APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 24
HCA/2022/000120/XC

Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL AGAINST SENTENCE

by

NP

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, solicitor advocate; Paterson Bell, Edinburgh
Respondent: McTaggart AD; Crown Agent

21 June 2022

[1] This is an appeal against a sentence of imprisonment for 27 months following the appellant's plea of guilty at a continued First Diet to a contravention of section 42 of the Sexual Offences (Scotland) Act 2009, an offence known as sexual abuse of trust.

[2] The sentence would have been one of imprisonment for 3 years but for the timing of the plea.

[3] The appellant, born in 1979, was a well-respected teacher at a school in Glasgow and between 9 December 2016 and 14 April 2019 she engaged in sexual activity with a female student between the ages of 15 and 18. The activity involved kissing, cuddling, touching, digital penetration of the complainer's vagina, the performance of oral sex on the complainer and acts performed on the appellant by the complainer.

[4] The appellant was an assistant housemistress and amongst her duties was the provision of pastoral care to students. The complainer became upset in a class in December 2016 and spoke to the appellant, disclosing that she felt alone. The appellant offered her support, gave the complainer her school email address and told her she could contact her outwith school hours. Multiple emails were exchanged thereafter and a close personal relationship quickly developed. The appellant would end her emails with kisses and they would state that they loved each other, exchanging heart and kissing emojis.

[5] In January 2017 the complainer contacted the appellant because she was upset after falling out with a friend. The appellant picked her up in her car and they chatted, the appellant saying that they probably should not be meeting up. The complainer felt special knowing that the appellant was prepared to break the rules for her and when she left the car the appellant kissed her on the neck.

[6] They met up regularly on Sundays after that. The appellant would take the complainer to quiet locations where they would kiss using their tongues and touch each other over their clothing.

[7] In February 2017 before the complainer went on holiday with her parents the appellant sent her a text telling her she was a special, wonderful young woman, calling her "my angel" and "sweetheart" and telling her she loved her.

[8] Ten days after that the complainer sent the appellant a selfie wearing a bra and shorts. This was unsolicited.

[9] In March 2017 they exchanged mobile phone numbers. After this they were kissing in the appellant's car when the appellant digitally penetrated the complainer's vagina and on another occasion she performed oral sex on the complainer. This was all consensual.

[10] In July 2017 the complainer spent two nights at the appellant's flat and they engaged in digital penetration and oral sex. Some weeks later the appellant moved to another property and the complainer would attend on a regular basis, usually on a Sunday. At times she would stay overnight. The appellant would sometimes pay for her taxi. When together they would regularly kiss and on a couple of occasions engaged in digital penetration. The complainer often said that she wanted to tell her friends and family about her sexuality but the appellant discouraged her as people would put two and two together about their relationship.

[11] The relationship ended when the complainer left school to go to university in 2019 but they kept in touch. The appellant visited her in September 2019 and they engaged in consensual sexual contact in a hotel.

[12] In June 2020 the complainer finally broke with the appellant in a telephone call but the appellant struggled with that and displayed manipulative behaviour by making repeated calls and threats to harm herself. This, along with the confusion caused by the relationship, caused the complainer significant stress and she was admitted to hospital for 3 days, losing 19 lbs in weight. In September 2020 she disclosed information to her doctor and this in turn led to police involvement. At interview and in response to charge the appellant denied any sexual activity with the complainer.

[13] The submissions in support of the appeal largely mirrored those made in mitigation before the sheriff.

[14] The appellant had no previous convictions. Shortly before the beginning of the relationship with the complainer, she had emerged from an abusive relationship and was herself at a low point and in a vulnerable position.

[15] She had been teaching for over 20 years and a number of impressive references testified powerfully to the positive impact she had had on the lives of a great many young people, often going above and beyond the call of duty to help them. There was no suggestion of any improper involvement with any other student. That career, which had been her life, was now lost to her. She had been having suicidal thoughts, as was confirmed by her general practitioner and her current partner.

[16] She recognised the impact of her offending on the complainer and her family and was remorseful. There was a low risk of future offending.

[17] The sheriff had placed too much weight on a comparison with the case of *Malcolmson* v *HM Advocate* [2021] SCCR 273, which was cited in mitigation, rather than looking at the circumstances of this case and of the appellant herself. It was accepted that the offence was serious but in all the circumstances a non-custodial disposal would have been appropriate. For the equivalent offence in England and Wales the starting point in the Definitive Guideline for a category 1A offence, which this plainly was, was imprisonment for 18 months, with a range between 1 and 2 years imprisonment. However, that was before mitigation was taken into account. Where there was sufficient prospect of rehabilitation a community order could be a proper alternative to custody. In any event the custodial sentence was excessive.

[18] In all the circumstances such an order should have been imposed on the appellant.

[19] We reject that submission. While each case has to be determined on its own merits, it is clear from *Malcolmson* and from the earlier case of *HM Advocate* v *Brough* 1996 SLT 1015, that in a case of this nature involving intimate sexual contact, a custodial sentence will be well-nigh inevitable unless the circumstances are truly exceptional. That is not the case here. As was said in *Malcolmson* at para [24], it is a not uncommon feature of cases like this that the offender is a person who is otherwise of good character. At the time of the offence the appellant was a mature woman and a very experienced teacher. The complainer had sought her assistance in her pastoral role so the position of trust was clear and indeed enhanced. Thereafter there was a significant degree of planning and a high level of grooming resulting in an improper intimate relationship, which lasted for a considerable time. The appellant engineered situations where she was alone with the complainer in her car, her home, and elsewhere. She knew it was wrong and could have taken steps to end the relationship at any time but chose not to. While the appellant has expressed remorse, we note that in speaking to the author of the Criminal Justice Social Work Report, she attributed a large measure of responsibility for what happened to the complainer, which is a subversion of the true position.

[20] That having been said, there is force in the submission that the sentence was excessive. Having regard to all the circumstances, and bearing in mind the Definitive Guideline as a cross-check, we consider that the appropriate headline sentence would have been one of imprisonment for 21 months.

[21] We shall accordingly allow the appeal to the extent of quashing the sentence of imprisonment of 27 months and imposing in its place a sentence of imprisonment of 16 months, reduced from 21 months on account of the timing of the plea.