

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202200828/A4

[2022] EWCA Crim 1871



Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 29 July 2022

Before:

LADY JUSTICE CARR DBE  
MR JUSTICE FRASER  
THE RECORDER OF LEEDS  
HIS HONOUR JUDGE KEARL QC  
(Sitting as a Judge of the CACD)

REGINA  
V  
ANTHONY BARKER

---

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

---

MR A BIRKBY appeared on behalf of the Applicant

---

**J U D G M E N T**

**REPORTING RESTRICTIONS AND ANONYMISATION APPLY:**

Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case.

MR JUSTICE FRASER:

1. This is an application for permission to appeal against sentence brought following refusal by the single judge and renewed to the full court.
2. Reporting restrictions apply in this case. No matter relating to any complainant shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. This is as a result of section 1 of the Sexual Offences (Amendment) Act 1992.
3. The full court has been assisted by oral submissions this morning by Mr Birkby of counsel appearing on behalf of the applicant and we are grateful to him for his assistance.
4. The applicant is an 88-year-old priest who pleaded guilty in the Crown Court at Durham to three counts of sexual offences. This was a change of plea, the applicant having indicated earlier that he would be pleading not guilty. Two other similar counts were ordered to lie on the file. All of the offending had taken place in the 1960s.
5. On 11 March 2022 he was sentenced by His Honour Judge Singh at the same court to one sentence of 28 months' imprisonment on a count of indecent assault on a male person, contrary to section 15(1) of the Sexual Offences Act 1956, the statute in force at the time of the offending, with no separate penalty on the other two counts. One of the other counts was the same charge, and the third was indecency with a child, that latter count being contrary to section 1(1) of the Indecency with Children Act 1960. Notification provisions were also imposed.
6. The facts are as follows. The offending came to light as a result of complaints made against the applicant that were made relatively recently by somebody to whom we shall refer as Mr C. Mr C sadly died in Australia, where he was resident, only about 10 days after the UK police had started an investigation following his complaints. As part of the

investigation into what had happened to Mr C at a boarding school in the 1960s for those intending to join the Priesthood, the complainant was contacted by the police. He had been school friends with Mr C who was the original complainant and he gave a statement in support of Mr C's allegations, explaining to the UK police that a series of indecent assaults had also been made upon him when he was a pupil at the school. The applicant was a priest and teacher at that school.

7. In respect of some of the offending which formed the subject matter of counts 2 and 3, the complainant could not say for certain whether he was above or under the age of 13. The applicant would have been in his thirties at the time. These assaults consisted of the applicant touching the complainant's genitals, getting him to masturbate the applicant in the shower and also on another occasion touching the complainant's penis with his erect penis. The complainant explained that he had complied with what the applicant, who was a large and imposing individual at the school, had instructed him to do. After Mr C died the complainant found himself in the position of being a victim of the applicant, as he put it in his statement, rather than merely a witness.
8. The applicant was arrested and gave a no comment interview. His initial reaction to the complaints made by Mr C, the former pupil who had moved to Australia, had been to deny them. In the event, as we have explained, the applicant pleaded guilty to three counts, the details of which we have described.
9. The count concerning masturbation in the changing rooms was a specimen count and the complainant explained this offending would regularly happen with the applicant coming into the changing rooms at the swimming pool and locking the door when the complainant was alone.
10. In sentencing him, the judge performed the necessary calibration exercise taking account

of the fact both that the actual offences themselves are now covered by different offences in the later 2003 Sexual Offences Act, but also taking account of the fact that the maximum sentence at the time for the other historic offences must be observed. He pointed out that the position that the applicant held at the boarding school was one that he had used to abuse the complainant, that there was undoubted grooming involved and that some of the counts on the indictment were specimen offences. There was also the obvious abuse of trust.

11. The complainant was frightened at the time and had nobody to whom he could turn. We are going to quote from one passage of the interview that the complainant gave to the police who said that the abuse was horrible and degrading. He explained in relation to his acquiescence at the time when instructed to perform acts by the applicant in the following terms:

"I just did it because you did what you were told. That is the view of children who are being abused by somebody in a position of power. I can distinctly remember feeling that if he walked into the swimming pool and no one else was there and the door was then locked it would send shudders up you because you knew you were going to be abused."

12. The victim personal statement is very moving and makes clear that the abuse had a powerful and detrimental effect upon him for many decades.
13. The sentencing judge placed the offences of sexual activity with a child, the comparable modern offences being section 9 and section 10 of the 2003 Act, in Category 3 for harm with culpability A. He took the starting point of three years and raised that due to the offence being a specimen and the wide number of aggravating factors. He reduced that for all the points that could be said to be in the applicant's favour, including his age and good character, although that latter point was qualified to reflect the fact that during the

period in his life the abuse that he had perpetrated regularly on the complainant at the time had been kept hidden and secret for many years. The sentencing judge reached a period of 42 months and then gave full discount for plea, leading to the sentence of 28 months' imprisonment.

14. The grounds of appeal advanced by Mr Birkby are as follows, which have been refined since refusal of permission by the single judge. They are, first, that the judge failed to adjust the starting point in the sentencing guidelines for the equivalent offences under the 2003 Act and had no regard for the higher maxima for the equivalent modern offences which meant that the sentence was wrong in principle. It is also said that undue weight was placed by the sentencing judge on additional aggravating factors and that he failed to take account of mitigating factors and that if he had performed that exercise, as Mr Birkby submits he ought to have done, the sentence would have been a far lower one and would have been capable of suspension.
15. In our judgment the first ground in relation to adjusting the starting point is simply wrong in law. Annex B of the Sentencing Guidelines for Sexual Offences expressly deals with the scenario where sentencing is required for what are called historic sexual offences. It explains in particular in Annex B at paragraphs 1 and 4 the following:

"1. The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Under the Criminal Justice Act 2003 the court must have regard to the statutory purposes of sentencing and must base the sentencing exercise on its assessment of the seriousness of the offence.

...

4. The seriousness of the offence, assessed by the culpability of the offender and the harm caused or intended, is the main consideration for the court. The court should not seek to establish the likely sentence had the offender been convicted shortly after the date of the offence."

16. It is specifically not the case that the figures within the guidelines for starting points should be adjusted whether as a pro rata or otherwise to take account of the different maximum sentences that apply to the older offences. That is contrary to what the sentencing guidelines require and would be wrong in principle. Far from the sentencing judge making an error of principle, he embarked upon this exercise by correct application of the approach to sentencing historic sexual offences. The principles are set down in a number of authorities such as R v Clifford [2014] EWCA Crim 2245, R v Forbes [2016] EWCA Crim 1388 and more recently R v DL [2020] EWCA Crim 881.
17. We turn to the latter two grounds, mitigation and aggravation, which can be seen either as two ways of expressing the same ground of appeal or as separate second and third grounds. In our judgment these are also misconceived. The sentencing judge expressly took all relevant factors into account. He correctly discounted the so-called good character of a man of 88 years of age whose sexual offending against a young boy in the 1960s when he was a priest and teacher at the boarding school went undiscovered for so many decades. The applicant led a long life as a serving member of the community generally and as a priest in the Catholic Church, there is no doubt that he was highly respected. However, that character that he assumed was an edifice that hid his real character, that of a sexual abuser of this complainant when the latter was only a child of 12 or 13 years of age, and also a child resident at a boarding school where he was a priest and teacher. It is difficult to overstate the breach of trust involved. Such offending by those in the priesthood is not, in the modern age, unheard of, regrettably. At the time, an offender such as the applicant was shielded not only by the cloak of respectability, but also by their position of trust in the wider community. Who would believe, in the 1960s, the word of a child against that of a priest?

18. We have the benefit of a range of medical and psychiatric reports upon the applicant, as well as a character reference for the applicant in a comprehensive witness statement by Mrs Patricia McCullen. She has pointed out to the full court in careful detail how prison is impacting upon the wellbeing of the applicant. There is no doubt that incarceration in prison at the age of 88 years for anybody, whether a long-serving priest or someone else, will be both a shock to them and something to which it will be difficult for that person to adjust. However, concentrating on that alone, which is what appears to the court is being done on this renewed application, is only to consider one small part of the picture. The other wider part of the sentencing picture is the offending itself, the criminality involved in grooming and selecting a young victim and then sexually abusing that young boy in a boarding school setting for the applicant's own selfish gratification taken together with the life-long impact upon that young person's entire life.
19. Finally, we deal with what is said to be the victim's plea for leniency, which it is said before us went unhindered by the sentencing judge. The sentencing judge had before him, as do we, material from the victim himself making it clear what his request was, in terms of the approach of the court to sentencing the applicant. He explained that having been contacted by the police due to the complaints by his childhood friend, he felt the truth was very important and he now found himself more than a witness and, as he had put it, had become another victim of the accused. He explained he did not want revenge and asked that any sentence would be of a minimal period. That phrase "minimal period" must be seen in its own context. Any sentence must be the shortest possible commensurate with the seriousness of the offending.
20. As the guide issued by the Sentencing Council to Victim Personal Statements says:

"The court must pass what it judges to be the appropriate sentence having

regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim. The opinions of the victim ... as to what the sentence should be are therefore not relevant."

This is consistent with the Criminal Practice Direction VII Sentencing F.3(e) dealing with victim personal statements. The complainant's statement is very measured and extremely mature. It is not a correct interpretation of his sentiments to suggest that he was urging the court to sentence in any particular way, even if that were relevant, which it is not.

21. The test for this court is whether any sentence is manifestly excessive or wrong in principle. In our judgment this sentence was considered carefully and correctly by the sentencing judge, who explained his approach in clear and express terms. There is no error of principle involved, even on an arguable basis. Nor can it be said, again even on an arguable basis, that the resulting sentence was manifestly excessive. We entirely agree with the conclusion of the single judge who reached the view there were no reasonably arguable grounds upon which to grant permission to appeal. There is no arguable basis for contending that the sentence is manifestly excessive or that it ought to be reduced.

22. Accordingly, we dismiss this renewed application for permission to appeal.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk