



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 7  
HCA/2024/000431/XC

Lord Justice Clerk  
Lord Matthews  
Lord Beckett

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

RB

Respondent

**Appellant: Harvey, AD; the Crown Agent**  
**Respondent: Brannigan; Faculty Appeals Unit**

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28 January 2025

**Introduction**

[1] On 14 June 2024 at Kilmarnock High Court, the respondent was found guilty of two sexual offences against his children. These were (i) causing his son, LC, to participate in sexual activity, on an occasion between April 2011 and April 2013 (charge 1); and (ii) rape of

his daughter, HH (charge 3), on an occasion between November 2019 and March 2020. LC was aged between 4 and 5 years old at the time of the offending in charge 1. HH was 10 years of age at the time of the offending in charge 3.

[2] The respondent was sentenced to a period of 12 months' imprisonment on charge 1 and a period of 6 years' imprisonment on charge 3, to be served consecutively. The sentence is appealed by the Crown on the grounds of undue leniency.

## **Facts**

### ***Charge 1 - "LC"***

[3] LC gave his evidence by way of a pre-recorded commission in 2023. He was 16 years of age at the time of the commission. The respondent and LC's mother, EC, were separated. During the libel period, the respondent had contact with LC at weekends. LC would sometimes stay over at the respondent's house. The respondent and LC would, from time to time, go walking together. On one occasion, the respondent took LC on a walk along an abandoned railway line in Ayrshire. At one point during the walk, the respondent stopped walking, asked LC to pull his trousers and underwear down and told him to bend over. LC did what the respondent asked because he did not want to upset the respondent or make him angry. The respondent pulled his own trousers and underwear down so that his penis was exposed. LC thought at the time that the respondent was going to urinate on him. LC panicked and pulled his trousers and underwear back on. In his evidence, LC explained that he thought that the respondent was going to kill him.

### ***Charge 3- "HH"***

[4] HH also gave her evidence by way of a pre-recorded commission in 2023. She was 14 years of age at the time of the commission. The respondent and HH's mother, LH, were

also separated. During the libel period, the respondent had contact with HH every Wednesday and every second Saturday. HH would frequently stay overnight with the respondent and she had her own bedroom in his house. HH would often watch television in the respondent's bedroom since she did not have a television of her own. On one occasion, HH was lying on the respondent's bed watching television. The respondent entered the room and lay on the bed next to her. The respondent grabbed HH by the arm and then around her waist. He pulled her towards him. HH was on her side and the respondent was behind her. The respondent pulled down his trousers and underwear. HH told him to get away from her. The respondent ignored her request and instead pulled down HH's leggings and underwear. The respondent proceeded to rape HH. HH tried to punch and kick the respondent. She tried to get away from the respondent but he kept pulling her back towards him. The respondent continued to rape HH for around 5 minutes. When the respondent stopped raping HH, she ran away. She tried to escape from the house however both the front and back doors were locked. When she realised that she could not escape, she hid in a closet next to the back door. When the respondent emerged from the bedroom, he smoked a cigarette and told HH that it was "time to go home." The respondent walked HH to her mother's house. The respondent reported the rape to her mother and the respondent had no further contact with HH.

#### *The Criminal Justice Social Work Report*

[5] The CJSWR reported that the respondent continued to deny all of the conduct within charges 1 and 3. He presented a high level of sexual recidivism on one assessment tool and a medium risk of sexual reoffending on another. The social worker noted that the respondent significantly lacked insight into the seriousness of the offences.

### *HH's Victim Statement*

[6] A Victim Statement was completed on HH's behalf by her mother, LH, in November 2022, some three years or so after the offence and when HH was 13 years old. It recorded that HH felt scared, often had mood swings and experienced nightmares in the aftermath of the rape. She was supported by her family and a social worker together with a support group and her school. Her mother also commented that "she has just started going out to play with her friends" and that "she didn't want to go out with her friends until recently."

### *The Trial Judge's Report*

[7] In selecting the sentence, the judge assessed the culpability of the respondent. He took into account the fact that, in each case, the respondent offended against his children whilst they were in his care, abusing the position of trust he was then in. He assessed the harm caused to LC as "limited" whilst describing the harm caused to HH as "significantly different", in that the offence committed against HH caused her "at least some psychological harm or trauma."

[8] In assessing aggravating factors, the judge noted the young ages of the complainers. Limited assistance could be drawn from the CJSWR since the respondent continued to deny the offending. The judge also noted the respondent's non-analogous previous convictions.

[9] In response to the Note of Appeal, the judge rejected the assertion that the psychological harm suffered by HH could be characterised as "significant." Beyond a basic level of psychological harm inherent in the nature of the offence, an assessment of psychological harm experienced by a complainer was for a sentencing judge to determine. The contents of the Victim Statement taken together with the presentation of HH when giving evidence could not support a view that psychological harm was significant or severe.

[10] A “cross-check” against the comparable sentencing guideline for England & Wales suggested that in that jurisdiction the starting point for an offence such as that set out in charge 3 would be 10 years’ imprisonment, and a range of between 8 and 13 years’ imprisonment. Such a range would be out of step with sentencing practice in Scotland. A similar exercise carried out against the draft Scottish equivalent guideline, currently the subject of consultation, would result in a sentencing range of between 6 and 9 years’ imprisonment.

[11] The offending against LC, if prosecuted alone, would likely not have been prosecuted in the High Court or would not have justified a custodial sentence.

## **Submissions**

### *The Crown*

[12] The respondent was in a position of trust towards HH. Application of the court’s guidance in *Collins v HM Advocate* 2017 JC 99 (para 41) would indicate the sentencing range was 8 to 10 years’ imprisonment. Parents are in an enhanced position of trust compared with teachers, care workers and others.

[13] The offending against HH was aggravated by her young age, the sudden and unexpected nature of the attack, the force used to carry out the offending, HH’s attempt to escape from the locus and the psychological harm caused to her.

[14] The judge erred in finding that the psychological harm to HH was not severe or significant. “Severe” or “significant” psychological harm meant harm going beyond the harm inherent in the nature of the offence: *R v Chall and others* [2019] 4 WLR 102 at paras 25 & 26. The content of the Victim Statement, completed some two years following the

offending, suggested long-term and severe consequences going beyond the harm inherent in the nature of the offence.

[15] Absent exceptional factors, a sentence for the rape of a young child should be much higher than a sentence for rape under section 1 of the 2009 Act, reflecting the increased harm and culpability when an adult offender decides to engage in penetrative sexual activity with a child under 13 years of age.

[16] Whilst no mechanistic cross-check could apply, the major disparity between the English guidelines and the judge's sentence confirmed that the sentence was unduly lenient: *HM Advocate v AB* 2016 SCCR 47 at para 13; *HM Advocate v Docherty* [2024] HCJAC 36 at para 20.

### ***Respondent***

[17] It could not be said that the sentence selected by the trial judge was outwith the sentencing range that could reasonably have been identified for an offence of this nature. The breach of trust element, which was taken into account by the trial judge, did not require him to select a starting point of 8-10 years' imprisonment. The Criminal Justice Social Work Report did not provide the court with sufficient information that would justify an extended sentence.

[18] Whilst a cross-check of a sentence against any available sentencing guidelines from England & Wales was a standard approach to take, care required to be taken when so doing, having regard to the distinguishing features between Scottish and English sentencing practice.

[19] The trial judge attached sufficient weight to the aggravating factors, which included the age of the complainers, the breach of trust, the use of force used in the commission of the

crime against HH, and her inability to escape the locus by virtue of being locked in the property.

[20] The trial judge properly considered the level of harm suffered by the complainer HH. In arriving at his conclusion that the harm suffered was not severe, he had regard to the evidence heard at trial together with the contents of the Victim Statement prepared by HH's mother. The trial judge's conclusion on the level of harm was one he was entitled to reach.

### **Analysis and Decision**

[22] The respondent was convicted of two serious charges of sexual abuse of his own children. We do not agree with the assessment of the trial judge that the offending against LC was of sufficiently minor nature that it might have been prosecuted on summary complaint: causing a child of 4 or 5 to participate in sexual activity, of whatever kind, is a serious matter, made all the more serious in this case by the egregious breach of trust involved. From the evidence it was clear that the child found the experience both alarming and frightening.

[23] As to the rape of HH, this is an extremely serious charge, with numerous aggravating factors. The respondent's conduct involved a breach of one of the most sacrosanct bonds of trust, that between parent and child. He took advantage of contact arrangements with the child to commit the offence of rape. He used a degree of force to overcome the child's active resistance, and locked the doors to prevent her escape.

[24] The trial judge in our view did not attach sufficient significance to these serious and aggravating factors. His conclusion that "on a fair reading of the victim statement, in my assessment it could not be said that the psychological harm set out therein was 'significant'" is not easy to understand.

[25] It is true that a sentencing judge requires to try to make an assessment of the degree of psychological harm which may have been caused in any individual case. It is not, however, necessary for the judge to have a formal report to enable him to do this in any reasonable manner. Nor is a Victim Statement, prepared by a victim, or in this case her mother on her behalf, to be assessed or interrogated with any degree of formality. Such documents are prepared by lay people, and must be assessed in that light. The extent to which, in any individual case, a court may be able to draw conclusions about harm may vary according to the individual Victim Statement and the precise factual circumstances. However, that reasonably severe psychological harm, with potential long term consequences, will have been caused to a child of 10 from having been raped, forcibly, by her own father is a statement of the blindingly obvious. Such detail as there was in the Victim Statement was more than sufficient to confirm that to be the case here: the Statement was provided three years or so after the offence, and indicated that only recently had the child started going out to play with her friends again, and that she feels (present tense) terrible and scared. It is obvious that the harm in this case goes beyond that inherent in the offence of rape. As a consequence, when using Guidelines from England and Wales as a cross-check, the trial judge erred in considering that the conduct would have fallen within category A3; it would clearly have fallen within A2.

[26] The observations made in the case of *Collins* at para 41 are of significance in the context of an offence such as the present:

“[41] For offences involving the rape of a complainer, or other penetrative sexual abuse of several complainers, in respect of whom the offender was in a position of trust or authority, headline sentences in the region of eight to ten years may be appropriate (*McBrearty v HM Advocate*; *George v HM Advocate*). The breach of trust involved, the duration of the offending, and the number of victims may, however, be such as to warrant a headline sentence in excess of ten years (*Murray v HM Advocate*; *Newman v HM Advocate*).”



An appropriate sentence for charge 1 would in our view be one of 2 years imprisonment; an appropriate sentence for charge 3 would be one of 10 years. A consecutive sentence would be appropriate having regard to the fact that the offence against HH was committed quite separately to the offence against LC. Applying the totality principle, we consider that the total *cumulo* should be reduced to 11 years. Moreover, having regard to the repetition of the offending, and the risk assessments, we are satisfied that this is a case which requires the imposition of an extended sentence. We shall therefore quash the sentence imposed and substitute a *cumulo* extended sentence of 14 years, consisting of a custodial term of 11 years and an extension period of 3 years.