APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 62
HCA/2019/220/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

RC

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, Sol Adv; Paterson Bell for Hodge, Solicitors, Perthshire
Respondent: Lord Advocate, QC, AD; L Irvine; Crown Agent

2 October 2019

Introduction

[1] On 12 February 2019 at Perth Sheriff Court, the appellant pled guilty by way of an indictment in terms of section 76 of the Criminal Procedure (Scotland) Act 1995 to a contravention of sections 31 and 34 of the Sexual Offences (Scotland) Act 2009 (charge 1) and a contravention of sections 21 and 24 of the 2009 Act (charge 2). On 1 May 2019, he was sentenced *in cumulo* to 20 months imprisonment. He appeals against that sentence on the

ground that it was excessive and, in the light of his particular circumstances, in contravention of his rights under article 3 of the European Convention on Human Rights ("ECHR").

Background

[2] The appellant was born with spina bifida and has never had any sensation or movement below the waist. He is doubly incontinent and is reliant on the care of his mother and aunt to manage his needs on a daily basis which needs include assistance with toileting, dressing, eating, washing and mobility. He wears incontinence pads which require to be changed on a regular basis. He had been able to maintain part time employment at a call centre by limiting his intake of fluids and using especially absorbent pads, but if problems arose he required to call his mother to take him home. This occurred on a regular basis. He uses a wheelchair. He also has diabetes and ulcers on his legs for which he requires constant treatment. Broadly speaking, it is submitted for the appellant that in light of his needs and the inability of the prison estate to provide therefor (at least in the immediate term) taken together with the fact that the appellant had no previous convictions, the sentence imposed by the Sheriff was inappropriate and excessive.

The Offences

[3] Charge 1 occurred on 16 August 2015 and involved the appellant communicating in a sexual manner with a 15 year old girl, and intentionally causing her to participate in a sexual activity via Skype in that he encouraged her to remove her clothing on camera whilst he watched her. The specific incident had been preceded by a period of "grooming" in which the appellant (who was aged 39) had developed an on-line relationship with the girl, holding himself out as being 18 years of age. He persuaded the girl to pull down the zipper

on her pyjama top, and tried to persuade her to remove it completely. Despite her expressed reluctance to engage he continued with explicit sexual remarks, until the complainer abruptly terminated the conversation when her foster carer came into the room. Charge 2, occurring on 21 February 2017, involved causing a child (who said she was 13 but was in fact 12) to participate in sexual activity by persuading her to remove her dressing gown and the top she was wearing underneath, and to send him a picture of her vagina. This too had been preceded by a period of "grooming" in which the appellant developed an on-line relationship with the girl, holding himself out as 14. In each case he said that he concealed his own image by saying the camera on his pc was broken.

Procedural History

[4] Following the plea, the sheriff deferred sentence until 27 March 2019 for the provision of a Criminal Justice Social Work Report and a Tay Project Assessment. At the continued calling, the sheriff, having considered the plea in mitigation along with the terms of the relevant reports, determined that a sentence of imprisonment was appropriate. Having regard to the "nature and extent of the appellant's disabilities, and to the care needs that he would require in the prison estate" the sheriff further deferred sentence until 1 May 2019 for those to be properly assessed. The supplementary report indicated that the deputy governor of Perth Prison had indicated that she "does not believe that we have the physical capacity to provide for all [the appellant's] needs safely in Perth Prison". It noted that HMP Edinburgh had no suitable available cells until September and HMP Glenochil had none until September. Nevertheless on 1 May the sheriff imposed a *cumulo* custodial sentence of 20 months, reduced from 30 months in light of the guilty plea.

Custodial arrangements

[5] On 1 May 2019, at Perth Sheriff Court, when the appellant required to use the toilet court staff sourced a large table and moved it into the disabled toilet where members of the appellant's family assisted him. On his admission to HMP Perth, the appellant was housed within the general area of the prison, in an adapted, larger than usual, cell with a wet room and lavatory. It had a hospital bed with a pressure relieving mattress. The appellant, as a protected prisoner housed in the mainstream part of the prison, could not be allowed out of his cell to mix with other prisoners and his meals were brought to him by members of staff**.** No arrangements were yet in place for carers to attend to provide social care. His mother and brother were called to attend the prison to care for his needs on his first night there.

[6] From 2 May 2019, the appellant remained in the same adapted cell. An individual care package included in-cell assistance by carers four times per day to assist him with washing, toileting and personal care and access to a call system if he required assistance from SPS staff during the night (no NHS staff were in the prison between 9.30pm and 7am). His meals were taken to him by SPS staff. He did not have the option of taking his meals within the hall or within his cell, being confined to the latter when on the wing. He was offered the opportunity to join the other protection prisoners for recreation and outside exercise for approximately 90 minutes in the evening and he was given access to visits.

[7] As at 13 August 2019, three of the four adapted cells within HMP Perth were occupied. The prison authorities have confirmed that all offenders attending prison for custody have their needs assessed by NHS staff and priority is given to those in the greatest need. The care package previously in place for the appellant would be reinstated should he be returned to custody.

[8] The appellant has expressed concern that these arrangements expose him to risk from the general prison population. His cell door was left open on one occasion leading to other inmates entering his cell and he was subjected to frightening and threatening behaviour. He complains that the care arrangements were thereafter inflexible. If, as frequently happens, he soiled himself during the night he must wait until the attendance of carers the following morning for his pads to be changed.

Submissions for the appellant

[9] It was submitted that the imposition of a custodial sentence was inappropriate and excessive. The offences were of some age by the time of sentencing and the appellant had been on bail throughout the proceedings. He had no previous convictions and no pending cases.

[10] The appellant had serious physical health issues. He had been assessed as suitable for a community based disposal. This could have included a Community Payback Order with Supervision which could have included a programme requirement, and a conduct requirement. There was a clear focus for such intervention to reduce the risk of further offending

[11] It was clear from the terms of the supplementary CJSW report that there were issues regarding the ability of the prison estate to provide appropriate care to the appellant. Notwithstanding the warning at the conclusion of the supplementary CJSW report, the Sheriff did nothing to ensure the wellbeing of the appellant in both the prison estate and the court in the period following the imposition of the sentence.

[12] Reference was made to the Scottish Sentencing Council: Core Principle of Sentencing effective from 26 November 2018; article 3 of the European Convention on Human Rights

and in particular, *Price* v *United Kingdom* (2002) 34 EHRR 53 in that regard; and the United Nations Convention on the Rights of Persons with Disabilities.

[13] The sentencing process must take account of a convicted individual's disability. Facilities and equality with other prisoners must be considered, including reasonable accommodation. Article 3 requires the State to ensure prisoners are detained in conditions which are compatible with human dignity, are not subjected to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that their health and well-being are adequately secured (*Semikhvostov* v *Russia* Application no. 2689/12 at para 71).

[14] An alteration or reduction in sentence is appropriate in certain circumstances (*R* v *Stevenson; R* v *Minhas* [2018] 2 Cr App R (s) 6). The State should take special care in guaranteeing such conditions as correspond to the special needs of the individual's disability (*Farbuths* v *Latvia* no. 4672/02 as cited in *Semikhvostov, supra* at para 72). A prisoner's segregation from the general prison population stigmatised him and served as the main restriction on his leading a dignified life in the already harsh environment of a penal facility (*Semikhvostov, supra* at para 80). Access to sanitation facilities is a particular concern under article 3 (*Semikhvostov, supra* at para 81), a matter of significance for the appellant. It was submitted that the appellant's article 3 rights were breached immediately upon his being sentenced. The Sheriff was aware of the inadequate facilities and concerns raised in the CJSW report.

[15] In any event, the appellant was protected by section 204(2) of the Criminal Procedure (Scotland) Act 1995. The imposition of a custodial sentence should be a last resort (*HM Advocate* v *CJB* [2019] HCJAC 45 at para 17). The offences were not so serious that custody was required. The Sheriff did not adequately allow for the difference between the appellant's likely experience and treatment in prison and that of other inmates or the lack of

equality in the incarceration experience of the appellant when compared to others in relation to socialisation and sanitation. The sheriff appeared to downplay the extent of the appellant's condition on the basis that he "nevertheless" managed to have job

Submissions for the respondent

I. Relevance of Disability in Sentencing

[16] Sentencing judges should take all relevant factors into account at the time of sentencing (Statement of Principles and Purposes of Sentencing, Scottish Sentencing Council, 28 November 2018). An accused who has a severe disability is not exempt from punishment (*R* v *Hall (Daniel)* [2013] 2 Cr App R (S) 68 at para 20) and is not, by reason of disability entitled to a lesser sentence than would otherwise be appropriate (*R* v *Bernard (Basil)* [1997] 1 Cr App R (S) 135). Certain principles might be derived from the approach taken in England & Wales: *R* v *S(A)* [2018] 1 WLR 5344. The effects of disability may be relevant to sentence (i) insofar as they impact on the risk posed by a particular individual; (ii) in assessing the relative merits of potential disposals; (iii) in cases of very severe disability where it may be that imprisonment would inevitably and immediately be incompatible with the accused's article 3 rights (although ordinarily the courts should assume that prison authorities will fulfil their own duties under the Convention); and (iv) where the disability is such that a court would be entitled as an act of mercy in the exceptional circumstances of a particular case to impose a lesser sentence than would otherwise have been appropriate (*R* v *Bernard (Basil)* (which position may be regarded as analogous to a medical condition: see *Janet Farquhar* v *HM Advocate* [2018] HCJAC 56 at para 9).

[17] The court is entitled to, and should, proceed on the assumption that the prison authorities will make provision for such medical treatment or care as may be required (*HM Advocate* v *McColl* 1996 JC 159) and will fulfil their duties to implement the sentence of the court in manner compatible with Convention rights (*R (Qazi)* [2011] 2 Cr App R (S) 8).

II. **Article 3 ECHR and Sentencing**

a. Article 3 and Prisoners with Disabilities

[18] Failure to make adequate provision for the detention of a prisoner with severe disabilities can, in certain circumstances, result in breach of that prisoner's article 3 rights: *Price* v *United Kingdom* (Application No. 33394/96); *Zarzycki* v *Poland* (Application No. 15351/03); *Wolkowicz* v *Poland* (Application No. 34739/13), where the conditions have attained the minimum level of severity to constitute a breach of article 3. The European Court of Human Rights' approach is articulated in *Helhal* v *France,* (Application No. 10401/12) at paras 49 to 52.

b. Article 3: The responsibility of the prison authorities

(i) Introduction

[19] Primary responsibility for the fulfilment of the UK's obligations under article 3 relating to the conditions of detention for prisoners rests with the prison authorities. In Scotland that is the Scottish Ministers and, insofar as specific statutory responsibilities rest upon them, the Governors of prisons (*Somerville* v *Scottish Ministers* 2008 SC (HL) 45). As public authorities, they must act compatibly with Convention rights. The prison authorities have obligations under the Equalities Act 2010. Failure to meet those obligations may result in civil claims (see *Napier* v *Scottish Ministers* 2005 1 SC 229, on appeal 2005 1 SC 307; *cp*

R (Hall) v *University College London Hospitals NHS Foundation Trust* [2013] EWHC 198 (Admin)).

[20] The statutory regime and practical arrangements in Scotland for the detention of prisoners would justify an approach, similar to that in England & Wales, namely that sentencers can and should ordinarily rely on the prison authorities to implement the sentence of the court in a manner which respects Convention rights (see *R(Qazi)* [2011] 2 Cr App R (S) 8).

(ii) The Statutory Regime

[21] The Prisons (Scotland) Act 1989 vests the general superintendence of prisons in Scotland in the Scottish Ministers. Section 3(3) obliges them to do all acts necessary for the maintenance of prisons and prisoners. Although transfers of prisoners are routinely agreed at Governor level, the ultimate power to commit prisoners to such prisons as they may direct and to move prisoners between prisons lies with the Scottish Ministers (section 10(2)). The Scottish Ministers may: make rules for *inter alia* the classification, treatment, employment, discipline [and] control of persons required to be detained in prisons and young offender institutions (section 39); direct that a prisoner be taken to a hospital or other suitable place for treatment (section 11(2)); order the transfer of prisoners with mental disorders to hospital for treatment (Mental Health (Care and Treatment) (Scotland) Act 2003); release a prisoner permanently prior to the expiry of their sentence (Prisoners and Criminal Proceedings (Scotland) Act 1993); release a prisoner on licence where there are compassionate grounds for doing so (s.3 of the 1993 Act). The Prisons and Young Offenders Institutions Rules (Scotland) 2011 regulate the treatment of prisoners and so may be relevant to the treatment and management of prisoners with disabilities.

[22] The foregoing provisions provide a structure of powers, duties and responsibilities which will enable the prison authorities to fulfil their duties under the Human Rights Act 1998, article 3, and the Equality Act 2010.

[23] Where the conditions of detention were incompatible with a prisoner's article 3 rights, the prison authorities would be obliged to make arrangements whereby the prisoner could be held in Convention compliant conditions. If that were not possible, the prisoner could be released under section 3 of the 1993 Act (*R (Spinks)* v *Home Secretary* [2005] EWCA Civ 275 at para 52).

(iii) Practical Arrangements

[24] In *R (Qazi)* (*supra*), the practical arrangements in place were relied upon to show that the legal provisions applicable in England & Wales could be relied on as compatible. Equivalent arrangements are in place in Scotland

(iv) Specific provision as regards prisoners with disabilities

[25] Statutory provisions and practical arrangements directed against discrimination are also relevant in the case of prisoners with disabilities (rule 6 of the 2011 Rules; Equality Act 2010 section 29(7)). The Scottish Prison Service has articulated equality outcomes (*Scottish Prison Service Equality Outcomes 2017 – 2020*). The Chief Executive of the Scottish Prison Service has issued "Guidance for Prison Officers on Disabled Prisoners and Visitors" and the service has entered into partnership with Capability Scotland for the provision of advice in relation to matters pertaining to the treatment of prisoners with disabilities.

c. Article 3 as a sentencing consideration

[26] A sentencing court is obliged to have regards to the provisions of the Convention where relevant to the sentencing decision (*R(P) v Home Secretary* [2001] 1 WLR 2002). When

sentencing prisoners with disabilities, the court is entitled to take account of the legal responsibilities resting on the prison authorities, the practical arrangements in place in that regard and the supervisory role of the courts (*cp R (Qazi) supra* at para 35). That approach is consistent with principle. As a general rule, the court is entitled to proceed on the basis that the prison authorities will make appropriate provision and need not be concerned about the allocation of a prisoner to a specific prison or as to the facilities of that prison, or for the meeting of the health and care needs of the prisoner (*HM Advocate* v *McColl* 1996 JC 159). Only where there is a proper basis for concluding that the very fact of imprisonment might expose the individual to a breach of his article 3 rights might the court be called upon to enquire into whether sentencing that accused to custody would inevitably result in a breach of article 3. Unless imprisonment would inevitably and immediately do so, any breach resultant from the conditions in which he is held would be attributable to the failure of the prison authorities to fulfil their duties, not the sentence itself. It is not for sentencing judges to prejudge the exercise by the prison authorities of their functions which are susceptible to control by the civil courts (*cp S* v *Pistorius* 2014 ZAGPPHC 793). Accordingly the only relevant question for the sentencing judge is whether imprisonment would inevitably and immediately be incompatible with article 3 (*R* v *Khan* [2016] 2 Cr App R (S) 42 at para 14). The following riders may be added to the analysis in *R(Qazi)* (*supra)*: (i) where a court is considering imprisonment for an accused with severe disabilities, it may wish to assure itself that the prison authorities have been alerted to the possible need to accommodate the accused so as to allow for the accused's needs to be anticipated; and (ii) where an issue properly arises as to whether imprisonment would immediately and inevitably be incompatible with article 3, the court will require to make inquiries to ascertain whether the case does fall into that exceptional category.

III. Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD)

[27] The CRPD has not been directly incorporated into domestic law and accordingly is not justiciable in the domestic courts (*R* v *Lyons* [2003] 1 AC 976 at para 27). However, it may be relevant as a consideration that the ECtHR would itself take into account in the context of Convention rights (*Grimailovs* v *Latvia* Application No 6087/03 at para 78). A domestic decision maker who is not bound to give effect to the UK's international obligations may nevertheless properly choose to have regard to those obligations (*R (Yam)* v *Central Criminal Court* [2016] AC 771.

[28] The requirements of article 14(2) CRPD are met by the legal responsibilities imposed on the prison authorities, including those under the Equality Act 2010, and the steps which they must take to accommodate prisoners with disabilities. There is no obligation on sentencers to assess whether particular arrangements envisaged by the prison authorities would or would not be "reasonable adjustments". An alleged failure by the prison authorities to make reasonable accommodation for a prisoner with disabilities would, so far as justiciable, be a matter for the civil courts in the light of the actual circumstances of the prisoner.

IV. Response to Appellant's Submissions

[29] The imposition of a custodial sentence on this appellant would not inevitably be incompatible with his Convention rights. Accordingly it would not be unlawful to impose a custodial sentence. *Helhal* v *France* (*supra*) is a useful comparator. The applicant's continued detention in that case was not, in itself, incompatible with article 3 although the court did find that the applicant's article 3 rights had been breached in the particular circumstances of the case. A consistent theme of the Strasbourg case law is that where a prisoner who is a

wheelchair user has had to rely on other untrained inmates for access to shower and toilet facilities that has resulted in a finding of a breach of article 3 (*Arutyunyan* v *Russia* (Application No. 48977/09); *Grimailovs* v *Latvia* (Application No. 6087/03); *Semikhvostov* v *Russia* (Application No. 2689/12); *Topekhin* v *Russia* (Application No. 78774/13)).

[30] The appellant was in a cell specifically adapted for a wheelchair user, with toilet and shower facilities, and a hospital bed with a pressure relieving mattress. An assessment of his needs was undertaken on the day of his admission and arrangements put in place for his care, which did not depend to any extent on fellow prisoners for his care, or for access to or help with toileting and showering. His case can therefore be contrasted to the aforementioned Strasbourg cases.

[31] The arrangements in the prison may be less responsive than the care provided by his mother. That is not, however, the issue (*cp Zarzycki*, *supra* at para 119). The sole issue is whether, notwithstanding the arrangements which the prison authorities made, or could make, for his care, the appellant was subjected to inhuman and degrading treatment such that a custodial sentence would be incompatible with his article 3 rights: a custodial sentence would not inevitably breach the appellant's convention rights.

Analysis and decision

[32] There was, ultimately, no dispute as to the legal principles applicable in a case such as the present, derived from examination of the authorities placed before the court.

The relevance of article 3 in the sentencing process

[33] Article 3 requires the State to ensure: (i) that prisoners are detained in conditions compatible with respect for human dignity; (ii) that the manner and execution of the measures do not subject them to distress or hardship of an intensity exceeding the

unavoidable level of suffering inherent in detention; and (iii) that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance (*Gelfmann* v *France* (2006) 42 EHRR 4, paragraph 50).

[34] When sentencing an offender a court is bound to have regard to the provisions of the Convention. However, in doing so the court will bear in mind that the primary responsibility for meeting the UK's obligations in respect of article 3, in connection with prisoners, rests with the State (*Qazi*). The court is entitled to take into account that there is a statutory and practical machinery in existence designed to ensure the State's compliance with its obligations under article 3 and, where relevant to those obligations, the terms of article 14 of the Convention of the Rights of Persons with Disabilities. As the Lord Advocate has identified, the machinery which was relied upon in *Qazi* has its direct equivalent in Scotland. Accordingly, Scottish Courts may also proceed on the basis that the State will meet its obligations under article 3 and that the individual needs of those incarcerated will be met in a case of a sentence of imprisonment being passed. We agree with the observations of Hughes LJ in *R* v *Hall* that:

> "A court which is passing sentence ought not to concern itself with the adequacy of these arrangements in an individual case, except in one circumstance. The sole circumstance in which this is necessary is if the mere fact of imprisonment would inevitably expose the prisoner to inhuman or degrading treatment contrary to article 3; in other words, that there cannot be made any arrangement in prison or out of it for his care which will avoid that consequence."

We also agree with the observation, under reference to *Qazi*, that it is "doubtful, given the detailed protocols for the treatment of prisoners, that this would ever arise".

[35] The experience in the present case tends to bear that out. Whatever the deficiencies of the arrangements for the appellant's reception into custody (as to which see below) within 24 hours the prison had managed to put in place a system of care which is not suggested to have been other than Convention compliant, although it is relied on as illustrating the extent to which imprisonment imposed a more significant punishment on the appellant than on a prisoner without his condition. Where the court has decided to impose a sentence of imprisonment on a prisoner with a severe medical condition, it should defer sentence for a period to ensure that the prison authorities are put on notice to expect the prisoner and may make suitable arrangements for his care. In that way, the lack of preparedness referred to in *Price*, and which contributed to the finding in that case of an article 3 violation will be avoided. Risk that the prisoner's needs will not be met will be eliminated, distress, suffering or inconvenience minimised and appropriate steps taken to preserve the prisoner's dignity.

[36] In the unusual situation where an issue properly arises as to whether imprisonment would immediately and inevitably be incompatible with article 3, we agree with the Lord Advocate that the court would require to make enquiries to ascertain whether the case did fall into that exceptional category or whether suitable arrangements may be made.

Article 3 in the present case

[37] As noted above, it is not seriously suggested that the conditions in which the appellant was incarcerated from 2 May 2019 constituted a breach of article 3. Consideration of whether such a breach exists requires a careful examination of the relevant circumstances including the duration of the treatment, its physical and mental effects and in some cases the age, sex and state of health of the victim. In any event, when an issue arises after sentencing

as to whether the conditions attain that minimum level of severity, the matter is one for the civil courts where appropriate remedies may be available to the individuals in question.

[38] The sheriff in the present case, having decided to impose a sentence of imprisonment, did defer sentence for the purpose of allowing the appellant's care needs within the prison estate to be assessed. That at least was his intention as he explained in his report:-

> "Although the adequacy of care for prisoners is clearly a matter for the Scottish Prison Service, I considered it appropriate that they be given fair notice and the opportunity to engage the necessary resources to meet the appellant's needs before his incarceration."

Such an approach would be unexceptionable and indeed is to be commended. The sheriff would have been entitled to proceed on the basis that the prison authorities would be able to meet the appellant's care needs. There is nothing about the appellant's condition, however severe it may be, in the context of the known regime for incarceration within the UK, which would suggest that his imprisonment would immediately and inevitably result in a breach of article 3. The period of deferral would enable the authorities adequately to prepare for his arrival and to ensure that they were prepared to meet his needs. However, there seems to have been a breakdown in communications. The method by which the sheriff sought to achieve his intention was by means of a supplementary Criminal Justice Social Work Report. The writer of the report appears to have been under the impression that the issue was "how the prison will cope with his additional needs" and it seems that it was on this basis that the writer engaged in discussion with prison authorities. It does not seem to have been made clear to the authorities either by the court or the writer of the report that a decision to impose a sentence of imprisonment had been made and that the purpose of the delay was

simply to provide notice of that to the prison authorities to put appropriate arrangements in place.

[39] In reality what was required here was not a supplementary Criminal Justice Social Work Report at all. What was required was intimation directly to the prison authorities that at the deferred diet a sentence of imprisonment would be imposed on the appellant; that he had numerous complex care needs; and that the delay was to enable the prison authorities to make the necessary arrangements for his reception. Had this been done, it seems likely – from the speed with which the prison was able to respond eventually – that there would have been no difficulty. However, what happened was that at the continued diet the sheriff had a report which stated in terms that the appellant's needs could not at that time safely be met within Perth Prison and that no facility was available in either Edinburgh or Glenochil. The sheriff was thus faced with information which at the very least raised the possibility that immediate imprisonment might inevitably, at least in the short term, breach the appellant's article 3 rights. Nevertheless, he proceeded to impose the sentence of imprisonment already decided upon. We are satisfied that he was wrong to do so even if a custodial sentence were otherwise merited, a matter we address below. The situation before the sheriff seems to have been the very circumstance calling for further enquiry as submitted by the Lord Advocate. The sheriff should have continued the case further; ensured direct intimation to the prison on the date of the deferred sentence; intimated that he expected arrangements to be made for the sentence to be served in Convention compliant conditions; and sought an assurance that suitable arrangements would be put in place. Only after that should he have imposed a custodial sentence, assuming that to be appropriate.

[40] Having regard to the way matters developed in this case, and the fact that catering for prisoners with extreme physical needs appears to be something which the Prison Service

must increasingly address, we consider it appropriate that formal arrangements should be put in place between SCTS and SPS to ensure that future such cases are dealt with appropriately.

The relevance of disability in sentencing

[41] As the court noted in *R* v *Hall*, the medical condition of an appellant "cannot be a passport to absence of punishment". Moreover, an individual is not, by reason of disability alone, entitled to a reduced sentence. Nevertheless as Hughes LJ observed in *Hall*, it is a legitimate aim of sentencing to preserve, to the extent possible, a degree of parity of punishment between like offenders. This is recognised in the guideline issued by the Scottish Sentencing Council and approved by the High Court of Justiciary on the Principles and Purposes of Sentencing. This provides that sentencing decisions should treat similar cases in a similar way, and that people should be treated equally and without discrimination. It is a consequence of these principles that in selecting a custodial sentence, and deciding on its length, the sentencer should recognise that in some cases the impact upon the prisoner may be significantly greater than on a prisoner without the relevant disability, which may justify the imposition of a shorter sentence than might otherwise have been selected. The case of *R* v *Hall* is a clear illustration of this. The trial judge had arrived at a reduced headline sentence of four and a half years before taking account of the effect incarceration would have on a prisoner with severe disabilities whose condition interfered with all bodily functions, required 24 hour monitoring and considerable assistance with every aspect of his life, as well as intensive medical input. On appeal it was determined that a reduction to three years was not sufficient to take account of the differential effect of

imprisonment on the prisoner and the sentence was further reduced to 18 months. We endorse the view expressed in that case (paragraph 14):-

> "… the sentencing court is fully entitled to take account of a medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the appellant, or as a matter of generally expressed mercy in the individual circumstances of the case. … It will not necessarily do so, and normally will not do so if, for example, the powers of release under the Prerogative powers will provide sufficient response if it is a case of possible future deterioration nor will it normally do so if the prisoner represents a danger from which the public needs to be protected. But in an appropriate case, it may be right to do so."

The circumstances of the present case

[42] So far we have been examining the circumstances of the case from the point of view of principle and practice. We turn now to consideration of the merits of the case. The starting point for consideration of the present case is not in fact, in our view, the appellant's condition but the protection afforded to him in terms of section 204(2) of the Criminal Procedure (Scotland) Act 1995. The appellant is a first offender and is thus someone who has not been previously sentenced to imprisonment or detention. Accordingly, the sheriff was only entitled to impose a sentence of imprisonment if satisfied that no other method of dealing with the appellant was appropriate. The sheriff considered that the offences constituted a course of conduct preying upon young and vulnerable (the first complainer was, as the appellant knew, in foster care) and was so serious that only a sentence of imprisonment was appropriate. The sheriff in his report notes the suggestion in the CJSWR that the appellant's conduct might be attributable to restricted emotional and sexual development as a result of the isolation imposed by his physical restrictions and that he was deemed suitable for a community based disposal. The sheriff does not however address the numerous aspects of the CJSWR which indicate why a community based disposal was

deemed appropriate, what it might consist of and the conditions which might be attached to it with a view to preventing recurrence of such behaviour. All of these matters were examined in detail in the CJSWR yet the sheriff does not address these nor explain his reasons for rejecting them. Instead he states that the author of the supplementary report suggested that "a custodial sentence has been deemed the most appropriate disposal". The suggestion that this should be interpreted as indicating that the social worker deemed a custodial sentence to be the most appropriate is not a fair representation of the terms of the second report. At the time of ordering that report the sheriff had already decided that only a sentence of imprisonment would suffice and the report was ordered on that basis. The author therefore knew that a prison sentence was to be imposed. That second report was not concerned with alternatives to imprisonment at all, but only with the appellant's care needs. From the full, first CJSWR it is quite clear that the appellant was deemed suitable for community based disposal. That report noted that the appellant's restricted sexual development, already noted, had resulted in highly complicated feelings that he was not currently equipped to process; however, "it is hoped with appropriate intervention and support [he] will be able to find appropriate ways to understand and process his sexual identity".

[43] The assessment of presenting a medium risk of re-conviction was based on two central factors – stranger victim selection and intimate relationship experience. The sheriff did not interrogate the extent to which the latter, in someone situated as the appellant, was truly a risk factor in the sense that it might be with someone not so situated. Moreover, the report concluded that whilst subject to monitoring and supervision further offending was unlikely to be imminent, although there might be a future risk without intervention. The conclusion was:-

> "Whilst [the appellant] is not considered a significant risk of general offending, sufficient treatment needs have been identified to suggest that Supervision would be appropriate in order to reduce the risk of further sexual offending. I would suggest that in particular [the appellant] needs to work on how his sexual functioning and emotional well-being have developed, and consider the impact his difficulties have had on his self-esteem, and the impact this then has on his interaction with others."

[44] The appellant was deemed suitable for participation in Moving Forward: Making Changes and a detailed series of conditions which would enable appropriate management within the community to take place was proposed, together with conditions designed to limit his access to the internet. The author recognised that the court might be considering a custodial disposal but offered the view that:-

> "It is clear that [the appellant] would benefit from intervention to address his sexual offending, and I would suggest that the Moving Forward: Making Changes group work programme would be the best way to manage this … if a community disposal can be considered, a three year community payback with supervision, programme and conduct requirements is available."

[45] How it is that in the face of the clear identification of treatment needs, an available and suitable programme of work to address these, and to reduce the risk of future offending, with conditions designed to ensure suitable management within the community, the sheriff nevertheless was able to conclude that only a custodial sentence would serve is difficult to understand. Moreover, we say that before taking any account of the appellant's physical difficulties. When one takes them into account, and recognises the extent to which imprisonment would constitute a heavier punishment for him than for an offender without his condition (something the sheriff appears not to have acknowledged), the position becomes even clearer.

[46] We are satisfied that the appeal must succeed. We will therefore substitute a three year community payback order with supervision, programme and conduct requirements involving participation in the Moving Forward: Making Changes programme and the

conditions specified at pages 9 and 10 of the Criminal Justice Social Work Report. We will put the case out by order for discussion of how the appellant's consent to this (noted in the Criminal Justice Social Work Report) may be obtained.