**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2023] HCJAC 45**
**HCA/2023/474/XC**

Lord Justice Clerk
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

GH

Respondent

**Appellant: A Edwards KC, AD; the Crown Agent**
**Respondent: G Reid; Paterson Bell, Solicitors, Edinburgh for L & G Robertson Ltd, Glasgow**

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21 November 2023

**Introduction**

[1] The respondent was convicted after trial of two charges involving the same complainer, his former partner, VM. Charge 1 was that he engaged in a course of abusive behaviour towards her between March 2020 and October 2021. This libelled that he did

repeatedly utter threats towards her, repeatedly utter offensive and degrading remarks towards her, repeatedly question and restrict her contact with other persons, shout and swear at her and repeatedly contact her by text messages, voice messages, letter and electronic mail. Charge 2 libelled assault and robbery at her home on 5 November 2021. This libelled that with his face masked, he did enter the premises without her knowledge and conceal himself within, make demands for money, punch her on the head, cause her to fall to the floor and repeatedly kick and stamp on her head to her injury and did rob her of a mobile telephone. This charge was aggravated under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The sheriff imposed concurrent sentences of 6 months on charge 1 and 15 months on charge 2. He also imposed a non-harassment order for a period of 7 years.

[2] The Crown submits that the sentence imposed on charge 2 was unduly lenient.

**Background**

[3] The respondent's relationship with the complainer commenced in around December 2017. They lived together at her former address from March or April 2020, with a brief separation, until May 2021. The complainer's evidence was that the abuse libelled in charge 1 continued until, and indeed beyond, their separation. From then until the date libelled in charge 2, the respondent repeatedly attempted to contact the complainer, and continued his abusive behaviour towards her in writing and by text.

[4] On 3 November 2021 the complainer moved into her new address, the locus in charge 2. On 5 November she was in the property alone. She was experiencing difficulties in locking the doors and, for additional security, pushed a nest of tables against the inner living room door. Shortly thereafter, when she was in bed, she heard the tables moving.

She shouted her son's name believing that he might be returning home from a friend's house. A voice, which she did not recognise, responded "Yes". She went downstairs and saw a man, wearing dark clothes, gloves, and a balaclava masking his face. He punched her on a number of occasions and she fell to the floor. She was so dizzy she could not get up. The assailant then kicked and stamped on her head and body. She could feel the front of her head hitting the ground. At one point she lost consciousness.

[5] During the course of the attack, in particular while the assailant was lying on top of her and pinning her to the floor, the complainer attempted to identify the assailant. She tried to bite and scratch his hand to get DNA. She thought she was going to die. Trying to remove his latex gloves to check whether, like the respondent, the assailant was missing a pinkie finger on his left hand, she managed to expose the left wrist, revealing a silver Rolex she knew the respondent to wear. The assailant noticed she had recognised this and his demeanour changed.

[6] When asked what he wanted, the assailant responded "Money". Towards the end of the assault, he demanded the "kitchen keys". The complainer pointed towards the kitchen worktop. The assailant grabbed them and her phone and exited the property via the rear door. The complainer went to her neighbour's house and called the police. A joint minute agreed that she attended hospital with multiple soft tissue injuries to her head, face and wrists. She gave evidence of suffering from PTSD and a brain injury because of the attack. She was suffering cognitive difficulties. She had sought psychological assistance and had been unable to return to her employment as a pharmacist. This evidence was given without objection. DNA from a piece of latex glove and from under the complainer's fingernail matched the respondent's.

**The sheriff's report**

[7] In his report the sheriff describes the attack on the complainer as very unpleasant and deeply violent. The respondent entered the complainer's property, masked and disguised, while she was alone, and assaulted her over a significant period. The motive was not robbery and the offence fell to be viewed against the background of charge 1. As to the consequences for the complainer, he had to proceed to sentence on the basis of the indictment before him which did not specifically libel severe injury or any kind of permanent impairment. The appellant's relevant conviction for domestically aggravated breach of the peace was almost 20 years old. The sheriff considered that 15 months was the appropriate sentence on charge 2, at least in part on the basis that the accused had never previously served a custodial sentence. On one view a consecutive sentence was merited, given that the offending was different, occurred on different dates and could thus be viewed separately. However, in isolation charge 1 would be likely to have resulted in summary proceedings.

**Submissions for the Crown**

[8] The sheriff erred in his approach to the Sentencing Process Guideline and the Principles and Purposes of Sentencing Guideline. The former required that he follow an 8-step process. It was not clear from the sheriff's report that he had done this either at all or in the prescribed order. He did not assess the respondent's culpability and the seriousness of the harm caused; he did not identify the appropriate sentencing range; and he did not state what specific aggravating and mitigating factors were taken into account and the respective weight attached to them.

[9] The respondent's culpability was high. He had intended to cause significant harm, and there were substantial degrees of planning and premeditation. The sheriff did not address these issues, and seems to have underestimated the seriousness of the attack. He erroneously failed to take into account the complainer's evidence about the impact of the assault, as well as her victim impact statement (*West* v *McNaughton* 1990 SCCR 439; *McCann* v *Cardle* 1989 JC 1). This evidence was relevant to the degree of harm, which fell in the medium-high range.

[10] There were significant aggravating factors :

(i) the offence was committed at the complainer's home;

(ii) he entered the home without permission overcoming the limited security in place;

(iii) the victim was at home alone and during hours of darkness;

(iv) he robbed her of her phone;

(v) the targeting of a former partner;

(vi) the background of an abusive domestic relationship;

(vii) the previous relevant conviction.

[11] The CJSWR assessed the respondent as posing a medium risk of domestic abuse related offending. Despite DNA evidence the respondent continued to deny the offence. The sheriff failed to take into account that, in consequence of the sentence, the respondent, as a "short-term prisoner" will be eligible for automatic release after serving one half of the sentence. A *cumulo* or consecutive sentence was more appropriate to reflect the respondent's overall criminality and the totality of his offending towards a single complainer (*HM Advocate* v *RM* [2023] HCJAC 43, paras 46-47).

**Submissions for the respondent**

[12] Counsel for the respondent accepted that the sentence was lenient, but submitted that it was not unduly so. Although the implication from the sheriff's observations about the detail of the libel implied that he considered himself constrained by the libel "to injury", he made specific reference to the victim impact statement, saying "The consequences of the assault were also eloquently described in her victim impact statement which I read carefully in advance of the diet for sentence."

[13] It was submitted that the sheriff had properly considered the terms of the applicable guidelines, and it was not necessary for him to set out every step in the process. The sentence, whilst it may be described as lenient, was nevertheless within a range reasonably open to the sheriff.

**Analysis and Decision**

[14] We are satisfied that the sentence in question meets the test set out in *HM Advocate* v *Bell* 1995 SLT 350 and is unduly lenient. Before setting out the reasons for that conclusion, we should make it clear that we do not accept the suggestion that the Sentencing Process Guideline somehow imposes a requirement on judges to set out in detail the method by which they arrived at the final sentence, or requires them to approach the issue of sentence by approaching the factors in question in a prescribed order. The Guideline itself makes that clear in paras C and D of the introduction thereto:

> "C. The sentencing decision may be made swiftly and in many cases the court may appear to consider some or all relevant factors at the same time. Where a court does not expressly take any individual step, that does not in itself amount to a decision not to follow the guideline.
>
> D. A court may choose to explain aspects of a sentence it has passed by reference to a specific part of this guideline. It does not have to give full reasons as to how each part of the process has affected the sentence."

[15] When faced with an argument that a sentencing judge has not followed a guideline the court will not approach that matter as if the judge were required to set out a template or tick sheet showing his workings. The guidelines are just that: guidance. They do not impose a rigid framework on the judge. Sentencing remains an essentially holistic exercise and whether a sentence may be described as excessive or unduly lenient will be determined according to the whole approach taken by the trial judge, and it is not be to be assumed that simply because a specific step is not recorded, or not mentioned, that it has not been taken into account.

[16] That is of course a different matter from saying that the sentencing judge has taken certain factors into account but has accorded them a weight which they do not merit, or which is excessive, in the whole circumstances of the case, allowing for the level of discretion rightly to be accorded the sentencing judge.

[17] Nor do we accept the Crown submission that the applicable early release provisions have a part to play in the selection of the sentence – see *McKnight* v *HM Advocate* 2008 SCCR 983. Further, although for reasons given below we consider that the sheriff underestimated the respondent's culpability, we do not accept the submission that he failed entirely to recognise that the respondent intended to cause harm. That intention is an inherent element of the crime of assault, as well as the aggravation, and there is no reason to think that the sheriff did not proceed on that basis. However, we do consider that the sheriff did not pay sufficient account to the highly sinister nature of the offending, and the clear inference that the respondent intended to terrorise the complainer and put her in a state of extreme fear.

[18] In addition, the sheriff erred in according greater weight to alleged mitigation than the factors in question - limited criminal history; good work record; being in another relationship; having family support; and general personal circumstances - merit when considered against the very serious nature of the offending. The sheriff's correct description of the offence as "deeply violent" is not adequately reflected in the sentence selected. Moreover, he seems not to have recognised the extremely serious factor that the respondent entered the complainer's home, overcoming such security as there was, and that the whole circumstances of the offence indicated a significant degree of planning and preparation. It was a non-sequitur for the sheriff to say that the possibility of a consecutive sentence was rejected because the offence on charge 1, taken in isolation, may have merited proceedings on summary complaint only. That charge was not to be taken in isolation any more then charge 2 was. Having determined the sentence selected for charge 1, the task for the sheriff was to impose a sentence on charge 2 which fully reflected the culpability and harm involved in the offence.

[19] The sheriff indicates that, although there was detailed evidence from the complainer about the harm sustained, he considered that he required to sentence on the offence as libelled, which was limited to an allegation of injury without the epithet "severe", and with no allegation of permanent impairment. However, evidence from the complainer about the serious consequences and aftermath of the assault was led without objection. A court is entitled to take such evidence into account, whether it impinges on conviction or sentence (*HM Advocate* v *McNaughton* 1990 SCCR 439). The court may take account of the harm to the victim, including her evidence, and the content of her victim impact statement so far as that is relevant to the libel. It was not impermissible, for example, for the sheriff to take into account the existence of psychological injury or PTSD, in respect of which the complainer

said she was being treated. Her concerns – being scared of the dark, alarmed by people dressing in a certain way, including "hoodies" – are relevant to assessment of the harm caused to her. It is undoubtedly true that robbery was not the motive for the attack, but nevertheless robbery there was, and the nature of the item stolen (the complainer's mobile phone) is significant in the context of a history of domestic abuse which involved controlling behaviour by questioning and restricting her contact with other persons. Again, this aspect of the offence, together with the whole background of an escalating pattern of domestic abuse, and the targeting of her as the respondent's ex-partner, do not seem to have been given sufficient weight by the sheriff. The sheriff seems to have placed little weight on the relevant prior conviction on the basis that there were no other convictions, and that it dated from almost 20 years ago, but these factors have only modest relevance when one considers the escalating pattern of domestic abuse involved in the current charges.

[20] In light of these factors a sentence of 15 months' imprisonment was "outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate." (*HM Advocate* v *Bell* 1995 SLT 353, p 353C-E).

[21] The sheriff was right to recognise that the circumstances of the offences might more readily have justified consecutive rather than concurrent sentences, but whether the sentences were concurrent or consecutive is not really the issue in the present case. The real issue is whether the sentence of 15 months was within a reasonable range for the offending on charge 2, taken in the round. For the reasons we have identified it was not; we will quash that sentence and impose a consecutive sentence of four years' imprisonment.