Neutral Citation Number: [2022] EWCA Crim 1208

Case No: 202202182 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
The Crown Court at Bradford
T20210337

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07 September 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE HOLGATE
and
MR JUSTICE MURRAY

- -

IN THE MATTER OF A REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

STEVEN PRIESTLEY **Respondent**

- -
- -

Paul Jarvis appeared on behalf of **HM Attorney General**
Adam Lodge appeared on behalf of the **Respondent**

Hearing date : 1 September 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on 07 September 2022.

The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences with which we are concerned. No matter relating to those against whom the offences were committed shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as victims of the offences. There are two individuals to whom these provisions apply in this case. We shall refer to them as AB and CD.

Introduction

1. On 23 March 2022 in the Crown Court at Bradford before HH Judge Rose and a jury Steven Priestley was convicted as follows:

   Count Offence

   1 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 1.9.89 and 1.2.90 - AB

   2 Indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960 – between 1.9.89 and 1.2.90 - AB

   3 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 1.9.90 and 1.2.91 - AB

   4 Indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960 – between 1.9.90 and 1.2.91 - AB

   5 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 5.4.92 and 25.9.93 - AB

   6 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 5.4.92 and 25.9.93 - AB

   7 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 5.4.92 and 25.9.93 - CD

   8 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 5.4.92 and 25.9.93 - CD

   9 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 5.4.92 and 25.9.93 - CD

   10 Indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956 – between 5.4.92 and 25.9.94 - CD

   11 Indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960 – between 5.4.92 and 25.9.94 – CD

2. On 13 June 2022 the offender was sentenced By HH Judge Rose to concurrent terms of imprisonment totalling 32 months. In relation to Counts 1, 3 and 6 to 10, the sentence on each count was 32 months' imprisonment. In relation to Counts 2, 4, 5 and 11, the sentence on each count was 15 months' imprisonment.
3. HM Attorney General seeks leave pursuant to Section 36 of the Criminal Justice Act 1998 to refer the sentence to this court as unduly lenient. At the conclusion of the

hearing on 1 September 2022 we announced that we refused leave with written reasons to follow. These are the reasons for our decision.

The Facts and the Indictment

4. AB was born in February 1985. CD was born in September 1984. They are cousins. When AB was aged between 4 and 8, he was sexually abused by the offender on occasions when he was at a house (not his own home) at which the offender was present. On at least three occasions, the abuse occurred in the presence of CD who was also at the house. CD was sexually abused by the offender when he was aged between 7 and 9 when he was at the same house at which the offender had abused AB. The offender was born on 25 March 1975. He was about 10 years older than AB and CD.

5. AB first made allegations of sexual abuse against the offender in 2003, namely about 10 years after the events about which he complained. The offender was arrested and interviewed. The offender denied the allegations. No further action was taken at that point. In 2019 CD made similar allegations against the offender. In January and February 2020 AB and CD provided ABE interviews to the police which formed the basis of the indictment against the offender.

6. Counts 1 and 2 referred to an occasion when the offender and AB were in the living room of the house. The offender took the penis of AB and put it into his mouth (Count 1). The offender also put his own penis into AB's mouth (Count 2). AB recalled that this occurred when he was due to go to school on the following day. AB first went to school in September 1989. Thus, the count was framed to cover the first few months AB went to school up to his 5th birthday.

7. Counts 3 and 4 referred to an occasion some months after the first occasion. AB recalled that he was 5 years old. The offender took AB to a bedroom in the house after he had played pornographic material on the television in the living room. Again, he took AB's penis in his mouth (Count 3) and put his penis into AB's mouth (Count 4).

8. Counts 5 to 7 related to four occasions on which the offender sucked the penis of AB when CD was present and when AB and CD were both at the house at which the offender was present. CD recalled that these occasions were after his grandfather had died, the date of the grandfather's death being 6 April 1992, and before his 9th birthday in September 1993.

9. On one of those occasions the offender also sucked the penis of CD (Count 9). There were two other occasions on which the offender sucked the penis of CD (Counts 7 and 8). AB was not present on those occasions.

10. Counts 10 and 11 reflected a specific incident which occurred in a bedroom at the house where CD was staying. The offender removed his own clothes. He stood in front of the door to the bedroom so that CD could not leave. He then forced CD onto the bed and touched his penis. The offender tried to get CD to touch his penis, but CD refused.

11. In the course of his ABE interview CD said that he stopped going to the house "after two years of (the offender) doing this". Counts 10 and 11 were framed to cover a period of something over two years from the point at which CD's grandfather died.

12. Save for Count 6 all of the Counts were single incident counts. Count 6 referred to two separate instances of sucking AB's penis. There was no incident which could be said to have occurred on a particular day or date.

The Sentence

13. The judge considered victim impact statements from AB and CD. CD read out his statement at the sentencing hearing. AB said that he had turned to drugs in his teenage years as a way of helping him block out the memories of being abused by the offender. He said that he has struggled to form relationships and that he felt internal anger. CD explained that the sexual abuse had had a massive impact on him. He remained traumatised by the memories of it. He had trouble connecting with friends and family. He had suffered depression and had had suicidal thoughts.

14. The pre-sentence report set out the offender's account of his involvement with AB and CD. The offender continued to deny any sexual abuse of either of them and any sexual interest in children. Nonetheless, the author of the report did recommend participation by the offender in a sexual offender programme. The report assessed the offender as presenting a medium risk of re-offending. Were he to re-offend the risk of serious harm would be high.

15. The judge had a number of statements and letters from friends and acquaintances of the offender which spoke of his trustworthiness and of his care for others. The offender had been in employment for almost all of his adult life and had had at least two long term relationships. The offender had been convicted in 1998 of indecent exposure. He was otherwise of good character. He had suffered considerable trauma in his adult life. It is not necessary for us to set this out in any detail. The judge properly took it into account as a mitigating factor.

16. The judge made specific reference to the following when considering the appropriate overall sentence:
    - The offender's age when he committed the offences, the offending having ceased in 1994.
    - The offender's blame free and largely untroubled life since then, apart from two minor offences in 1998 for which he received a fine.
    - The principle of totality.
    - Annex B of the Sentencing Council Definitive Guideline for Sexual Offences and *Forbes* [2016] EWCA Crim 1388.

17. The judge found that the offending did not involve significant planning and that there was no breach of trust in relation to either victim. However, both victims were vulnerable by reason of their extreme youth and both had suffered severe psychological harm. In relation to Count 1 he said that, by reference to the equivalent offence in the

Sexual Offences Act 2003 (sexual assault of a child under 13), the offending fell into Category 1B in the Sentencing Council guideline. For an adult offender the starting point would be 4 years with a category range of 3 to 7 years. Noting that there were two victims and taking into account the number of offences committed over a period of time, the judge concluded that the appropriate sentence for an adult would have been 54 months. He reduced the sentence to 32 months to take account of the offender's age imposing the same sentence concurrently on Count 3 and Counts 6 to 10, with concurrent sentences of 15 months on the remaining counts.

The submissions of the parties

18. On behalf of the Attorney-General Mr Jarvis argued that the proper sentence for an adult who had committed these offences would have been significantly greater than 54 months. The proper sentence in relation to an adult for a single offence of indecent assault by reference to the equivalent offence in the Sexual Offences Act 2003 and the guideline for that offence had to fall in the range 3 to 7 years' custody. Whilst the starting point in the guideline was 4 years' custody, some account had to be taken of the fact that the maximum sentence for the offence of indecent assault in the 1956 Act was 10 years as opposed to 14 years for the offence to which the current guideline referred. Thus, it properly could be said that the least sentence for a single offence would have been 3 years. The overall sentence necessarily had to reflect that there had been multiple offences over a period of years committed against two different victims. An uplift of 18 months from the sentence appropriate for a single offence (which is what the notional adult sentence adopted by the judge involved) did not adequately reflect those factors. The adult starting point used by the judge based on the totality of the offending was outside the range of sentences reasonably open to him. Thus, the eventual sentence was unduly lenient. It is not submitted that the judge erred in discounting the sentence by around 40% to take account of the age of the offender when he committed the offences. However, the discount should have been applied to a much longer custodial sentence.

19. It is noted on behalf of the Attorney-General that the judge was not referred to and did not mention the case of *Limon* [2022] EWCA Crim 39. It is argued that, insofar as there is tension between what was said in *Limon* and the principles set out in *Forbes*, the latter is to be preferred. Thus, any judge sentencing an adult for offences committed when they were a child needs only to conduct two historical inquiries. First, what was the maximum sentence for the offences committed by the defendant? Second, could the defendant have been made the subject of any form of custodial sentence if he had been convicted and sentenced at the time the offences were committed? So long as the defendant could have been sent to custody had he been sentenced as a child, the court would be free to impose any custodial sentence up to the maximum for the offence.

20. Mr Jarvis in oral submissions acknowledged that the absence of any reference to *Limon* by the judge in this case meant that the apparent tension between that decision and *Forbes* may not need to be resolved for the purposes of our determination of the Attorney-General's application. Were it to remain a live issue and were there to be any

departure from the reasoning in *Forbes*, a constitution of this court similar to that assembled in *Forbes* ought to consider the issue.

21. On behalf of the offender, it is submitted that, as the trial judge, HH Judge Rose was best placed to assess the level of harm and culpability. Whilst another judge might have taken a higher starting point for an adult who had committed these offences, the figure adopted by the judge in this case could not be described as so far outside the reasonable range as to render the eventual sentence unduly lenient.

Discussion

22. In considering the appropriateness of the sentence imposed in this case we note first that the indictment (with one limited exception which referred to two incidents) charged single offences. Moreover, Counts 1 and 2 concerned a single incident as did Counts 3 and 4 and Counts 10 and 11. Thus, the judge in accordance with the jury's verdicts on the indictment had to reflect 9 occasions of sexual abuse over a period which, by reference to the dates of the indictment, spanned the years between 1989 and 1994. In the final Reference, it was said that the offending "went on for years". Insofar as this was intended to indicate that there was repeated and regular offending over the years, this is not a conclusion properly to be drawn from the jury's verdicts. On the basis of the evidence of AB and CD it would have been possible to take one of two courses. First, the indictment could have charged additional counts e.g. two or more offences in each calendar year. Second, the indictment could have included multiple incident counts charging (for instance) at least 5 incidents in any given period. Neither course was adopted. The consequence of this in terms of sentencing was explained clearly at [30] to [34] in *Forbes*. Although this is not an instance of the court being prevented from any consideration of multiple offences, the way in which the indictment was framed means that we cannot consider the application on the basis of a regular course of conduct repeated month after month.

23. The second point to be made in relation to the indictment is that there was and is no proper basis upon which the judge could have concluded that the offender committed any offence after his 18th birthday. In the final Reference it was said that in relation to Counts 7 to 11 the period of offending began in April 1992 when the offender was 18. Had that been correct we observe that the same argument would have applied in relation to Counts 5 and 6. In fact the argument is based on an arithmetical error. The offender was born on 25 March 1975. He did not reach his 18th birthday until March 1993. Thus, for about 11 months of the indictment period in relation to Counts 5 to 11, the offender was 17. It is impossible to conclude from the jury's verdicts on those counts that any of the offences charged had been committed at any particular point during the indictment period. By way of example the verdict in relation to Count 9 meant that on a day between April 1992 and September 1993 CD had been indecently assaulted. No further conclusion could be drawn from the jury's verdict.

24. In his oral submissions Mr Jarvis accepted that the final Reference contained the arithmetical error to which we have referred. He drew our attention to the judge's

reference to "the fact that the last of those offences was committed in 1994". Mr Jarvis tentatively suggested that this could be read as a finding of fact that at least one offence had been committed in 1994 when the offender was at least 18. The suggestion was only tentative and rightly so. The judge was referring to the last date on the indictment and no more. He made no finding of fact. He could not have done so given the way in which the indictment was framed and the evidence called in the trial. It follows that all of the offences could have been committed before the offender achieved the age of 18. In those circumstances, the only proper basis on which his sentence could and should have been imposed was that he was at all times under the age of 18.

25. By reference to these matters relating to the structure and nature of the indictment, we are not satisfied that the sentence of the judge was so far outside the reasonable range as to require us to interfere with it. It is accepted on behalf of the Attorney General that the judge was correct when he used the current guideline for sexual assault of a child under the age of 13 as the proper benchmark for the sentence to be imposed. Given that there were two victims and multiple offences, there had to be an uplift from whatever sentence after trial was appropriate for a single offence within that guideline. For the reasons advanced by Mr Jarvis, it is accepted that a single offence committed by an adult properly could have attracted a sentence of 3 years' custody. Whatever overall period could be justified by the fact that there were nine separate incidents involving two different victims, there were mitigating factors to be considered before any allowance for the offender's age at the time of the offences. The judge considered that they were of substantial effect. So do we. As submitted on behalf of the offender, another judge might have concluded that a longer overall sentence was required to reflect all of the offences. But we do not consider that the adult sentence identified by this judge fell outside the range of sentences reasonably open to him on the facts of the case.

26. The Attorney-General does not criticise the overall discount of 40% from the adult sentence to take account of the offender's age at the time of the offences. We understand why that view is taken. Although the offending from April 1992 onwards occurred when the offender was 17 (in which event discounting the sentence for age by 40% would be very generous), what might be regarded as the most serious offending occurred when the offender was 14 or 15. Since we are not persuaded that the judge erred in setting the notional adult sentence at 54 months' custody, it must follow that the eventual sentence of 32 months' custody was not unduly lenient. So it was that we refused leave to bring the application pursuant to Section 36 of the 1998 Act.

27. Given this conclusion any tension there might be between *Forbes* and *Limon* falls away. It is not suggested that the judge in this case took an inappropriate approach to the issue of the offender's age at the time of the offence. He made a significant reduction by reason of the offender's age because the youth of the offender reduced his culpability to a substantial degree. That approach was in line with *Forbes* at [19] to [22].

28. However, the Attorney-General has put forward the argument that *Limon* invites a different approach which is wrong in law and should not be adopted. Whilst we do not

need to consider whether that is in fact the case, we have heard full argument on the point. Therefore, we propose to offer our observations albeit that they will be obiter. Should the issue arise in another case where the facts of the case mean that the issue is of real significance, it may be necessary to assemble a special court to consider the point.

29. In *Limon* the offender, when he was aged 14 to 17, had committed offences of indecent assault against a girl aged between 6 and 9. The offences had been committed between September 1993 and September 1996 though, on the evidence, it could not be shown that any offence had occurred after January 1995. At all material times the offence of indecent assault contrary to Section 14 of the 1956 Act was not one to which the grave crime provisions applied. Thus, a sentence of long term detention could not have been imposed on the offender had he been convicted at the time of the offences. Moreover, at the relevant time, the maximum period of detention in a young offender institution to which a person under 18 could be subject for an offence to which the grave crime provisions did not apply was 12 months. By reference to paragraphs 6.1 to 6.3 of the Sentencing Children and Young Persons Guideline (introduced with effect from 1 June 2017) the court in *Limon* concluded that it was not appropriate for the sentence in his case to exceed 12 months i.e. the maximum period of detention which could have been imposed at the time of the offending. The court referred in particular to paragraph 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.*
The court in *Limon* observed that this guideline had not been published at the time of the judgment in *Forbes*. The court in *Forbes* could not have applied the principles set out in the guideline.

30. The Attorney-General submits that this proposition is contradicted by a consideration of the Sentencing Guidelines Council Definitive Guideline entitled Overarching Principles – Sentencing Youths published in November 2009. Paragraph 5 of that guideline is not identical to paragraphs 6.1 to 6.3 of the 2017 guideline but the effect of the guidance given is precisely the same, in particular in the third and fourth bullet points of paragraph 5.2. Therefore, the rationale adopted by the court in *Limon* is not sustainable. Moreover, reference was made to the November 2009 guideline in *Forbes* at [22].
When sentencing an adult offender, the Youth Guidelines ….will not be generally applicable as they are predicated on the basis that the offender is still a youth. Their relevance in these circumstances is confined to the emphasis placed in each on the significance of immaturity at the time of the offending to the assessment of culpability. They are not relevant for any other purpose.
It is argued that it was entirely open to the court in *Forbes* to apply the principles in paragraph 6.3 of the 2017 guideline because precisely the same principles appeared in the 2009 guideline to which the court referred. The court in *Forbes* deliberately chose not to do so. The question to be asked related to the maximum sentence for the offence at the time of its commission, not for the offender.

31. We accept that the relevant part of the earlier guideline would support the approach adopted in *Limon*. This point was made by the commentary on the decision in the Criminal Law Review: Crim LR [2022] 419. But the relevant part of the earlier youth guideline was not referred to in *Forbes*. The court said that the youth guideline when sentencing an adult offender would not generally be applicable "as they are predicated on the basis that the offender is still a youth". This cannot be correct in relation to paragraph 5. It refers in terms to an offender attaining the age of 18 and the approach to be taken to such an offender. Thus, that part of the guideline is not "predicated on the basis that the offender is still a youth". Paragraph 5 was relevant to the issues which arise when sentencing an adult for something they did as a child.

32. As was explained in *Limon*, whilst the principles set out in the guideline (whether the SGC guideline or the current youth guideline) usually will apply when the offender is a young adult who has recently crossed the relevant age boundary, there is no reason in logic why they should not apply when many years have passed between the offending and the date of sentence. Mr Jarvis accepted that logic did not require a distinction between a young adult and a much older person. He argued that it was an issue of pragmatic sentencing policy. He pointed to the potential difficulties in identifying maximum sentences for a young offender when the legislative regime changed more than once in 1980s and 1990s. We observe that similar difficulties arise by reference to the not infrequent changes to maximum sentences for sexual offences over the same period. Those are difficulties with which, by reference to *Forbes*, judges in the Crown Court have to grapple on a regular basis. There is no reason why they should not do so in relation to sentences available for those under 18 at different times.

33. In our view as a general rule logic should prevail over pragmatism unless there are compelling reasons to the contrary. Changes to the legislative regime may introduce complications which are acute in particular cases. Where the complications are intractable, it may be that a pragmatic solution has to be adopted. That is no reason to abandon logic for all cases.

34. Consideration of the second enquiry sanctioned as appropriate by *Forbes* supports the argument based on logic. This enquiry involves asking whether the offender at the relevant time could have been made the subject of any kind of custodial sentence. The particular example in *Forbes* is *BD* at [102] to [124]. It is clear that the court when considering *BD* had to investigate whether at the time of the offending (1968 to 1971) an offender under 14 could be subject to any form of custodial sentence.

35. We reject the view advanced by Mr Jarvis that *Limon* was per incuriam because of its departure from *Forbes*. In *Forbes* the reference to the youth guideline indicates that the court had not considered paragraph 5.2 of that guideline. Had the court done so, it could not have said that the guideline was predicated on the basis identified. We consider that the guidance in *Forbes* was designed to prevent a court dealing with historic sexual offences being required to consider the general level of sentencing current at the time of the commission of offences many years before. That is not the exercise in which the court engaged in *Limon*. The agreed position in that case was that

the maximum sentence which could have been imposed on the offender by reference to the provisions of Section 1B of the Criminal Justice Act 1982 (had he been sentenced at the time of the offences) would have been 12 months' detention. Taking account of that legislative position did not involve any qualitative departure from the principles in *Forbes*.

36. It is not for us to speculate what the position would have been had the judge in this case taken the approach suggested in *Limon*. There has been no appeal against the sentence. What is certain is that the provisions which led to the reduction of the sentence in that case did not apply until October 1992. Thus, the legislative position in relation to this offender was significantly different to that which applied to the appellant in *Limon*.