likelihood exists as a question of fact. It will depend upon the whole circumstances, but the court will have particular regard to the level of risk which is identified in the necessary Risk Assessment Report. The prediction of likelihood has to be made at the time of sentencing,

but it looks into the future by considering the risk at the point of release from custody, had a determinate sentence been passed (*Ferguson* v *HM Advocate* 2014 SCCR 244, LJC (Carloway) at para [99]).

[7] If a judge considers that, at the predicted point of release, the offender will pose a threat of serious harm, an extended sentence at least will be imposed. The alternative of an OLR is appropriate where it is thought that the offender will require monitoring for the rest of his life. This will arise only where it is thought that, at the expiry of the custodial element of an extended sentence, the offender will continue indefinitely to endanger the public seriously. In practical terms here, this appellant's earliest conceivable date of release on parole and licence from the extended sentence will be in October 2033, when the appellant will be 64 years of age. The reality is that it is far more likely that he will be about 70.

Facts

[8] The appellant was 53 years old at the time of the offences. He was identifying himself as a transgender female called Amy George. He lived in a bungalow near Melrose.

[9] At about 1.30pm on Sunday 5 February 2023, the complainer, who was aged 11, left her home in Galashiels to meet friends in the town centre. She was expected home in the early evening. At about 5.30pm she parted from her friends and went to the bus station. There were no buses expected, so she started to walk home. Her phone had run out of charge. The appellant was driving a car. He drove into a car park, before driving out and back in the opposite direction. He stopped and spoke to the complainer. He was dressed as, and appeared to the complainer to be, a woman. The complainer accepted an offer of a lift home. The appellant instead took her to his own home. He removed her socks and shoes and began to lick her feet. The complainer asked him to stop. She started to scream.

[10] The appellant took the complainer by the neck and led her into the main bedroom. He removed her lower clothing and digitally penetrated her vagina and anus. He repeated this and perpetrated the other indecent assaults as libelled in charge 3 over a period of some 27 hours. The complainer repeatedly asked to go home. The appellant said initially that he would take her home in the morning. Later, he would sometimes say that he planned to keep her for a week and at others that he would never allow her to leave. One feature, which is contained in the RAR (below) is that the appellant had fitted a new lock on the main bedroom door which, despite the appellant's alternative explanation, might suggest a prior intention to detain someone in the room at some time.

[11] During the period of detention, the appellant watched pornography on television. He generally wore a bra and female pants. At one point, when he left the bedroom to go to the bathroom, the complainer noticed that "Amy" had a penis.

[12] On the second night, at about 9.30pm on Monday 6 February, after the appellant had fallen asleep, the complainer tried to escape, but the front door was locked. She found the landline and dialled 999. She reported what was happening. The call was traced to the appellant's house and the police promptly attended. The appellant, who was wearing tights, female pants and a bra with silicone breasts, was arrested on suspicion of abduction and sexual assault.

[13] Having initially made no reply on being cautioned, and before he could be afforded an opportunity to consult a solicitor, the appellant began to explain that, in offering the complainer a lift, he had been trying to be nice, as she was freezing. He had taken her to his home because she was cold. He had not realised that she was only eleven. He panicked. He denied any "inappropriate" behaviour. At about 5.30 on Tuesday 7 February, the appellant was interviewed by the police over a period of six hours. He had declined the

services of a solicitor. He repeated that he had taken the complainer to his home out of sympathy for her; she had said that she would be home alone. He denied any sexual interest in children and said that he had had no sexual contact with the complainer.

[14] An internet search over the period of detention revealed that the appellant had been searching the pornographic website "x…" for videos involving various fetishes. A search of the appellant's laptop identified a number of Category A to C inaccessible (ie deleted) still images involving children. Other pornographic material involving adult women in tights, or carrying out sexual acts with their feet, was found. The appellant had visited many webpages whose titles indicated indecent child content.

Risk Assessment

[15] The appellant had been adopted at 8 weeks of age, although his adoptive parents had a son two years later. The appellant's father had been a successful businessman; his mother acting as his bookkeeper. Both parents were heavily involved in the community. The appellant had no previous convictions for sexual offending, although he did have a record for a variety of offences; all of which resulted in fines. He had a history of stealing female clothing, especially tights, as a youth. He had been confused in his early years about his gender identity. There had been some psychiatric intervention, including in-patient care, when he was an adolescent. He developed traits which are characteristic of a narcissistic personality, but he did not meet the diagnostic criteria for the relative disorder.

[16] At the age of 22, with the assistance of his father, he began to operate his own butcher's shop in Melrose; that being an occupation in which his family had engaged for generations. He repressed his feelings and attempted to conform to the expectations of his parents and the community. He had three children from previous, relatively short-lived,

relationships, including a marriage which had ended in 2002. His parents had suffered strokes at the time of the COVID pandemic. Both had moved to a care home in 2022.

[17] The appellant had stopped work in the year before the offences. He had taken to drinking to excess and watching pornography. He was, as the risk assessor put it, "dissatisfied with his intimate relationships and was unable to moderate … problems with sexual deviance/attraction to children". Protective factors, that is those which would reduce the risk of re-offending, included his work record, leisure pursuits and his positive attitude to authority and supervision. The latter might involve moderation of alcohol intake, avoidance of pornography and repression of attitudes which condoned sexual abuse of children.

[18] The risk assessor's conclusion was that, despite the exceptionally serious nature of the principal offence, the appellant presented only a medium risk. This classification, from the Risk Management Authority's Guidelines, is that the appellant's behaviour indicated "a propensity to seriously endanger (*sic*) … the public at large" but that (as distinct from a high risk individual): he may be amenable to change; there are some protective factors; he has the capacity and willingness to engage in intervention; and he may be sufficiently amenable to supervision. There were characteristics indicating that measures short of an OLR may be sufficient to minimise the risk of serious harm to others.

Sentencing Statement

[19] At the sentencing diet, the judge read out what he describes as "lengthy sentencing remarks". In the course of these he set out the circumstances at the point of abduction as involving the appellant "dressed and presenting as a female". He considered this to be a "significantly aggravating feature", since otherwise the complainer would not have accepted

a lift in his car. In relation to the appellant's denials of inappropriate behaviour at interview, the judge said that "As a result of your repeated denials" the complainer had to undergo medical examination, including the taking of intimate swabs. When considering the RAR, the judge commented that the appellant's primary focus "when considering the impact of your offending … has been yourself". The appellant had not acknowledged the harm done to the complainer.

[20] On discount, the judge said that there was "very little utility in the … early plea." In his sentencing remarks, he stated that he had restricted the discount because of: (i) the overwhelming evidence; (ii) the complainer's courageous actings, which led to the appellant being caught "red handed"' (iii) the appellant's victim blaming and denials; and (iv) the overarching requirement of "condign" (appropriate) punishment to crimes of this gravity.

Submission

[21] The appellant had been at pains, at the sentencing diet, to persuade the judge not to impose an OLR. In light of the RAR, the judge had accepted the appellant's contention on the inappropriateness of such an order. It was nevertheless submitted on appeal that the duration of the custodial element of the extended sentence was excessive. The judge had attached too much weight to the seriousness of the offence, as distinct from the personal circumstances of the appellant. The judge had thought that the appellant being dressed as a woman, when offering the complainer a lift, was important. His choice of dress had been because of his personal life and not with a view to entrapping the complainer. The judge had failed to attach appropriate weight to the complex psychological circumstances of the appellant and their co-existence with his offending behaviour.

[22] The move of his parents to a care home and his lack of work had operated as a trigger for his behaviour. His use of alcohol and pornography as coping strategies had disinhibited him. The judge had erred in considering that the appellant had engaged in "victim blaming". The appellant was not doing this but explaining his distorted thinking. The judge had erred in describing the appellant as only being concerned about himself in the risk assessment process. He had not been asked about his feelings about the impact on the complainer in that process. A 10% discount for the early plea was insufficient, even if the appellant had not accepted guilt at his interview by the police. There had been a clear utility to the witnesses, including the complainer, in the early plea. The complainer would inevitably have had to undergo medical examination.

[23] On whether an OLR might be substituted for the extended sentence, the test was whether, in terms of section 210E of the 1995 Act, the offence of itself or as part of a pattern of behaviour, was such as to demonstrate a likelihood that the appellant, if at liberty, would seriously endanger the lives or well-being of the public. Seriousness was not determinative. Likelihood meant probability (*Liddell* v *HM Advocate* [2010] HCJAC 86). The court had to be satisfied not just that there was a chance of endangerment but that, as a matter of probability, it would occur (*Ferguson* v *HM Advocate* 2014 SCCR 245 at para [98]).

[24] Sexual recidivism reduces with age and such a reduction would be present by the time the appellant were released. The appellant was assessed as presenting a medium risk. He had a propensity to endanger the public seriously but had characteristics which may be amenable to change. The triggers to his behaviour had a realistic prospect of being managed, as they had been for considerable periods of his life. He was not a persistent offender. This escalation was referable to a particular set of personal circumstances. His issues could be addressed in prison and under the conditions attached to an extended

sentence. The risk assessor's categorisation was not binding on the court but attention should be paid to it.

Decision

[25] The first difficulty, which the court has faced when analysing the appeal, is the form of the judge's report. The judge begins by simply incorporating *ad longum* the written "agreed narrative". This is almost 17 pages long and has the appearance, almost in its entirety, of having been cut and pasted from a report to the Crown Office. Cutting and pasting the narrative is not of itself the problem. It is something which is regularly done. However, narratives should be reduced to a linear narrative of relevant fact. Very often, and this is such a case, the narrative contains a large quantity of material which is not only irrelevant to the appeal process but would also have been equally irrelevant to the sentencing exercise at first instance. It consists, to a significant degree, in the detailing of evidence, rather than agreed fact. In this case, for example, the narrative describes what witnesses saw, or CCTV showed, rather than just setting out any relevant observed fact. Whilst the description of events inside the house is in a helpful form, there is a series of paragraphs on the recovery of labels, medical or otherwise, which add nothing. Especially in a case of this seriousness, the court expects a narrative of fact to be just that; to be properly edited and to confine itself to the relevant matters.

[26] The second difficulty is that the judge then simply sets out *verbatim* his sentencing remarks. These consist of a relatively brief summary of what, presumably, the Advocate depute had already said when moving for sentence, together with comments on the level of depravity involved.

[27] There are thirdly, erroneous, or at least speculative, aspects to the sentencing remarks, which have been founded upon in the appeal. First, the judge regarded, as a significantly aggravating factor, the appellant's female apparel as indicative of a pre-conceived intention to abduct a girl. The court cannot agree. By the time of the incident, the appellant was already dressing as a woman as a matter of routine, rather than for any more sinister a reason. Secondly, the judge attributes the need for the complainer to undergo an intimate medical examination to the appellant's denials of significant sexual conduct at interview. In a case of this nature such an examination would have been inevitable. It would not have been prompted by the appellant's denial.

[28] When dealing with the content of the RAR, the judge hardly touches upon the significant personal circumstances of the appellant, notably his psychological difficulties with gender and fetishes in his youth and his attempt to depress these in later life. As a generality, there is no need for a judge to delve deeply into an offender's personal antecedents at the point of sentencing, but if he has elected to provide lengthy sentencing remarks, he would, as a matter of balance, be advised to do so. What the judge does focus on is what he perceived as victim blaming in the appellant's interviews with the risk assessor. Given the nature of the questioning, the appellant's responses did not justify the conclusions which the judge reached in relation to his attitude to the complainer or his crimes.

[29] In short, there is very little analysis of what the judge made of the appellant's personal circumstances in the sentencing remarks. That would not pose a problem if, in his appeal report, the judge had corrected that omission. He did not do so; stating specifically that he did not intend to rehearse the terms of his sentencing statement or the material otherwise available to the court. What the judge made of that material remains opaque.

[30] The level of discount is 10% of the custodial element. This is undoubtedly very small for a plea by way of a section 76 indictment. The overwhelming nature of the evidence is not a factor which is relevant to discount for an early plea (*Saini* v *Harrower* 2017 SCCR 530, LJC (Dorrian), delivering the Opinion of the Court, at para [4] following *Gemmell* v *HM Advocate* 2012 JC 223, LJC (Gill) at para 48 and overruling *Horribine* v *Thomson* 2008 JC 306; see also *Tanveer Ahmed* v *HM Advocate* 2017 JC 130, LJG (Carloway), delivering the Opinion of the Court, at para [18]). It is erroneous to say that the plea had very little utility. The appellant appeared on petition on 9 February 2023. The section 76 hearing took place on 18 May 2023. The plea must have saved a considerable amount of time in terms of Crown, defence and court preparation. It must have saved the complainer and her family much anxiety in relation to the progress and outcome of the prosecution.

[31] Given the level of the custodial component required in a case of this seriousness, the level of discount ought not normally to have exceeded about one-sixth (by analogy with life sentences; *Tanveer Ahmed* at para [18] following *HM Advocate* v *Boyle* 2010 JC 66), but it should have been greater than two years. Four years might have been seen as appropriate. However, the error in relation to the discount does not automatically result in a reduction of the judge's selected sentence upon appeal. Equally, the mistakes, which have been identified in the judge's reasoning, do not mean that the overall sentence must be seen as excessive. The test remains whether a miscarriage of justice has occurred (1995 Act, s 106(1) and (3)) and a different sentence ought to have been passed (*ibid* s 118(4)(b)).

[32] The mistakes and errors are significant and the court has therefore re-assessed the sentence, having corrected these errors and taken into account especially, first, the extreme depravity of the principal crime but also, secondly, the appellant's patent psychological difficulties as revealed in the RAR and, thirdly, the fact that this is the appellant's first

conviction for a crime of this magnitude at the age of 53. Taking all of these matters into account, the court is unable to characterise an extended sentence of 28 years, with a custodial element of 20 years, as excessive, even if a greater discount ought to have been applied.

[33] As already observed, an OLR is appropriate when the offence, and related behaviour, demonstrate a likelihood that, upon release from custody under the terms of what would otherwise be an extended sentence, the appellant *will* seriously endanger the public. In the appellant's case, the time at which this likelihood has to be predicted will be when the appellant will be at least 63, but probably nearer 70 or even older, when he is released from custody. He will then have another period of 8 years supervision, probably taking him up to his mid-70s. It is not too difficult to surmise that the offences here show that the appellant might seriously endanger the public at that time; but that is not the test. It is that he will do so.

[34] The court is unable to find it established that the test for an OLR has been met, largely for the reasons given by the risk assessor. There is, of course, the age of the appellant and the prospective dates for his release from custody and supervision under licence. Over and above that, this is the appellant's only conviction for a crime of this nature, involving a complainer. It was committed when he was 53 against a background of psychological disturbance. The risk assessor has identified that, notwithstanding the depravity of the offence, the appellant has had a steady work record, contributed to the community over many years and, most important, has a positive attitude to authority and hence potential compliance with any post-release supervision requirements. He will have the opportunity to undertake rehabilitation courses whilst in prison and beyond. He may be amenable to change. Having regard to all of these factors, the court agrees with the assessment of the

judge at first instance that, whereas this case merited an extended sentence with a substantial custodial component, an OLR was not appropriate.

[35] The appeal is refused.