Neutral Citation Number: [2019] EWCA Crim 1632

Case No: 201700747/C3 & 201700190/C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Preston Crown Court
HHJ Knowles QC
T20157519/7599

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2019

Before :

LORD JUSTICE GREEN
MR JUSTICE PHILLIPS
and
HER HONOUR JUDGE MOLYNEUX

- -

Between :

REGINA
- and -
KC

(Transcript of the Handed Down Judgment.
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Mr Alex Chalk (instructed by **Crown Prosecution Service**) for the **Crown**
Mr Max Saffman (instructed by **Olliers Solicitors**) for the **Appellant**

Hearing date: Friday 19th July 2019

Judgment
As Approved by the Court

Lord Justice Green :

A. Introduction

1. On 17th November 2016, in the Crown Court at Preston, after the jury were sworn and after the complainant's ABE interview had been played, the appellant changed his plea to guilty to four counts. These comprised three counts (Counts 2, 3 and 4) of assault of a child under 13 years old by penetration, contrary to Section 6 Sexual Offences Act 2003 ("SOA 2003"), and one count (Count 8) of inciting a family member to engage in sexual activity contrary to Section 26 SOA 2003.

2. The appellant was sentenced on Counts 2, 3 and 4 pursuant to Section 236A of the Criminal Justice Act 2003 ("CJA 2003") to a sentence of 11 years and 6 months imprisonment, comprising of a custodial term of 10 years 6 months and a further period of 12 months on licence, on each count concurrent. In relation to Count 8, the appellant was sentenced to a term of 18 months' imprisonment, consecutively. The structure of the sentences accords with the guidance given by the Court of Appeal in *R v Fruen* [2016] EWCA Crim 561 at paragraphs [6] and [16] – [24].

3. The appellant appeals with leave of the single judge both conviction and sentence. There are two principal issues arising. These can be summarised as follows:

    a) **Change of plea**: Whether the conviction was unsafe because the appellant was not allowed to apply to change his plea from guilty to not guilty after the jury had been directed to deliver a guilty verdict and had done so, but prior to sentence.

    b) **Category 2 Harm factors**: Whether the judge erred in treating the sentence for Counts 2, 3 and 4 as Category 2 (Harm), under the definitive Guidelines on Sexual Offences, rather than Category 3. This focuses attention upon the meaning of the phrases "*sustained incident*" and "*child is particularly vulnerable due to extreme youth and/or personal circumstances*", in the Guidelines.

4. In addition the appellant seeks leave well out of time on certain new grounds which proceed upon the basis that the court rejects the appellant's argument that the conviction and sentence should be set aside because of the erroneous position adopted by counsel and by the judge in relation to change plea. It is then argued that the plea (of guilty) was in any event to an incorrect charge on the indictment because the evidence in the case does not disclose penetration and, accordingly, the charges should have been pursuant to Section 7 SOA 2003, as sexual assault of a child under 13.

5. The provisions in the Sexual Offences (Amendment) Act 1992 apply to this offence. It follows that no matter relating to the complainant in the present case may during that person's lifetime being included in any publication if likely to lead members of the public to identify that person as the victim of the offence, save insofar as this prohibition is waived or lifted pursuant to Section 3 of the said Act. The appellant is referred to as "KC" and the complainant as "B"

6. We turn now to summarise the facts of the case.

B. Summary of Facts

The assaults and the incitement

7. The complainant ("B") was the daughter of the appellant's partner. B however believed that the appellant was her biological father and she became aware of the truth only as a result of her complaint. At the date of trial, B was 16 years of age.

8. The offences comprising Counts 2, 3 and 4 occurred at various points between 2006 and 2008 when the complainant was between 7 and 8 years of age. The first offence took place at some point between December 2006 and December 2007 when the complainant was 7 years of age. Her mother had gone out for the evening. The complainant was alone in the house with the appellant. He brought her downstairs ostensibly to watch television with him. She was lying under a cover and the appellant lay down behind her. He touched her stomach beneath her pyjamas and inserted his finger into her vagina. This course of conduct was repeated on a number of occasions over the following 2 years. Each occasion occurred when Bs mother was out of the house. She did not make a complaint at the time and continued to live with the appellant in the family home.

9. Count 8 concerned an incident some five years later when B was 15 years of age. She had, at that point, a boyfriend which fact made the appellant jealous. Between 1st September 2014 and 27th November 2014, the appellant sent B a series of inappropriate messages on Facebook in which he asked her, for instance, to send him a picture of herself naked. In one message he told B that he wished to give her an orgasm. In another he told her that he wished to spend 30 minutes with her promising that she "*would not regret it*". The message upset B and caused her to disclose the earlier abuse to her boyfriend, some school friends and eventually to a pastoral carer at her school. The appellant was arrested. He initially pleaded not guilty to all counts. The case was listed for trial in November 2016. The jury was sworn, and the prosecution played the complainant's video interview to the jury.

10. At this point the appellant decided to plead guilty to Counts 2, 3, 4 and 8 on a multi-count indictment. The Crown agreed to this course and the appellant was sentenced only on those counts.

The facts surrounding the intention to change the guilty plea

11. The circumstances surrounding the plea of guilty have been described by counsel, then appearing for the appellant, who has provided information to the Court following a waiver of privilege by the appellant, upon a change of legal representative. The gist of that evidence is as follows. There was a delay in the commencement of the trial. Counsel spoke to the appellant on 16th November 2016 and had taken instructions regarding the defence. Counsel had no recollection nor any note of the appellant being unwell or affected in any way by medication or the lack of it. The complainant's ABE interview was played to the jury and the jury was then sent home for the day.

12. Following the retirement of the jury, the judge made a number of comments to the appellant relating to credit for plea. Counsel's impression was that the judge had

watched the way in which the appellant was viewing his stepdaughter upon the screen and recognised the possibility that the appellant might not wish to defend the charges. Counsel had a discussion with the appellant that evening and explained what he thought might be in the judge's mind. He invited the appellant to consider his position overnight. The following morning the appellant told counsel that he had not slept well because he had indeed been considering his position. Counsel advised upon the likely sentence if the appellant pleaded guilty. Paragraphs [7] and [8] of counsel's note of evidence state:

> "We talked then (as we had before) about the likely sentence if he pleaded. It was my view that his actions would fall within Category 3A of the Guidelines with a starting point of 6 years but this was a case that involved more than one incident.
>
> The applicant said that he could not put [B] through the ordeal of a trial and wanted to plead guilty but he did not accept that he had sexually assaulted [B] on as many occasions as was suggested by the indictment."

13. Counsel also prepared a verbatim note of the instructions given to him by the appellant at the time and these were included in the note provided to the Court. They can be summarised as follows. In 2006/2007 the appellant and his wife were "*drugs orientated*". On several occasions, they organised an orgy. They would also go to "*swingers club*". The drugs were making their libido "*uncontrollable*":

> "Everything excited us. One evening [B's mother] was out at her mum's. She was ill. I had taken cocaine and amphet. I was watching porn. [B] came down. I paused the video. [B] sat with me. I was turned on – porn/drugs. I put my hand in her knickers and started stroking her [on her vagina]. I stopped after about 5 minutes. Over the next 18 months or so on no more than 3 occasions I would stroke [B]. I cannot put my daughter on trial when she is telling the truth. I will plead to Counts 2, 3, 4 + 8."

The verbatim note was signed by the appellant.

14. Counsel states that at no point during the discussion with the appellant did he form the view that the appellant did not understand what he was doing or was in any way incapacitated i.e. by drugs or a lack of medication.

15. Following the plea of guilty, the judge directed the jury to deliver guilty verdicts on counts 2, 3, 4 and 8, which they did. The case was then adjourned for the preparation of reports. At this point, the appellant contacted his solicitor indicating a desire to vacate his plea. He was advised that he could make an application, but he would have to instruct new solicitors to do so. New solicitors were instructed. The appellant was advised not to cooperate in the preparation of a pre-sentence report given that he, now, wished to vacate his plea of guilty. New counsel was instructed. Privilege in relation to the advice given by the new counsel has been obtained. Counsel has provided a detailed note to assist the Court. Counsel confirms that in his opinion the appellant had no power to apply to the court to vacate the pleas, having been convicted by a directed verdict of the jury. The counsel ventilated this conclusion

before the judge who concurred with the position. Counsel also advised the appellant upon the prospects of an application were it possible so to make the application to the Court of Appeal:

> "I advise that my preliminary view was that this application would be difficult and unlikely to be successful in unseating his convictions given that he was represented by experienced solicitors and counsel. That he had taken time to consider his position during the course of his trial before providing his instructions and having seen the ABE interview. But as he had entered to specific charges on the Indictment which limited the period of his offending I would anticipate that he would have provided specific instructions to the previous representative as the basis of this negotiation. In addition, I explained that a successful application would lead to a retrial of his case. It seemed to me that, bearing in mind that he had changed his pleas having watched the ABE video played to the jury, he had made his decision in the full knowledge of the strength of the case against him and no doubt having considered that very carefully."

16. Counsel also advised the appellant of the impact of a change of plea on any credit that the judge might, otherwise, accord to him for his earlier guilty plea. Counsel stated:

> "[The appellant] then had an opportunity to consider his position before I had a second conference with him later that day. I was then instructed to proceed with the sentence without restriction and that he would be able to cooperate fully with a pre-sentence report."

17. The case was then adjourned for the preparation of a pre-sentence report. We turn now to that report. This records, at some length, the evidence given by the appellant to the author and it plainly records admissions by the appellant. For instance:

> "[The appellant] tells me that his increased libido resulted in his becoming attracted virtually to everything and everybody without exception and that his sexual touching of [B] occurred during this time because he was experiencing such a heightened libido. Thus, he clearly admits his actions were motivated by his own sexual preoccupation and the need for gratification yet [the appellant] also states that he does not understand why he was engaging in this behaviour and denies having any specific sexual attraction to children."

18. The appellant admitted "*inappropriate behaviour*" towards B having occurred 3 – 4 times over the period. The author observes that the appellant blamed the conduct on cocaine misuse. He did however acknowledge that his conduct was unacceptable and constituted "*an appalling breach of trust*".

C: Issue 1: Whether the conviction is unsafe because the appellant was denied the right to apply to vacate his guilty plea?

19. We turn now to the ground of appeal relating to the change of plea. There is no material dispute as to the law. A plea of guilty may be withdrawn at any stage before the passing of sentence. This has long been the law.

20. In *R v Plummer* [1902] 2 KB 339, the Court stated that "*there cannot be any doubt that the court had such power at any time before, though not after…*" sentence. In *S v Recorder of Manchester* [1971] AC 481, it was held, in the context of a change of plea, that there was no conviction until sentence had been passed and that it followed that magistrates, like the Crown Court, could permit a change from guilty to not guilty provided that sentence had not been passed. In *Dodd* (1981) 74 Cr App R 50, the Court of Appeal endorsed three propositions advanced by counsel, namely: (i) That the court has a discretion to permit a defendant to change a plea of guilty to one of not guilty at any point in time prior to sentence; (ii) that discretion exists even where a plea is unequivocal; and (iii) the discretion to permit a change of plea must be exercised judicially.

21. Notwithstanding the existence of a discretion, case law also establishes that it should be exercised sparingly in favour of an accused. In *R v McNally* [1954] 2 All ER 372, the accused indicated in the magistrates' court an intention to plead guilty and fully understood the nature of what was a straightforward charge. He unequivocally admitted guilt when the indictment was put to him. The Court of Appeal approved of the decision of the trial judge to refuse permission to change the plea. Similar approaches are evident in more recent decisions including in *Revitt v DPP* [2006] 1 WLR 3172 and in *R v Brahmbhatt* [2014] EWCA Crim 573.

22. It follows that counsel gave erroneous advice to the appellant when informing him that there was no scope for such an application to made; and the judge erred when he concurred in this conclusion.

23. We turn, therefore, to consider whether in the circumstances of the case this error has caused any miscarriage of justice within the meaning of Section 2(1)(a) of the Criminal Appeals Act 1968. The test for us is whether the conviction was "*unsafe*".

24. On the facts of this case, we are clear that the error exerted no impact whatsoever upon the safety of the conviction. There are a number of reasons for this which may be summarised as follows: First, at the time of entering the guilty plea, the appellant was represented by experienced counsel and solicitors. Second, the appellant gave a detailed and convincing explanation for his conduct to counsel which was recorded in a verbatim note and clearly acknowledges guilt. Third, counsel advising the appellant at the time of the trial has confirmed that he was not under any disability caused by drugs or the absence of medication. Fourth, it is clear from the surrounding facts and circumstances (set out above) that at all material times the appellant was fully aware of the charges against him and expressly confirmed to counsel that the complainant, B, was telling the truth. Fifth, the decision to plead guilty was a considered one the appellant having received advice and having had overnight to contemplate the position. Sixth, appellant had admitted to the author of the pre-sentence report his culpability. Seventh, the Facebook messages sent subsequently to B confirm the appellant's profoundly unhealthy interest in sexual gratification with the complainant.

25. In our judgment, the guilty plea was clear, unequivocal and correctly given. There is no basis upon which the judge could, or should, have permitted the appellant to

change his guilty plea. We observe that counsel, indeed, advised the appellant that any application to change plea, including one made to the Court of Appeal, would be most unlikely to succeed. This advice was correct. We dismiss this ground of appeal.

D: Issue 2: The meaning of the expressions "*sustained incident*" and "*child is particularly vulnerable due to extreme youth and/or personal circumstances*" in Category 2 (Harm) of the Sexual Offences Definitive Guidelines

The difference in sentence between Categories 2 and 3

26. It is common ground in the present case that the court is concerned with Category A culpability. The issue for determination is whether the judge erred in concluding that this was a Category 2 Harm case, as opposed to a Category 3 Harm case. The differences in starting point and range for Category 2 and Category 3 cases are as follows. Under Category 3 the starting point is 6 years' custody with a range of 4 – 9 years' custody. Under Category 2 the starting point is 11 years' custody with a range of 7 – 15 years' custody.

27. We would record that we received focused and detailed oral submissions from both advocates appearing upon the appeal addressing a number of difficult points of construction relating to the Guidelines. We are very grateful for those submissions. They have highlighted the wide variety of factual circumstances which can arise in cases such as these, and we necessarily exercise due caution in expressing views on all the matters raised in argument. This is because, as we explain below, whilst we see the force of a number of arguments advanced to us, we consider that we must confine our analysis to the facts of which we are sure and not those which were not fully explored by the judge in his sentencing remarks and about which there might be scope for material debate.

The findings of the judge

28. The Judge found that the 3 assaults perpetrated when B was aged 7-8 amounted to a "*sustained incident*." He did not find that, standing alone, each of the three separate incidents was "*sustained*". For this reason the judge when sentencing found that this was a Category 2 case and sentenced accordingly. The nub of the ground of appeal is that in so finding the Judge erred: This was not a "*sustained incident*" but three separate incidents all falling within Category 3, not 2.

Arguments relevant to "sustained incident"

29. The concept of "*sustained incident*" is found throughout the Sentencing Guidelines as an indicator of the measure of "*Harm*". For instance it is relevant to all the offences covered by sections 1-8 SOA 2003. In relation to section 6 the Guideline provides:

> "Category 1
>
> The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate to category 1

Category 2

- Severe psychological or physical harm
- Penetration using large or dangerous object(s)
- Additional degradation/humiliation
- Abduction
- ***Prolonged detention /sustained incident***
- Violence or threats of violence
- Forced/uninvited entry into victim's home
- Child is particularly vulnerable due to extreme youth and/or personal circumstances

Category 3

Factor(s) in categories 1 and 2 not present"

(emphasis added)

30. We set out below the arguments as advanced to us and our responses. Analysis focused upon the meaning of the words "*sustained*" and "*incident*" both separately as and a composite phrase.

31. First, it is common ground that the distinction between a single "*sustained incident*" and a series of separate incidents (none of which are "*sustained*") is important. Where there is a "*sustained incident*" and the offending falls within Category 2 this can lead to a significantl increase in sentence relative to an offence falling within Category 3. In cases involving sexual assaults upon children it might be relatively commonplace that the offending will span a period of time and involve multiple acts and it follows that in such cases the concept of a "*sustained incident*" might frequently come into play and exert a material impact upon sentence.

32. Second, we next address arguments arising out of the fact that the Guidelines refer to an "*incident*" singular, and not "*incidents*" plural. What is an "*incident*"? An "*incident*" can refer to a single offence set in its surrounding circumstances or context; but it can also refer to a single episode of some duration within which more than one assault might take place. An example of the latter is *R v Mamaliga & Mamaliga* [2018] EWCA Crim 515 ("*Mamaliga"*), an Attorney General's reference, where the defendants were convicted of multiple violent rapes and assaults in an episode lasting about 25 minutes during which the victim was tied up and restrained. In increasing the sentence the Court described the "*incident*" as "*sustained*" and treated this as relevant to whether this was a Category 1A case (ibid paragraph [24]).

The "*incident*" for the purposes of the Guidelines was the whole episode, even though it contained multiple different offences.

33. Mr Chalk, for the Crown, argues that the three assaults in the present case amounted to a "*sustained*" incident. This is because they all occurred in the same familial context involving the same abuse of trust and deploying similar *modus operandi*. This was "*sustained offending during a vulnerable part of Bs childhood*". In our judgment the three assaults are not a single "*sustained*" incident. Mr Saffman, for the appellant argued, in effect, that: (i) the length of time elapsing between the three assaults; and/or (ii), the absence of any connecting factors linking them all together, sufficed to refute the conclusion that this was a single "*incident*". We agree. The mere fact that over the period of years the appellant remained in a position of trust viz a viz B and she was sharing the same home with him are not sufficient, individually or collectively, without more, to create the continued linkage needed to make the three assaults a single "*incident*". To this extent we conclude that the judge erred.

34. Third, in the alternative, Mr Chalk, for the Crown, argues that even if the judge was wrong and the three assaults over time did not amount to a single sustained incident, that <u>each</u> of the three assaults was itself a "*sustained incident*". He argues by reference to the facts before the Crown Court including the ABE interview (the contents of which he says are not sensibly capable of being disputed even if not set out in sentencing remarks) that the *modius operandi* of the assaults was that the appellant would invite B to join him on the sofa whereupon he would put a rug over them and he would then put on the tv or porn and would then begin the assault. He argues that the incident is the totality of the events which could last some considerable period, for instance 10-15 minutes. As an example of a relatively short-lived incident found to be "*sustained*" counsel referred to *R v B* [2015] EWCA Crim 319 ("*R v B"*) where the appellant was the stepfather of the complainant, aged 7. Whilst she was asleep the appellant photographed the complainant in a naked state, this included him with his penis touching her skin close to her vagina. The next morning he asked the complainant to lie on a sofa, raise her legs and he then took photographs of her bottom. When police arrested the appellant, he was found to have nearly 400 images of the complainant. The appellant was charged with a series of offences one of which (count 4 - sexual assault) related to the events when the complainant was asleep. It was argued that this was not a Category 2 case since the incident was not "*sustained*". The Court disagreed. It accepted that it did not know what the precise duration of the incident was but that it was certainly long enough for the appellant to position himself into contact with the complainant and then to take photographs of himself (ibid paragraphs [15] – [17]) and this meant that it was "*sustained*".

35. However, this is not the way that the judge analysed the facts and there are aspects of the description of the *modus operandi* which might be disputed. The minimum amount of time that must elapse before an incident could be described as "*sustained*" is not something that we received detailed submissions upon and we do not consider that it would be right or fair, in such circumstances, to proceed to analyse this case upon this basis. We also do not consider that we can or should use *R v B* as a comparator since not only is there not much detail in the report as to the nature or duration of the incident but cases such as these will turn upon their particular facts.

36. Fourth, Mr Saffman, for the appellant, argued in relation to the word "*sustained*" that it implied some temporal continuity of facts which he said was absent between the 3

assaults. The parameters of the term would always depend on the facts. But the tenor of the Guidelines suggested that an "*incident*" that was "*sustained*" would still likely to be relatively short-lived, measured in minutes, hours or possibly, in an exceptional case, a day or more. He said that the events had to be capable of being viewed as a single incident. Mr Chalk, as already observed, argued that the three assaults, spanning years, were "*continuous*" and met this requirement.

37. Whilst recognising that ultimately this is a question of fact, we find it difficult to see how a "*sustained incident*" could, in the context of sexual offending, span months. We reject the submission of the Crown that the three assaults were "*sustained*" for similar reasons to our rejection of the argument that they amounted to a single "*incident*" ie due to the time elapsing between the assaults and the lack of sufficient linking facts or circumstance.

38. Fifth, we draw support for our conclusion from the fact that the expression "*sustained incident*" is a part of "*prolonged detention/sustained incident*" and the two phrases are intended to bear some common characteristics. In the case of prolonged detention a child might be prevented from leaving for a period of time during which one or more assaults occur. In such a case the increased Harm factor is because there was a wider incident of "*detention*" bordered by a start point (restraint) and an end point (release). During the period of detention various assaults might occur. The facts of *Mamaliga (ibid)* reflect such a situation. The concept of a "*sustained incident*" is clearly intended to be similar or analogous to a "*prolonged detention*". This supports the conclusion, advanced by Mr Saffman for the appellant, that three assaults over a period of years is not a "*sustained incident*" because there were, in essence, start and end points to each of the three assaults; but not a start point before the first assault and an end point after the third assault.

39. For the above reasons in our judgment the judge should have found that there were three separate assaults spanning a number of years, but not a single "*sustained incident*". Accordingly, this reason for placing the offending into Category 2 was in our view erroneous. We conclude therefore that the judge erred.

Arguments relevant to: "Child is particularly vulnerable due to extreme youth and/or personal circumstances"

40. We turn now to consider an alternative argument which is that even if the judge did err this was still a Category 2 case because the facts reflect an assault on a child that was "*particularly vulnerable due to extreme youth and/or personal circumstances*". This is a factor taking a case into Category 2 territory irrespective of whether there was a "*sustained incident*"**.**

41. The judge, when addressing count 8 (inciting) referred to the youth of B and her vulnerability and to the appellant having groomed her and targeted her in her own home. But it is right to observe that the judge did not expressly justify his conclusion about Category 2 in relation to counts 2,3 and 4, upon the basis of this part of the Guideline. In argument attention focused upon the meaning of "*particularly*" in relation to vulnerability and "*extreme*" in relation to age. Mr Saffman, for the appellant, argued that whilst it was right to describe B as "*vulnerable*" there was no evidence to suggest that she was "*particularly*" so. And with regard to age he contended that aged 7-8, B was not of "*extreme youth*" which, he said, related to

babies and toddlers given that the offences in issue by their nature involved children under the age of 13 and "*extreme*" in that context was looking towards the lower end of that age range. In this context "*extreme youth*" had to be viewed as referring to children who were exceptionally young. Mr Chalk, for the Crown, accepted the broad thrust of this argument but contended that a child aged 7 or 8 was on the border of "*extreme youth*".

42. We are reluctant to express a firm view on what is meant by "*extreme youth*". Given that "*extreme youth*", as a concept, takes as its starting point a child under the age of 13 we tend towards the analysis of Mr Saffman. In the circumstances we do not consider that we should consider this case upon the basis that this was a case of "*extreme youth*", as that term is referred to in the Guidelines.

43. In order to overcome having to argue about the precise limits of these terms Mr Chalk adopted a somewhat broader-brush approach. He said that when one looked at the position of the appellant and B in the round there were many factors which made this, *par excellence*, a Category 2 case. In particular: B's young age; her familial relationship with the appellant; her general vulnerability; the abuse of trust; the fact that the assaults occurred in Bs home when her mother was absent; the exposure of the child to porn; the grooming element to the offences, and the fact that even if not a "*sustained*" single incident there was nonetheless a pattern or course of abusive behaviour spanning a lengthy period of time. He argued that the facts could properly fall under the heading "*Child is particularly vulnerable due to … or personal circumstances"*.

44. In addition, Mr Chalk referred us to the other factors treated by the judge as aggravating which he said supported a sentence of the severity imposed. First, the judge concluded that the appellant's "*backing off*" from his admission tempered the credit to be accorded. The delay in sentencing had painful emotional consequences for B and for her grandparents who were attending and supporting her. Nonetheless even late pleas of guilty were to be encouraged in order to spare victims of sexual offences the ordeal of cross-examination by people who prefer, falsely, to deny their guilt and significant credit was still due. Second, the appellant had contacted B's mother, who was bearing twins by the appellant at the time, despite bail conditions upon him prohibiting that conduct. In his communications he pleaded with her not to believe B and to persuade B that she had got it wrong. The appellant was given an opportunity to rebut this evidence but chose not to do so. The judge also took into account that the appellant sent anonymous Facebook messages to B's mother indicating what she should say to B to deal with particularly difficult pieces of inculpatory evidence. The judge concluded that these attempts to interfere with evidence and deter B from giving evidence constituted aggravating factors under the guidelines which treat as aggravation: "*any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution*". These were "*serious*" aggravating factors.

45. We agree with Mr Chalk in his analysis. It is not sensible to seek to construe the Guidelines as if they were a statute. They cannot predict every permutation of circumstances that might arise and there must be a degree of elasticity in the terminology used, and to this extent there is a degree of flexibility in how the Guidelines operate. In this case the combination of the factors applicable to this offending are, broadly, within the rubric "*Child is particularly vulnerable due to …*

personal circumstances". But even if this were not correct and, technically, the facts fell into Category 3, the combination of all the facts identified would still have warranted a sentence of the order imposed by the Judge. This could have been done in a number of different ways, for instance by consecutive sentences on one or more of Counts 2,3 and 4; or simply moving outside of the Category 3 range in the Guidelines.

46. In the final outcome, when we stand back, we do not consider that the sentence imposed was unlawful or inconsistent with the Guidelines. We are conscious that some of the factors that make this a Category A Culpability case (such as grooming / abuse of trust) might also contribute to this being "*Child is particularly vulnerable due to … personal circumstances".* We consider that even taking account of the risk of double counting this is Category 2 Harm.

47. When considering the sentences for Counts 2, 3, and 4 we also take into consideration that the judge materially reduced the sentence for Count 8 so that the real burden of the sentence fell upon Counts 2, 3 and 4. We address this below. But it is a factor reinforcing the lawfulness of the sentences for the Section 6 offending. In terms of totality the sentence was a lawful one.

Conclusion on sentence

48. For all the above reasons the judge erred in concluding that this was a case of a "*sustained incident*" but on terms of totality the sentence imposed was a lawful one.

E. Other matters

49. We deal briefly with other matters arising. We refuse leave to raise these matters (a) because they lack merit and/or (b) because they are raised long out of time without proper cause.

50. In relation to Count 8, inciting a child family member to sexual activity, the judge imposed a consecutive sentence of 18 months. It is said that the judge erred because of the absence of actual sexual conduct. We reject this submission. The judge considered that this was Category 1. The appellant plainly intended activity of the kind covered by that category, namely penetration of the vagina. It was culpability Category A because, as the Facebook messages revealed, there was grooming and targeting of a particularly vulnerable child. The judge considered the damage caused to the child. For this offending the starting point was 6 years custody with a range of 4 – 10 years' custody. Ultimately B did not succumb to his requests. The appellant exploited B's vulnerability that he had, by his earlier abuse, created in her. The judge considered the sentence for Count 8 in the context of totality and concluded that the greater weight of the sentence should fall on the counts committed against her physically when she was younger. We can detect no error in this analysis. The judge was right to treat this as a separate matter and to impose a consecutive sentence. He set a significantly discounted tariff by reference to totality. Standing back this sentence was well within the discretion of the judge

51. In relation to the argument that the charges were incorrectly laid since there was no evidence of penetration, this is unsustainable. First, there was express evidence of penetration including that in the ABE interview concerning the appellant. Second, the appellants admitted to the indicted charges which included penetration knowing full

well of, and having been advised as to, their nature. There is in our judgment nothing in this argument.

52. Finally, we would echo the concerns expressed by Mr Chalk for the Crown as to the delay in seeking leave to advance new grounds. He rightly drew our attention to the robust guidance given by the Court in ***R v James*** [2018[EWCA Crim 285. In the event we have dealt with the proposed new grounds summarily but no proper reason has been advanced to us to explain or justify the long delay in raising these new points, and do not need to devote time to an analysis of the delay or the reasons for it.

F. Conclusion

53. For the above reasons the appeal is dismissed.