APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 16
HCA/2020/000339/XC

Lord Justice Clerk
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in

CROWN APPEAL AGAINST SENTENCE

in causa

HER MAJESTY'S ADVOCATE

Appellant

against

JB

Respondent

Appellant: Edwards, QC AD; the Crown Agent
Respondent: Stephenson, Sol Adv; Thorley Stephenson, Solicitors

10 March 2021

[1] On 15 September 2020 the respondent appeared at Edinburgh Sheriff Court at the first diet and tendered pleas of guilty to two charges on an indictment in the following amended terms:

> "(2) On various occasions between 28 June 2019 and 5 August 2019 both dates inclusive at (a specified address) and elsewhere you JB did intentionally and for the purposes of obtaining sexual gratification or of humiliating, distressing or alarming A … a child who had not attained the age of 13 years, send sexual written

communications to her in that you did via text messages and WhatsApp messages send to her communication repeatedly stating you would like to kiss and touch her, ask her to send you photographs of herself, repeatedly refer to taking her on dates and on holiday, make reference to her as your girlfriend and state you would dream about her;
CONTRARY to section 24(1) of the Sexual Offences (Scotland) Act 2009.

(3) On 5 August 2019 at (a specified address) you JB did sexually assault A … a child who had not attained the age of 13 years, in that you did place your arms around her, lift her body off the ground, touch and squeeze her buttocks, repeatedly kiss her with an open mouth and on the neck and suck on her bottom lip;
CONTRARY to section 20 of the Sexual Offences (Scotland) Act 2009."

[2] These pleas, and a plea of not guilty to another charge, were accepted by the Crown. Having obtained a criminal justice social work report, on 23 October 2020 the sheriff made a community payback order as a direct alternative to custody with a supervision requirement for three years and a programme requirement requiring the respondent to participate in the Community Intervention Service for Sex Offenders (CISSO) for three years. The respondent was made subject to the notification requirements under the Sexual Offences Act 2003 for the same period.

[3] The Crown now appeals to this court against the sentence imposed on the ground that it is unduly lenient.

The factual narrative

[4] The following agreed narrative was placed before the court:

"<u>History of the case</u>

The accused appeared on Petition at Edinburgh Sheriff Court on 07 August 2019. He was CFE'D and released on bail.

The case was indicted and due to call on 29 September 2020. The case appears today as an accelerated first diet.

Discussions between the Crown and the Defence took place on 19th

August 2020. On 20th August 2020 the Crown received a section 76 letter in acceptable terms.

History of the Accused

The accused is aged 55(54).
He has previous convictions as per the schedule tendered to the Court. There are two analogous convictions. Both related to female children aged 10 and 15 respectively.

CIRCUMSTANCES OF THE OFFENCE

Background

In September 2018 the accused's wife discovered she had a sister called B. B made contact and the two sisters arranged to meet. Shortly after the accused was introduced to B's children including the complainer (A), born 19th January 2009 (aged 10 at the time of the offending).

The accused asked the witness A for her mobile number and began texting her and sending What's App messages from a mobile number.

Around the end of June 2019 the accused's wife LB and the accused were going to a public house for dinner and invited B and the complainer A.

Whilst having dinner A announced that she was on a date with the accused and everyone was to be quiet. Everyone thought this was funny and allowed A to have her date.

The accused's wife overheard their conversation and heard the witness A ask the accused if he came to the pub often and told him about a boyfriend that she used to have. The accused then offered to take her to the pictures to see a film and she agreed. The accused subsequently took A to the cinema and for something to eat on 28 June 2020 (*sic*).

Offences

The accused took the complainer A to the cinema and for dinner on 28 June 2019. Before he took her out the accused said to the complainer's mother B that A should have her hair, make-up and to get a tan done for going and this was referred to as a 'date'. A advised that she was told by B that the 'date' was to show her how she should be treated on a date.

At 1600 hours on Friday 28 June 2019 the accused text the witness A 'THAT'S GOOD CAN'T WAIT TO SEE YOU FOR OUR DATE X'.

The accused and the complainer A continued exchanging messages, their conversations moved to What's App.

At 1711 hours, same date, A sent a picture of herself to the accused and he replied 'YOU LOOK BEAUTIFUL'.

A sent two more images of her wearing a dress and the accused replied 'I'M ONE LUCKY MAN TAKING YOU OUT ON A DATE XXX'

A replied 'I AM ONE LUCKY GIRL TO HAVE AN UNCLE LIKE YOU XXX' and the accused replied with 3 smiley faces with hearts for eyes.

Messages on 1st July

At 1932 hours on Monday 1st July 2109 A sent an image of herself to the accused and he replied 'YOU LOOK NICE TONIGHT'.

A replied 'THANKS HUN' and 'I MISS YOU'.

At 2038 hours the accused replied 'I MISS U TOO MISSING MY KISSES AND CUDDLES'.

The conversation continued and at 2049, A sent the accused a message which read 'OK PRINCE I MISS YOU SO MUCH AND I HOPE YOU HAD A GREAT DAY AND I JUST WANT TO LET YOU KNOW THAT I LOVE YOU'.

The accused replied 'I LOVE YOU TOO A'.

A replied "I LOVE YOU MORE", the accused replied "I'M NOT SURE XXX. I WILL SEE YOU SOON MY PRINCESS AND HOLD U IN MY ARMS XX"

Messages on 4th July

At 2120 hours on Thursday 4th July 2019 A sent the accused a message with a large number of X's and she also sent two voice messages to the effect of 'because I's not enough'.

The accused replied 'OMG THAT'S LOADS OFF KISSES WISH I WAS THERE TO GET THEM OFF YOU'

At 2158 hours, the accused sent A the following message "OK GORGEOUS I'M OFF TO SLEEP NOW AS UP AT 4AM FOR WORK I WILL DREAM ABOUT YOU xxx.'

Messages on 7th July

At 0009 hours on Sunday 7th July 2019 the accused sent A a message saying "HELLO MY GORGEOUS PRINCESS I'VE NOT HEARD FROM YOU TONIGHT SO JUST THOUGHT I SAY I'M IN BED DREAMING OF YOU AND CAN'T WAIT TO SEE YOU AGAIN LOVE YOU LOADS XXXX'

At 2052 hours, same date, the accused sent A a message saying "WILL FIND OUT ON WEDNESDAY IF I HAVE MANAGED TO BUY A CARAVAN THEN MAYBE WE CAN GO ON HOLIDAY FOR A FEW DAYS WILL PROBABLY HAVE TO TAKE C AND YOUR SISTER" with 9 emoji's of a smiley face with hearts around it.

A replied "OK xx" and the accused replied "BUT I'M SURE WE CAN FIND TIME ON OUR OWN" with a number of X's after.

At 2109 hours, same date, the accused sent A a message as follows 'SO HOW FAR CAN YOU RIDE YOUR BIKE XXX'. She replied 'MAYFIELD TO MUSSELBURGH' and the accused replied 'THAT'S FAR OK NEXT TIME I SEE U WE WILL MAKE ANOTHER DATE TO GO A RIDE AND HAVE A PICNIC. I CAN'T WAIT TO SEE YOU NOW' and finished with 11 lip emoji's. A replied 'CAN'T WAIT' and finishes with a number of X's and 22 lip emoji's. The accused replied 'ME TOO, CAN'T WAIT TO HOLD YOU IN MY ARMS AGAIN'.

The conversation continues with A replying 'I CANT' WAIT TO SEE YOU' and the accused replying 'I LOVE YOU' with 12 emoji's of a heart with an arrow through it.

The accused finished the conversation with 'NIGHT NIGHT MY GORGEOUS GIRLFRIEND'.

Sometime in early July 2019 witness CR (B's best friend) was at the family home. When she was sitting on the sofa with the complainer and she noticed some messages from the accused. CR was concerned by the content of the messages having noted that the accused called the complainer his girlfriend and that he said he was dreaming about kissing her soft lips and mentioned taking her and her sister to the caravan. CR advised the complainer's mother B of the messages and it was decided that they would monitor the messages from the accused.

From this point on, the witness B asked A if she had heard from the accused. A mentioned that the accused had asked her to send a picture of her stitches that she got from falling from her bike. Her stitches were at the top of her left leg next to her groin. B told A not to send any pictures to him.

Messages on 10th July

At 1202 hours on Wednesday 10th July 2019 the accused sent A the following message ''YOU PRACTISE YOUR MAKE UP FOR WHEN WE GO ON ANOTHER DATE'. He then said 'WHAT SORT OF DATE WOULD YOU LIKE xxx.'

At 1507 hours, same date, A sent the accused an image of her face and he replied 'THAT LOOKS NICE LOVE YOU LIPS (lips emoji) SO KISSABLE (9 x lips emoji).

Messages from 14th – 27th July

At 2401 hours on Sunday 14th July 2019 the accused messaged A 'CAN'T WAIT TO SEE YOU AGAIN AND HOLD YOU IN MY ARMS'.

At 1611 hours on Monday 15th July 2019 the accused messaged A asking if she was at home and when she replies, the accused said 'OOO GOOD I'LL SEE YOU SOON ON MY WAY HOME I'LL POP IN AND SEE MY BEAUTIFUL GIRLFRIEND' with 9 x lips emoji's.

At 2024 hours on Thursday 25th July 2019 the accused messaged A 'WON'T BE LONG UNTIL TOMORROW AND I PICK U UP CANT WAIT TO GET MY KISSES AND CUDDLE BUT ONLY OFF U THIS TIME XXX'.

At 2346 hours on Saturday 27th July 2019 the accused messaged A 'THOUGHT YOU WOULD HAVE BEEN SLEEPING BY NOW PRINCESS' with 3 emoji's of a smiley face with the eyes replaced by love hearts.

At 2349 hours, same date, the accused messaged the witness A 'WELL I AM OFF TO BED SO I WILL DREAM ABOUT YOU AND HOW SOFT YOUR LIPS ARE FOR KISSING AND HOW BEAUTIFUL YOU ARE NIGHT NIGHT MY GORGEOUS PRINCESS LOVE YOU LOADS'.

Messages on 3rd and 4th August

At 1214 hours on Saturday 3rd August A sent the accused a message with a photograph of her face with make up on. He replied 'WOW U LOOK STUNNING' with 5x of the smiley face emoji's with the eyes replaced by love hearts.

The accused later asked her what she was wearing and she sent pictures of herself in a dress. The accused replied 'YOU LOOK SO GROWN UP' and later 'I SO WANT TO KISS YOU' with a winking face blowing a kiss, 'LOOKING BEAUTIFUL'.

At 2200hrs on Sunday 4th August 2019 the accused messaged the witness A 'I'M OFF TO SLEEP NOW UP AT 4.30 IN THE MORNING FOR WORK. I'LL MAYBE SEE YOU TOMORROW SOMETIME XXX'. She replied 'OK XX HOPE YOU MAKE IT'. The accused replied 'ME TO MISS MY CUDDLES AND KISSES' with a winking face blowing a kiss and 12 lips emoji's.

On 05 August 2019 the accused and his wife went to B's family home to give the children rock following their holiday. The children and B were outside in the garden.

While the accused had the complainer A's younger sister on his knee the accused motioned to go to the toilet and removed the child from his knee, the accused changed his mind, returning to his seat with the complainer A. The accused touched the top of the complainer A's leg where she previously sent him a photograph of a scar. The accused then went upstairs as he said he wanted to go to the toilet, the complainer A noted the accused usually used the downstairs toilet.

At this time A noticed her phone required charging and told her brother D who told her to go and do this. While A was in the house she saw the accused standing at the top of the stairs looking down at her. When she got to the top of the stairs the accused smiled at her and made a hand gesture directing her to go into her bedroom.

Whilst in her bedroom the accused picked A up by under her arms, placing his hands on her bottom and squeezed her buttocks. He then kissed her in what A described as a 'long long kiss' and while doing so the accused was 'sooking' on the lip of A and kissed her with an open mouth.

While outside the room her brother D (then aged 13) heard kissing and entered the bedroom observing the accused in the bedroom with the complainer and 'squishing her bum'. D returned to the room and waved a magazine at the accused in front of his face. The accused told him to leave the room and closed the door behind him. The accused then put A back down. As A went to exit the room the accused knelt down and kissed her twice again on her lips and neck. The accused said to A that she was a 'good kisser' and then said 'al go to jail if you tell , am too old'.

The complainer A thought the incident felt 'weird' and it 'didn't feel right'. The accused returned downstairs whereas A went into the bathroom to wash her mouth before also going back downstairs.

After the accused left A told B what the accused had done. A was crying during this time.

<u>Post-incident disclosures/police involvement</u>

About 1930 hours, the accused and his wife left B's house. Whilst en route home C received a message from B asking her to contact her ASAP when she was alone. C phoned immediately and B told her that A was upset and had disclosed that the accused squeezed her bum and when he kissed her on the mouth and told her not to tell anybody or he would go to jail.

The accused returned to the car and C asked him if he had touched A's bum and he replied that he did so when he picked her up. She then asked him if he kissed her and he said that she kissed him and he kissed her back. Witness C asked the accused if he said anything to her and he said 'mind don't tell anyone outside you've had a kiss of me (the accused) or the police will come and take me to jail'. C stated that the

accused only meant people outside the house.

At 2032 hours, same date B contacted police to report the incident. Police officers came to the family home and A told them what the accused had done. They also inspected the WhatsApp messages on her phone.

At about 0305 hours the following morning the accused was arrested on suspicion of committing a contravention of section 20 of the Sexual Offences (Scotland) Act 2009 and taken to the police station. The accused's phone was seized and the number confirmed by ringing it. He was later interviewed under caution in the presence of his solicitor and made 'no comment' in response to all questions."

Previous convictions

[5] The respondent had four previous convictions, two of which were analogous. On 29 October 1993 he was convicted before a sheriff and jury of lewd and libidinous practices and fined £750. On 18 June 2001 he was convicted of contravention of section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995. He was sentenced to probation for three years with a community service order of 300 hours. He was subsequently found to be in breach of probation, and his probation was extended by 12 months. Further details are discussed below.

The Criminal Justice Social Work Report

[6] The respondent told the author of the social work report that he was introduced to the complainer when his wife formed a relationship with her sister and her children. He stated that the complainer was given his phone number by a family member and started texting him; she was extremely tactile with him, kissing him on the lips and sitting on his knee but he did not feel uncomfortable with this attention because it was in public and in front of his wife and family (the complainer was aged 10 at the time). The idea of a "date" was promoted by the other adults in the complainer's life and was meant as a positive

experience to make her feel special. The respondent agreed that the content of his messages was inappropriate and would give her family cause for concern. Although his wife knew that he and the victim were texting she was unaware of the adult nature of the language. The respondent admitted that he began to misinterpret the relationship and it quickly descended into being almost flirtatious and fantasy from his side. He admitted that he forgot about the boundary between himself as the grown up and the complainer as a child. With regard to charge 3, the author of the report observed that the agreed narrative indicated that the sexual contact between them was more intimate than described by the respondent to her. She concluded that this indicated that the respondent had a lack of internal controls in regard to managing his behaviour. She suggested that the respondent struggled to distinguish between innocent behaviour and instead began to develop a more adult connection; after he began to view the child as a willing participant he was unable to reconstruct the boundaries, and progressed to sexual contact.

[7] The reporter noted the similarities with the respondent's previous convictions. In the first of these, in 1993, the complainer was also a 10 year old girl. The respondent was in a position of trust as a neighbour and considered a friend by the complainer's parents. On that occasion he went upstairs, entered the complainer's bedroom and touched her vagina. At the time of the 2001 offence, he was aged 35 and the complainer was aged 15. He saw the complainer at work and was caught by her uncle having sex with her in the office.

[8] The author of the report initially had concerns that the respondent was blaming the victim for kissing him first and engaging in flirtatious language. However, as the interviews progressed he admitted that he should have behaved like the adult, stopped the communication and reduced contact. With regard to the issue of the degree of planning, the

author of the report was uncertain if he planned the sexual contact on 5 August 2019 or if it was opportunist, but she was clear at this stage that "he was no longer seeing her as a 10 year old child but rather a consenting partner".

[9] The respondent was "aware that he had a pattern of misinterpreting innocent behaviour of young female children which has led him to offending". He reported that he had actively attempted to stay out of any potential situations that would put him in close contact with children. The author of the report suggested that the respondent had understood his risk for a long time and had attempted to put avoidance strategies in place to prevent him offending. It was her assessment that the respondent had been unable to understand fully how he felt so instead has attempted an avoidance strategy to minimise the risk he knows he poses. If given the opportunity to enter into a treatment programme the respondent would be able to work with professionals to develop a more structured risk management plan for himself which would assist him reducing his risk in the future.

[10] The author of the report carried out a risk assessment using two established tools – the Level of Service – Case Management Inventory (LSCMI), and the Risk Matrix 2000 Sexual Scale (RM2000 S). The LSCMI resulted in his being assessed as a medium risk of generic offending. He was assessed as a high risk using the RM2000. He was considered as a moderate risk using the stable assessment. The author of the report considered that all of the respondent's offences were very serious, but observed that he had significant gaps in his offending, which indicated that he could put strategies in place to limit the risk he can cause to children. If he was given the opportunity to attend a treatment programme this would lower the risk of any future offending. The author had discussed the need for treatment with staff at CISSO and it was agreed that the respondent would benefit greatly from

entering into a programme. He was currently suitable for a CPO with supervision requirement. If made subject to such a disposal CISSO would then assess him further and develop a treatment plan that might involve group or one-to-one work depending on what is available during the pandemic.

[11] The author of the report stated that the respondent was aware that custody is a real consideration for the court given the seriousness of the offence and the fact that this is his third sexual conviction. She observed:

> "However, I would ask the court to consider allowing Mr B to remain in the community and enter into a treatment programme."
>
> …
>
> "In relation to a suitable disposal I would suggest the court impose a three year CPO with supervision/programme requirement."

The sentencing sheriff's report

[12] In his report to this court the sentencing sheriff records that in his plea-in-mitigation, the solicitor for the respondent urged him to follow the principal recommendations set out above and impose a community payback order with supervision for a period of three years. The respondent had shown that he had insight into his own pattern of behaviour and was willing to work with professionals to reduce his risk to others in the future. The respondent's solicitor explained that such courses are unlikely to be available in the custodial setting. The respondent had not offended for a long period of time. He had until recently a long term job as an HGV driver and would expect to regain employment as such. He would engage with a community payback order. Having regard to the terms of

section 204 of the 1995 Act it was submitted that in this case the court could not come to the view that there was no alternative to a sentence of imprisonment.

[13] In approaching sentence the sheriff states that he took full account of the circumstances of the offending, the respondent's previous convictions, the contents of the CJSWR and the submissions. He observed that undeniably, the offences of which the respondent was convicted were serious, although the modifications made to the charges by way of amendment reduce that severity. The previous analogous offending occurred about 20 years ago; the length of time between that offending and the present offending was something the sheriff took into account in the respondent's favour. The sheriff went on to observe as follows:

> "[8] As identified in the Note of Appeal the court requires to engage in a balancing exercise. As set forth in the sentencing guideline entitled 'Principles and Purposes of Sentencing' issued by the Scottish Sentencing Council with effect from 26 November 2018, the core principle of sentencing is that sentences must be fair and proportionate. That principle requires *inter alia* that all relevant factors of the case must be considered including the seriousness of the offence, the impact on the victim and others affected by the case and the circumstances of the offender. In addition, it is a requirement that sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case. In relation to purposes of sentencing, these include *inter alia* the protection of the public, punishment, rehabilitation of offenders and expressing disapproval of offending behaviour."

[14] The sheriff concluded by stating:

> "[10] I took account of the principles and purposes set forth in the guidelines. In this particular case, I decided that the purposes of punishment and expression of disapproval of offending behaviour were outweighed by the purposes of rehabilitation, which in the long run would serve to protect the public from further offending behaviour. Those purposes, in my view, were best achieved by a community based disposal, which would enable the respondent to benefit from a programme, working with professionals, to reduce the risk. This was not a case, in my view, where no disposal other than imprisonment was appropriate."

[15] In the result, the sheriff imposed a community payback order with an offender's supervision requirement for a period of three years and a programme requirement for the same period, as a direct alternative to custody.

Submissions for the Crown

[16] The advocate depute adopted her written submissions. She submitted that whilst the sheriff accepted that the offences were serious, he failed to attach sufficient weight to the fact that this was a course of conduct by a trusted family member which involved the grooming of a young child over about six weeks, escalating over that period to include her sending photographs of herself and culminating in the respondent carrying out a contact sexual offence that he had been describing in his messages. The deletions made to the charges did not detract from the duration of the offending behaviour and the escalation during that period. Although the sheriff referred to the need to consider the impact on the victim, there was no indication that he factored this into the sentencing exercise. There were significant similarities between the previous offending and the current offending. With regard to the length of time since the previous offending, the advocate depute drew attention to *JGC* v *HM Advocate* [2017] HCJAC 83, particularly at paragraphs [10] and [18]. The sheriff in the present case attached too much weight to the age of the previous convictions and not enough to the similarities with the present case.

[17] Intrinsic to the sentencing process was a consideration of the harm to the complainer, and an assessment of the culpability of the offending behaviour. The sheriff failed to attach sufficient weight to either of these factors. He did not attach sufficient weight to the age and vulnerability of the complainer, or to the likely psychological effect on her. Although there

was no particular information about this before the court, it was within judicial knowledge that conduct of this sort towards a young and vulnerable complainer would be likely to have psychological consequences. With regard to culpability, the sheriff did not attach sufficient weight to the element of planning, the abuse of trust, and the past conduct as shown in the previous convictions. The sheriff erred in concluding that the purpose of rehabilitation outweighed other relevant sentencing considerations in this case.

[18] The advocate depute acknowledged that in order to satisfy the court that this sentence was unduly lenient she required to meet the test set out in *HMA* v *Bell* 1995 SCCR 244, and that this was a high test. It was not enough that the appeal court would have passed a more severe sentence – the sentence must be seen to be unduly lenient. However, in the present case she submitted that the sentence imposed failed to recognise the gravity of the actions of the respondent, the impact on the victim and the public interest in punishment, deterrence and the expression of disapproval of the respondent's offending behaviour. It was, in her submission, unduly lenient.

Submissions for the respondent

[19] Mr Stephenson submitted that the sentence was not unduly lenient, under reference to his written submissions. The sheriff took proper account of the provisions of section 204(2) of the Criminal Procedure (Scotland) Act 1995 and was correct to conclude that it could not be said that no method of dealing with the respondent other than a custodial sentence was appropriate. The sheriff paid proper regard to the guidance given by the Scottish Sentencing Council. He also attached appropriate weight to the previous

convictions, and to the length of time that had elapsed since those previous offences had been committed.

[20] Mr Stephenson also drew our attention to the fact that the Crown had not applied for a suspension of the community payback order which was imposed on 23 October 2020. The respondent had been complying with the order since then and had had meetings with his supervising officer on a weekly basis and had started the course "Moving Forward Making Changes" which was part of the CPO. He provided us with an email from the respondent's criminal justice social worker dated 10 February 2021 confirming that the respondent had attended all scheduled appointments with him and that he had started and was participating in offence focused work as he was required to do. In all the circumstances the respondent was complying fully with the community payback order. Mr Stephenson submitted that the sheriff had taken account of all the relevant factors in deciding on the appropriate sentence, and it could not be said that this was unduly lenient.

Analysis and decision

[21] The test which falls to be applied in a Crown appeal against sentence is set out in the opinion of the court delivered by the Lord Justice General (Hope) in *HM Advocate* v *Bell* at page 250C/D as follows:

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Weight must always be given to the views of the trial judge, especially in a case which has gone to trial and the trial judge has had the advantage of seeing and hearing all the evidence. There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is

> only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it at the request of the Lord Advocate."

[22] The advocate depute did not suggest that the sheriff omitted any particular fact from his consideration; rather, the Crown's position was that he attached undue weight to some factors and not enough weight to others. In particular, it was submitted that he failed to attach sufficient weight to the similarity between the offences in 1993 and 2001, and too much weight to the period of non-offending since that date. The sentence imposed did not recognise the gravity of the respondent's offending and the public interest in punishment, deterrence and the expression of disapproval of the respondent's offending behaviour.

[23] The sheriff stated in his report that undeniably the offences of which the respondent was convicted are serious. The author of the CJSWR observed that "all Mr B's offences are considered very serious". We agree with each of these observations. Although it began at a family event, and members of the family were aware of the proposal that the respondent should take the complainer on a "date", they were quite unaware (and had no reason to be aware) of the way in which the respondent would behave thereafter, and how matters would develop. Clearly no fault attaches to them – the culpability of the respondent was his entirely. His behaviour involved a significant breach of trust. As is apparent from the exchange of messages set out in the agreed narrative, it involved a process of grooming a 10 year old girl over a period of some five weeks, and culminating in quite inappropriate sexual contact with her. This would be reprehensible in any circumstances, but it is a particular concern against the background of the respondent's previous convictions, two of which are closely analogous to his present offending.

[24] We consider that the sheriff has failed to recognise the gravity, deliberation and persistence of the grooming of the child. This extended to repeated use of sexual language, such as holding her in his arms, to her lips being kissable, to his dreaming how soft her lips are, and to other similar statements. Moreover, the clear aim underlying the grooming was to enable the respondent to gain access to the child in private with the intention, it may be inferred, of sexually abusing her. We refer, in particular, to the message saying that the respondent was investigating the purchase of a caravan so they could go on holiday for a few days; they would have to take her mother and sister with them "but I'm sure we can find time on our own", followed by a number of kisses. In another message the respondent inquired of the child how far she could cycle and to making "another date" to go for a ride and have a picnic together.

[25] So far as the "date" episode is concerned, we would observe that whilst this appears to have started within the family as a sort of joke, and a way of making the child feel important, it was exploited by the respondent, who allowed and encouraged what should have been an innocent and passing fancy on the child's part to develop into something much more serious, inappropriate and sinister. Many young girls go through a phase of having a "crush" on an uncle or older male relative, who should see that for what it is and behave in a circumspect and appropriate manner. Instead of doing that the respondent exploited the situation for his own gratification, encouraging the child to wear make up, and send photos of her stitches, which were near the groin.

[26] The fact that the respondent intended to take matters further can be seen both from the content of the texts, and the incident in the bathroom (the subject of charge 3). The latter incident was the first step along the road of escalation. Moreover, the respondent's

comment "I'll go to jail if you tell" shows that he knew full well what he was doing and that it was wrong. In addition it is a well recognised grooming technique to encourage victims to keep quiet and to treat what is happening as a secret.

[27] The respondent's discussions with the author of the CJSWR cause considerable concern. The phrase "he admitted that he began to misinterpret the relationship and that it quickly descended into almost flirtatious fantasy from his side" is unconvincing and self-serving, quite apart from the fact that he had started to act on this fantasy. It shows a blatant attempt to minimise both his behaviour and his level of responsibility. We would highlight, as most telling, the words "misinterpret"; "relationship"; "almost flirtatious"; and "fantasy". This attitude can be seen again in the sentence that "he forgot" the boundary between himself as the grown up and the complainer as a child; and the fact that he gave an account of charge 3 that was less intimate than the reality. The lie behind all this is seen by the comment "I'll go to jail if you tell" – there was not "forgetting" – he knew fully what he had done and how inappropriate it was.

[28] In our view it is impossible to accept the interpretation of the author of the social work report that simply because the respondent eventually recognised that he should have behaved as the adult this means that he was not seeking to minimise his responsibility or indulge in a degree of victim blaming. The two are not mutually exclusive. It is to be noted that in saying that he should have recognised that he was the adult, what he said he should have done was to stop the communication and reduce contact. In other words, the responsibility lay with the other party to the contact, not with him. His responsibility for the nature, detail, content, and prolongation of the contact is entirely ignored. His minimisation and deflecting of responsibility is seen in his telling the social worker that another family

member gave the child his phone number, when according to the agreed narrative the respondent himself asked the child for her phone number. Contrary to what he told the social worker, namely that the child started texting him, the agreed narrative records that after getting her number it was the respondent who began texting and sending WhatsApp messages to the child. He told the social worker that the idea of a "date" "was promoted by other adults in the family", whereas according to the narrative, apart from the first mention of a date during the family dinner, it was the respondent who encouraged this by offering to take the child to the cinema.

[29] We note also that the respondent misrepresented the circumstances of the offence to the social worker; he implied that he was downstairs and just happened to see the child, whereas he was at the top of the stairs and waited for her to come up, before gesturing her into the bedroom. Again contrary to the narrative, and consistent with victim blaming, he maintained to the social worker that the child "kissed him first". Overall, the respondent clearly minimised the nature of what happened.

[30] In our view, the author of the CJSWR was too willing to accept and be convinced by the respondent's explanations and excuses for his conduct. For example she noted that the respondent was aware that "he had a pattern of misinterpreting the innocent behaviour of young female children". She seems to view the respondent as the victim of his own "lack of internal controls" rather than the exploitative and manipulative sex offender that he shows himself to be. The content of the CJSWR is redolent of the respondent's manipulative nature.

[31] For these reasons, we are satisfied that the CJSWR did not provide a sufficiently robust and rigorous basis for the recommendation that the respondent should receive a non-

custodial disposal involving supervision and treatment in the community. The assessment of high risk under the RM 2000S is significant, since this relates to the risk of further sexual offending. It is a matter of concern that the assessment states that there are no protective factors. In fairness to the sheriff, it must be acknowledged that the extent of the respondent's culpability was underplayed in the CJSWR; it took a passive approach to what the respondent asserted and did not examine thoroughly the import of his comments.

[32] In our opinion the sheriff did not adequately recognise the gravity of the offences; the degree of culpability; the age and vulnerability of the complainer; the effect the offending was likely to have on her ability to trust people in the future, and the nature- rather than the age – of the 1993 and 2001 convictions, each of which involved sexual abuse of female children. In relation to the 1993 conviction, we note that the respondent's account of this to the author of the CJSWR entailed further victim blaming.

[33] The sheriff took account of the guidelines provided by the Scottish Sentencing Council. We agree that he required to carry out a balancing exercise. He decided that the purposes of punishment and expression of disapproval of offending behaviour were outweighed by the purpose of rehabilitation, which in the long run would serve to protect the public from further offending behaviour. We are unable to agree that the sentence imposed struck a reasonable balance between the various considerations. Whilst we recognise that the sheriff was faced with a difficult task (and that he was not assisted by the approach taken in the CJSWR), we are unable to agree that his sentence fell within the range of sentences that could reasonably have been imposed. The sentence contained no punitive element; it contained no real element of deterrence; and it seriously underestimated the gravity of the present offences (particularly the extensive grooming), against the background

of the respondent's closely analogous record of prior offending. In these circumstances, we are satisfied that the case was one in which the custody threshold was clearly passed. We are satisfied that the sentence was unduly lenient in the sense referred to in *HM Advocate* v *Bell supra* and that the appeal must be allowed. We shall quash the sentence imposed by the sheriff and in its place substitute a sentence of 12 months imprisonment (reduced from 18 months because of the guilty plea). The respondent will remain subject to the notification requirements applicable to sex offenders for a period of ten years.