Neutral Citation Number: [2022] EWCA Crim 617

Case No: 202103466 A1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM NORWICH CROWN COURT**
**HHJ BACON QC**
**INDICTMENT NOS T20200722 and T20210250**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2022

**Before :**

**LORD JUSTICE WARBY**
**MR JUSTICE CHOUDHURY**
and
**THE RECORDER OF NEWCASTLE, HHJ SLOAN QC**

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**Between:**

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| **JOHN ANTHONY TURNER** | **Appellant** |
| **- and -** | |
| **THE QUEEN** | **Respondent** |

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**Nicholas Bleaney** (instructed by **Metcalfe Copeman and Pettefar LLP**) for the **Appellant**
**Duncan O'Donnell** (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing date: 29 April 2022

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# 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 10:30am on Friday 06 May 2022.*

## LORD JUSTICE WARBY:

1. This is an appeal against sentence for sexual offences.

2. The appellant is John Anthony Turner, who is now 75 years old. On 9 August 2021, after a trial in the Crown Court at Norwich, he was convicted of nine counts of indecent assault on a male person, contrary to s 15(1) of the Sexual Offences Act 1956, and three counts of indecency with a child, contrary to s 1(1) of the Indecency with Children Act 1960. On 13 October 2021 he was sentenced by the trial Judge Her Honour Judge Bacon QC to a total of 16 years' imprisonment.

3. At a hearing on 17 March 2022 the Full Court gave him leave to argue that this sentence was wrong in principle and manifestly excessive.

4. The court invited the Crown to attend if it thought fit, and we have therefore had the benefit of written and oral argument both from Mr Bleaney on behalf of the appellant and from Mr O'Donnell for the Crown. We are grateful for their helpful submissions.

### The facts

5. As the charges indicate, the case is one of historic child sex abuse. It took place in the late 1970s and the early 1980s and involved four male victims who were aged between 7 and 14 at the time. We shall anonymise them in this judgment as BN, NT, TQ and CX. One of them has since died, but we understand the others remain alive, and to that extent the provisions of the Sexual Offences (Amendment) Act 1992 apply. That means that no matter relating to the victim shall during his lifetime be included in any publication if it is likely to lead members of the public to identify him as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s 3 of the 1992 Act.

6. For the purposes of this judgment it is enough to give a broad description of the pattern of offending. The appellant was a schoolteacher, a lay preacher, and a senior leader in the cub scouts. He abused each of those positions to facilitate his offending. On boating holidays in the Norfolk Broads he subjected boys aged between 7 and 14 to unwanted touching, often in plain sight of other young boys.

7. He also engaged in unwanted touching of boys at a Cub Scout camp whilst others slept nearby. He often put his hand down the victims' trousers and played with their penis. Sometimes he got them to touch his penis.

8. Some of the offending took place at the church where the applicant was the lay preacher. Some occurred at his home, to which he enticed complainants with promises of alcohol. He tried to get some of the boys aroused by masturbating them and on occasion he placed their hands on his semi-erect penis.

9. All of this came to light as a result of some of the victims going to the police in 2018. The first to do so was BN. Police interviews and a press report of December 2020 led to others being interviewed.

10. The appellant himself, when interviewed, denied the offending and professed horror and revulsion at the accusations.

## The trial

11. As BN had died before trial his evidence was given by recorded interview. The other victims gave evidence in person. The appellant sought to disparage them, but their evidence was accepted by the jury. The jury's verdicts established that the appellant had offended against BN on six separate occasions between 31 December 1978 and 20 January 1982, when BN was between 9 and 12 years of age. Four of these occasions were on boat holidays, reflected in counts 1 to 4 on the indictment. Two were occasions when assaults began in the church but continued at the appellant's home. These were reflected in counts 5 and 6.

12. In his recorded interview, when asked where the appellant's hand would go, BN had mentioned his bottom. At one stage he said that the hand would go straight "on to my willy with his other finger rubbing my bottom and maybe, a quarter of an inch up my bum". But the Crown did not suggest to the jury that they could be sure that there had actually been any digital penetration of BN's anus.

13. The appellant was also convicted of three offences against NT, one committed on a boat holiday and two at a Scout camp, when NT was between 10 and 13 (counts 7, 9 and 10). The appellant was convicted of two offences against TQ, one on a boat holiday and the second at a social club (counts 11 and 12). TQ was between 7 and 10 years old at the time. And there was one indecent assault on CX at a Scout camp, when CX was 13 or 14 (count 13).

## Sentencing information

14. Having presided over the trial, the Judge had learned from BN's video interview and the live evidence of the other victims of the impact of the offending on them. For the purposes of sentence, she also had a written victim personal statement from BN's sister "A", and one from CX.

15. BN had told in interview of his descent into alcoholism and criminal offending. "A" reported that her brother had been a lovely boy aged 10, who changed into a very disturbed young boy, and had many mental, emotional and financial troubles in his adult life. CX told of how what the appellant had done to him had plagued his mind for over 40 years, badly affecting his confidence and his general mental state.

16. The appellant had no previous convictions and in that respect was of good character. But he had forfeited the best available mitigation by pleading not guilty and contesting the trial. And there was no remorse. A pre-sentence report made clear that even after conviction the appellant continued to insist that he was innocent of the crimes of which he had been convicted by the jury. He described BN as "Mentally unhinged and an abuser of alcohol". The three others who came forward to complain were also said to have no good cause to do so.

17. The approach to sentence in cases of this kind is well-established. It is to identify the modern offences that correspond to the historic offences and to apply the current sentencing guidelines with measured regard to the statutory sentencing framework that applied at the time of the offending.

18. Mr O'Donnell provided the court with a prosecution Note for the sentencing hearing, which correctly identified the modern equivalent of the indecent assault offences as sexual assault of a child under 13, contrary to s 7 of the Sexual Offences Act 2003 or, where there was touching of the naked genitalia, sexual activity with a child, contrary to s 9 of the 2003 Act. The maximum sentences for those offences are 10 and 14 years' imprisonment respectively. The maximum sentence for the old offence was 10 years' imprisonment. The modern equivalent of the offence of indecency with a child was also correctly identified as causing or inciting a child to engage in sexual activity, contrary to s 8 of the 2003 Act. The maximum sentence for that offence is 14 years' custody. The offence under the 1960 Act had a maximum sentence of 2 years.

19. The prosecution Note set out the factual basis on which the prosecution invited the Judge to sentence, and the Crown's case as to where the individual offences sat within the guideline. The note described counts 2 and 6, both alleging indecent assault on BN, as "multiple incident counts". Of count 2 and of count 5, also a count of indecent assault on BN, the Note said this:-

> "The Crown have not asked the Jury to be sure that there was actual digital penetration of [BN's] anus (he says "maybe" at one stage), therefore we do not invite the Court to sentence as an Assault of a child under 13 by penetration."

**The sentencing remarks**

20. The Judge began her sentencing remarks by outlining the facts of the offending, beginning with the case of BN. Having recounted the details of count 1, the first occasion when BN was assaulted on a boat holiday, she went on to count 2. She said that the abuse had:

> "… continued beyond that first occasion on several other occasions too, again on further boating holidays when you would be touching his penis and also, on occasions, putting your finger up his anus. He described how he would cry because it hurt him. That is count 2, a multiple occasion count of indecent assault."

21. Describing the events that underlay count 5, an allegation of assault at the church and then at home, the Judge referred to BN's evidence of how the appellant would touch him up, "touching his penis, rubbing his bottom and putting your finger a little way up his anus." She said "Those assaults continued opportunistically and regularly. This is count 5, indecent assaults."

22. Of count 6, which also alleged assault at the church and the defendant's home, the judge said this:

> "The abuse continued on and on. You would entice him to your home with alcohol and he would cycle there. You had a hold over him, he said. The abuse was as before, you touching his penis, under his clothing, and again it occurred on several occasions. This is count 6, indecent assaults."

23. The Judge described the impact of the offending on the victims and identified the appropriate categories in the sentencing council guidelines. For the assaults of BN that were charged in counts 1, 2, 5 and 6 the severe psychological harm, abuse of trust, grooming, and deliberate isolation meant the applicable category was 1A for the offence under s 7 of the 2003 Act. This has a starting point of 6 years' imprisonment and a range of 4 to 9 years. Counts 3 and 4 were treated as s 8 offences in guideline category 2A, but although that has a starting point of 8 years the Judge's sentencing powers were constrained by the 2-year maximum sentence for the historic offence actually charged.

24. The sentences imposed were as follows. On counts 1 to 4 sentences of 4, 6, 2 and 2 years' imprisonment, all concurrent with one another. On each of counts 5 and 6, sentences of 6 years' imprisonment, concurrent with one another but consecutive to the sentences on counts 1 to 4. The total sentence for the offending against BN was therefore one of 12 years. On counts 7, 9 and 10, the offending against NT, the sentences were 3, 4 and 4 years, concurrent with one another but consecutive to the sentences for the BN offences, bringing the total to 16 years. The Judge imposed sentences of 6 months, 18 months and 1 year for counts 11, 12 and 13 - the offending against TQ and CX - but made these concurrent, leaving the overall total at 16 years.

## The grounds of appeal

25. The full court gave leave to argue three grounds of appeal.

26. The first is that the appellant was sentenced for his offending against BN on a basis more serious than that suggested by the Crown. Granting leave to argue this ground the full court noted the position which the Crown had adopted in relation to the offending covered by counts 2 and 5, and that the Judge had twice referred to digital penetration of BN's anus. The court said it was "arguable that this error may have found its way into the ultimate sentence imposed by the judge." Mr Bleaney submits that this first point really matters because it was never part of the Crown's case that there was penetration, and the Sentencing Guidelines for actual penetration are of a wholly different order of seriousness.

27. Secondly, it is said that the overall sentence imposed did not properly reflect the gravity of the offending; it would have been apt for much graver criminality. The core submission on ground two is that accepting the aggravating features we have mentioned, the length of the period of offending, and the number of victims, the total sentence was too high. Mr Bleaney points out that, though serious, the offending was touching over or under clothing which he describes as falling at the lowest end of the "unhappy pantheon of sexual offending".

28. The third ground of appeal is that the Judge paid insufficient regard to the principle of totality. Mr Bleaney recognises that it was legitimate for the Judge to impose consecutive sentences but argues that the total sentence went beyond what might be just and proportionate for this offending. The sheer length of the sentence as a whole is said to show that the totality principle was not properly applied.

29. Consistently with his stance below, Mr O'Donnell does not suggest that the Judge was right or even entitled to sentence the appellant on the basis that he had engaged in digital penetration of BN. He suggests that her remarks should not be interpreted in that way.

We are invited to read what she said as merely reciting some of the evidence, rather than setting out her own conclusions. Mr O'Donnell further points out that the Judge did not stray outside the range for the guideline category which she said she was applying, namely category 1A for the offence contrary to s 7 of the 2003 Act. Mr O'Donnell submits that the total sentence did not go beyond the range that was properly open to the Judge and respected the principle of totality.

**Assessment**

30. This was serious offending, persisted in for years, which plainly had a devastating impact on BN, and a serious impact on each of the other victims. This, the features we have noted, the multiplicity of offences, the duration of the offending and the number of victims all meant that a heavy sentence for the total criminality was inevitable. But sad though it is to say it, this court encounters more serious cases of sexual assault under ss 7, 8 and 9 of the 2003 Act. Proportionality must be maintained across the range of offending of this kind. Having looked with care at the specifics of this case we find ourselves driven to agree with Mr Bleaney that the overall sentence at which the Judge arrived is out of scale.

31. The reason, in our view, is that the overall sentence for the offences against BN was excessive. That, on analysis, is what lies at the heart of the matter; there is no challenge to any of the individual sentences in respect of the other victims, or to the overall structure of the sentencing exercise.

32. We are not persuaded by Mr O'Donnell's interpretation of the sentencing remarks. It is clear to us that the Judge found as a fact that the offending reflected in counts 2 and 5 involved digital penetration and that for that reason the sentences for those counts were higher than they would otherwise have been. That should not have been the case.

33. A judge sentencing after a trial is entitled to make findings of fact provided (i) they are not inconsistent with the jury's verdicts, (ii) the evidence allows her to be sure of the facts, and (iii) a fair procedure is followed. The judge is not bound by the way the prosecution chooses to present its case. But in this case not only did the Crown never suggest that a finding of digital penetration should be made, the parties were and remain agreed that the evidence did not justify such a finding. There has been no detailed exploration of the evidence in the course of this appeal, but on the basis of what we have seen we think the parties are likely to be right about this. And even if that were not so, we are satisfied that the Judge should not have passed sentence on this basis without first making clear that she was minded to depart from the approach so clearly adopted by the Crown and then allowing the defence a full and fair say on the matter.

34. There is another point, which came to light during the hearing of this appeal. As we have made clear, the case was presented to and dealt with by the Judge on the basis that counts 2 and 6 were "multiple incident" counts. But that is not how they were pleaded. They were framed as specimen counts. The particulars of count 2 alleged that the appellant had assaulted BN "on a date other than that in count 1". Count 6 was particularised as assault on BN "on a date other than that in count 5". As Mr O'Donnell came to accept in oral argument, this form of words is not apt for an allegation of multiple incidents on different dates. The authorities show that the only proper inference from a guilty verdict on a count drawn in this way is that the jury were sure that the defendant offended on

one additional occasion and it would be wrong to sentence on any other footing: see *R v A* [2015] EWCA Crim 177, [2015] 2 Cr. App. R (S) 12 [36]-[48]. That is why we have said above that the verdicts established offending against BN on six occasions.

35. *R v A* was a case of sexual offending. The issue we have identified has arisen in other such cases. One of these is *R v CC* [2018] EWCA Crim 2704, where count 1 charged a single offence, identifying a single occasion; count 2 was in the same terms but with the additional words "on a date other than as specified in count 112; and a similar pattern was repeated in counts 5 and 6 of the indictment. The prosecution opened the case to the jury on the basis that these counts were "designed to reflect the repeated nature of the allegations of rape". This court observed that this was wrong; each count charged a single event. See [12]-[14]. At [39]-[40] the court noted with "no little regret" that the way in which the indictment had been drafted meant that "the verdicts of the jury could not be taken to represent a wider pattern of sexual assault" so that the judge was unable to reflect in his sentence "the repeated nature of the offences of rape." The sentencing judge in that case had loyally followed *R v A.*

36. In the present case the particulars of count 2 included explanatory wording in brackets: "(Further indecent assaults committed on the boat holidays)". Count 6 had similar explanatory words referring to "further indecent assaults" in the plural. We have not explored in any detail how the matter was dealt with before the jury. But we think Mr O'Donnell's concession is rightly made. At best this wording introduced an element of ambiguity. An indictment must leave no room for misinterpretation of a guilty verdict. The proper way to frame a multi-incident count is to specify a minimum number of occasions. If a defendant is convicted on such a count the Judge has a solid basis for sentencing. If the prosecution fails to do this the judge cannot make up the deficiency by finding facts that the jury may or may not have found established. See *R v A* [47]-[48]. It has not been argued nor do we believe that the explanatory wording used in this case can affect these basic principles. We have not seen or heard anything else to persuade us that this case could properly be treated as an exception to the rules identified in *R v A.* In this respect, therefore, the sentences on counts 2 and 6 were wrong in principle. The Judge's remarks we have quoted suggest that she may also have wrongly treated count 5 as one alleging multiple incidents when it had been pleaded and presented by the Crown as the "first indecent assault committed in the church and the defendant's home"..

37. For these reasons we conclude that grounds one and two are both made out, and that the sentencing in respect of BN was both wrong in principle and manifestly excessive. In respect of counts 2, 5 and 6 we quash the sentences of 6 years imposed by the Judge. On each of those counts we substitute a sentence of 4 years' imprisonment. Although the indecency alleged in count 4 was also wrongly treated as involving multiple incidents, the sentence of 2 years is not one with which we would interfere. Nor do we otherwise interfere with the sentences below or the structure adopted by the Judge.

38. The result is that the total sentence is now one of 12 years' imprisonment. That is a sentence that in our view properly reflects the form of the indictment, the convictions returned by the jury, the evidence, the relevant guidelines, and the principle of totality. The appeal is allowed to that extent.