

SCOTLAND / JUDGMENT

CS v His Majesty's Advocate

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APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 40 HCA/2024/550/XC Lord Justice Clerk Lady Wise Lady Carmichael OPINION OF THE COURT delivered by LORD BECKETT, the LORD JUSTICE CLERK in APPEAL AGAINST CONVICTION AND SENTENCE by CS against HIS MAJESTY'S ADVOCATE Appellant Respondent Appellant: Graham KC, Baillie; Faculty Services Limited (for Craig Wood Solicitors, Inverness) Respondent: Harvey AD; the Crown Agent 10 September 2026

Introduction

[1] The appellant was convicted after trial at the High Court of Justiciary at Inverness on 26 August 2024 of five sexual offences against two former partners. He has leave to appeal against conviction on one ground, a contention that senior counsel then instructed was deterred from presenting an application under the Criminal Procedure (Scotland) Act 1995 section 275 by the view of the law of evidence then prevailing. Following the decision of the 2 UK Supreme Court in *Daly & Keir v HM Advocate* [2025] UKSC 38, 2026 SC (UKSC) 1, he asserts that he would be permitted to adduce evidence about interactions he had with each complainer following the conduct of which he was convicted. It would have undermined the case against him. Its absence from his trial has caused a miscarriage of justice. [2] The appellant also challenges, as excessive, his sentence of imprisonment for 11 years imposed on 11 October 2024. The indictment [3] The charges, alleging offending committed at various addresses in settlements in the north of Scotland, can be summarised as follows: Charge (2) Contravention of section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 on various occasions between 7 October 2005 and 15 April 2007 by having unlawful sexual intercourse with AA aged 14 and 15, a girl then above the age of 13 but under the age of 16. Charge (3) Indecently assaulting AA aged 15 by penetrating her anus with his penis on 26 July 2006. Charge (4) Raping AA aged 16 on an occasion between April and October 2007. Charge (7) Raping BB while she was asleep and unable to consent on various occasions between 1 December 2012 and 30 April 2018. The trial judge reports that the jury's deletion of the second locus on this charge signals that the jury found that the last instance of rape had occurred by January 2015, restricting the period of his offending on charge 7 to about 2 years. Charge (9) Raping BB on 10 January 2013. [4] A further six charges were either deserted pro loco et tempore before the trial or withdrawn at the conclusion of the Crown case. Evidence 3 AA [5] AA, then aged 36, explained that she met the appellant when she was 13 or 14 years old and he was 17. They formed an intimate relationship, frequently having

sexual intercourse. Her parents disapproved of the relationship because of the age gap, but nothing would have stopped her at that time. She had to lie to the appellant's parents about her age when she visited their house. She said she had sex with the appellant "as often as he wanted." It seems that they did not use contraception as she miscarried pregnancies before she was 16. He was controlling at times and she felt quite isolated. [6] AA attended her brother's 18th birthday party with the appellant when she was 15 and they were both drunk. When they returned to his house, they were having consensual sex when the appellant grabbed her and forcefully penetrated her anus with his penis. There had been no prior discussion about anal sex. She was crying because of the pain, but he continued even when she tried to stop him. He had a firm grip on her hips and kept pulling her back. This caused very considerable pain.

- [7] When AA had just turned 16 and was about 22 weeks pregnant, she was lying in her bunkbed, fully clothed, when the appellant approached her in a drunken state. He pulled down her trousers and had sex with her from behind while she was facing the wall. He did not ask her to have sex. She was crying throughout while holding her baby-bump. When he was finished, he was sick in her shoe. [8] She reported his offending in 2021, explaining that as she got older and more mature, she realised what had happened to her was wrong. It had always been in the back of her mind. 4 [9] AA confirmed in cross-examination that she had consented to vaginal intercourse after her brother's birthday party but not anal intercourse. It would have been clear to the appellant that she was not consenting on the occasions he raped her and indecently assaulted her. [10] Senior counsel asked AA whether she remembered writing to the appellant for his 21st birthday after they had broken up. She assented, explaining: "I was in love with him. I would never deny that". She had been devastated by the breakup, even though he "wronged [her] so many times...". Senior Counsel then asked: "If he had been a rapist and this was always in the back of your mind, I was thinking why would you try to contact him 10 years later?" AA replied that she did not know.
- [11] Questioning then turned to defence production 3, a series of text messages between the appellant and a number said to be associated with AA. The text messages involved friendly exchanges between the parties in 2019, including some reminiscing about their relationship. The messages were often concluded with multiple "x" marks. AA claimed to have no memory of sending the messages but did not dispute that she sent them and accepted that the information therein related closely to her. In due course her mother confirmed that the messages appeared to be from AA, and the trial was conducted by both Crown and defence on the basis that they were.
- [12] Questioning turned to defence production 9, a letter that AA accepted sending the appellant on his 21st birthday listing 21 reasons why she loved him, continuing: "Q And the reason for asking you about it is obviously the way you've described him as having raped you on one occasion when you were pregnant and having anally penetrated you when you didn't want that to happen. He was still a rapist to you, you understand? A Yes, but I still stayed with him. 5 Q But more than stay with him, you were expressing what might be viewed as a

completely different picture of someone than the one you're describing today? A Yes. I was young there. I'm 33 now. I know what abuse looks like. Q I'm just asking you why. Why did you see him in that way? A Because I was in love with him, or I thought I was." BB [13] BB was 43 when she gave evidence, explaining that she met the appellant in 2010 and they commenced a relationship in June 2011. They moved into their first address together in December 2012. By January 2015, the couple had moved from their first to their second home together and BB was early in a pregnancy that led to the birth of her first son. She had two sons by the appellant, born respectively in 2015 and 2017, before their relationship ended in April 2018. She continued to live with him until July 2018. [14] BB's mother's funeral was held on 10 January 2013. She and the appellant were staying over at her father's house on a bed in the living room. In the early morning, the appellant asked her to have sex. She told him no, she was not in the mood. He said he just wanted to feel close to her and that sex would make her feel better. He was lying behind her and pulled down her pyjama bottoms and had sex with her. It would have been clear to him that she did not want to have sex. She recalled feeling her mother was watching her and just wanted it to be over. The appellant stopped when he ejaculated. [15] BB went on to explain that there were multiple occasions when she awoke in their first home to find the appellant having sex with her. She woke up feeling strange, and she just went along with it, although she described feeling "really weird" about it afterwards. This happened about 10 times. On one occasion, she awoke with the appellant having sex 6 with her while he pinned her face to the pillow. She could not get him off and she thought she was going to die because she could not breathe.

- [16] After they finally separated, they were in touch to arrange contact between the appellant and his sons. She got a Facebook friend request on 19 February 2020 from AA who she knew was an ex-partner of the appellant, but BB did not know her well. The appellant asked her about AA, and he said that she was saying he had raped her. He told her not to tell anyone about it. [17] In cross-examination, BB explained that so far as the sleeping rapes were concerned, the appellant would say he had no memory of it happening. Sometimes she would pull away and stop him and other times it was easier to let it happen. It felt weird but she got used to it. He would be lying if he said this did not happen at all. There were also times when he would wake her up and they would have sex (implicitly she meant consensually). [18] BB confirmed that after they separated, she was still communicating with the appellant. She acknowledged that she asked for his help with renovations to her new house and that until 2021 they dealt with each other amicably over the children. Appellant [19] The appellant was 36 by the time of the trial and denied meeting AA when she was 13: she was 16 and he was 18. He denied ever having sex with her before she turned 16. Their relationship lasted for about 18 months, ending around June 2009. AA was quite upset when the relationship ended. He accepted that he may have been at AA's brother's birthday party, but he denied being in a relationship with her at the time, or that he had sexual intercourse with her. He denied anally penetrating her and denied that they had sexual intercourse on the occasion described by the complainant. He denied that the event described 7 by the complainant on charge 4 occurred. He recalled having consensual sex with AA while she was pregnant but never when she was upset. [20]

The appellant spoke to the various text messages and the letter in defence productions 3 and 9. [21] The appellant confirmed that he was the former partner of BB and explained that they were in a cohabiting sexual relationship from 2012 until 2018. She moved out on 5 July

2018. She was the mother of his two young children. Both were born after they had moved to their second address (ie after January 2015). His younger son was born in 2017. He continued to have contact with the children after they separated. [22] The appellant denied raping BB. There had never been an occasion where he started having sex with BB when she was asleep. There were occasions where he woke BB up for sex and other occasions where she had woken him up to instigate sex. This did not always lead to sexual activity. There was no occasion where he initiated sex when she was asleep. The conversations that she had described as occurring afterwards did not happen, but she had told him not to wake her up if she was tired. He spoke to defence production 1, a text message from BB: "If I'm sleeping when you decide to come to bed, do not wake me for sex or I will be VERY grumpy LOL xxx". This was her joke; she was not serious. He would often finish work late at night and wake her for consensual sexual intercourse. He recalled going to BB's mother's funeral but denied having sexual intercourse with her that morning. Their relationship deteriorated upon the family's move to their second address. Other evidence

[23] DD, AA's mother, said that AA was about 14 when she started a relationship with the appellant, who was driving at the time. She disapproved of the relationship and was 8 angry when she found out they had been staying in each other's beds. She recalled AA becoming pregnant a few times during the relationship and thought that was when AA was under 16. In his speech to the jury, the appellant's counsel acknowledged that DD's evidence was capable of providing corroboration on charge 2 albeit he invited them not to find such corroboration. [24] IS and CS are the appellant's parents. Both gave evidence that they thought AA was 16 or 17 when the relationship started in around 2008. Speeches Crown [25] The Crown case relied on mutual corroboration. The Advocate Depute acknowledged the point that the defence would make about AA's denial that she could recall exchanging messages with the appellant in 2019 and did not refute it. The sexual relationship between AA and the appellant had started in about 2005, long before she had turned 16. That had been confirmed by DD, not least with reference to pregnancies. AA had given a credible reason for the delayed disclosure of the offending. She accepted that she had been in love with the appellant, but she had since matured. The offending spoken to by AA and BB, taken together, was a continuous course of offending systematically pursued with similarities in time, character and circumstance. Both complainers were credible and reliable, whereas the appellant was vague and evasive. Defence [26] To convict, the jury had to believe the testimony of both complainers. AA's evidence about her age at the commencement of her relationship with the appellant was clearly 9 unreliable. The appellant was only 2 years and 10 months older than AA and her evidence was that he had been driving a car when they first met. Accordingly, they could not have been younger than 17 and 14 respectively. [27] Senior counsel proposed, at page 52 of the transcript of his speech to the jury: "Now the biggest thing, you might think, in this case is [AA] contacted the accused in 2019 and you saw

some of the text messages that went between them. In fact, almost within a month of her contacting him, her mother contacted him as well. Now, did either of them or were either of them able to explain the reason for doing that?"

- [28] AA was unable to explain the reason why she had contacted the appellant in 2019. She had lied about sending messages in the first place. It could have been to rekindle their relationship, AA having seen that the appellant's relationship with BB had ended. AA's evidence was incredible and unreliable in attempting to explain why she was seeking to contact someone: "who, after all, is her rapist... she was contacting a person she knew as her rapist and wasn't prepared to explain ... why that is". [29] Pages 52-53 of the transcript record the following submission to the jury: "The prosecutor put the proposition in front of you that [AA] was a young woman when she'd finished the relationship with the accused, but by the time of 2021, when she went to the police, she was older and wiser. But she was only two years past
2019. So what was going on in 2019? You could guess about it, you shouldn't be guessing, but 2019 happened to be the end of his relationship with [BB]. If you guessed about it and you thought maybe this was somebody who wanted to rekindle a relationship with someone, an old boyfriend, who she had realised was no longer in a relationship. You don't actually know that for a fact and, again, as his Lordship would say, don't speculate. But, you're still left with, well, doing what?
- [30] At 54-55, he continued: "In one of the messages to him, she had said that her world had ended when she'd broken up. It was the worst feeling. In other words, she didn't want the relationship to end as her "21 reasons why I love you". She was saying, in 2019, that her world 10 had ended. It was the worst feeling. But she also said she was lucky she could laugh about it. Lucky she could laugh about it. And here we are, in 2024, in a rape trial in the high court. So to suggest that they could've laughed about it, or she thought it was something they could've laughed about in 2019, when she was a 27 or 28 year old, it's not a laughing matter anymore." He continued on this theme, at 55-56, with "You must be thinking she was the author of it. She actually knows what this is about, but she's not prepared to tell you. Is there any other conclusion you could draw about it. If you're satisfied the information identified her as the author, and you're satisfied she had contacted him, and you're satisfied that she said it was the worst feeling at the end of it and her world had ended, and she was lucky. Lucky that she could laugh about it. Well, you might have to wonder whether you could believe her in any of her evidence."
- [31] Concerning BB, counsel referred to evidence that the appellant and complainer had acknowledged that during the first part of their relationship they would each wake the other up to have sex. Founding on BB's description of the appellant's behaviour senior counsel earnestly explored with the jury the possibility that the appellant had not been conscious when "sleeping rape" events occurred, justifying acquittal for lack of criminal intent. He did not really address charge 9, preferring to remind the jury that they should not accept AA's evidence such that there was no corroboration for the charges involving BB. Note of Appeal

[32] Evidence was available, but not adduced, to demonstrate that the complainer BB had, following the end of their “mainstream” relationship, initiated a casual sexual relationship with the appellant during which the parties had consensual sexual intercourse. The excluded adminicles included evidence that BB: (i) contacted the appellant 2 to 3 weeks after the conclusion of their “mainstream” relationship, inviting him to attend her home. This was beyond the ultimate date libelled in charge 7; 11 (ii) on receiving the appellant into her home, he found her to be awaiting his arrival in a state of undress; (iii) instigated and then participated in consensual sexual activity, including sexual intercourse, with him on the occasion libelled in sub-paragraph (ii) hereof; (iv) continued to initiate and participate in consensual sexual activity regularly with the appellant within her home on other occasions until January 2021; (v) in December 2018 and March 2020 repeatedly, and at her own instigation, engaged in sexual activity whilst on video calls with the appellant following the conclusion of their “mainstream” relationship; (vi) in May 2019 suggested to the appellant that she wished to recommence a formal relationship with him; (vii) in the course of their casual relationship, instructed the appellant to purchase sex toys for them to use together whilst engaging in the sexual activity they enjoyed; (viii) between 1 May 2018 and 31 January 2021, sent the appellant text messages, following the end of their relationship, which expressed a positive view of the appellant as a partner and father. [33] The excluded adminicles included evidence that AA: i) Repeatedly sent text messages to the appellant between 1 May 2007 and 31 December 2019; ii) Called the appellant in January 2019 and engaged in “cordial conversation”; iii) Asked the appellant to recommence their relationship in 2019; and iv) Sent the appellant a letter on his 21st birthday stating that she loved him and outlining the reasons why she loved him. [34] The evidence, if admitted, would have had a bearing on the credibility of the evidence of the complainers. Its absence rendered the trial unfair because it was incongruous with the evidence of the complainers in the trial and would have given rise to “reasonable doubt as to the credibility and reliability of [their] evidence.” 12

Submissions

Appellant [35] Senior counsel wished to acknowledge that much of the additional questioning for AA had been put and answered in the trial. The purpose of the questioning signalled in the Note of Appeal was to challenge the credibility of the complainers. The credibility of the complainers was decisive of the issues at trial. Justice to the appellant required that it should have been possible for him to challenge the credibility of the witnesses by leading the evidence: *Daly & Keir*. The continued behaviour of the complainers following the sexual offending may have caused doubt regarding their credibility. Had the complainers been raped in the manner libelled, it would seem incongruous that they would choose to engage in the behaviour sought to be adduced in evidence. The jury may well have regarded it unlikely that the complainers, had they been raped, would then maintain a relationship of that kind with their rapist. The evidence, if admitted, would have significantly strengthened the appellant's defence. Crown

[36] Concerning AA, most of the evidence said to have been improperly excluded was squarely before the jury. Messages demonstrating the parties' contact and its content was led in evidence, both in cross-examination of the complainer and in examination-in-chief of the appellant. Reference was made to the messages in Senior Counsel's speech, as was an invitation to speculate on the purpose of AA's approach to the appellant in 2019. The letter sent to the appellant on his 21st birthday was the subject of repeated examination throughout the trial. The jury would have been aware of the ongoing contact between the parties following the end of their relationship. 13 [37] For BB, evidence of a further sexual relationship after the end of their formal relationship served only to provide additional specification of sexual activity continuing after the rapes libelled in charges 7 and 9. The probative value of the additional evidence was so slight as to not outweigh considerations of the proper administration of justice under section 275(1)(c) of the 1995 Act. In circumstances where the jury knew of the nature of the parties' relationship, to adduce evidence of the use of sex toys, engaging in phone sex and waiting undressed for the appellant would be an unnecessary intrusion of the complainer's dignity and privacy. Daly & Keir was not authority for a right to lead any and all evidence of consensual sexual acts after an allegation, irrespective of the implications that might have for the complainer's dignity and privacy. [38] There had been no miscarriage of justice. There had been mutual corroboration between two complainers. In addition, there was independent corroboration from DD for AA's account in respect of charge 2. The appellant was able to, and did, effectively challenge the credibility of the complainers during the trial. The verdict was discerning. There was no real possibility of a different verdict had the additional material been adduced. Decision [39] It is not possible to know what the decision would have been had applications been made under section 275 at the preliminary hearing at first instance. It is possible, but not certain, that the prevailing view of the common law would have dissuaded a judge from allowing the applications. In the interval between the decision in CJM v HM Advocate

[2013] HCJAC 22, 2013 SLT 380 and the decision in Daly & Keir, first instance judges did allow some section 275 applications seeking to adduce evidence of extrinsic sexual behaviour where the statutory criteria were met, despite what was represented to the contrary in the hearing of Daly & Keir in the UK Supreme Court. There may be few appeal decisions to vouch that, but that is because generally no one had an interest in appealing against such an allowance when made in appropriate circumstances. An exception is RR v HM Advocate [2021] HCJAC 21, 2021 JC 167 where an application to permit evidence of previous sexual activity and discussions about future sexual activity was allowed by the preliminary hearing judge. The appeal court considered that the appeal was concerned with procedure and not the merits of the first instance allowance of the application and required that the application be considered again after notice had been given to the complainer so that she could comment on it and her comments communicated to the first instance judge deciding the application. [40] Since the publication of the Full Bench decision in RR on 7 October 2020, it is standard practice for the prosecution to put the

substance of a section 275 application to a complainer and ask for comment and confirmation of whether the averments are accepted as true. This information is recorded and shared with the defence and the judge hearing any section 275 application. [41] If applications had been (made and) granted in the appellant's case, the PH judge would have allowed a grant sufficient to enable the appellant to make the general points he wished to make about incongruity between the allegations and particular conduct on the part of the complainers. The judge would have limited it in order to protect the privacy and dignity of the complainers from exploration of extrinsic conduct that went further than necessary to make the appellant's desiderated points about the credibility of the evidence of AA and BB. If applications had been made and granted widely at the PH, it may well be that the trial judge would have restricted them under section 275(9) once it became clear that 15 the appellant had elicited the material he needed to make his points about the credibility of AA's and BB's respective accounts. [42] In *Daly & Keir*, the UK Supreme Court signalled a risk that the way the common law of evidence had developed in Scotland in this context, generally barring access to the statutory relief under section 275, could deprive an accused person of a fair trial. Since that decision was issued, this court's approach has been to evaluate applications and evidence according to the scheme enacted in sections 274 and 275 which has been endorsed by the High Court of Justiciary, Judicial Committee of the Privy Council, UK Supreme Court and European Court of Human Rights as apt to respect an accused person's fair trial rights. Looked at in this way, some of the proposed material in this case may be of some relevance in the particular circumstances of this case but it would also have to meet the test in section 275(1)(c). It must have significant probative value, likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited. The proper administration of justice includes appropriate protection of a complainer's dignity and privacy and ensuring that the facts and circumstances are relevant to an issue to be put before the jury and commensurate to the importance of that issue to the jury's verdict: section 275(2). [43] There is something artificial about the exercise facing us because there was no section 275 application. The PH judge, looking to the future, would have had very limited information on which to decide upon the application. He would not have known how the evidence would unfold in the trial. We know little or nothing about what the complainers would have said in response to the averments in the note of appeal. Such information as we have about that derives only from what happened at the trial. 16 [44] The issue as presented now, is whether there has been a miscarriage of justice. Senior counsel explained in the appeal hearing that he was not raising any point under Article 6 of the European Convention on Human Rights. His point was that there has been an unfair trial under Scots law and, accordingly, a miscarriage of justice. Charges 2, 3 and 4 [45] It is now clear from the transcripts, supporting the judge's report summarising a trial conducted by a different senior counsel, that almost all the evidence said to have been improperly excluded was explored, at length, in cross-examination of AA and in the appellant's evidence-in-chief. The jury knew of her feelings about the appellant when he turned 21, some years after his offending ceased. The jury cannot have avoided the conclusion that AA was less than

candid, in responding to questioning about electronic communications that she plainly shared with the appellant more than a decade after the offending ceased. It did not deter the jury from convicting the appellant unanimously on charges 2 and 3 and by majority verdict on charge 4. This suggests that the jury were careful and discriminating in their assessment AA's evidence, entitled as they were to accept some parts of her evidence even if they rejected others. [46] Senior counsel confirmed that there was no message or recording to support the averments in his second and third points. They were based on the appellant's recollection of a telephone call, or calls, between parties.

- [47] Given the material already before the jury with similar import, better vouched by real evidence in the form of transcripts of messages and a birthday card, and amply sufficient to allow the appellant to challenge the credibility of AA's evidence, as he also did by giving evidence of denial that any such sexual activity occurred, and his counsel did 17 through cross-examination of AA and in detailed submissions to the jury on the appellant's behalf, bearing also in mind the availability of mutual corroboration on all charges and free-standing corroboration on charge 2, the ground of appeal concerning AA is not made out. That is so whether we apply the correct approach under Scots law of using our collective judicial experience and evaluating all the circumstances of the trial to determine whether there has been an unfair trial under Scots law and a miscarriage of justice, TH v HM Advocate
- [2025] HCJAC 46, 2026 JC 58 and the cases therein cited, or asking ourselves whether the absence of allowance of the further questioning proposed leads to the conclusion that there would have been a real possibility of a different verdict. The latter test was identified in *McInnes v HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28 for breach of Article 6 where evidence was missing from a trial because of prosecution failure of disclosure. If the issue had been properly raised before us, we would have concluded that there was no real possibility of a different verdict had extra material to the same effect as that already before the jury featured and that the trial was Article 6 fair. Charges 7 and 9 [48] The jury knew that parties remained living together for more than three years after the end of what they considered to be his sexual offending against BB, which was, at latest, January 2015. During that time, two children were born. The second was undoubtedly conceived a year and a half after the sexual offending came to an end. Even when they separated, the jury knew that they were in touch about renovations to BB's new home and on an ongoing basis concerning their children. Despite knowing that there was an ongoing sexual relationship for a considerable period after the crimes of rape finished, this did not cause the jury to reject BB's evidence that she was raped. 18
- [49] Knowing what is known now, it may be doubted whether the material now proposed would have added anything beyond what the jury already knew, other than a level of prurient detail that would be unlikely to have been allowed in a section 275 application at any time. A court might allow some general questioning to elicit that there was ongoing sexual intimacy between the parties over a particular post-rape period, but that would not require detail of

the sort proposed in the note of appeal. Such detail would be highly invasive of BB's privacy and dignity, and unnecessary to achieve any legitimate challenge to the credibility of her evidence. Its probative value would have been negligible given the evidence before the jury of an ongoing intimate relationship. [50] The short point is that the jury knew that, for at least a year and a half after they found that the last act of rape had occurred, the appellant and BB were living together as partners and having sexual intercourse. In these circumstances, in considering the availability of mutual corroboration, the appellant testifying and stating his defence, his counsel cross-examining BB in accordance with his defence and making submissions about it to the jury, who rejected the appellant's denials that any such sexual activity as that described by BB occurred, and how little more the picture before the jury would or could have changed, we are not persuaded that the trial was unfair under Scots law. We are not persuaded that there has been a miscarriage of justice. Nor if the issue had been formally raised, would we be persuaded that such material as might have been allowed under a section 275 application, even if it exceeded the scope of what the jury learned from the evidence in the trial, would allow a real possibility of a different verdict. [51] For these reasons the appeal against conviction is refused. Sentence 19 [52] In mitigation, senior counsel highlighted the appellant's youth at the time of charges 2, 3 and 4. The appellant had matured and was in a new relationship with a supportive partner with whom he has a stable relationship. He had not offended whilst on bail between 2021 and 2024. [53] The judge had a justice social work report. He knew of the appellant having a previous conviction on summary complaint for assault in 2006 that attracted a community service order with 200 hours of unpaid work and a compensation order of £400. Despite that disposal signalling that unpaid work was imposed as a direct alternative to imprisonment, he did not consider it significant. He was careful to proceed in light of the deletion of the second address on charge 7 that restricted the period of offending on charge 7 to about two years. He gave the appellant credit for having built a successful business employing others. He noted from the report that the appellant was assessed as presenting low risk and might respond to intervention. [54] The appellant had repeated his denials to the reporting social worker, took no responsibility and showed no victim empathy. He was unsuitable for the MF2C (Moving Forward [to] Change) programme [55] The judge focussed on the appellant's conduct, considering it deplorable. Even allowing for his youth on the earlier charges, his culpability was considerable, as was the harm he caused to two women. Although he had not previously served a prison sentence, it was now necessary for reasons of punishment, deterrence, public protection and, potentially, rehabilitation.

[56] He performed the exercise expounded in *HM Advocate v Fergusson* [2024] HCJAC 22, 2024 JC 376 and identified notional sentences of imprisonment: 20

- charge 2 - 20 months
- charges 3 and 4 cumulatively - 6 years
- charges 7 and 9 cumulatively - 8 years.

- [57] He considered a total of 15 years, and 8 months would have been excessive and adjusted it to a cumulative sentence on all charges of 11 years, backdated to 26 August 2024 and imposed non-harassment orders for both complainers. Note of appeal and submissions
- [58] Whilst a long sentence of imprisonment was necessary, that imposed was excessive and a miscarriage of justice given the assessment of low risk, the appellant having only one previous conviction accrued at the age of 18, his presently stable personal and domestic circumstances and his age at the time of charges 2, 3 and 4. [59] Senior counsel adopted these contentions, adding that the appellant was between 17 and 19 when he committed charges 2, 3 and 4. He was a net contributor to society. Given the content of the reports, a cumulative sentence of 11 years' imprisonment for offending against two complainers was excessive. Decision on sentence [60] The appellant was no longer a young offender when sentence was passed but his relative youth at the time of the earlier charges was relevant to his culpability and this could be, and we consider was, reflected in the identification of a cumulative sentence of 6 years' imprisonment on charges 3 and 4. These charges were different and each serious in its own way. AA was just 16 when he anally penetrated her without consent causing considerable pain. It was a serious and wholly reprehensible breach of her sexual autonomy. Charge 4 occurred at a time when AA was several months pregnant with the appellant's child. That is 21 a materially aggravating consideration. Once again, the appellant showed complete disregard for his partner's wishes and autonomy when he raped her. The sentence on charge 2 cannot be argued against. Since it covered a different period and involved conduct of a different nature, that had significant consequences according to the complainer and her mother, it also merited the sentence imposed.
- [61] On charges 7 and 9 the appellant was no longer a young offender six months after this offending began on charge 7. There could be no material reduction in culpability for a man being 24 years and 6 months when he started raping his partner as she slept and when he raped her, a month or so later, on charge 9. Repetition of his conduct on charge 7, itself a breach of trust and exploitation of BB's vulnerability when she was asleep, justified a substantial sentence of imprisonment. The circumstances of charge 9 were materially aggravating, raping the complainer on the day of her mother's funeral. Just as with AA, he showed no respect for BB's wishes and sexual autonomy. [62] For these reasons we find no fault with any of the judge's decisions or the resulting sentence. Each element of the sentence was justified and the final sentence, 11 years' imprisonment, following an appropriate adjustment for proportionality, cannot be said to be excessive or a miscarriage of justice. The appeal against sentence is refused.

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