APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 13
HCA/2020/000316/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

CALLUM RAE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Hay, Adam; Faculty Services Limited for Lawson, Coull & Duncan, Dundee.
Respondent: Prentice QC, AD; Crown Agent

5 March 2021

[1] The appellant pled guilty at a section 76 hearing to an indictment containing two charges. The first was a charge of rape to injury of a child under the age of 13, contrary to sections 18, 19 and 20 of the Sexual Offences (Scotland) Act 2009. The second was a charge of failure to appear at a diet of the High Court of which he had been given due notice, contrary to section 102A(1)(a) of the Criminal Procedure (Scotland) Act 1995. The appellant is 19 years old. The judge imposed a sentence of 6 months imprisonment on charge 2, with a

consecutive extended sentence on charge 1 of 3 years and 9 months, the custodial term being 1 year and 9 months.

Circumstances of the offence

[2] The complainer and the accused had known each other for about a year and communicated through social media, including Snapchat and Facetime. She believed that at some stage she had told the accused that she was 16 years old. A week prior to the offence they met and watched television together. There was no sexual activity between them. At about 1600 hours on Tuesday 14 May 2019 the complainer left her home address to meet a 16 year old friend, A. They drank some vodka produced by A and the complainer felt a little drunk. They then made their way to the Whitfield area of Dundee. Later that night, they met up with the accused and B, a male friend of A's. Meanwhile, the complainer's mother had contacted police at around 2247 hours on 14 May 2019 to report her daughter as a missing person, having tried and failed to trace her. Local police issued a social media posting on Facebook.

[3] At some stage the four all ended up at the accused's house, where the accused and the complainer had sex. They began to kiss. The accused asked if she wanted to have sex. The complainer said that she did, and sexual activity, including intercourse, followed. The following morning before the complainer left, she and the accused kissed and cuddled and arranged to meet later. The complainer felt pain in her vagina and later noticed blood in her pants. Prior to this incident the complainer had not engaged in penetrative sexual activity.

[4] The accused ran off in his socks when the police called at his house. When cautioned the accused immediately replied "She lied about her age". On being taken to the police car

the accused voluntarily stated "I didn't touch that wee girl. She's lying. I have plenty of witnesses." In answer to caution and charge he said "she lied about her age."

Sentencing

[5] Extensive submissions were made to the sentencing judge to the effect that the appellant did not know the age of the complainer, and reasonably believed her to be 16, and that this, combined with the absence of exploitative or predatory behaviour, combined to make the case an exceptional one, meriting a non-custodial sentence. At a continued hearing the Crown presented detailed information on this issue which led the sentencing judge to proceed on the basis that the accused did not know that the complainer was under 16. Nevertheless he considered that a custodial sentence was necessary, having regard to the fact that the legislation was designed to protect children such as the complainer from the harmful effects of sexual activity at such a young age; and to the risk assessments that the appellant presented a high risk of sexual reconviction, and a very high risk of reconviction for a violent offence.

Appeal proceedings

[6] It was maintained that a custodial sentence was excessive. The case called initially before a bench of two judges. Having heard submissions substantially based on assertions that the appellant's lack of knowledge of the complainer's age and his youth made the case exceptional, those judges appointed the case to call before a bench of 3 judges and appointed the Crown to lodge submissions on its understanding of any contact between the appellant and complainer prior to the events libelled and how it took place; the appellant's understanding as to the age of the complainer; and the Crown's understanding of the policy in respect of such cases including any comments on the English authorities pertaining

thereto, in particular *Attorney General's References Nos 11 and 12 of 2012 (Roshane Channer and Ruben Monteiro)* [2013] 1 Cr App R. (S) 43.

Submissions made at the adjourned hearing

Appellant

[7] First, it was submitted that there were exceptional mitigating circumstances in that: the appellant believed the complainer to have been 16; there was no manipulation, predatory behaviour, force or coercion; the complainer was a "willing and active participant" in sexual intercourse. The facts that others also believed the complainer to be older and that she seems to have lied about her age on more than one occasion were highlighted. The culpability of the appellant was at the very lowest end of the scale.

[8] Second, emphasis was placed on the appellant's age. He is now 21 years old. He was 19 at the time of the offence, and had believed the complainer to be 16. The appellant's youth and lack of maturity were relevant factors. Reference was made to *Kane* v *HMA* 2003 SCCR 749 and *Hay* v *HMA* [2020] HCJAC 30 for the submission that the sentencing of a young person involves considerations and factors which are different from those applicable to an adult, and that the court erred in concluding that only a prison sentence was appropriate. Reference was made to "The Cognitive Maturity Literature Review on The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts" published by the Scottish Sentencing Council. Given the appellant's age and the associated potential for rehabilitation, a non-custodial sentence should have been imposed. His youth provided him with a greater capacity for change, treatment and rehabilitation through interventions such as Moving Forwards: Making Changes. He was keen and motivated to engage in offence focussed work in order to address the attitudes that

were noted to be of concern in the Criminal Justice Social Work Report (CJSWR). In the intervening period he had himself sought assistance in this respect from Barnardo's and had worked with the Mental Health Team within HMYOI Polmont. However , it is difficult to access appropriate programmes within the prison estate during lockdown. Detailed engagement in community based programmes as part of a non-custodial disposal would be likely to lead to a better outcome. As to the previous failures to engage, when the appellant was not on medication for his ADHD and other mental health issues, his life was rather more chaotic. Since being in custody and addressing his medication issue, he is considerably more stable, engaged in the process, and keen to address the issues that he has.

[9] Third, insufficient weight was given to the appellant's difficult upbringing as a trigger for his offending. He had been diagnosed with ADHD as a child. He had a difficult upbringing with a background of domestic violence and social work involvement. Insufficient weight was given to the impact on the appellant of the death of his grandmother, who had largely brought him up. He has not previously been convicted on indictment or for a sexual offence.

[10] As to the appropriate level of sentence generally, the cases of *R* v *G* [2006] 1 WLR 2052 and in the House of Lords [2009] 1 AC 92, and *R* v *Corran & Others* [2005] 2 Cr. App. R. (S.) 73 were of particular assistance. The former also involved the statutory rape of a child under 13, the plea being tendered, it was said "on the basis of a consensual act". In drawing guidance from this case the sentencing judge erred in thinking it justified the sentence which he selected.

[11] Significant guidance was offered in *R* v *Corran*, where the court noted that whilst absence of consent was not an integral ingredient of the offence, the presence of consent was

material to the question of sentence, particularly in relation to young offenders, when the age of the offender compared to the complainer is also a relevant factor.

[12] In both these cases a conditional discharge was imposed. Reference was also made to The Definitive Guideline for Sentencing Sexual Offences issued by the Sentencing Council for England and Wales on 1 April 2014 in relation to offences equivalent to the present, which recognised that there may be exceptional cases where a lengthy community order with a requirement to participate in a sex offender treatment programme may be the best way of changing the offender's behaviour and protecting the public. It suggested that the guideline might not be appropriate in the absence of exploitation, where a young or particularly immature defendant genuinely believed, on reasonable grounds, that the victim was aged 16 or over.

[13] That guideline was considered in *Attorney General's Reference No. 105 of 2014* (*Harrak Musa*) [2015] 1 Cr. App. R. (S.) 45 where it was accepted that ignorance of a complainer's true age could provide mitigation.

[14] The key factors relevant to the eventual non-custodial sentence in *HMA* v *Daniel Cieslack* (High Court of Justiciary, Glasgow, unreported 17 March 2017) were also present in the instant case. These were that whilst the complainer was, in law, incapable of granting consent, she was a willing participant; had the complainer been a few months older, the accused would have been charged under section 28 of the Act, and been able to take advantage of the statutory defence; and that the appellant's reaction when finding the complainer's true age was one of shock.

Crown

Prior contact

[15] On the issue of prior contact between the complainer and appellant, they had known each other through social media for approximately one year prior to the events libelled. In all these conversations her age was not mentioned nor did the appellant ask her if she went to school. A week prior to the offence they met alone at the appellant's home address and watched television together. There was no sexual activity between them.

The appellant's understanding of the complainer's age

[16] The complainer stated in her Joint Investigative Interview [JII] "I thought he had just turned 19 but it seems to be that he is away to be 20. People have said that I was 16 to him and he thinks that I am 16." The complainer lied to A about her age, saying she was 14 turning 15. When asked in her JII if the appellant had ever asked her age the complainer replied "No. He thought that I was 16 because I was hanging about with A." She added

> "in fact I think one time because when I was drinking I said that I was 16 and then M [H] went along with it. He would have thought I was 16 when I went over to his".

[17] She thinks she told the appellant she was 16 at one point when she was drunk. The complainer did not look or converse like someone of 12, using more adult terminology, particularly in relation to sexual matters. B thought the complainer was older than 12 as she was "hanging about" with A and she looked about 15 or 16. There is no evidence to suggest that the appellant was aware of the complainer's true age.

The Crown's understanding of policy in such cases and comments on the English authorities

[18] It is not a defence to a charge under any of sections 18 to 26 of the Sexual Offences (Scotland) Act 2009 that A believed that B had attained the age of 13 years (see section 27). A form of strict liability thus operates. The maximum penalties for contravention of sections 18 and 19 of the Act (rape of a young child & sexual assault on a young child by penetration) or section 20 (sexual assault on a young child), are life imprisonment and a fine. For rape of

a young child or sexual assault on a young child by penetration, a penalty of imprisonment without a fine may be imposed, but not a fine alone; and the power of the court in section 199(2)(b) of the Criminal Procedure (Scotland) Act 1995 (c. 46) to substitute a fine for imprisonment is not available: section (48)(2) of the 2009 Act.

[19] The category range as prescribed by the Sentencing Council for England and Wales in relation to the equivalent offence (a contravention of Section 5, Sexual Offences Act 2003) is 6 – 11 years' custody, the starting point being 8 years' custody.

[20] *R* v *G* and *Corran* were viewed as exceptional cases in which a custodial sentence was not necessary. Nevertheless in *Corran* it was noted (para 6) that

> "There will be very few cases in which immediate custody is not called for, even in relation to a young offender, because the purpose of the legislation is to protect children under 13 from themselves, as well as from others minded to prey upon them."

[21] At paragraph 23 of *Attorney General's References Nos 11 and 12 of 2012 (Roshane Channer and Ruben Monteiro)* [2013] 1 Cr App R. (S) 43, the court repeated that this was the policy of the Act. At para 27 it stated, under reference to the sentencing guideline, that a reasonable belief that the victim was aged 16 years could be taken into account as a mitigating factor. It was however not the only relevant factor. In the present case the trial judge referred to the risk assessments before him, the prior convictions and the failure to co-operate in the past with a non-custodial disposal.

Analysis and decision

[22] The starting point for sentencing in a case such as this is that parliament has chosen to make it a strict liability offence to have intercourse with a child under the age of 13, whether or not there is consent, and has concluded that a statutory defence of a belief that the child had reached the age of consent should not be available. It is not a requirement of

the offence that the accused knew the complainer was under 13, nor is it a defence to show that he believed her to be 16 or over. As the sentencing judge observed the law penalises conduct such as occurred in this case in order to protect young children from the harmful effects of sexual activity at such a young age. The absolute nature of the offence ensures that they are protected against themselves, their own actions, the effect of their developing maturity, and sexual curiosity, as much as from the actions of others. That being so, and consent being immaterial to commission of the offence, we find it difficult to consider consent as a truly mitigating factor; it would be more appropriate to suggest that lack of consent should be treated as a factor which aggravates culpability. Even if it is correct to describe it as a mitigating factor, it is only one element by which assessment of the appellant's culpability, for the purpose of sentencing, must be addressed. It is a factor the significance of which may take on more or less weight depending on all the circumstances of the case.

[23] In relation to an older child, aged between 13 and 16, section 39(1) provides the statutory defence that an accused person had a reasonable belief that the child in question had reached the age of consent. The absence of such a defence in relation to children under 13 is significant. It means that whilst such a factor may legitimately be treated as a mitigating factor, that can only be taken so far. Thus, if this were the only, or even the primary, mitigating factor of any significance, it would not in our view be appropriate to grant an absolute discharge, since this would effectively subvert the intention of parliament. Cases in which an absolute discharge might follow from a conviction under the relevant sections involving younger children can be expected to be rare indeed. We consider that the sentencing judge was correct at paragraph 33 of his report, to say:

> "Absolute discharge did not commend itself in this case and, other than in truly exceptional circumstances, I would be concerned about taking a course which might be considered to come close to decriminalising an already existing statutory offence adopted by the Scottish Parliament and re-categorised as rape of a young child in the 2009 Act."

We also agree with the sentencing judge that the case of *HMA* v *Daniel Cieslak* [2017] has to be treated as wholly exceptional. In that case, apart from the factor that the appellant reasonably believed the complainer to be over 16, there were other factors which distinguish it from the present case. The appellant had used contraception; and was clearly and genuinely extremely distressed at discovering the true age of the complainer. According to the sentencing statement, when informed by police of the complainer's true age, the accused spontaneously became distressed, crying and holding his head in his hands, and the effect and consequences of that distress had continued to affect him. In addition the "apparent" age of the complainer, according to the evidence, was between 17 and 20 years of age. That is quite unlike the present case where the suggestion is that the appellant thought she was 16, and B said she looked 15-16. The accused was a first offender, and there was other personal mitigation. In short the circumstances were nothing like those of the present case.

[24] In the present case the offence occurred only two months past the girl's 12th birthday. The appellant was 19 at the time, thus 7.5 years older than she was. Although we accept that the complainer asserted that she was 16, the appellant made no inquiry about her age at any stage; he did not ask if she was at school or make any further inquiries that might have indicated her age. He believed that she was 16, but he could not have believed that she was any older than that, given the evidence of the complainer, and of A and B. The words of Lord Hoffman in *R* v *G* are apposite:

> "…The policy of the legislation is to protect children. If you have sex with someone who is on any view a … young person, you take your chance on exactly how old they are…"

[25] The appellant did not use any contraception, although he did remove his penis and ejaculate onto the complainer's abdomen. He had previous convictions extending from 2017 to the present, for disobedience of court orders, including on two occasions an ASBO, and for crimes of disorder, two of which were domestically aggravated. One of these was associated with breach of special bail conditions and an attempt to defeat the ends of justice. He also has a conviction for assault in 2019. He was made subject to a community payback order including unpaid work in 2017. He failed to attend at court in breach of bail conditions in 2017 and 2019 and failure to attend at court is a feature of his record in both 2018 and 2019. In the present case he failed to attend for a diet of the High Court of Justiciary of which he had due notice, thus causing substantial inconvenience and virtually eliminating the utility of his plea. He was subject to deferred sentences when he committed the crime in charge 1 and to community payback orders when he committed the crime in charge 2.

[26] The outcome in the case of *R* v *G* is of no assistance, the accused there being only 15 years of age, and the circumstances again being quite different from the present. Of more significance are the remarks of Rose LJ in *R* v *Corran* at para 6 that:

> "There will be very few cases in which immediate custody is not called for, even in relation to a young offender, because the purpose of the legislation is to protect children under 13 from themselves, as well as from others minded to prey upon them"

[27] In *Attorney General's Reference (No.105 of 2014) (R* v *Harrak)* [2015] 1 Cr. App. R. (S.) 45, the court noted that *Corran* had limited value as a relevant sentencing authority as sentencing practice has moved on, but the observations just quoted continued to hold good.

[28] As the sentencing judge noted, *Attorney General's References Nos 11 and 12 of 2012 (Roshane Channer and Ruben Monteiro)* involves a number of seriously aggravating

circumstances which render it of little value for comparative purposes but the policy considerations there discussed remain relevant. A significant point identified by the sentencing judge was the remark at para 34 that

> "There was a strong element of deterrence in sentencing for sexual offences committed against young children, whether they were sexually experienced and willing or not. They were vulnerable to exploitation and required protection."

[29] In the present case, the sentencing judge had before him a CJSWR and a Tayside Project assessment. The former suggested that the appellant presented a high risk of sexual reconviction, and a very high risk of reconviction for a violent offence. The Tayside Project assessment reached a similar conclusion. The CJSWR suggested that the only protective factor was that the appellant was currently incarcerated. There was particular concern regarding his conduct within relationships and towards females.

[30] The sentencing judge recognised the appellant's youth, and that he had not been coercive or forceful with the complainer. He properly analysed the purpose of the legislation. He took account of the factors advanced in mitigation. However he also noted that the appellant was not a first offender, having numerous previous convictions, had previously failed to attend at court, had breached court orders in a variety of ways and was subject to deferred sentence when he committed this crime. There was no indication that he was likely to cooperate successfully with a community payback order. In these circumstances the sentencing judge concluded that there was no suitable alternative to imprisonment. He was entitled to reach that conclusion. The appeal must therefore be refused.