Neutral Citation Number: [2020] EWCA Crim 948

Case No: 201804139 C1 &
202000517 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT SNARESBROOK
HHJ SAUNDERS
T20177005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE MCGOWAN DBE
and
MR JUSTICE GARNHAM

- -

Between :

A	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Dr Lyndon Harris (instructed by the **Registrar of Criminal Appeals**) for the **Appellant**
Ms Amanda Hamilton (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates : 30th June 2020

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Approved Judgment

Lord Justice Fulford :

Background

1. On 16 April 2018 in the Crown Court at Snaresbrook before Judge Saunders and a jury, the appellant who is now aged 52, was convicted after a re-trial of a number of offences for which, on 11 May 2018, he received the concurrent sentences set out hereafter. Count 1, sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003, 4 years' imprisonment; count 2, assault by penetration of a child under 13, contrary to section 6(1) of the Sexual Offences Act 2003, 10 years' imprisonment; count 3, sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003, 4 years' imprisonment; count 4, assault by penetration of a child under 13, contrary to section 6(1) of the Sexual Offences Act 2003, 10 years' imprisonment; count 5, indecent assault on a male, contrary to section 15 of the Sexual Offences Act 1956, 3 ½ years' imprisonment; and count 6, indecent assault on a male, contrary to section 15 of the Sexual Offences Act 1956, 3 years' imprisonment. The total sentence therefore was 10 years' imprisonment.

2. The judge also imposed a sexual harm prevention order prohibiting the appellant from (A) having contact of any kind with any person under the age of 18 other than: (i) such that is inadvertent and not reasonably avoidable in the course of daily life, or (ii) with the consent of the person's parent or guardian, (who must have knowledge of the convictions), and (B) residing at any premises in which there also resides, at that time, any person under the age of 18 unless prior agreement is given by: (i) the person's parents/guardian, (ii) Social Care for the appropriate area, and (iii) a representative of the Chief Constable for the appropriate area.

3. On 11 February 2020, the Full Court refused the appellant's applications in relation to his appeal against conviction, and granted leave to appeal against sentence solely in relation to the judge's failure to impose two mandatory sentences under section 236A of the Criminal Justice Act 2003 on counts 2 and 4.

4. Putting the issue on this appeal in summary form, given the judge omitted to impose a sentence under section 236A of the Criminal Justice Act 2003 on counts 2 and 4, we are asked to consider what, if any, steps should be taken on this appeal against sentence to rectify that failure.

5. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to the victims of the counts on which the appellant was convicted shall during their lifetime be included in any publication if it is likely to lead members of the public to identify either of them as a victim of this offending.

The Facts

6. Z and Y, the complainants, alleged that the appellant sexually assaulted them on various occasions between 2001 and 2016. The appellant is the uncle of Z, and he is a long standing friend of Y's father. The prosecution case is that the appellant took advantage of these relationships to abuse both complainants. The offending as regards Z began when he was about 9 years' old, whilst staying at the appellant's home. The appellant entered Z's bedroom, pulled the covers off his bed and removed his nightclothes, thereafter inserting his finger into Z's anus. On other occasions the appellant would fondle Z's penis. Z said that it hurt when the appellant inserted his fingers into his anus, on one occasion resulting in bleeding. He could not say how many times the appellant sexually assaulted him in this manner. When Z was a little older, the appellant took to sexually assaulting him in the living room on the sofa where Z had started sleeping. This abusive activity continued until Z was approximately 11 years of age.

7. Y's evidence was that when he was approximately six years' old, he stayed at the appellant's house whilst his mother was pregnant. The appellant sexually abused him during this period. This mostly occurred on the appellant's bed. The appellant would close the door and sit Y on the bed. The appellant pulled out his penis, which he asked Y to touch and to perform oral sex on him. The appellant would pull Y's trousers off, and play with his penis, testicles, and anus with his fingers. Y said this happened multiple times, mainly in the appellant's bedroom but also in the living room. Y said that on other occasions, the appellant lay behind him and held him up against his penis, whilst moving him up and down against it. In about January 2017, his father told him that the appellant had been arrested for sexual assault on a child. Y then disclosed to his father what had happened.

8. The appellant denied the allegations in their entirety. He alleged that his wife had orchestrated a false story.

The Sentence

9. It follows that this was a serious case of sexual abuse perpetrated against two young boys. The author of the pre-sentence report was of the view that the appellant poses a high risk of harm to children, albeit within a particular

context. He clearly focusses on pre-pubescent children with whom he had developed a relationship over time. It was assessed, therefore, that he was unlikely to reoffend imminently although a clear risk would be created should he establish personal or family relationships which involved unsupervised access to children.

10. In passing sentence, the judge took into account that the appellant was of previous good character. He summarised the content of the victim personal statement of Y who described his crushing sadness and anger towards the appellant, and the fact that that he found it hard to maintain relationships as a consequence of what had occurred. Z's mother and father spoke of their extreme distress over these events and the destruction of Z's innocence by someone who was a friend.

11. The judge was of the view that there was a significant abuse of trust as against Z and that he was vulnerable given he was away from his family, staying with the appellant. The offences against Z were aggravated by the facts that they were committed at night in Z's bedroom. Similarly, for Y, the judge concluded that the abuse of trust was a significant factor.

12. The judge decided that instead of imposing consecutive sentences for these offences which spanned a decade, he would pass a global sentence for all the counts which would be reflected in the two which were most serious (*viz*. the assaults by penetration of a child, counts 2 and 4, both perpetrated on Z). He determined that these two offences (counts 2 and 4) were either at the top of category three or the bottom of category two of the Guideline, and he focused especially on the fact that Z was particularly vulnerable due to his extreme youth and his personal circumstances. Given the culpability was at level A on the basis of the abuse of trust, the relevant range within category two is 7 to 15 years' imprisonment and within category three, four to nine years' imprisonment. For Y, the guideline of greatest relevance was that for sexual assault on a child under 13 and this was clearly a category 2 A case. The starting point was 4 years' imprisonment with a range of 3 to 7 years.

The Appeal

13. Section 236A Criminal Justice Act 2003 ("CJA 2003") created a special custodial sentence for certain offenders of particular concern. The section applies to someone convicted of an offence listed in Schedule 18A to the Act, who was (a) aged 18 or over when the offence was committed and (b) is not sentenced to life imprisonment or an extended sentence under section 226A CJA 2003. The offence of assault by penetration of child charged in counts 2 and 4 is included in schedule 18A CJA 2003. The court must impose a

special custodial sentence under this section when the criteria are satisfied, meaning there is no discretion (see section 236A(1) and (2)). The sentence in these circumstances comprises the "appropriate custodial term" together with an additional period of 12 months' licence (section 236A(2)). The appropriate custodial term is "…the term that, in the opinion of the court, ensures that the sentence is appropriate" (see section 236A(3)). The prisoner is eligible for release after serving half of the appropriate custodial term and entitled to release at the expiry of the appropriate custodial term (see section 244A(3) and (5) CJA 2003). Release prior to the expiry of the appropriate custodial term is at the direction of the Parole Board which may not make such a direction unless it is "... satisfied that it is not necessary for the protection of the public that [the prisoner] should be confined" (see section 244A(3)(b) and (4)(b) CJA 2003).

14. Section 11(3) Criminal Appeal Act 1968 ("CAA 1968") provides:

> "On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—
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> (a) quash any sentence or order which is the subject of the appeal; and
> (b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;
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> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below."

15. This court provided extensive guidance on the operation of section 236A in *R. v Fruen; R. v S(D)* [2016] EWCA Crim 561; 2016] 2 Cr App R (S) 30, *R. v Thompson and Others* [2018] EWCA Crim 639; [2018] 2 Cr App R (S) 19 and *R v KPR* [2018] EWCA Crim 2537; [2019] 1 Cr App R (S) 36. *R. v Reynolds and Others* [2007] EWCA Crim 538; [2007] 2 Cr App R (S) 87; [2008] 1 WLR 1075 is relevant to the operation of section 11(3) CAA 1968 in this context.

16. The decision in this case depends on the resolution of an apparent tension between the decisions in *Thompson* and *KPR*. Before we analyse that issue, the starting point as regards the approach to section 236A in this context is the observation of this court in *Fruen* that it would be wrong to re-engineer a sentence by reducing the custodial term by a year so as to bring the case within the ambit of section 236A when the court was of the view the custodial

term imposed by the judge was appropriate. However, the court went on to state:

> "30. […] The situation might well be different if this court concluded that the custodial term imposed was too long and reduced it by a period of at least a year. This would enable the court properly to substitute the reduced custodial term and to add to it the further one-year period of licence which should have been imposed in the first place, without infringing section 11(3). In cases where that situation does not apply, we consider that the court should follow the course taken in *R v Reynolds [2008] 1 WLR 1075*, para 24 by not interfering with the Crown Court's sentence."

17. A pure interpretation of the approach enshrined in the first two sentences of that quotation was called into question by *Thompson* (a five-judge court presided over by Sir Brian Leveson P), and particularly at paragraph 23, as discussed below. But before we turn to *Thompson*, it is important to note that *Reynolds*, cited in this passage from *Fruen*, is authority for the important proposition that this court is precluded from substituting a mandatory sentence on appeal if that course would have the result of treating the defendant more severely than he or she had been by the sentencing court. Latham LJ VP observed in *Reynolds*:

> "23. For these reasons, we are satisfied that section 11(3) of the 1968 Act precludes this court from interfering with any sentence, even if the provisions of Chapter 5 mandate a different, ex-hypothesi more severe, sentence. Although this means that there will be sentences which will be "unlawful" in the sense that the court has failed to apply the mandatory sentence, that does not seem to us to create difficulty or absurdity. If the sentence in question had not been appealed, the sentence would have been a perfectly valid and effective sentence. As Lord Scarman explained in R v Cain [1985] 1 AC 46, 55, a sentence of a Crown Court cannot be a nullity. It remains an effective order unless and until varied or quashed. An extended sentence, for example, passed when there should have been an indeterminate sentence, therefore remains a perfectly valid and effective sentence. Further, unlike, for example, a detention and training order for three years, which is beyond the powers of the court, an extended sentence is within the powers of the court. In that sense, also, it is not an "unlawful" sentence."

18. Against that background, we return to the decision in *Thompson*, and the critical passage for the purposes of this appeal is as follows:

> "23. Bringing the authorities together, we recognise that, on appeal, it is open to this court to restructure a sentence particularly where, as has occurred in a number of the cases discussed, the sentence passed has been unlawful having failed to comply with mandatory sentencing provisions. *R v Fruen [2016] 1 WLR 4432*, however, is not authority for the proposition that if a custodial term is reduced by at least a year, a sentence under section 236A of the 2003 Act will necessarily satisfy the requirements of section 11(3) of the 1968 Act. The limit of its power is that the court must be satisfied that, taking the case as a whole, the appellant is not being dealt with more severely on appeal. That requires a detailed consideration of the impact of the sentence to be substituted which must involve considerations of entitlement to automatic release, parole eligibility and licence. If a custodial sentence is reduced, the addition of non-custodial orders (such as disqualification from driving or sexual offences prevention orders) may be added but, in every case, save where the substituted sentence is "ameliorative and remedial", that sentence must be tested for its severity (or potential punitive effect) compared to the original sentence."

19. It is clear, therefore, that when applying section 11(3) CAA 1968 the impact on the offender of the proposed course must be considered, notwithstanding the general rule that release provisions do not feature when determining the appropriate sentence to be passed on a defendant. Furthermore, in *Thompson*, the court stressed that "the date on which release becomes unconditional will be of particular importance when assessing comparative severity" (at [41]). Fortified especially by this latter quotation from *Thompson*, Dr Harris, for the appellant, submits that this court should substitute a sentence under section 236A and as an exercise of hard-edged calculation reduce the custodial term to five years, in order to ensure that the appellant is entitled to release at the same point in time as under the current determinate sentence of 10 years (release at the half way point: section 244 CJA 2003).

20. Notwithstanding the persuasive nature of Dr Harris's submissions, we do not agree the custodial term should be halved. Instead, in our view Ms Hamilton for the respondent was right to place reliance on *KPR*, an appeal decided 7 months after *Thompson* by a constitution once again presided over by Sir Brian Leveson P. In *KPR*, the sentencing judge ought to have imposed an extended sentence, and in the absence of that disposal, a special custodial sentence under section 236A was mandatory. It is clear from the decision in *KPR* that a formulaic, mathematical or rigid approach of the kind proposed by Dr Harris has not been endorsed by this court.

21. We must first, however, summarise the difference between *KPR* and the present case. In *KPR* the court was considering a factual and legal situation somewhat at variance from this appeal, namely whether the prohibition on imposing a sentence after a retrial which was more severe than the sentence imposed after the original trial had been infringed. The court made clear that the two sets of provisions relevant to *KPR* and the instant appeal are to the same effect. In the present case, as in *Thompson*, section 11(3) CAA 1968 applies, which makes it impermissible to impose a more severe sentence on appeal, whereas in *KPR* paragraph 2(1) of Schedule 2 CAA 1968 permitted the sentencing court following a retrial to impose any sentence authorised by law, but limited to it not being a sentence of greater severity than that passed on the original conviction. The court in *KPR* concluded that the difference in wording between the two provisions did not materially affect the situation and that similar considerations apply to both (at [42]).

22. In *KPR*, the appellant was convicted, on two indictments, of rape of a child under 13, two counts of sexual activity with a child, two counts of taking indecent images of a child, a count of making indecent images and (on the second indictment) possession of an imitation firearm. At the conclusion of the first trial, he was sentenced to 17 years' imprisonment on the first indictment with a consecutive term of one year's imprisonment on the second indictment. His convictions were quashed and following a retrial when he was again convicted, he was sentenced to 16 years' imprisonment, with a one-year extended licence period, pursuant to section 236A, on the first indictment and, as before, a consecutive sentence of one year's imprisonment on the second indictment.

23. Having concluded that the sentence passed at the conclusion of the retrial was of greater severity than that passed on the original conviction (contrary to paragraph 2(1) of Schedule 2 CAA 1968) the court approached the issue of the sentence to be substituted as follows:

> "50. We have given careful consideration as to how to remedy the situation. Just as the judge in the second sentencing hearing was obliged to impose a sentence under s.236A , so too are we, given the mandatory nature of those provisions. To do otherwise would involve this court in passing an unlawful sentence, and we decline Miss Donovan's invitation to do so. However, it is clear that, in considering the question of comparative severity, we must carry out a detailed

> consideration of the impact of the sentencing options, including consideration of entitlement to automatic release, parole eligibility and licence.
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> 51. In the event, we propose to quash the sentence on Count 1 and to substitute for it a special custodial sentence for offenders of particular concern, pursuant to s.236A of the CJA 2003 , comprising a reduced custodial term of 10 years and an extended licence of one year. Furthermore, we will quash the sentence on Count 3 and substitute for it a standard determinate sentence of four years' imprisonment and order that the two sentences will run consecutively with one another. However, the concurrent standard determinate sentences on the remaining counts will stay as imposed in the lower court."

24. It is important to understand the impact of this sentence, as imposed by this court on the first indictment. Under the original sentence (17 years), the appellant was eligible and entitled to release at the half way point (8 ½ years); under the sentence imposed on the retrial (16 years' imprisonment and 1 year extended licence), the appellant was eligible for release after 8 years and entitled to be released after 16 years; under the sentence substituted by this court, the appellant was eligible for release after 7 years and entitled to release after 12 years.

25. Reaching the conclusion that the sentence on appeal was less severe than the original sentence involved the court in *KPR* placing substantial emphasis not on the entitlement to release (which was 3 ½ years later under the substituted sentence) but on the eligibility for release, i.e. the time which will definitely be served in custody (which was 1 ½ years less under the substituted sentence). This materially demonstrates a change in emphasis in *KPR* to that indicated in *Thompson* when, as set out above, the court highlighted that the date on which release becomes unconditional will be of particular importance when assessing comparative severity (at [41]). In our view, that difference between these two cases as to the approach to be adopted is entirely understandable when it is recognised that this is a multifactorial assessment in which a significant number of disparate considerations have to be borne in mind, such as the entitlement to automatic release, parole eligibility and licence. As we have already indicated above, in our view a formulaic, mathematical or rigid approach should not be adopted in these circumstances.

26. In this regard, we consider it instructive that in *Thompson*, the court considered a number of authorities, including *R v S (Julian)* [2016] EWCA Crim 1607 and *R v Bradbury* [2015] EWCA Crim 1176; [2015] 2 Cr App R (S) 72. Although the court in *Thompson* indicated that *Bradbury* should not be followed, it dealt with *S (Julian)* as follows:

> "19. In *R v S (Julian) [2016] EWCA Crim 1607* […] a total determinate term of 14 years' imprisonment was imposed when the offender was of particular concern so that, at the very least, a sentence pursuant to section 236A should have been imposed. In the event, the court replaced the sentence and imposed a sentence under section 236A comprising a six-year custodial term with a further year on licence and a consecutive determinate term of six years. Thus, instead of automatic release after seven years with seven years licence, he was entitled to be considered for parole after six years and, if he failed to obtain parole, could be detained for up to nine years with a licence coming to the end 12 years after sentence. In this case, the court specifically had regard to section 11(3) and so, taken as a whole, did not consider that the offender was dealt with more severely."

27. It was not suggested in *Thompson*, therefore, that *R v S (Julian)* had been wrongly decided or that the approach taken in that case should not be followed.

28. Critically, in *Thompson* this court quoted with approval from the judgment of Lord Bingham of Cornhill CJ in *R v Howells* [1999] 1 Cr App R (S) 335 at 337 when he observed that: "In the end, the sentencing court is bound to give effect to its own subjective judgment of what justice requires on the peculiar facts of the case before it" and we would add the sentence that immediately followed: "It would be dangerous and wrong for this Court to lay down prescriptive rules governing the exercise of that judgment, and any guidance we give, however general, will be subject to exceptions and qualifications in some cases". Moreover, the court in *Thompson* emphasised (at [13]) that in this context "(d)ecisions, however, are case specific and no general rule can be identified".

29. Against that background, standing back and considering totality, we are of the view that notwithstanding the seriousness of these offences, for an offender of previous good character the overall sentence of 10 years' imprisonment was too long. The necessary approach in these circumstances is to determine the appropriate sentence without regard to the provisions for early release and licence in accordance with the general principle that a sentencing court will not consider the actual period the offender is likely to spend in custody. Thereafter, we need to compare the effect of the proposed new sentence with the sentence originally imposed to ensure that it does not contravene the requirements of section 11(3).

30. Having followed these two steps, we consider that on counts 2 and 4, the sentence ought to have been a special custodial sentence for offenders of particular concern, pursuant to section 236A, comprising a reduced term of 8

years' imprisonment and an extended licence of one year. Otherwise the sentences will remain undisturbed.

31. In the event, we quash the sentences on counts 2 and 4 and substitute terms of 8 years' imprisonment and an extended licence period of one year, with all the sentences to which the appellant is subject to be served concurrently with each other.

32. The effect of this will be that the appellant is now subject to a custodial term that is two years' shorter than that originally imposed. He will be eligible for release, provided that the Parole Board consider that it is safe to do so, after four years, but he can be detained (if still not considered safe) for a further four years. Compared with the effect of the original sentence imposed at the first sentencing hearing, by which the appellant was entitled to automatic release after 5 years, although it is possible he may remain in custody for a further three years, he is now eligible to be released after four years, which we do not consider results in a sentence of greater severity than that originally imposed. It complies with the mandatory statutory provisions and it meets the overall justice of the case. We note that this approach is consistent with that adopted in *R v S (Julian)* and *KPR*, as described in detail above.

33. We granted the appellant leave to argue that the Sexual Harm Prevention Order should be amended. The application was unopposed, and the Order is varied as follows:

> "The appellant/defendant is prohibited from:
>
> 1. Having contact of any kind with any person under the age of 16, other than:
>
> i) such that is inadvertent and not reasonably avoidable in the course of daily life; or
> ii) with the consent of the person's parent or guardian (who must have knowledge of his conviction); or
> iii) in relation to the defendant's children, with the express permission of Social Services.
>
> 2. Living in the same home in which there also resides, at that time, any person under 16 years unless prior agreement is given by:

i) the person's parents/guardian (who must have knowledge of his conviction); or
ii) Social Services for the appropriate area.

No prohibition in this Order shall operate at any time when its effect is overridden by an Order of a Court."

34. To this extent the appeal against sentence is allowed. We are grateful to both counsel for their detailed and apposite submissions. The unfortunate circumstances of this case act to demonstrate the importance of counsel providing the judge with the help that he or she needs as regards the relevant sentencing provisions. If they fail do so, there is a risk that the mandatory sentence will not be imposed, and time and expense will be incurred in this court investigating whether it is possible and just in all the circumstances to rectify the error.