APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 39
HCA/2021/247/XC

Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD PENTLAND

in

APPEAL AGAINST SENTENCE

by

KIERAN MALCOLMSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, solicitor advocate; Paterson Bell (for Allans Solicitors, Lerwick)
Respondent: Prentice, Q.C., solicitor advocate, advocate depute; Crown Agent

24 August 2021

[1] In this appeal against sentence the appellant was a secondary school teacher in the Shetland Islands at the time he committed two offences. He was convicted after trial of engaging in sexual activities with female pupils from the school where he was employed. The charges were brought on indictment under section 3(1)(b) of the Sexual Offences (Amendment) Act 2000 in the case of the first charge; and under section 42 of the Sexual Offences (Scotland) Act 2009 in the case of the second. These statutory offences each require

it to be shown that the offender engaged in sexual activity with a person under the age of 18 towards whom he stood in a position of trust.

[2] The first offence (charge 1) occurred in 2009 and extended to kissing the victim on the mouth, handling her vagina, penetrating her vagina with his fingers and penetrating her mouth with his penis. The victim was 17 and the appellant was almost 24. The second offence (charge 3) was in 2018; it involved kissing the victim on the mouth and repeatedly asking her to accompany him to a dark and secluded area. The victim was 16 and the appellant was by then 33. The sentencing Sheriff imposed a sentence of imprisonment of 15 months on the first charge and a concurrent term of 6 months on the second.

[3] In his report to this court the Sheriff explains that the evidence at the trial was that the appellant met the two victims late at night or early in the morning at a location where young people in the area, including pupils from his school, would tend to congregate after a night out, most likely involving the consumption of alcohol. The appellant clearly knew this to be the case. At the time of both offences the appellant was intoxicated by alcohol.

[4] The circumstances of charge 1 involved the appellant challenging the victim to a race up a steep hill, and the most serious aspects of the sexual behaviour took place once he was alone with her after that race. The Sheriff observed, justifiably in our view, that there was an element of premeditation in the appellant being alone with the victim.

[5] The offence in charge 3 involved the appellant repeatedly suggesting to the victim, after kissing her, that she should accompany him to a dark and secluded place. Again the Sheriff observed (and we agree) that this suggested premeditation.

[6] In mitigation before the Sheriff it was submitted that a custodial sentence was not necessary. The appellant had no previous criminal convictions. He had the protection of section 204 of the Criminal Procedure (Scotland) Act 1995. He had been suspended from his

employment for two and a half years pending trial. He was dismissed following the convictions. He would never work again as a teacher. He shared the care of his young daughter on an equal basis with his former wife. There had been no grooming of the victims. The offences were described as being random and impulsive. The impact on the victims had not been significant. The appellant had made a positive contribution to the local community in various capacities. He had been assessed in the criminal justice social work report as presenting a low risk of further offending. In the whole circumstances the appropriate disposal was a community-based one.

[7] The Sheriff approached the task of sentencing the appellant on the footing that the offences had not been random and unconnected. The jury had convicted the appellant of the two charges on the basis that he had been engaged in a systematically pursued course of criminal conduct. The offences were so serious that the only appropriate disposal was a custodial one. The Sheriff had regard to certain cases from England and Wales. We shall discuss these in due course. He took account of the appellant's previous good character and of a number of positive testimonials. He recognised that the appellant had been a good teacher and that his career and his reputation had been ruined.

[8] In support of the appeal Ms Ogg submitted that a custodial sentence was inappropriate. If that submission was rejected, she argued that the overall length of the custodial penalty was excessive.

[9] Ms Ogg reiterated all the points that had been made in mitigation to the Sheriff. She submitted that, properly understood, the offences had been committed impulsively whilst the appellant had been under the influence of alcohol after he had been socialising. She stressed that there had been no element of grooming. The age gap between the appellant and the first victim had not been significant. The conduct reflected in charge 3 was a good

deal less serious than that in charge 1. The criminal justice social work report had been favourable to the appellant. A custodial penalty should be a last resort. In any event, a custodial term of 15 months was greater than was necessary to punish the appellant.

[10] Ms Ogg drew our attention to two Scottish authorities, but neither of these is in point. The first case, *HMA* v *Collins* [2016] HCJAC 102, was a Crown appeal against an unduly lenient sentence for historic offences of rape perpetrated in secure residential units. This court increased the sentence imposed by the trial judge from 6 years to 10 years imprisonment. The second case, *HMA* v *Cartwright* [2001] SLT 1163, was an unusual one where this court held that account should be taken of the fact that had the appellant been charged at the time he sexually abused one of his pupils, he would have been prosecuted under a statutory provision which carried a maximum penalty of 2 years imprisonment. We have not derived any assistance from these cases.

[11] Ms Ogg also referred to three cases decided in the Court of Appeal of England and Wales: *R* v *Hubbard* [2002] 2 Cr. App. R. (S) 101; *R* v *MacNicol* [2003] EWCA Crim 3093; and *R* v *Battenbo* [2004] EWCA Crim 2553. In each of these cases the appellants had been teachers who were convicted of sexual offences against their pupils in breach of trust. The circumstances of each of those cases were said to be more serious than those of the present case. The sentences imposed on the appellant were, according to Ms Ogg, out of line with those considered to be appropriate by the Court of Appeal for offences of this nature.

[12] Ms Ogg also mentioned the Guidelines issued by the Sentencing Council of England and Wales on sexual offences involving abuse of a position of trust ("Abuse of position of trust: sexual activity with a child/abuse of position of trust: causing or inciting a child to engage in sexual activity"**).** She submitted that whilst charge 1 fell within category 1 of the Guidelines, the level of culpability fell within category B since there was an absence of

aggravating factors. Charge 2 was a category 3 offence. When the mitigating considerations were taken into account, the Guidelines pointed towards a non-custodial disposal for charge 1 as well as for charge 2.

[13] We invited the Advocate Depute to make submissions on the principles which should govern sentencing in cases of the present type. He submitted that the purpose of the legislation was to protect young people against sexual exploitation by persons who held a position of trust in relation to them. Teenage girls were particularly vulnerable to sexual abuse by teachers with whom they might become infatuated. On the relevance of the issue of consent, the Advocate Depute drew attention to what was said by this court in *Rae* v *HMA* [2021] HCJAC 13 at para 22 in the somewhat different context of the strict liability offence of having sexual intercourse with a child under the age of 13 (section 18 of the Sexual Offences (Scotland) Act 2009). Consent was immaterial to the commission of such an offence. The absolute nature of the offence ensured that children were 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, consent was not a truly mitigating factor. It was more appropriate to view the lack of consent as an aggravation of culpability.

[14] The Advocate Depute submitted that the English sentencing guidelines were a useful cross check. Charge 1 fell within harm category 1 as it involved digital penetration of the vagina and penile penetration of the mouth. Charge 3 fell within harm category 3 as there was no penetration and no touching or exposure of naked genitalia or breasts by or of the victim. It was submitted that both offences should be regarded as falling under culpability category B as none of the aggravating factors listed in category A was present. The Advocate Depute added that whilst the factors in category A did not refer specifically to intoxication of the offender as an aggravating consideration, it was obvious that intoxication

should be treated as an aggravation. The starting point for a category 1B offence was 1 year's custody with a range of 26 weeks to 18 months. The starting point for a category 3B offence was a medium level community order with a range of low level community order to high level community order.

[15] The Advocate Depute also drew our attention to the case of *W* v *HMA* [2016] HCJAC 44. There the appeal against conviction was allowed but this court said the following at paragraph 26:

> "Parliament has decided that where a relationship of trust exists such conduct should constitute an offence regardless of whether the complainer consents or not. Effectively, any consent is invalidated if the conditions in section 42 apply. Thus, a complainer may consent, but the offence would nevertheless be committed…"

[16] We begin our analysis by examining briefly the cases from the Court of Appeal of England and Wales which were cited to us. In *Hubbard* the appellant, a secondary school teacher, pleaded guilty to three counts of abusing a position of trust contrary to section 3 of the 2000 Act. The victim was a girl of 15; she had personal problems. Sexual intercourse took place on three occasions. The appellant was sentenced to 2 years' imprisonment on each count concurrently, with an extension period of 2 years. The Court of Appeal upheld the sentence. It regarded the case as a serious one. The object of the statutory provisions was to control the activities of people who were in a position of responsibility and trust over others.

[17] In *MacNicol* a teacher pleaded guilty to two offences contrary to section 3 of the 2000 Act. He began a consensual sexual relationship with a 16 year old pupil. The relationship, though serious, was short of intercourse. They exchanged cards and text messages. When arrested the appellant made full and frank admissions. He also admitted having intercourse with another 16 year old girl at the school. That relationship had begun with exchanges of

text messages; it culminated in a single act of intercourse, which was fully consensual. The appellant was sentenced to concurrent terms of 15 months' imprisonment with an extended licence period of 33 months. The Court of Appeal declined to interfere with the sentences.

[18] In *Battenbo* the appellant pleaded guilty to two counts of sexual assault and one count of sexual intercourse with a girl under the age of 16. She had been a pupil at the school where the appellant was a science teacher. The sentencing judge imposed a total period of 2 years' imprisonment. On appeal this was reduced to 12 months. Only one girl had been involved, the amount of sexual activity was relatively limited, and the sexual offending all took place with the full consent and encouragement of the victim.

[19] It is not easy to draw a direct comparison between the circumstances which arose in these English cases and those of the present case. We note that *Hubbard* involved full sexual intercourse on three occasions; it may therefore be regarded as a more serious case, but it attracted a longer sentence than that imposed on the appellant. *MacNicol* resulted in a sentence of the same length as imposed on the appellant, but it appears to have involved some degree of grooming and there was a single episode of full intercourse with one victim and serious sexual activities with the other. It too may be seen as a somewhat more serious case than the present one. As for *Battenbo* there was only one victim and relatively limited sexual activity. The sentence was 3 months lower than that imposed on the appellant. While the comparison exercise was of some limited assistance, each case must turn on its own facts.

[20] As the Sheriff aptly observed, both offences in the present case involved serious breaches of trust by the appellant. The sexual activity in charge 1 included digital penetration of the victim's vagina and penile penetration of her mouth. At the time he committed both offences the appellant was under the influence of alcohol. Annex A to the

Sentencing Council for Scotland's "The Sentencing Process" Guideline and the Sentencing Council for England and Wales "Overarching Guidelines" both recognise that a perpetrator's voluntary intoxication can be an aggravating factor. We have no doubt that in the present case the appellant's intoxication was a significant aggravating feature.

[21] As we have already mentioned, we consider that the Sheriff was well-founded in his view that the offences involved some degree of premeditation on the part of the appellant. In the case of charge 1 he engineered a situation in which he found himself alone with the victim. So far as charge 2 is concerned, the appellant repeatedly invited the victim to accompany him to a secluded place after he had kissed her.

[22] It is important also to note that the appellant has expressed no remorse for what he did. He did not admit the offences and he continues to protest his innocence. The victims required to give evidence. In these respects his position differs from the positions of the appellants in the English cases to which we have referred.

[23] On the other hand, we accept that there was no grooming of either victim. We note also that at the time of the offence in charge 1 the appellant was not yet 24 and was therefore still a relatively immature young man, and that the age difference between him and his victim was less than 7 years.

[24] The purpose of the statutory offences of which the appellant stands convicted is to protect impressionable young people under the age of 18 from the possible consequences of infatuation with their teachers and others who are entrusted with their care and welfare. The aim of the legislation is to control the sexual activities of persons who hold positions of trust and who have responsibility for children. Regrettably, it is a not uncommon feature of such cases that the offender is a person, like the appellant, who is otherwise of good character.

[25] We note that the maximum penalty prescribed by the legislature for these offences is imprisonment for 5 years. This is an indication of the seriousness with which Parliament views conduct of the type in which the appellant engaged. Young persons must be protected from sexual abuse and exploitation by persons entrusted with their care, welfare and education. Taking account of the aim and purpose of the legislative provisions, and all of the other relevant factors, we are satisfied that the Sheriff was right to take the view that the nature and gravity of the offences, taken together, could only properly be marked by the imposition of a custodial sentence.

[26] We are persuaded, however, that the length of the custodial term selected by the Sheriff was excessive. Having regard to the appellant's conduct and his culpability, and all of the aggravating and the mitigating factors, we consider that the appropriate period of imprisonment is one of 12 months. We take comfort from the fact that that sentence appears to be in line with (i) the sentences in the English cases to which we were referred (once the differences in circumstances are taken into account); and (ii) the Guidelines issued by the Sentencing Council of England and Wales.

[27] We shall accordingly quash the sentences imposed by the Sheriff and substitute for them a single *cumulo* sentence of 12 months' imprisonment.