IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/00399/A3

NCN No: [2022] EWCA Crim 39

Royal Courts of Justice

The Strand

London

WC2A 2LL

Thursday 20th January 2022

LORD JUSTICE HOLROYDE

MR JUSTICE LAVENDER

SIR NIGEL DAVIS

R E G I N A

- v –

ANDREW LIMON

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Mr C Q Morrison appeared on behalf of the Appellant

Miss J Kidd appeared on behalf of the Crown

J U D G M E N T

Thursday 20th January 2022

LORD JUSTICE HOLROYDE:

1. This is an appeal by leave of the full court against sentences totalling four years' imprisonment for sexual offences committed by the appellant many years ago, when he was a child. The issues in the appeal make it necessary to consider the correct approach to sentencing when the maximum sentence available to the court, if the offender had been convicted at the time of the offences, would by reason of his age have been subject to a restriction which does not apply to an adult.

2. The victim of the offending, to whom we shall refer as "C", is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences.

3. For the purposes of this appeal, the relevant facts can be stated very briefly. As a teenager, the appellant groomed and abused C. He committed sexual offences against her when she was a visitor in the appellant's family home. When C felt able to report the offending to the police, the appellant was charged with eight offences of indecent assault, contrary to section 14 of the Sexual Offences Act 1956. These involved kissing her and putting his tongue in her mouth (count 1); kissing, touching and rubbing against her under the pretence of comforting her (counts 2, 3, 5 and 7); putting his hand inside her clothing and inserting his fingers into her vagina (count 4); and on one occasion causing her first to masturbate his penis and then to take his penis into her mouth (counts 6 and 8). The maximum sentence in each case was ten years' imprisonment.

4. Each of the offences was charged as having been committed between September 1993 and September 1996, when the appellant was aged between 14 and 17 and C was aged between 6 and 9.

5. The appellant denied all the offences but was convicted after a trial. He was sentenced in the Crown Court at Teesside on 25th January 2021. He was then aged 41 and of otherwise good character. A pre-sentence report assessed him as being at low risk of committing further offences.

6. Submissions were made to the judge as to relevant statutory provisions and case law, and as to the application of the Sentencing Council's guideline: Sexual Offences - Historic. That guideline is commonly referred to as Annex B, in recollection of its initial inclusion as an appendix to the hard copy sexual offences guidelines, though only the online version should now be used. It was submitted to the judge that the effect of the statutory provisions was that at the time of the offences the appellant could not have been sentenced to more than two years' detention in a young offender institution.

7. The judge, in his sentencing remarks, summarised the circumstances and serious aggravating features of the offending, and the matters of mitigation available to the appellant. He referred to the long-lasting and continuing harm caused to C. He found, on the evidence, that it was reasonable to conclude that all or most of the offending occurred when C was aged 7 and the appellant was aged 15 or 16. He took the view that the appellant did not have an entrenched attraction to children and was

at the time "taking the only, but inappropriate, opportunity available to you for your sexual experimentation".

8. The judge noted that some form of custodial or detention order would have been available to the court if the appellant had been sentenced at the time of the offences. On that basis he adopted the approach to sentencing set out in R v H[2011] EWCA Crim 275 and R v Forbes[2016] EWCA Crim 275, and in Annex B. He identified the modern equivalents of the offences and placed them into categories under the relevant modern guidelines. No challenge is made to those latter decisions, and we need not refer to them in any greater detail.

9. The judge stated that he would treat count 8 as the lead offence, take all the other offending into account as aggravating features, and "reflect your youth and immaturity as best I can". He imposed the following concurrent sentences of imprisonment: on count 8, four years; on count 4, three years; on count 6, 12 months; on counts 2, 3, 5 and 7, nine months; and on count 1, six months. Thus, the total sentence was four years' imprisonment. He declined to make a Sexual Harm Prevention Order, viewing such an order as unnecessary to manage future risk. He said that a surcharge order should be drawn up in the appropriate sum. Having regard to the dates of the offending, no surcharge was payable and the appropriate sum was accordingly nil. The court record correctly showed no surcharge.

10. We are grateful for the written and oral submissions we have received from counsel, both of whom appeared below. For the appellant, Mr Morrison submits that the sentencing was wrong in principle and/or manifestly excessive because at the time of the offences the appellant, by reason of his age, could not have been sentenced to a total of more than 12 months' detention, and to impose a total sentence in excess of 12 months breached Article 7 of the European Convention on Human Rights.

11. For the respondent, Miss Kidd draws particular attention to the seriousness of the offending and to the markedly heavier penalties which would be imposed today on someone convicted of similar offences. She argues that the total sentence imposed by the judge, though longer than the maximum available at the time, did not breach Article 7.

12. We shall consider first the issue relating to Article 7 and then address the application of relevant sentencing guidelines.

13. Article 7(1) of the Convention provides:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

14. In R v Ghafoor[2003] 1 Cr App R(S) 84, the appellant was aged 17 when he committed his offence, but 18 when he pleaded guilty to it. As a 17 year old, the legislation then in force had the effect that he could not have been sentenced to more than two years' detention in a young offender institution. As an adult, the maximum sentence was ten years' imprisonment. A sentence of four years six months' detention was imposed. The appellant argued on appeal that the sentence was in breach of Article 7. The court found it unnecessary to decide that question, because it found that the sentence was manifestly excessive on established sentencing principles, which required the judge to have regard to the age of the appellant at the date of the offence and the maximum penalty permissible at that time.

For that reason the sentence was quashed and 18 months' detention in a young offender institution substituted.

15. Article 7 was considered in detail by the House of Lords in R (Uttley) v Secretary of State for the Home Department [2005] 1 Cr App R(S). The claimant was sentenced to a total of 12 years' imprisonment for offences or rape committed some 12 years earlier. At the time of his offending, the release provisions applicable to such a sentence would have required him to be released unconditionally after serving two-thirds of the sentence. There had however been a subsequent legislative change, as a result of which the release provisions which in fact applied to him meant that he would be released after serving two-thirds of his sentence, but would be subject to licence conditions until the three-quarters stage of his sentence. In judicial review proceedings, he argued that his liability to those licence conditions meant that he had received "a heavier penalty" in breach of Article 7.

16. The House of Lords rejected that argument. Lord Phillips referred to the decision of the Court of Justice of the European Union in 2000 in Coëme v Belgium, in which the Court had held that Article 7 required consideration of whether, at the time of the offending, "there was in force a legal provision which made that punishable and that the punishment imposed did not exceed the limits fixed by that provision". Lord Phillips concluded at [21] that:

"... Article 7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which would have been imposed on the defendant under the law in force at the time that his offence was committed."

At the time of the claimant's offending, the maximum penalty for rape was life imprisonment. That was "the applicable penalty" for the purposes of Article 7(1).

17. Lord Roger, at [38] said that for the purposes of Article 7(1), the proper comparison was between the penalties which the court imposed for the offences in 1995 and the penalties which the legislature prescribed for the offences when they were committed around 1983. He went on to say, at [42], that the decision in Coëme v Belgium showed that Article 7(1) did not require the court to speculate as to what sentence the court would in practice have been likely to impose at the time of the offending. He said that the purpose of Article 7(1):

"... is not to ensure that the offender is punished in exactly the same way as he would have been punished at the time of the offence, but to ensure that he is not punished more heavily than the relevant law passed by the legislature would have permitted at that time. So long as the court keeps within the range laid down by the legislature at the time of the offence, it can choose the sentence which it considers most appropriate."

18. Similarly, Lord Carswell, at [62] stated that the "applicable penalty", for Article 7(1) purposes, was that which the sentencer could have imposed at the time of the offending, i.e. the maximum sentence then prescribed by law for such offending.

19. It is clear from those statements that Article 7(1) requires a court, when sentencing for historical offences, to sentence within the maximum sentence prescribed at the time of the offending. The court is not required to consider what sentence might have been imposed in practice at the time.

20. In Uttley, the maximum sentence for rape had been the same at all material times. In R v H, Lord Judge CJ considered the application of the principle to cases in which the maximum sentence for the

offence, or a modern equivalent offence, was greater at the time of sentencing than it had been at the time of the offending. He concluded at [18] that in historical cases:

"... provided sentences fall within or do not exceed the maximum sentence which could lawfully have been imposed at the date when the offence was committed, neither the retrospectivity principle nor Article 7 of the European Convention are contravened."

21. In R v Bowker[2007] EWCA Crim 1608, the appellant had been aged 17 at the time when he committed an offence of violent disorder, but 18 when sentenced. He was sentenced to a term of detention which was longer than the maximum term of the detention and training order which would have been imposed if he had been sentenced as a 17 year old. He argued on appeal that there was a breach of Article 7, submitting that Article 7(1) referred to the maximum sentence available in respect of the offender at the time of the commission of the offence. The court rejected that submission. Latham LJ, giving the judgment of the court, said at [27]:

"... it seems to us that the provisions of Article 7(1) are clearly directed to the mischief of retroactive or retrospective changes in the law. In the present case, there was no change in the law. The penalties for violent disorder remained the same. All that changed was the penal regime to which the appellant would be exposed as a result of the normal operation of existing law to his age at the time of conviction. For those reasons, we do not consider that the court is constrained in any way by the provisions of Article 7 in situations such as the present.

22. In R v Forbes[2016] EWCA Crim 1388, the court considered appeals in a number of unrelated cases. The court referred to R v H and to Annex B. Lord Thomas CJ, giving the judgment of the court, said this at [13]:

"The court is, as has been stated, not concerned to ascertain what sentence would have been passed if the case had been tried shortly after the offence had been committed; it is only concerned to ascertain the statutory maximum. There may, however, be rare cases where a broader inquiry is necessary. An illustration is provided by the appeal of BD where BD was under the age of 14 when he committed some of the indecent assaults. As we set out at paragraph 110, BD could not have been sentenced at the relevant time to any custodial sentence for those offences because of his age. For the reasons we give at paragraphs 111-121, we concluded that, taking into account Article 7 and the common law requirements of fairness, it would not be right to impose on him a custodial sentence for those offences. The appeal in that case is to be contrasted with that of Rouse where, although only a little older, a custodial sentence would have been available at the time of the offending (see paragraph 144). The rare circumstances of the appeal in BD should therefore not operate as encouragement or licence to courts to consider a similar exercise in any other situation."

23. In R v L[2017] EWCA Crim 43, the court endorsed the principles in Forbes, and at [14] summarised the position which flowed from Forbes as follows:

"(a) The general principle is that the relevant maximum penalty is the maximum penalty available for the offence at the date of the commission of the offence.

(b) There is an exception to the general principle where the offender could not have received any form of custodial sentence at the time he committed the offence.

(c) The exception is no licence for any broader inquiry. If custody was available at the time of the offending for the offender, the age of an offender at the time of the commission of the offence is relevant solely to the assessment of culpability. The only constraint in those circumstances on the

powers of the sentencing court is the statutory maximum for the offence. The court should not analyse the nature of the custody available for a young offender at the time, the maximum length of that custody, the court's powers to commit for sentence as a grave crime or the principles governing sentencing of young offenders, in so far as they go beyond the importance of assessing culpability and maturity."

24. In the light of those authorities, we are unable to accept Mr Morrison's principal submissions to the effect that the appellant, in common language, received "a heavier penalty" than would have been available had he been sentenced as a teenager, and that the legislation of primary relevance to the present appeal is section 53 of the Children and Young Persons Act 1933 (which makes clear that these offences were not in the category of grave offences for sentencing purposes). In our judgment, we are constrained to reject those submissions by the decisions in Uttley, Bowker and the other cases we have mentioned. At the time of the offending, the maximum penalty prescribed for an offence contrary to section 14 of the Sexual Offences Act 1956 was ten years' imprisonment. The total imposed on the appellant was well below that maximum. The fact that, as a 15 year old, he would have been subject to a different sentencing regime does not assist him in relation to Article 7. The sentence imposed by the judge did not breach Article 7(1).

25. That is not, however, the end of the matter, because the issues raised by the grounds of appeal make it necessary for us to say a little more about the sentence which could have been imposed on the appellant at the time of the offences, and then to consider the application of the Sentencing Council's definitive guideline on sentencing children and young people ("the Children guideline").

26. The appellant was aged under 18 throughout the indictment period. At the start of that period, the offence of indecent assault, contrary to section 14 of the 1956 Act, was not one of the grave offences in respect of which section 53 of the 1933 Act enabled a court to sentence a young offender to a term of detention not exceeding the maximum applicable sentence of imprisonment. Accordingly, the custodial sentence which could be imposed on an offender aged between 15 and 18 was detention in a young offender institution. The effect of sections 1A and 1B of the Criminal Justice Act 1982 was to place a limit on the total term of such detention which could be imposed, even if a young offender fell to be sentenced for multiple offences. At the start of the indictment period, that limit was 12 months.

27. Both aspects of that legislation were amended in material respects during the indictment period. With effect from 5th January 1995, the offence of indecent assault was added to the grave offences in respect of which long-term detention under section 53 of the 1933 Act was available. Miss Kidd very fairly and properly concedes that the court could not be satisfied that any of the offences were committed after that date, and that the court should accordingly proceed on the basis that long-term detention would not have been available in the appellant's case.

28. Then with effect from 3rd February 1995, the maximum total term of detention in a young offender institution was increased from 12 months to two years. Transitional provisions, however, excluded from the effect of that increase any offences committed before that date. Again fairly and properly, Miss Kidd concedes that the court must proceed on the basis that the maximum total term of detention which would have been available in the appellant's case would have been 12 months. As she justifiably observed, this appeal provides yet another example of the grave difficulties of navigating through frequently-changing legislation.

29. The Children guideline came into effect on 1st June 2017. It therefore post-dates R v H, R v Bowker, R v Forbes and R v L. It is of course primarily directed to the sentencing of those aged under 18 when convicted. It does, however, contain important guidance as to sentencing an offender who

crosses a significant age threshold between the date when he commits the offence and the date when he is convicted. Paragraphs 6.1 to 6.3 set out the following principles:

"6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).

6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:

• the punishment of offenders.

• the reduction of crime (including its reduction by deterrence).

• the reform and rehabilitation of offenders.

• the protection of the public; and

• the making of reparation by offenders to persons affected by their offences.

6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate."

30. Commonly, of course, the application of those principles will arise in a case in which the offender is a young adult when convicted of offences committed a comparatively short time earlier as a child. But we see no reason in principle or logic not to apply them also to a case in which many years have passed between the offending and the conviction and sentence. In such a case, as in the more common type of case, the important point is that it would be wrong to overlook the principles contained in the paragraphs we have quoted from the Children guideline. As Mr Morrison eloquently put it in his submissions, "The passage of time does not imbue the appellant with any greater culpability or moral responsibility than he had at the time of the offence". The importance of that observation for present purposes is that Parliament has consistently legislated over the years in ways which reflect the lesser culpability and lower moral responsibility of a child offender by making special provision for his punishment which explicitly distinguishes him from those of full age and understanding. Thus, however many years have passed since the commission of the offences, the principles in the Children guideline are relevant; and by section 59(1) of the Sentencing Code, every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, unless it is satisfied that it would be contrary to the interests of justice to do so.

31. As we have noted, the case law which we have mentioned pre-dated the Children guideline, and accordingly makes no reference to it. We have considered in particular whether our view as to the application of the Children guideline is inconsistent with the decisions of the court in the cases of BD and Rouse, which were amongst the appeals considered in Forbes and were referred to at [13] of the judgment in the passage we have quoted at paragraph 22 above. We do not believe that it is. The court in those cases was considering whether the sentences offended against Article 7(1). As we have already ruled, Article 7(1) was not a bar to the judge in the present case passing a total sentence in excess of the sentence which could have been imposed at the time of the offences. The Children guideline, however, raises a different point. Even though a longer sentence would not offend against

Article 7(1), it must, for reasons of fairness, be tempered by reference to the sentence which would have been imposed at the time of the offending.

32. Annex B does not expressly refer to the Children guideline, but at paragraph 7 it makes the general point that the passage of time may mitigate the seriousness of an offence, and at paragraph 9 it states that the young age or immaturity of the offender at the time of the offence may be regarded as personal mitigation. We do not think that the approach set out in Annex B is inconsistent with the application of the principles in the Children guideline to the comparatively few cases of this nature in which they will be relevant. The Children guideline adds a further element of structure to the approach to be taken to such cases, and in that sense it adds to the previous guidance.

33. We note also that in R v M[2020] EWCA Crim 1386, the court applied the principles in the Children guideline when allowing an appeal against sentence by a man who was aged 23 when sentenced for a number of sexual offences, but had been aged 11 to 16 when he committed those offences. Similarly, the court (differently constituted) in R v Amin[2020] EWCA Crim 1583; [2020] 1 Cr App R(S) 36, and R v Scothern[2021] 1 WLR 1735, applied the principles stated in paragraphs 6.1 to 6.3. The application of those principles to cases in which the offender has crossed a relevant age threshold between offence and conviction is accordingly now well established and in our view those cases should be followed.

34. It follows from all that we have said that the judge fell into error in this regard, though we must point out, in fairness to him, that these considerations were not brought to his attention by counsel and that the submissions made to him had a different focus. In accordance with the Children guideline, he should have taken as his starting point the sentence likely to have been imposed at the time of the offending, and the maximum sentence which could then have been imposed. For the reasons we have explained, the starting point should accordingly have been a total sentence of 12 months. That need not necessarily have been the end point. In the circumstances of this case, however, without in any way underestimating either the seriousness of the offending or the seriousness of the harm caused, to which Miss Kidd rightly drew our attention, we are not persuaded that there is any good reason why the adult appellant in 2021 should have been sentenced more severely than the adolescent appellant could or would have been sentenced in 1994 or 1995.

35. We therefore allow the appeal to this extent. We quash the sentences of four years' imprisonment on count 8 and three years' imprisonment on count 4. We substitute for them sentences of one year's imprisonment, concurrent on each of those counts. The other, shorter concurrent sentences remain as before. Thus, the overall sentence is reduced from four years' imprisonment to 12 months' imprisonment.

36. One further consequence of our decision is that the period for which the appellant is subject to the notification requirements will be reduced to ten years.
