

PE2102/J: Require anyone found guilty of rape or sexual assault to be registered as a sex offender

Lord Advocate written submission, 17 June 2025

I refer to your letter dated 9 May 2025 seeking information on how unduly lenient sentence appeals operate in practice in Scotland for cases of absolute discharge and whether there are any examples of an absolute discharge in a rape or sexual assault case being appealed by the Crown Office and Procurator Fiscal Service (COPFS).

Unduly Lenient Sentence Appeals

While sentence is rightfully the domain of the independent judiciary, the balance of justice is served by the Crown being allowed to appeal in limited circumstances.

The Appeal Court has set a high test to be satisfied for this to happen and has held that a sentence or other disposal (which includes an absolute discharge) may be regarded as being *unduly* lenient if it falls outside the range of sentences or disposals which a sentencing judge, applying their mind to all the relevant factors, could reasonably have considered to be appropriate (*HM Advocate v Bell 1995 SCCR 244*).

A sentencing judge must take account of the circumstances of the crime and of any mitigating circumstances which have been advanced on behalf of the convicted person. Recognising this, the Appeal Court has emphasised the right of judges to show leniency where appropriate and in a number of cases has commented that although a particular sentence was lenient - or even lower than the sentence which the Appeal Court itself would have imposed - nevertheless it could not be regarded as being *unduly* lenient. This approach is consistent with the Court's approach when dealing with appeals against sentence generally: the Appeal Court it is not to be regarded as a Court of review.

The Court has also commented that where the sentencing judge has heard the evidence, he will be in a better position than the Appeal Court to determine what sentence is appropriate (*HM Advocate v Bell 1995 SCCR 244*).

A decision on whether to appeal the sentence imposed in any case must be based on legal considerations, and I can confirm that careful consideration is given to cases which may meet the high legal test set out by the Appeal Court. Where a prosecutor considers that the sentence satisfies the test and a Crown appeal against sentence may be appropriate, the case is referred to Crown Counsel, the most senior prosecutors in Scotland appointed by me, to carefully consider whether an appeal should be lodged in the case. In cases of unduly lenient sentences, approval is also required from me or the Solicitor General before such an appeal is lodged with the court. Decisions on whether to appeal are not taken lightly and are taken after detailed consideration of all the relevant factors in the case.

As the Committee is aware, the Scottish Sentencing Council is currently developing sentencing guidelines on rape and sexual assault. The creation and introduction of such guidelines for these offences is welcomed both due to it providing the opportunity to provide consistency in sentencing and to enable a greater understanding of the factors relevant to the sentencing of these offences.

Examples of any Crown appeals against an absolute discharge in a rape or sexual assault case

I can confirm that the last case in which a Crown unduly lenient sentence appeal was lodged in a rape or sexual assault case where an absolute discharge was imposed by the sentencing judge, was in 2014. The individual in this case was convicted of a contravention of section 3 of the Sexual Offences (Scotland) Act 2009 (sexual assault) and received an absolute discharge. The Crown appeal was successful, and the Court substituted a sentence of Community Payback Order containing a supervision requirement for one year and directed the Clerk to the lower court to issue amended certificates in terms of the Sex Offenders Act 2003.

The case against Daniel Cieslak may be of interest to the Committee. Mr Cislak pled guilty to a contravention of section 18 of the Sexual Offences (Scotland) Act 2009 (rape of a girl under the age of 13 years) in 2017. The sentencing judge concluded that in the particular circumstances of the case, justice was best served by taking the “wholly exceptional decision” not to sentence Mr Cieslak but instead discharge him absolutely. The judge’s sentencing statement can be located at:

[Scottish Legal News](#)

The Crown have also successfully appealed several recent convictions for rape on the basis that the sentence imposed was unduly lenient, albeit the original sentence imposed was not an absolute discharge. These cases may be of interest to the Committee and demonstrate my commitment to exercising this right of appeal when I consider the high test to be met:

[HMA V LM \[2025\] HCJAC 3](#)

The respondent, a football coach, was convicted of repeatedly raping and sexually assaulting a 14-year girl and communicating indecently with a person he thought was another child. The Appeal Court found that the judge had failed to take account of grooming as an aggravating factor. The original extended sentence of 7 years with a custodial term of 5 years was quashed and replaced with a *cumulo* extended sentence of 12 years, made up of a custodial term of 9 years and an extension period of 3 years.

[HMA V Barzan Nawshowani \[2024\] HCJAC 21](#)

The respondent abducted and raped an intoxicated young woman, who thought he was a taxi driver. The Appeal Court agreed that the sentence did not adequately reflect the premeditated and predatory nature of the attack, the features of abduction and detention, the force used, and the harm caused. The original sentence of 6 years imprisonment was quashed and substituted with an extended sentence of 11 years, made up of custodial term of 8 years and an extension period of 3 years.

[HMA v TJ \[2023\] HCJAC 23](#)

The respondent pled guilty to raping the complainer in the presence of her young son. The Appeal Court found that the judge had failed to adequately consider the degree of planning and violence involved and the added degradation of the presence of the child, who had tried to comfort her and to bring matters to an end. The Appeal Court agreed that the original sentence of 4 years 6 months imprisonment was unduly lenient and substituted 8 years 6 months imprisonment.

COPFS is committed to improving the criminal justice journey for those affected by this type of serious offending, from the stage of reporting all the way through to sentencing. Prosecutors have a responsibility to consider appeals based upon undue leniency in sentencing. Whilst such appeals are rare, they are important to ensure the public interest is properly served. They allow the court to review sentences that the Crown believe fall outside the range of sentences reasonably considered appropriate. It is important that the harm caused by such offending, and the culpability of the convicted person, be consistently reflected in sentencing decisions.

I trust that this information is of assistance.

Yours sincerely,

THE RIGHT HONOURABLE DOROTHY BAIN KC
LORD ADVOCATE