APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 55
HCA/2018/000240/XC

Lady Paton
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

CROWN SENTENCE APPEAL

by

HER MAJESTY'S ADVOCATE

Appellant

against

SEAN McCUAIG

Respondent

Appellant: McSporran QC, AD;
Respondent: Lenahan Advocate, Anthony Mahon Limited, Solicitors

21 September 2018

[1] This is an appeal by the Lord Advocate under section 108 of the Criminal Procedure (Scotland) Act 1995 against the sentence imposed on the respondent Sean McCuaig by the sheriff at Glasgow on 12 April 2018.

[2] The respondent, a 22 year old first offender, appeared on an indictment libelling 35 charges. At a first diet on 20 February 2018 his pleas of guilty to 20 of these charges were

accepted. His pleas of not guilty to the remaining charges were accepted. The offending conduct occurred between January 2016 and July 2017, when the respondent was aged 20 and 21 years.

The Charges

[3] Of the charges to which pleas of guilty were tendered and accepted, charge (33) was a charge of taking or permitting to be taken or making indecent photographs of children, charge (34) was a charge of distributing or showing indecent photographs of children and charge (35) was a charge of possessing extreme pornographic images.

[4] The remaining charges to which pleas of guilty were tendered concerned communications which the respondent sent to the nine young female complainers. Having set up a number of Facebook profiles in pseudonym names the respondent contacted the complainers using these user names.

[5] The respondent sent pseudo-images to eight of the complainers, who were aged between 12 and 15 years, which comprised a naked female body with the head of the respective complainer superimposed on the image. He then threatened each that he would post the image on the internet if the complainer failed to send him a sexual image of themselves. The remaining complainer (charge 11) was not sent an image but did receive a threat of the same nature as the others. Three of the complainers succumbed to the threats which the respondent made.

[6] The complainer EC, aged 15, begged the respondent not to share the image which he had sent her and sent him a picture showing her bare legs. The respondent pressed her for more photographs. She continually asked him to stop and, after persuasion, sent a picture of

herself in shorts showing her torso. She then pleaded with him to leave her alone. She repeatedly told him that she would kill herself if he posted pictures of her.

[7] The complainer AH, aged 13, received messages from the respondent saying that she had to send him a photograph of her or he would come and find her. He said he knew where she lived and threatened her family. Out of concern as to what would happen the complainer sent a photograph of herself dressed in her bra and shorts and then sent further photographs, one of which was a full body photograph and another showing the bottom half of her body including her vagina. She told the respondent to leave her alone. She also sent a number of moving images in which it was obvious that she was a reluctant participant and appeared to be crying.

[8] The complainer KMcG, aged 13, received messages from the respondent threatening that if she did not send nude photographs of herself her family would be at harm. Feeling that she had no other choice this complainer sent three photographs of her naked breasts to the respondent.

[9] The respondent also sent a photograph of the complainer KMcG's breasts to her friend the complainer AH. He then sent a photograph of AH dressed in her underwear to KMcG.

[10] In relation to one further complainer, TK aged 12, the respondent posted an image of a female standing in a bathroom with her face superimposed onto it on her Facebook page. Along with the image he attached a note stating "she's exposed noo, she sends dirty nudes to everybody." This was not an indecent image but members of the complainer's family and some people at her school saw the image.

[11] Certain of the complainers informed their parents or teachers and in June 2017, acting on information relating to possession of indecent images, police officers attended at the

respondent's home. Forensic interrogation of computer equipment recovered established his responsibility for the various offences concerning the nine complainers. In addition, 2653 indecent still images of children were recovered, 336 of which were at category A, along with 65 moving images, 54 of which were at category A. Five further images were identified as depicting females being raped and fell to be classified as extreme pornography in contravention of section 51A of the Civic Government (Scotland) Act 2010. Examination also disclosed that the respondent had shared indecent images of the complainer AH with other Facebook users.

[12] Also recovered from the respondent's computer was a text document in which he had described a range of sexual scenarios created by him in relation to a number of teenage females, including two of the complainers. The scenarios involved abduction, rape and physical violence.

[13] Having heard the narrative of the circumstances the sheriff called for a Criminal Justice Social Work Report and in addition called for two Forensic Clinical Psychology Reports, one prepared by Dr Lorraine Johnstone, the other by Dr Gary MacPherson. Having considered the content of these reports, and having heard the respondent's solicitor in mitigation, the sheriff imposed an extended sentence of 6 years' imprisonment comprising a custodial period of 3 years and an extension period of 3 years. The respondent was made subject to the notification requirements provided for by the Sexual Offences Act of 2003 for an indefinite period.

The Reports

The CJSWR

[14] At pages 3 and 4 of his report the author of the Criminal Justice Social Work Report makes certain introductory comments concerning the scope of his risk assessment. He identified certain limitations in his use of the Stable 2007 risk assessment tool, he noted that he had not been provided with a narration of the facts and did not have access to the written Forensic Report compiled by Police Scotland Cyber Crime Unit. He noted that these factors imposed some limitations on the current risk assessment which he was able to undertake.

[15] Despite these limitations he offered certain conclusions in relation to risk assessment. At page 10 he noted that no input had as yet been formulated or commenced to intervene and manage risk of similar behaviour on the part of the appellant in the future. He had in mind that this would include the control and oversight of the respondent's use of technology and the Internet. He observed:

> "Until this input is carried out Mr McCuaig should be considered as high-risk of further similar sexualised offending."

Having carried out an assessment using the Risk Matrix 2002 tool, the Stable 2007 tool and the Moving Forward Making Changes decision tree framework, his combined assessment was that:

> "These taken together suggest that Mr McCuaig be considered as high-risk of sexualised offending requiring a very high level of treatment input, external supervision and monitoring."

[16] Under the review of relevant sentencing options the author noted that the respondent was considered to be suitable for, and highly in need of, sex offender treatment. He noted that the programme is offered both in community and custody environments and that the respondent would likely benefit from initial participation in the custody setting to develop a

degree of safe planning and accountability for behaviour on eventual release whilst subject to post-release supervision. He recommended that the court consider imposing an extended sentence but also noted that given the current risk assessment and need for public protection the court may wish to consider referring the matter to the High Court.

Dr MacPherson's report

[17] Dr MacPherson explained that he adopted the "structured clinical approach" to form a view on the respondent's risk of sex offence recidivism and used an evidence-based measure recognised in the professional and peer-reviewed literature as having utility in the decision-making process for an individual's risk of sex offence recidivism. He went on to explain that he used the Sexual Violence Risk-20 (SVR-20) guide to inform his clinical judgement. He made the following observation about this guide:

> "Unlike other available risk assessment schedules the SVR-20 has been tested with sex offenders in Scotland to predict escalation in severity of sex offending."

[18] As part of his risk assessment exercise Dr MacPherson commented that it is important to consider the presence of behaviour consistent with psychopathy. He formed the view that the respondent did not fulfil sufficient criteria for this condition.

[19] Under the heading of "Sexual Deviation", Dr MacPherson noted that the respondent has an entrenched, highly unusual sexual interest in rape and violence towards young females. As had the author of the CJSWR, Dr MacPherson noted that the respondent demonstrated a poor level of understanding *vis-a-vis* the wider implications of his behaviour. In relation to intervention work, Dr MacPherson noted that the respondent would benefit from offence focused intervention to reduce his risk and he noted that the respondent would complete the Moving Forward – Making Changes (Sex Offender) programme.

[20] In his conclusions at page 18 of his report Dr MacPherson expressed the opinion that the respondent:

> "… presents a high risk of analogous offending *at this time without any further supervision or intervention*."

His further conclusions at page 19 included the following:

> "There remains debate and gaps in professional knowledge with respect to whether offenders who use the Internet share most or all of the characteristics of other types of sex offenders, although the emerging evidence suggests that only a minority of Internet sex offenders progress towards contact sex offending. Sean McCuaig should engage in offence focused work to understand the antecedents to his offending and develop an awareness of how to prevent a situation where he may be at risk of reoffending. He would be a candidate for the Moving Forward – Making Changes Programme [the Sex Offender Treatment Programme] for sex offenders which runs within the prison service estate and in the community."

[21] Dr MacPherson drew his report to a finish by stating that he was not confident that significant changes could be made to such an entrenched unusual and deviant sexual interest in extreme child abuse and recommended that the respondent be monitored and supervised on a statutory basis in the community. He went on to give examples of how this form of management could take place. He had in mind face-to-face meetings and unannounced visits to his home, monitoring and management of any use of computer equipment et cetera, that he be prohibited from engaging in any work with children or vulnerable groups and that his behaviour should be re-assessed and risk assessed at intervals while supervised in the community. At no stage did Dr MacPherson suggest that the respondent posed the sort of risk which would require the imposition of an Order for Lifelong Restriction, or that the risk criteria specified in section 210E of the Criminal Procedure (Scotland) Act 1995 might be present.

Dr Johnstone's report

[21] Dr Johnstone set out in her report the content of the narrative of the case with which she had been provided. In her initial offence analysis she noted that the respondent's offences reflect a persistent, repeated, dense and serious pattern of cyberstalking, harassment and sexual offending during which he communicated to and about victims, where he intimidated and threatened his victims, where he has shown a callous and reckless disregard for their emotional and physical well-being and where there has been a pattern of escalating seriousness. She also noted that he had offered one of his victims the opportunity to meet with him at a specified location and had detailed a sexual interest across a range of different paraphilias. Dr Johnstone used the term stalking to describe the appellant's unwanted and repeated communication.

[22] Dr Johnstone discussed the content of the text document which had been recovered from his computer with the respondent. She noted that he informed her that "one thought led to another and I was worried it would escalate". He also explained to her that he could feel the progression in his offending itself. She noted that the content of this document was disturbing and included graphic accounts of how the respondent had fantasised about serious sexual violence against child victims. She also noted that in his discussion with her he explained that he wished to understand and manage his difficulties. He admitted that his motivations were sexual and told her that he did not have any real interest in perpetrating serious physical violence.

[23] In carrying out her risk assessment Dr Johnstone also undertook the structured professional judgement approach which, she explained, produces a highly individualised evaluation. She utilised a different protocol to guide her assessment from that used by Dr MacPherson to identify the respondent's sexual violence risk and she used what she

referred to as the Stalking Assessment Manual to guide her assessment of his stalking assessment risk.

As Dr MacPherson had done, Dr Johnstone included a passage in her report concerning the question of any link between the use of online images and contact offending. Having referred to research indicating a similar opinion to that expressed by Dr MacPherson she went on to say the following:

> "However, when it comes to the individual case, it would be incorrect and misleading to generalise from this finding. Whilst prospective research would suggest that, in general terms, most people who are found in possession of indecent images do not appear to have progressed onto contact offences – some people do. Furthermore, retrospective research has shown that those who do engage in contact sexual offending often have engaged in Internet offending."

She went on to say that against that background it was accepted that any assessment of risk at the individual level required a detailed assessment of a range of relevant variables and a clear formulation of what is driving the offending.

[24] Having considered the presence or otherwise of relevant risk factors and undertaken her clinical assessment, Dr Johnstone expressed certain opinions:

- She considered that the respondent posed a high risk of repeat stalking behaviour.
- Based on the available information she could not exclude an escalation scenario
- The respondent's risk factors if unchanged and unmanaged would place him at high risk of using the Internet for the purposes of having indecent images of children and adolescents.
- The respondent may present a risk of a twist scenario, in other words sexual interest in children with whom he already has access, although she noted that

this would require him to use other behaviours such as grooming leading to coercion.

[25] In light of her findings Dr Johnstone identified a number of risk management interventions which included:

- Further assessment to aid ongoing risk management
- Monitoring by police or other surveillance when the respondent was in the community in particular to control the use of computers and his proximity and access to any of his victims or young females.
- When in the community, supervision and control such as to require restrictions on his activity movement, association and communications.
- Treatment such as might improve deficits in his psychological functioning via the provision of rehabilitative services.

[27] Having set out all of the information known to her, and having identified the various risk factors present, her assessment of those and their implications, Dr Johnstone set out her overall summary and conclusions at paragraph 50 of her report. She concluded with the following expression of opinion:

> "An analysis of known risk factors for stalking and sexual violence has revealed that Mr McCuaig presents with a high number and diverse range of risk factors relevant to both stalking and sexual violence recidivism. The nature and configuration of his risk factors means that, *if currently at liberty*, he would pose a risk of serious harm to female members of the general public at large if he were to perpetuate a repeat scenario or if his offending were to escalate and he acted on other aspects of his sexual fantasies. *In the absence of any significant change or robust management of his risk*, it is likely that Mr McCuaig will continue to pose a risk in the long term. In order to manage him, he will require a complex range of multi-agency interventions akin to those required for offenders who are being considered for MAPA Level 3 or an Order for Lifelong Restriction."

Submissions

Crown

[28] In opening his submissions the advocate depute intimated that the appeal was to be presented on a more restricted basis than had been identified in the Note of Appeal. The contention now advanced by the Crown was that in imposing an extended sentence the sheriff selected a disposal which failed properly to provide for rehabilitation, risk assessment and risk management and as such fell to be seen as an unduly lenient sentence. The Crown's contention was that the sheriff ought to have concluded that the risk criteria specified in section 210E of the Criminal Procedure (Scotland) Act 1995 may have been met in the respondent's case and ought to have remitted the case to the High Court. That would have given a judge of that court an opportunity to make a risk assessment order in terms of section 210B of the 1995 Act and then, if appropriate, an Order for Lifelong Restriction as provided for by section 210F. Whilst it was recognised that the sheriff stated in her report that she did not consider that the respondent may meet the risk criteria, the submission was that she was clearly wrong in this regard. The advocate depute frankly recognised that the submission being advanced was a most unusual one.

[29] In setting out the Crown's argument the advocate depute explained that the foundation of the appeal could be found in the passage from Dr Johnstone's report quoted at paragraph [27] above. He submitted that neither Dr MacPherson nor Dr Johnstone had identified any measure which they considered would be effective in managing the respondent's risk. In light of the absence of any such reassurance it was clear that the sheriff's view could not be supported.

[30] In the Crown's written submissions emphasis was placed on the contention that the sheriff had placed undue weight on the risk of further analogous noncontact offending,

rather than taking cognizance of the escalating behaviour in its totality. It was said that the imposition of an extended sentence failed to provide an adequate degree of protection to the public against "the high risk of serious sexual offending posed by the respondent".

Respondent

[31] On behalf of the respondent it was submitted that the sheriff, who was highly experienced, had provided a coherent and reasoned explanation for her decision. It was submitted that account should be taken of the candour which had been displayed by the respondent in his discussions with the psychologists and weight should be given to his stated willingness to address his deviant thoughts and attitudes. In this regard it was important to note that there was no history on the respondent's part which might suggest a lack of ability or willingness to engage with professional support. The respondent's age was important and it was to be noted that Dr MacPherson had formed the opinion that he was in fact immature for his years.

[32] It was submitted that the psychological reports had identified the presence of risk of analogous re-offending rather than a risk of escalation to contact offending and had identified various measures through which this risk could be alleviated and managed. The respondent was keen to engage with the type of risk management and rehabilitation programmes mentioned. The sheriff's report made it clear that she had fully appreciated the content of the reports and had carefully assessed all that had been said. The decision which she arrived at was an appropriate one.

Discussion

[33] The Lord Advocate has the right under section 108(1)(a) of the 1995 Act to appeal against a sentence passed on conviction where it appears to him that the sentence imposed was unduly lenient. A sentence may only be viewed by the court as being unduly lenient if it falls outwith the range of sentences which a judge at first instance, applying her mind to all the relevant factors, could reasonably have considered appropriate – *HM Advocate* v *Bell* 1995 SCCR 244. In the present case the submission was that the sheriff's decision in relation to whether the risk criteria may be met fell to be seen as unduly lenient in this sense. It was accepted that if her decision on this matter fell within the range available then the extended sentence which she imposed is beyond criticism.

[34] Given the narrow and unusual scope of the Crown's argument it may be helpful to set out the statutory context within which the submissions were located. An Order for Lifelong Restriction is a disposal provided for by section 210F of the 1995 Act. It can only be imposed in the High Court. Such an order is made where the High Court is satisfied, on a balance of probabilities, that the risk criteria identified in section 210E are met. The risk criteria are that:

> "the nature of or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large."

[35] The normal process through which the court would come to be considering whether to impose an Order for Lifelong Restriction is triggered through Section 210B of the Act. That section provides that where it falls to the High Court to impose sentence in respect of a qualifying offence the court at its own instance, or on the motion of the prosecutor, if it considers that the risk criteria may be met, shall make a risk assessment order. The effect of

this order is that a risk assessment report will be prepared by an assessor accredited by the Risk Management Authority. That report would then be available to the court in determining whether or not to make an order under section 210F.

[36] Accordingly, the Crown's argument in the present case was that the sheriff ought not to have imposed sentence herself but ought to have remitted the case to the High Court in order that a judge could consider whether or not to make a risk assessment order under section 210B. Three matters fall to be taken notice of. First, the reports which the sheriff had before her were from two eminent and highly experienced psychologists. One is the Lead Psychologist at the State Hospital, the other, amongst her other qualifications, is a Risk Management Accredited Assessor. Second, no motion was made on behalf of the Crown alerting the sheriff to their contention that the risk criteria were met. Third, section 210B(6) provides that there shall be no appeal against a risk assessment order, or against any refusal to make such an order. In other words, had the sheriff possessed the power to decide whether to call for a risk assessment report, in terms of the statutory procedure, her decision, either way, could not have been the subject of an appeal. Equally, if the Crown's argument in the present case was to prevail and a judge of the High Court was to arrive at the same decision as the sheriff in relation to the risk criteria there could be no appeal from that decision.

[37] The reasons for the sheriff's decision in relation to risk assessment are set out in some detail in the report which she provided to this court. She begins by drawing attention to the basis of the appeal as set out in the concluding statement of the Note of Appeal:

> "The imposition of an extended sentence fails to provide an adequate degree of protection to the public against the **very high** risk of serious sexual offending posed by the convicted person and is accordingly unduly lenient."

As the sheriff notes, that level of risk was not expressed in the reports which were provided. In those reports the level of risk was described as being high and in relation to analogous offending.

[38] In paragraph [29] of her report the sheriff noted that:

> "The circumstances of the offences were of a very serious nature but did not include any physical contact with any of the complainers. The threats by the respondent resulted in three out of the nine complainers sending sexual images. Of the remaining six, a number acted quickly, sent no messages and stopped the communications with the respondent. The respondent posted or shared images in respect of three of the complainers (TK, AH and KMcG)."

No criticism of this understanding of the facts of the case was advanced.

[39] The sheriff explains that taking account of the less detailed assessment of risk in the Criminal Justice Social Work Report, and the greater expertise of the psychologists, she concluded that she was not greatly assisted by that report in the task of considering risk and preferred the opinions of Doctors MacPherson and Johnstone. She was plainly correct to do so.

[40] The sheriff informed us that she took account of Dr MacPherson's conclusion, at page 18 paragraph 2 of his report, that the respondent "presents a high risk of analogous offending at this time in the absence of any intervention or supervision". She noted that Dr MacPherson expressed the view that the respondent would be a candidate for the Moving Forward – Making Changes Programme.

[41] She informed us that she took account of Dr Johnstone's opinion, as expressed at paragraph 50 of her report, to the effect that "In the absence of any significant change or robust management of his risk it is likely that Mr McCuaig will continue to pose a risk in the long term". She tells us that she understood Dr Johnstone's reference to not being able to exclude an escalation scenario to mean that the major consideration in her assessment of risk

was of further offending of an analogous nature, namely stalking of females and not the risk of actual sexual violence.

[42] At paragraph [38] of her report the sheriff explains that she took into account the harm caused and considered that there was a significant level of harm involved. In the following paragraph she explained that, as against that harm, she required to balance the fact that the respondent had no physical contact with any of the complainers and did not perpetrate any violence or sexual violence upon any of them. She explains that she considered the lack of any physical contact was a factor that she had to give some weight to when deciding upon an appropriate disposal.

[43] Having considered the content of the reports, the nature of the offences and the fact that the respondent was a first offender, the sheriff did not consider that the respondent may meet the risk criteria set out in section 210E of the 1995 Act. In arriving at this opinion she was influenced by the fact that Dr MacPherson had not said in his report that an Order for Lifelong Restriction was the only method of managing the risk posed by the respondent. Had he been of that view the sheriff was satisfied that he would have said so, given his experience in such matters. She was also influenced by the fact that in Dr Johnstone's conclusions on the appropriate methods of managing the respondent's risk she stated that they should be "akin" to those required for an Order for Lifelong Restriction. Dr Johnstone did not express the view that such an order was an appropriate way to manage the respondent's risk. At paragraph [36] the sheriff explains her understanding of the combined reports in the following way:

> "I drew from the reports by Doctors MacPherson and Johnstone that the risk the respondent poses is one of further similar offending. Whilst violent sexual offending cannot be excluded, I considered that on the reports from the psychologists any risk of that occurring is not at a level that would meet the risk criteria in section 210E."

[44] In light of this assessment the sheriff goes on to explain that she took account of the fact that the respondent expressed a willingness to partake in any treatment programmes offered to him and she concluded that his lack of previous offending, and his acceptance of responsibility, indicated that a significant period of custody, followed by close management in the community, under the terms of a licence, would provide supervision, robust management and an opportunity for change. She therefore decided that an extended sentence would meet the need for the protection of the public from the risk of future harm by the respondent and adequately punish him.

[45] It is plain that the sheriff gave careful thought to how to address the unusual and serious offending which the respondent engaged in. In her understanding of the two reports the principal risk which was identified was of further analogous offending. We do not consider that she can be criticised over this assessment. Each report canvassed the risk of escalation and considered the evidence base for any such prediction. Of course, as Dr Johnstone said, it could be misleading to generalise from the research findings in an individual case. But even having individualised her assessment to the factors which applied to the respondent, the highest concern which Dr Johnstone expressed was that she "could not exclude an escalation scenario".

[46] It is also the case that both reports described an ongoing risk i*n the absence of intervention and change*. Various risk management processes were then identified, tailored to the level of risk assessed. These included the sort of programmes available in custody and in the community, ie Moving Forward Making Changes. Each identified the sort of monitoring which can be accommodated within a combination of extended sentence licence conditions and the notification requirements provided for by the Sexual Offences Act. Each report contemplated the respondent being in the community and provided advice on risk

management. The advocate depute invited us to read these suggestions as indicating what might be available, but not to read into the reports any implication that the authors considered these to have any prospect of being effective.

[47] In our opinion this is too narrow an approach. Each report set out an assessment of risk in detail. Each then set out risk management strategies. It would be inconsistent with the function undertaken by the psychologists to set out risk management strategies in which they had no confidence. Whilst the Crown's contention comes to be that it was so glaringly obvious that the risk criteria may be met in the present case that the sheriff could not but have acted on that basis, we would simply observe that at no stage in either of the Forensic Clinical Psychology report do the authors state that the risk posed by the respondent cannot be managed by means of an extended sentence. Nor do they say that the respondent requires an Order for Lifelong Restriction, or that such an order should be considered.

Decision

[48] The court is not persuaded that the decision to impose an extended sentence, rather than remitting the matter to the High Court for consideration of a Risk Assessment Order, can be characterised as a sentence which fell outwith the range of sentences which the sheriff could reasonably have considered appropriate.

[49] For the reasons given the appeal is refused.