IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01730/A3
NCN [2022] EWCA Crim 1205

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 4th August 2022

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(Lord Justice Holroyde)

MRS JUSTICE MAY DBE

MR JUSTICE GOOSE

R E G I N A

- v -

MARCUS ONG

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Mr A Bell appeared on behalf of the Applicant

Mr T Kenning appeared on behalf of the Crown

J U D G M E N T

Thursday 4th August 2022

LORD JUSTICE HOLROYDE:

1. On 30th March 2021, following a trial in the Crown Court at Birmingham, the applicant was convicted of one offence of common assault, contrary to section 39 of the Criminal Justice Act 1988 (count 1), and one offence of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (count 6).

2. On 31st May 2022, he was sentenced to two years and eight months' detention in a young offender institution on count 6 and to a consecutive term of three months' detention on count 1. The total sentence was one of two years and eleven months' detention in a young offender institution.

3. The applicant's application for leave to appeal against sentence has been referred to the full court by the Registrar.

4. The victim of the assault by penetration is entitled to the lifelong 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 offence. We shall refer to her as "C2" and to the victim of the common assault as "C1".

5. The applicant, C1 and C2 were all students at a residential ballet school. Male and female students were accommodated in separate areas, but would socialise together.

6. On a Saturday afternoon in May 2019 the applicant (then aged 16 years 7 months) was in the company of C1 and another female student. He began to tickle the girls and then became more rough. C1 told him to stop, but he continued. He tried to put his hands around the throat of the other student. When C1 tried to stop him, he bit her twice on her upper arm, leaving visible bite marks and bruising.

7. On the following evening, the applicant sent a text message to C2, who had been a close friend at the school. He asked if he could go to her room. He said that he wanted to get away from arguments in the boys' area. There was an exchange of messages over the next few hours, in which C2 was sympathetic to the applicant. Eventually he went to her room. He sat on the bed with her and tried to kiss her. She told him not to, but he repeated his attempt. He put his hand inside the back of her trousers and touched her bottom. She told him to stop. He then put his hand inside the front of her trousers. She continued to tell him to stop, but he inserted his fingers into her vagina.

8. The applicant also stood trial on other charges, in respect of which the jury were unable to agree on a verdict. A retrial was ordered, which also ended in a jury disagreement. So it was that the applicant was not sentenced for the two offences of which he had been convicted until 31st May 2022 – three years after they were committed. He had been aged 18 when convicted and was 19 by the time he was sentenced.

9. The judge had presided over the trial. He heard victim personal statements from both complainants. Each had been badly affected. C1, in addition to suffering pain and bruising which was apparent for several weeks before fading, became depressed and stressed. She was unsettled at school and eventually ended her term four weeks early. C2 emphasised that she had trusted the applicant as a friend. The applicant was aware that she had previously been in a relationship which had ended unhappily. As a result of the offence she had lost all trust in men. She initially had difficulty sleeping and became anxious if she heard anyone approaching

her room. Her dancing was affected because she disliked any contact with a male dancing partner.

10. The judge had the assistance of a pre-sentence report which set out the applicant's personal circumstances. The applicant lived with his family in Singapore and had to an extent been isolated from his parents whilst attending the school. The author of the report suggested that by reason of his young age, the applicant had lacked insight into the consequences of his actions and also lacked victim awareness. She felt that the applicant had recently come to appreciate the impact on the victims of what he had done and the shame he had brought on his family, although he still showed only limited remorse. She felt that he could be managed in the community and recommended a community order with a package of requirements.

11. Medical evidence before the judge indicated that the applicant had been prescribed medication to treat Attention Deficit Hyperactivity Disorder. The applicant also has a peanut allergy and at all times carried an EpiPen.

12. In his sentencing remarks, the judge referred to the anxiety and stress which all involved in the case had suffered because the proceedings had been delayed for a long time. He referred to the harm which the offences had caused. He noted that the applicant had been aware of C2's "particular sensitivity and vulnerability in this area". He assessed count 6 as falling within category 3B of the relevant definitive guideline issued by the Sentencing Council, which has a starting point of two years' custody and a range from a high level community order to four years' custody. He placed the offence at the top of that range, but made a reduction of one third because of the applicant's age at the time of the offence. It was in those circumstances that the judge imposed the sentences to which we have referred.

13. In his grounds of appeal Mr Bell, who represents the applicant in this court as he did at trial, submits that the judge was wrong to move upwards from the guideline starting point. He argues that the judge should have taken the guideline starting point of two years or less and should have reduced the sentence by half to reflect the applicant's age. Mr Bell accepts, realistically, that the common assault merited a short consecutive sentence, but that was to be limited by considerations of totality. He submits that the total sentence was manifestly excessive and that the judge should have concluded that either a community order or a shorter sentence, which could and should be suspended, was appropriate.

14. On behalf of the respondent, Mr Kenning, who also appeared below, has reminded the court that the judge had the advantage of having seen and heard all the evidence at the trial and was therefore particularly well placed to assess the harm suffered by the victims. Mr Kenning has helpfully taken us to text messages between the applicant and C2 which he suggests explain the judge's reference to C2's particular sensitivity.

15. We are grateful to both counsel for their submissions. Having reflected on them, we have come to the following conclusions. The sexual offence was correctly categorised by the judge in accordance with the guideline. He rightly did not treat the applicant's conduct as a breach of trust, which would have put the offence into culpability category A. There were two serious aggravating features which necessitated an initial upward movement from the starting point of two years. First, the offence was committed in C2's own room, to which she had invited the applicant out of kindness and concern for his wellbeing. She was entitled to expect him to behave appropriately. Instead, he took shameless advantage of her goodwill and ignored her repeated requests to stop. Secondly, although the harm suffered by C2 fell short of the severe psychological harm which would raise the case to harm category 2, it was, in our view, high in the scale of category 3 harm.

16. There were, however, a number of important mitigating features which then necessitated a downwards adjustment of the provisional sentence. First, the applicant had no previous convictions and was of previous good character. Secondly, the applicant had hoped for a career as a ballet dancer, but his convictions had made it unlikely that he would succeed in that aspiration. He had lost his scholarship and place at the school, and his student visa had been revoked. Thirdly, there had been long delay in the proceedings, for which the applicant could not be regarded as culpable. Fourthly, serving a custodial sentence at a time when the Covid pandemic has continuing consequences is particularly difficult, especially for a young man serving his first custodial sentence far from home.

17. In our judgment, those mitigating features fairly balance out the aggravating features, taking the provisional sentence back to the starting point of two years. We hesitate to disagree with the experienced judge who, as we say, had had the benefit of presiding over the trial; but, with all respect to him, he did not make clear why he felt that a sentence at the very top of the category range was appropriate, notwithstanding the significant mitigation.

18. It was then necessary for the judge to reflect the applicant's age at the time of the offending. In *R v Limon* [2022] EWCA Crim 39, this court has recently stated the principles applicable where an offender has passed a significant age threshold between the date of the offence and the date of conviction and has, as a result, become liable to a more severe sentence. As Mr Bell rightly accepts, that is not the case here. However, in *Limon* the court accepted at [30] a more general submission that the passage of time does not imbue a defendant with any greater culpability than he had at the time of the offence. That submission was consistent with the principles stated in cases such at *R v Ghafoor* [2002] EWCA Crim 1857, *R v Bowker* [2007] EWCA Crim 1608, *R v Y* [2013] EWCA Crim 1175, and recently *R v Amin* [2019] EWCA Crim 1853. When a court is sentencing an adult for offending committed when he was a child, it must take account of the adult purposes of sentencing, now stated in section 57 of the Sentencing Act 2020, but the culpability of the offender must be judged by reference to his age at the date of the offence.

19. The judge was therefore correct to have regard to paragraph 6.46 of the Sentencing Council's guideline on principles applicable to sentencing children and young persons. That guideline would have been directly applicable if the applicant had been sentenced when he was 16 or 17. It reflects the reduced culpability which generally attaches to a young offender. Where a court concludes that only custody is appropriate for a young offender, paragraph 6.46 indicates as a rough guide, which is not to be applied mechanistically, that it may be felt appropriate "to apply a sentence broadly within the range of half to two-thirds of the adult sentence for those aged 15 to 17". The applicant, as we have said, was 16 years 7 months when he committed the offence. The judge was therefore entitled, and in our view correct, to reduce by one-third the sentence which would have been appropriate if the assault by penetration had been committed by a mature adult. We are not persuaded that there is any basis for treating the applicant as less mature than his peers, and no other reason for making a greater reduction than the judge allowed.

20. It follows that the sentence of two years' detention, which in our view was appropriate, should have been reduced by one-third to reflect the applicant's youth at the time of the offence. We cannot, however, accept the submission that the judge was wrong to conclude that an immediate custodial sentence was necessary. The assault by penetration was too serious an offence for any other course to be taken, notwithstanding the mitigation available to the applicant.

21. We do accept the submission that, having regard to the mitigation, and for reasons of totality, the sentence on count 1 should also be reduced.

22. For those reasons, and with all respect to the judge, we are satisfied that the total sentence was manifestly excessive. We therefore grant leave to appeal. We allow the appeal. We quash the sentences imposed below and substitute the following: on count 6, 16 months' detention in a young offender institution; and on count 1, two months' detention, to run consecutively. The total sentence is accordingly reduced to 18 months' detention in a young offender institution.
