A

KELLY v HM ADVOCATE

No 2
9 August 2000

L J-G Rodger, Lord Allanbridge and Lord Caplan

FRANCIS KEVIN KELLY, Appellant — *Gilbride*
HER MAJESTY'S ADVOCATE, Respondent — *McCreadie, A-D*

B *Justiciary — Sentence — Sex offender — Whether a finite sentence comprising a custodial term and an extension period was preferable to a discretionary life sentence — Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), sec 2*[1] *— Criminal Procedure (Scotland) Act 1995 (cap 46), sec 210A*[2]

The pannel pled guilty at the High Court at Dundee to a charge of breach of the peace by masturbating and exposing his private member to a female
C complainer and to a charge of assaulting another female complainer by placing his hand over her mouth, pulling her to the ground, compressing her mouth and nose with his hand, compelling her to lie face down on the ground, lifting up her clothing, handling her buttocks, seizing hold of her and further compelling her to take him to a particular house and going into the house with her, all to her injury. On 4 June 1999 the sentencing judge (Lord Cowie) imposed a sentence of life imprisonment and, in terms of sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, ordered that a
D period of three years six months be served by the pannel in custody before the provisions of sec 2(4) and 2(6) of the Act should apply to him. The pannel appealed against sentence to the High Court of Justiciary. The pannel argued that, instead of imposing a discretionary life sentence, the sentencing judge could and should have imposed an extended sentence in terms of sec 210A of the Criminal Procedure (Scotland) Act 1995.

E [1]Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides, *inter alia*, that: '(1) In this Part of this Act "designated life prisoner" ... means a person ... in respect of whom the court which sentenced him for that offence made the orders mentioned in subsection (2) below. (2) The order referred to in subsection (1) above is an order that subsections (4) and (6) below shall apply to the designated life prisoner as soon as he has served such part of his sentence ("the designated part") as is specified in the order, being such part as the court considers appropriate taking into account — (a) the seriousness of the
F offence, or of the offence combined with other offences associated with it; (b) any previous conviction of the designated life prisoner; and (c) where appropriate, the matters referred to in paragraphs (a) and (b) of section 196(1) of the 1995 Act. (4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a designated life prisoner on licence ... (6) where this subsection applies, a designated life prisoner may, subject to subsection (7) below, at any time require the Secretary of State to refer his case to the Parole Board."

G [2]Section 210A of the Criminal Procedure (Scotland) Act 1995 provides, *inter alia*, that:'(1) where a person is convicted on indictment of a sexual or violent offence, the court may, if it — (a) intends, in relation to — (i) a sexual offence to pass a determinate sentence of imprisonment or (ii) a violent offence, to pass such a sentence for a term of four years or more; and (b) considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender, pass an extended sentence on the
H offender. (2) An extended sentence is a sentence of imprisonment which is the aggregate of (a) the term of imprisonment ("the custodial term") which the court would have passed on the offender, otherwise than by virtue of this section; and (b) a further period ("the extension period") for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above. (3) The extension period shall not exceed, in the case
I of — (a) a sexual offence, ten years; and (b) a violent offence, five years.'

Held (1) that the point of the extended sentences which had been introduced by sec 210A was to provide additional protection for members of the public from offenders who had committed violent or sexual offences. Where such a finite sentence can provide the necessary protection, Parliament's intention must have been that a finite sentence should be preferred to an indefinite life sentence (p 14E–H); and (2) that in the present case, since Parliament had now provided the mechanism of an extended sentence, the imposition of a life sentence was excessive, and in the circumstances an appropriate sentence was a custodial period of seven years and the maximum extension period of ten years (p 15B–D); and appeal allowed.

FRANCIS KEVIN KELLY was charged at the instance of Colin Boyd QC, Her Majesty's Advocate, on an indictment the libel of which is sufficiently set forth in the opinion of the court.

The cause came to trial in the High Court at Dundee when the pannel pled guilty. The sentencing judge, Lord Cowie, adjourned the diet in order to allow the accused's agents to obtain a psychiatric report. On 4 June 1999, the sentencing judge imposed a sentence of life imprisonment.

The pannel thereafter appealed to the High Court of Justiciary by note of appeal against sentence.

Case referred to:
O'Neill v HM Advocate 1999 SCCR 300; 1999 SLT 958

The cause called before the High Court of Justiciary, comprising the Lord Justice General (Rodger), Lord Allanbridge and Lord Caplan for a hearing on 21 and 22 June 2000.

At advising, on 9 August 2000, the opinion of the court was delivered by the Lord Justice-General.

OPINION OF THE COURT — [1] The appellant is Francis Kevin Kelly who pled guilty at the High Court at Dundee on 7 April 1999 to a charge of breach of the peace by masturbating and exposing his private member to a female complainer; he also pled guilty to a charge of assaulting another female complainer on the same day by placing his hand over her mouth, pulling her to the ground, compressing her mouth and nose with his hand, compelling her to lie face down on the ground, lifting up her clothing, handling her buttocks, seizing hold of her and further compelling her to take him to a particular house and going into the house with her, all to her injury. The sentencing judge, Lord Cowie, adjourned the diet in order to allow the accused's agents to obtain a psychiatric report. On 4 June 1999 the sentencing judge imposed a sentence of life imprisonment from that date and, in terms of sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, he ordered that a period of three years six months be served by the appellant in custody before the provisions of sec 2(4) and 2(6) of the Act should apply to him. In imposing that sentence the sentencing judge decided not to backdate it. In reaching this decision he had in mind the fact that at the time of the offences the appellant had been on licence and his licence had been recalled on 3 February 1999 after he had spent 51 days in custody on remand. In presenting the appeal counsel did not challenge the sentencing judge's decision not to backdate the sentence.

[2] When the appeal first called before this court on 11 January 2000 counsel submitted that, instead of imposing a discretionary life sentence, the sentencing judge could and should have imposed an extended sentence in terms of sec 210A of the Criminal Procedure (Scotland) Act 1995. Under subsec (4) of that section, before passing such a sentence, the court must consider a report by a relevant

A officer of a local authority about the offender and his circumstances. The court therefore continued the appeal pending the preparation of a social inquiry report addressing specifically the desirability of passing such an extended sentence. We now have that report.

[3] The narrative of the offences to which the appellant pled guilty shows that they are both offences against women and that they are of an explicitly sexual B nature. The second of the two offences is clearly a serious assault which, even without any background, would require to be visited with an appropriately heavy sentence both to punish the appellant and to protect the public, in particular women. But, of course, the offences are not to be seen in isolation. In August 1988 the appellant was convicted of assault on indictment in the sheriff court at Airdrie. Professor Cooke's report shows that the assault was on a young female. The appellant C had been drinking heavily and tried to get the young woman to masturbate him. He was sentenced to 18 months detention. In February 1991, this time on indictment in the sheriff court at Glasgow, the appellant was convicted of two charges of assault and robbery. Again, these offences had a sexual element since they both involved robbery of a prostitute in a dispute about payment for her services. In June 1995 the appellant was convicted of assault and robbery in the High Court at Edinburgh and was sentenced to four years imprisonment. This offence had no D sexual element. It was while he was on licence under this sentence that the appellant committed the present offences. The reports from Professor Cooke which were available to the sentencing judge indicated that there was a high risk that the appellant would reoffend in a sexual manner. Indeed he was concerned that the appellant might progress to more serious offending. In a supplementary report Professor Cooke indicated that there was difficulty in predicting the outcome of E treatment and he therefore considered that several years of treatment would be necessary to provide the best chance of a successful outcome.

[4] In presenting the appeal counsel submitted that, whereas previously a discretionary life sentence might have been the only appropriate way to deal with a case like the present, by inserting sec 210A into the 1995 Act, Parliament had provided the courts with a new type of sentence which was indeed tailor-made for F such cases. It appears to us that there is force in that submission, since the whole point of extended sentences is to provide additional protection for members of the public from offenders who have committed violent or sexual offences. Where this type of finite sentence can indeed provide the necessary protection, we consider that Parliament's intention must have been that a finite sentence should be preferred to an indefinite life sentence. Such extended sentences comprise two elements, the G custodial term and the extension period. The prisoner must serve the appropriate period of the custodial term, just in the same way as with any other determinate sentence. So, if, for instance, the prisoner is sentenced to four or more years imprisonment, he may be released after serving one-half of his sentence and must be released after serving two-thirds of the sentence. On his release, the prisoner does not remain subject to a licence merely during the balance of the custodial H term; rather, he remains subject to a licence until the end of the extension period. The effect is that, if he offends during that period, his licence may be recalled and he will be liable to serve the balance of the custodial term. Bearing in mind the way in which such sentences operate, we turn to consider whether it would be appropriate to impose an extended sentence and, if so, for what periods.

[5] In the social enquiry report which we obtained from Dundee City Council I it is said that the appellant presents a serious risk of re-offending and that there

is a high risk of harm to any potential victim. The report points out that the need to earn release under a life sentence may motivate a prisoner to undertake the sex offender programmes, whereas there might be less motivation where the offender knew the date for his release. We would observe, however, that the possibility of earning release after serving one-half of a sentence would also provide an incentive, if one were needed, to undertake such programmes.

[6] It appears to us that, since Parliament has now provided the mechanism of an extended sentence, the imposition of a life sentence in the present case can properly be regarded as excessive. But, although an extended sentence would be an appropriate disposal, none the less, in view of the appellant's previous convictions, the custodial period must indeed be substantial. As we noted, the sentencing judge designated three and a half years as the minimum period which should elapse before the appellant could be considered for release on parole. The judge refers to the guidance given by this court in *O'Neill v HM Advocate* and it is therefore apparent that he considered that an appropriate determinate sentence for the offences would have been seven years. In the light of the nature of the second offence to which the appellant pled guilty and in light of the previous convictions which we have described, we see no reason to disagree with that view. We therefore consider that the custodial period should be seven years.

[7] Furthermore, the assessments in the reports by Professor Cooke and the social work department make this a case where a lengthy extension period is appropriate in order to provide additional protection for the public. In view of the uncertainty about the prognosis we consider that we should select the maximum extension period of ten years.

[8] In the result we shall allow the appeal, quash the sentence of life imprisonment and substitute an extended sentence. In doing so, we shall impose a custodial period of seven years and an extension period of ten years.

THE COURT allowed the appeal, quashed the sentence of life imprisonment and substituted an extended sentence.

Crown Agent

ROBERTSON v HM ADVOCATE

No 16
17 February 2004

LJ-G Cullen, Lord Hamilton
and Lady Cosgrove

NEIL DUNCAN ROBERTSON, Appellant — *Wheatley (Solicitor-advocate)*
HER MAJESTY'S ADVOCATE, Respondent — *Bell QC, A-D*

Justiciary – Sentencing – Discretionary life sentence – Whether appropriate to impose a discretionary life sentence or finite sentence in the particular circumstances of the case – Factors to be taken into account – Duty of court to protection of the public where high risk of reoffending

The appellant pled guilty to charges of lewd, indecent and libidinous practices towards a child and of making an indecent photograph of the child and of having in his possession indecent photographs of children. The appellant had initiated contact with the complainer's family through an internet support group and had made false claims to the complainer's mother that he was a pilot and suffered himself from a condition for which the support group existed for the assistance of those suffering from it and that he had qualifications as a psychologist. As a result of the contact initiated by the appellant, he had entered into a relationship with the complainer's mother and conducted himself in an indecent fashion towards the complainer. His conduct had come to light as a result of a conversation between the complainer and an assistant head teacher at her school. Following police involvement, a search under warrant was carried out at the appellant's house. In the course of search various items were recovered including a computer on which a file deletion programme was in operation at the point of recovery and children's panel application forms. Upon police interview, the appellant denied he was aware of indecent pictures including one of the complainer found on his computer. He thereafter made a voluntary statement in which he claimed sexual contact had been initiated by the complainer whom he had never coerced, that as an adult he was aware that what was happening was both wrong and illegal, and that the statement was given as an admission of guilt and to ensure the complainer was not put through the trauma of a court case and that he recognised he had a serious problem and was requesting appropriate assistance. The computer was found to hold a large number of images of a paedophilic nature.

The appellant had a number of previous convictions in England involving deception and forgery, and one of taking a child out of the United Kingdom without the appropriate consent contrary to the Child Abduction Act 1984. A social enquiry report obtained prior to sentencing concluded that the appellant's account of events demonstrated elaborate grooming of the complainer and her mother, manipulation of events to allow him to be alone with the child, a lack of any victim empathy and a failure to pursue sources of advice on assistance or treatment apart from an isolated occasion. A risk assessment prepared by another social worker assessed the appellant as presenting a high risk of sex offence recidivism towards young females. The sentencing judge taking account of the two reports concluded that in view of the high level of risk of further sexual offending by the appellant, a discretionary life sentence was the most appropriate disposal in respect of the principal charge.

The appellant argued that the discretionary life sentence was excessive having regard to the nature of the conduct complained of, the relatively short length of time over which it occurred, the early acknowledgement of guilt, the acceptance of the need for specialist treatment, the absence of any analogous previous convictions and the possibility that the risk of recidivism might be reduced through intensive supervision.

Held that in addition to the factors sought to be relied upon for the appellant, the court also had a duty to have regard to the protection of the public and to impose a sentence which took proper account of the risk of reoffending; that the risk should be assessed as that presented at the time of sentencing; that each

individual case must be considered on its own individual facts and circumstances, and particular regard be had to whether a finite, rather than life sentence could provide the necessary public protection; that in the appellant's case release without supervision in the event of a finite sentence being imposed would provide insufficient protection to the public (paras 25–35); and appeal *refused*.

NEIL DUNCAN ROBERTSON was charged on indictment with lewd, indecent and libidinous practices towards a child and with offences under, *inter alia*, sec 52 of the Civic Government (Scotland) Act 1982. On 19 June 2003 the appellant pled guilty to amended charges and was thereafter sentenced to life imprisonment on the principal charge.

The pannel thereafter appealed to the High Court of Justiciary against the imposition of the discretionary life sentence.

Cases referred to:
Crossley v HM Advocate 25 November 2003, unreported
Kelly v HM Advocate 2001 JC 12
McGovaney v HM Advocate 2002 SCCR 762

The appeal called before the High Court of Justiciary, comprising the Lord Justice-General (Cullen), Lord Hamilton and Lady Cosgrove for a hearing, on 30 January 2004. The opinion of the Court was delivered by Lady Cosgrove on 17 February 2004 —

OPINION OF THE COURT — [1] The appellant is Neil Robertson who pled guilty at the High Court at Glasgow on 19 June 2003 to charges which, as amended, were in the following terms:

'(1) On various occasions between 1 February 2002 and 12 January 2003, both dates inclusive, at [addresses in Troon and Rosyth], you did use lewd, indecent and libidinous practices and behaviour towards [BL], born 1 July 1994, c/o Strathclyde Police, Ayr, supply her with alcohol, handle her private parts, take photographs of her private parts, compel her to take your private member in her mouth and to lick and suck same, rub your private member against her private parts and simulate sexual intercourse with her, induce her to dance naked in front of a webcam and lick her private parts in front of said webcam, display indecent images to her including *inter alia* on a computer images of children, put lubricant into her private parts, attempt to insert a vibrator into her private parts, place said vibrator against her private parts, compel her to masturbate you to the emission of semen; . . .

(3) On 27 December 2002 at [address in Troon] you did make an indecent photograph or pseudo-photograph of [BL], born 1 July 1994, c/o Strathclyde Police, Ayr: CONTRARY to the Civic Government (Scotland) Act 1982, Section 52(1)(a) as amended; and

(4) On 23 January 2003 and 18 February 2003 at [address in Troon] you did have indecent photographs or pseudo-photographs of children in your possession: CONTRARY to the Civic Government (Scotland) Act 1982, Section 52A(i) as amended'.

[2] The circumstances giving rise to the offences were as follows. The complainer lived with her parents and brothers at the family home at the address in Rosyth contained in charge 1. In September 2001, one of her brothers was diagnosed as suffering from attention deficit hyperactivity disorder (ADHD) and Asperger's syndrome. In November 2001, the complainer's mother visited a website on the internet concerning a support group for families with children suffering from Asperger's syndrome. She posted her own e-mail on this site asking for help and advice.

[3] In January 2002 she received a reply from the appellant, who claimed to be a pilot with Ryanair. This claim was false. He said he suffered from Asperger's syndrome himself, and had qualifications in South Africa as a psychologist. This was also false. He said that he wished to offer help to parents with children who suffered from ADHD and Asperger's syndrome.

[4] The appellant and the complainer's mother then began communicating by means of the internet. At this time he claimed to be a psychologist working for an airline. Two or three weeks later the appellant provided his telephone number, and the complainer's mother telephoned him. They began conversing frequently. Towards the end of February 2002, the appellant was invited to the family home in Rosyth where he met the entire family and provided advice on how to deal with the son's problems. In March or April 2002 the appellant stayed with the family for the weekend. During this time it transpired that he was unemployed. He was invited to stay with the family, and stayed there for four or five weeks. By this time an attraction had developed between the complainer's mother and the appellant. Whilst the appellant stayed with the family, he slept in the complainer's bedroom. He still claimed to be involved in the airline and frequently used his laptop computer.

[5] In May 2002 the appellant and the complainer's mother began a sexual affair. She and the complainer regularly stayed overnight at the appellant's house in Troon. They stayed there every second weekend. The appellant continued to stay on occasions at her home in Rosyth. The relationship continued until 11 or 12 January 2003 when the police became involved. Around November or December 2002, when the complainer was eight years old, the appellant advised her mother that she had been masturbating, rubbing herself against a clothes pole and using her mobile telephone as a vibrator. The appellant went on to suggest that the complainer's mother should provide her with a vibrator which she herself owned, as that would be less likely to cause the complainer injury.

[6] The information provided to the court was that period of the libel (1 February 2002 to 12 January 2003) covered the entire time that the appellant knew the complainer. It was difficult to pinpoint exact dates when things happened. Certain dates had, however, been identified when the appellant and the complainer were alone. On 13 December 2002 the appellant baby-sat for the family at their home in Rosyth while the parents attended a Christmas night out. On 24 December 2002 the appellant again baby-sat whilst they were out. Around Christmas 2002 the appellant showed the complainer's mother a pink vibrator which he stated he had purchased for the complainer, but he said that he would not let her use it without her mother's permission. The complainer's mother subsequently said that she did not find any of the appellant's behaviour sinister, but accepted it as what she called ''Neil's logic''. On 27 December 2002 the complainer was allowed to travel to Troon alone with the appellant to stay for a week's holiday.

[7] On 1 January 2003 the complainer told her mother that she had been drunk the night before, having a drunk a bottle of Bacardi Breezer. Her mother was angry with this, and spoke to the appellant about it. The complainer was picked up the next day. The complainer and her mother stayed for the last time at Troon on the weekend of 11 and 12 January 2003. By this time the relationship had deteriorated because the appellant insisted that he was prepared to take on only the complainer and none of the male children.

[8] Matters came to light on 7 January 2003, when the complainer approached an assistant head teacher at her school, who described her as looking tired and down. In the course of their conversation, the assistant head teacher became concerned. She

contacted the child protection unit in Fife for advice. They became involved on 10 January 2003. On 22 January police officers attended at the family home and indicated that they wanted to interview the complainer. The complainer's mother informed the officers that she had been having an affair with the appellant. The complainer was interviewed but did not disclose any abuse. On 23 January 2003 the complainer informed her mother that she had been sexually abused. She was re-interviewed on 24 January 2003 and described abuse as libelled in charge 1.

[9] In particular, she spoke about the first time, in or about April 2002, when the appellant touched her private parts in a bedroom in her house. The complainer was seven years old at that time. She described herself as feeling scared. She recalled a similar incident one morning in her house, when the appellant touched her private parts below her clothes. She stated that it happened on most nights when he came over. She spoke about 13 December 2002 and Christmas Eve 2002, when the appellant had her on the webcam and licked her private parts. She also spoke about touching the appellant's private parts and in particular sucking his private parts. She also spoke about him taking photographs of her private parts for his computer. She also stated that he put his private parts near hers and rubbed his private parts against hers. She also said that on two occasions he made her dance naked in front of the webcam. She also spoke of him putting vaginal lubricant on her. The appellant called it 'slurpy stuff'. He would squirt it on and rub it in. She also spoke of seeing photographs of other children on the computer of an indecent nature. In relation to the vibrator, she stated that the appellant used it on her 'flower'. He had bought it not long before and had given it to her as a gift. She indicated that it was used on the outside of her private parts. The appellant had tried to put it inside but had been unable to. She said that he used it quite a lot. At New Year she was given a full bottle of Bacardi Breezer, which she drank. She felt dizzy. She spoke, in her own language, of masturbating the appellant, holding his private parts and moving her hand up and down until sperm came out over her hand.

[10] A warrant was obtained to search the appellant's home address. On 27 January 2003, police officers entered his house and detained him. He was shown the warrant and a search took place. A laptop computer was on in the room. It was displaying the words 'Win Wash'. That is a software programme used to delete files. One of the police officers recognised it as such and switched the computer off. A webcam was recovered in the livingroom. Various drawings were recovered, which the appellant indicated had been done by the complainer. A digital camera was recovered, along with various floppy discs and other computer equipment. A vibrator was recovered from a drawer in a hi-fi unit, along with a vaginal lubricant. South Ayrshire and North Ayrshire children's panel application forms were found. The appellant indicated that he was considering applying. The appellant was interviewed but made no admissions. He was not cautioned and charged at that stage. He was advised that his computer would be sent for examination.

[11] Examination of the computer system revealed a picture of a pre-pubescent female from the neck down with a pink vibrator at her vagina. Further examination and enquiries disclosed that the picture was of the complainer. It had been taken on 27 December 2002. This formed charge 3. Various other paedophilic images were found on floppy discs from the appellant's house. He was arrested on 30 January 2003 in connection with the indecent image. He was interviewed and denied knowledge of the image of the complainer, and of the other images on the computer. He was asked if the complainer ever had a vibrator in her possession. He said that she might have, and that she was able to operate his digital camera. He indicated that

she might have photographed herself. After the tape was switched off, the appellant asked if he could make a voluntary statement. He then did that, in his own handwriting. In that statement the appellant claimed that it was the child who had initiated their sexual contact, and that he had not forced or coerced her in any way. As an adult, he was aware that what was happening was both wrong and illegal, but he believed she was enjoying what they were doing. He indicated that the statement was given both as an admission of guilt and to ensure that the child was not put through the trauma of a court case. He also said: 'I recognise that I have a very serious problem and also that my own attempts at self-treatment have clearly not worked. I am requesting and pleading for appropriate assistance and therapy in order to avoid any similar event happening at any time in the future from the judicial and/or health system.' The laptop computer was further examined. The police were of the opinion that a large portion of the memory of the computer was missing from the hard drive. Examination however did reveal 55 images of young children in nappies on the internet cache, which is a temporary storage location found in web browser software. Analysis also revealed membership of an internet chat site, 'Butterfly Kisses', which is a pornographic website involving children. A total of 223 image files were recovered from the unallocated space of the laptop. They were all images of young children in nappies. A zip disc was examined. It initially appeared to contain no data. On further examination, however, 347 deleted images were recovered from an area known as the unallocated space. These images were of a paedophile nature. A previously deleted zip file within the disc was identified, which had been corrupted. This file was fixed. When examined, it was found to contain 878 suspected paedophile images and 45 paedophilic movies.

[12] The appellant appeared on petition on 31 January 2003, when he was committed for further examination in custody. He had remained in custody since then.

[13] The schedule of previous convictions tendered by the Advocate-depute in respect of the appellant disclosed that he had been convicted on three occasions between 1984 and 1990 at the Crown Court in England of a number of offences of obtaining property by deception, forgery, forgery and counterfeiting, and using a copy of a false instrument. He was also convicted in 1991 at Birmingham Crown Court of an offence of taking a child out of the United Kingdom without the appropriate consent, contrary to the Child Abduction Act 1984. That conviction resulted in a sentence of 12 months' imprisonment.

[14] Prior to sentencing the appellant the sentencing judge obtained both a social enquiry report and a risk assessment by Mr Gary McPherson consultant forensic clinical psychologist at the state hospital. The social enquiry report was based on an interview with the appellant. He stated that he was an adopted child. He had no contact with his parents or his brother. He had very limited contact with his sister. Both siblings were also adopted and were not blood relatives. The family had moved during his childhood between Scotland, Africa and England. He recounted having attended various schools and universities. He claimed to have a degree in psychology from the University of South Africa. He later stated that he had not studied clinical psychology and had no experience of practice. He said that he had married in Africa in 1995 but had been divorced in 1997. There was one child of the marriage, with whom the appellant had no contact. He said that since completing his education he had moved around the world, working in services related to the aircraft industry. He had worked in England, Nigeria, Canada, South Africa and Burundi before returning to Scotland in March 2001. He described business ventures centred around the aircraft industry

involving considerable amounts of money. He referred to one of his previous convictions, in respect of forgery, as having concerned a £5,000,000 bond. He had returned to Scotland in 2001 with plans to set up an airline company. The business had failed to start. Several investors had already given considerable amounts of money to him, and he used this to meet living expenses. He had no problem with drugs or alcohol.

[15] In relation to his past offending behaviour, the appellant described the child abduction offence as a 'favour' for a female friend who required to have her child's passport stamped and validated. The author of the report was unable to understand the scenario described by the appellant. The appellant also said that he had been charged with possessing child pornography in 1995. He said that this led to him seeking assistance for his paedophilic tendencies. He had contacted an independent consultant for sex abusers, but he had not undergone any treatment as the case had been dropped and there was therefore no funding available.

[16] In relation to the current offences, the appellant told the social worker that after making contact with the complainer's mother, he quickly realised that she was an extremely vulnerable woman who had many unresolved issues from her own past. He also viewed her as having fairly serious mental health difficulties. He described how he had been invited to visit the family home and how he afterwards resided in the family home for several weeks. He stated that soon afterwards the complainer's mother had made an overture. The complainer's parents had offered to let him stay with the family. He shared a bedroom with the complainer. The appellant described the complainer to the social worker as attention seeking and demonstrating sexually overt behaviour. He maintained that the child initiated the sexual contact. He told her that she should not do so because her parents were close by and he was worried about the risk of detection. He wanted sexual contact with the child and therefore asked her if she would like to visit him at his home in Troon. He was clear that he planned this with the sole intention that sexual contact would indeed take place without the child's parents being able to deter or detect it. In describing subsequent events during a stay in November 2002, the appellant referred to the child as leading him to the bedroom, undressing and giving him 'the green light' to go ahead. He indicated that he had an encrypter in his computer and a wiper system in place which destroyed files before the police searched his home and computer.

[17] The social worker observed that the appellant's account of the offences demonstrated his elaborate grooming of the complainer and her mother and his manipulation of circumstances to allow him to be alone with the child and abuse her for his own sexual needs and gratification. It was noted that the appellant did not express or demonstrate any form of victim empathy. In relation to the appellant's professed eagerness to accept assistance, the social worker observed that while the appellant indicated that he sought assistance in 1995, he had not pursued any further sources of advice on where he could secure assistance and treatment since then as a non-convicted paedophile. It was possible that his current motivation was fuelled by his forthcoming court appearance.

[18] A risk assessment had also been prepared by another social worker, who was the project leader of the Ayrshire Change Project. This report was again based on an interview with the appellant, as well as other information. The appellant told the writer that he had visited a variety of websites which he described as being for dysfunctional families, and that he had left messages on discussion boards. It was through one of these sites that he had made contact with the complainer's mother. He indicated that he had contacted other families on ADHD websites and, in

particular, had contacted a woman in Surrey who had visited him with her son. The writer carried out a risk assessment based on an actuarial approach known as Risk Matrix 2000. This involved the measurement of risk of reoffending based on actuarial (static) factors, including number of convictions, age at conviction, type of offence, and the age and gender of victims. Applying this approach, the appellant scored as being a high risk of reconviction of a sexual offence.

[19] Mr McPherson's findings at interview with the appellant were that he presented as a rather grandiose and haughty individual who appeared unconcerned over the nature of his predicament. The impression formed was that the appellant had no insight into the potential impact of his behaviour on the complainer or her family; he continued to rationalise his offending by claiming that the child initiated sexual contact; and he continued to believe that his behaviour towards the child was based on consent and was not wrong.

[20] Mr McPherson carried out an assessment of the risk of sex offence recidivism. He completed a review of risk factors using 'structured clinical judgment' and the rationale of the Sexual Violence Risk-20 (SVR-20). The SVR-20 includes factors that are widely recognised in clinical practice as having utility in decision-making relating to an individual's propensity to sexually reoffend and represents the professional guidelines for clinical psychologists assessing factors associated with risk for sexual offending. The appellant was assessed as presenting a high risk of sex offence recidivism towards young females. The particular factors identified as increasing the risk of recidivism on the part of the appellant were: that he had had a sexual interest in pre-pubescent females for at least 20 years; that he himself might have been the victim of child abuse; that he had a limited capacity for guilt and displayed no emotion with respect to his offending; that he might be unable to sustain a mature relationship; that he had previous convictions, relating mainly to forgery and including an offence under the Child Abduction Act; that his offending behaviour was consistent with high-density sex offending and multiple sex offence types; that the offending escalated in severity over a relatively short period of time, with clear evidence of grooming the complainer to satisfy his sexual deviation; that he had an almost total lack of insight into his offending behaviour; and that he was unable to appreciate that he had behaved wrongly.

[21] The sentencing judge took account of the two professional risk assessments, each using a different approach, but both reaching the conclusion that the appellant presented a high risk of further sexual offending. He concluded that, in view of that level of risk, a discretionary life sentence was the most appropriate disposal in respect of charge 1. He imposed concurrent sentences of one year and three months' imprisonment in respect of the other charges. In terms of sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), he ordered that a period of six years be served by the appellant in custody before the provisions of secs 2(4) and 2(6) of the Act should apply to him.

[22] In presenting the appeal the solicitor-advocate for the appellant challenged only the imposition of the discretionary life sentence. He submitted that that was an excessive disposal having regard to the nature of the conduct described in charge 1 and the fact that the specific incidents mentioned in the Crown narrative occurred within a relatively short period of time towards the end of 2002. Further, the appellant had acknowledged his guilt from an early stage and had accepted that he required to undergo specialist treatment. The absence of any analogous previous convictions was said to be a highly significant factor in a case of this kind. The recommendation in both assessment reports was for the imposition of an extended sentence.

[23] Reference was made in this connection to *Kelly v HM Advocate*, where the appellant who was convicted of a serious sexual offence had been assessed as presenting a high risk of further sex offending and had three previous convictions that involved a sexual element. The court decided that an extended sentence rather than a discretionary life sentence was the appropriate disposal. That approach was followed in the case of *Crossley v HM Advocate*, where a 28-year-old offender who had two analogous previous convictions had targeted his 7- and 10-year-old victims by befriending their mothers and had abused them over a period of several months. The appellant in that case had two analogous previous convictions and admitted that he had been sexually abusing young boys since he was 15. In both these cases this court considered that the imposition of the maximum extension period of ten years would provide the necessary protection for members of the public.

[24] The solicitor-advocate for the appellant submitted that a similar approach should be adopted in this case. He drew attention to Mr McPherson's view that the appellant's risk of recidivism might be reduced and managed through intensive supervision, and his recommendation that the appellant be subject to long-term supervision on release to allow for his continuing risk management in the community. The importance of effective supervision in the community was also emphasised by the author of the risk assessment from the Change Project. The imposition of a finite sentence with a lengthy extension period was, in these circumstances, the appropriate disposal for this appellant.

[25] In a case of this kind the court requires to take into account the nature and gravity of the offending behaviour and the length of time during which it occurred, the accused's previous criminal record, and his attitude to his offending, including, of course, the question of whether he has acknowledged his guilt. But the court also has an important duty to have regard to the need to protect the public and to impose a sentence that takes proper account of the risk of the accused reoffending.

[26] Before reaching a view as to the likely level of risk of future offending presented by an offender convicted of a sexual offence, the court should obtain both a risk assessment performed by a suitably qualified psychologist and a post conviction social enquiry report, in order to enable an informed decision to be made. It should be noted that sec 210A(4) of the Criminal Procedure (Scotland) Act 1995 (cap 46) provides that, before passing an extended sentence, the court is to consider a report by a relevant officer of a local authority about the accused and his circumstances and, if the court thinks it necessary, hear that officer.

[27] At the stage of sentencing the court cannot know whether and to what extent the accused will co-operate with any sex offender programme offered to him whilst he is in custody; likewise, it is impossible to predict the effectiveness of any such programme. In view of this uncertainty, the court should approach the issue of public protection on the basis of the level of risk the offender is assessed as presenting at the time of sentence.

[28] Since the decision for the sentencer will, in a serious case of this kind, often involve a choice between, on the one hand, the imposition of a discretionary life sentence and, on the other, an extended sentence, it is convenient to examine at this point the effect of each of these sentences.

[29] The particular protection afforded to the public by the imposition of a life sentence is that the offender is not released into the community until the Scottish Ministers, on the advice of the parole board, are satisfied that it is safe to do so. Further, on his eventual release into the community, a life sentence prisoner remains

subject to the conditions of his licence, and is liable to be recalled to prison, for the rest of his natural life.

[30] As this court pointed out in *Kelly* (per the Lord Justice-General (Rodger) at para 4) Parliament, by inserting sec 210A into the 1995 Act, provided the courts with a new type of sentence with a view to providing additional protection for members of the public from offenders who have committed violent or sexual offences. Such extended sentences comprise two elements, the custodial term and the extension period. The prisoner must serve the appropriate period of the custodial term, in the same way as any other determinate sentence prisoner. So, if a prisoner is sentenced to four years' or more imprisonment, he may be released after serving one-half of his sentence and must be released after serving two-thirds of the sentence. On his release into the community, the prisoner does not remain subject to a licence merely during the balance of the custodial term; rather, he remains subject to a licence until the end of the extension period. The effect is that, if, during that period, he fails to comply with the conditions of his licence, his licence may be revoked and he may be recalled to prison by the Scottish Ministers, with or without consultation with the parole board. (Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), sec 17). In this connection, we note that the reference in *Kelly* (para 4) to such a prisoner being liable on recall to 'serve the balance of the custodial term' is mistaken. He remains liable to be detained in prison until the end of the extension period. He has, however, a right to have his case reviewed on an annual basis by the parole board (sec 3A(2) of the 1993 Act). As in the case of a life sentence prisoner, his release will be dependent upon the parole board being satisfied that his continued detention is not necessary on public protection grounds. The licence conditions and the degree of supervision provided are, we understand, broadly similar for each category of prisoner.

[31] The approach of this court in *Kelly* and *Crossley* was to give effect to what was presumed to be Parliament's intention in providing for extended sentences, namely that a finite sentence should be preferred to a life sentence where the former can provide the necessary protection for members of the public. In both these cases the court was satisfied that the imposition of the maximum extension period would provide that protection. A different view was reached in the case of *McGovaney v HM Advocate*, where the appellant, who had been convicted of sexual offences on seven previous occasions, pleaded guilty to a serious sexual offence. The psychologist stated in his report that there was no indication that he had been able to respond positively to treatment in the past. This court decided that, notwithstanding the decision in *Kelly*, the case was one where, having regard to the appellant's considerable criminal record, the imposition of a discretionary life sentence was appropriate in the public interest.

[32] It is clear, in our view, that each case of this kind must be considered on its own individual facts and circumstances. In particular, the court must consider whether it is likely that a finite sentence can, having regard to the particular circumstances of the offender and his offending behaviour, provide the necessary public protection.

[33] In the present case, we consider that there are several factors that suggest, at this stage, that supervision in the community of the appellant is unlikely to be sufficiently effective in that regard. In the first place, he has a disturbing number of previous convictions for deception; and the circumstances of charge 1 disclose another serious and unpleasant deception which exploited an internet site set up to support families with a particular problem. Having targeted his victim, the appellant progressed his plans by further falsehood — he persuaded the victim's

family to believe he had a professional qualification as a psychologist and that he could help them. He inveigled himself into a position of trust and proceeded to groom both the victim and her mother. He has also lied about his employment history. The appellant's past history reveals that throughout his adult life he has moved around the world. He has no family ties, and has no settled roots in any particular community, both factors likely to militate against effective supervision and monitoring. Further, the appellant has admitted that his deviant sexual interest in pre-pubescent females has existed for more than 20 years, but he has taken no steps to address this and still displays a total lack of insight into his offending. He has used the internet both to feed his deviant sexual fantasies by downloading paedophile images and also to further his offending by making contact with a potential victim living in a different part of the country. It is plain that this kind of abuse of the internet is unlikely to be susceptible to supervision, even by the most vigilant supervising officer.

[34] In the light of these considerations, we find we are unable to feel in any way confident about the likelihood of effective monitoring and supervision of this appellant in the community. While he has indicated that he would co-operate with any offence-focused group work in prison as well as supervision of his behaviour on release, we note that he has previously failed to comply with the conditions of a probation order imposed upon him. We also note in this connection that Mr McPherson indicated that he was not confident that any significant change could be made to the appellant's basic sexual deviation in view of its nature and duration.

[35] The sentencing judge decided that, since the appellant would be entitled to be released two-thirds of the way through the custodial period of any finite sentence imposed and would not be subject to any supervision on the ultimate expiry of the extension period, the public would not be sufficiently protected by an extended sentence. We agree with that view. We consider that the risk posed by this appellant is such that a finite sentence cannot provide the necessary protection for members of the public. In our view, the public interest requires that this offender be detained in custody until those responsible for his release are satisfied that he can safely be returned to the community.

[36] The appeal against the sentence of life imprisonment is accordingly refused.

THE COURT refused the appeal.

Blacklock Thorley — Crown Agent