IN THE COURT OF APPEAL
CRIMINAL DIVISION

Neutral Citation Number:
[2023] EWCA Crim 1204

Case No: 2023/02143/A3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 13th October 2023

B e f o r e:

LORD JUSTICE STUART-SMITH

MR JUSTICE CHOUDHURY

THE RECORDER OF NOTTINGHAM
Her Honour Judge Shant KC
(Sitting as a Judge of the Court of Appeal Criminal Divisions)

R E X

- v -

ANTHONY DOUGLAS WHITELAM

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Mr G A M Purcell appeared on behalf of the Appellant

J U D G M E N T

Friday 13th October 2023

LORD JUSTICE STUART-SMITH: I shall ask Mr Justice Choudhury to give the judgment of the court.

MR JUSTICE CHOUDHURY:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to the victims shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as a victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 10th March 2023, following a trial in the Crown Court at Derby before His Honour Judge Hurst and a jury, the appellant (then aged 70) was convicted of 13 counts of historic sexual offending against two child complainants, "C1" (who was aged between 8 and 12 at the time of the offending) and "C2" (who was aged between 10 and 14 at the time of the offending). He was acquitted of two counts (counts 11 and 12).

3. On 1st June 2023, the appellant was sentenced as follows:

Count on indictment	**Offence**	**Pleaded guilty or convicted**	**Sentence**	**Consecutive or Concurrent**	**Maximum**
Offences against C1					
1 & 2	Indecency with a Child, contrary to s.1(1) of the Indecency with	Convicted	2 years imprisonment	Concurrent	2 years

	Children Act 1960				
3, 4, 6	Indecent Assault on a Male Person, contrary to s.15(1) of the Sexual Offences Act 1956	Convicted	4 years imprisonment	Concurrent	10 years
5	Indecent Assault on a Male Person, contrary to s.15(1) of the Sexual Offences Act 1956	Convicted	4 years imprisonment	**Consecutive**	
Offences against C2					
7, 8, 9	Indecent Assault on a Male Person, contrary to s.15(1) of the Sexual Offences Act 1956	Convicted	7 years imprisonment	Concurrent	10 years
10	Indecent Assault on a Male Person, contrary to s.15(1) of the Sexual Offences Act 1956	Convicted	9 years imprisonment		10 years
13	Indecent Assault on a Male Person, contrary to s.15(1) of the Sexual Offences Act 1956	Convicted	6 years imprisonment	Concurrent	10 years
14 & 15	Indecent Assault on a Male Person, contrary to s.15(1) of the Sexual Offences Act 1956	Convicted	4 years imprisonment	Concurrent	10 years
Total Sentence:		**13 years imprisonment**			

In addition, a Sexual Harm Prevention Order was imposed until further order.

4. Having been convicted of an offence listed in Schedule 3 to the Sexual Offences Act 2003, the appellant was required to comply indefinitely with the provisions of Part 2 of the Act (notification to the police).

5. The appellant now appeals against sentence by leave of the single judge.

The Background

6. The facts may be stated briefly. The offences against C1 were committed when the appellant was himself a child. In 1966, at the age of 15, the appellant commenced an apprenticeship at Rolls Royce in Derby. C1, who was aged 8 when the offending commenced, used to play on the street near the appellant's home. C1 recalled seeing the appellant, dressed in white Rolls Royce overalls, travel to work from home either by bicycle or by moped. The appellant offered C1 a ride on his bicycle and invited him round to his home. There, in the appellant's bedroom, the appellant encouraged C1 to masturbate him to the point of ejaculation (counts 1 and 2). The appellant also touched C1's penis (counts 3 and 4) and caused him to suck the appellant's penis (counts 5 and 6). The judge accepted C1's evidence that the offending represented by counts 1 to 4 occurred five to eight times over a period of years. Counts 5 and 6 represented two specific occasions. The offending against C1 only ceased in 1971, when he reached the age of 12.

7. C1 did not tell anyone about the abuse until 2018 when, at the age of 59, he disclosed what had happened to his GP and was advised to go to the police.

8. Unbeknownst to C1, the police had already commenced an investigation into allegations of abuse made against the appellant by C2. In 2016, C2 had disclosed to the police that he

had been fostered by the appellant between the ages of 10 and 14. C2 described how the appellant (then aged 37 to 40) would come into his room at night and fondle C2's genitals (counts 7 and 8). He would put C2's penis into his mouth (counts 9, 10 and 13). This would occur whilst the appellant's youngest son slept on the lower bunk. Over time, the appellant's abuse of C2 extended to licking C2's anus (counts 14 and 15). C2 would pretend to be asleep, but he was appalled that he could not control his body's reaction to the stimulation, which he did not understand. The appellant used alcohol to facilitate the offending. C2 eventually ran away from home when he was just 14 years old.

9. In Victim Personal Statements, both C1 and C2 described blighted personal lives and suffering from long-term psychological harm.

10. In sentencing the appellant for this historic offending, the judge took account of the maximum sentences, as set out in the table above, which were available for these offences at the time they were committed. He noted that imprisonment was available for the offences at the time, and that the maximum sentence for indecency with a child (counts 1 and 2) was two years' imprisonment. The modern equivalent of that offence was said to be that under section 8 of the Sexual Offences Act 2003, causing or inciting a child into sexual activity.

11. The maximum sentence for the offence of indecent assault at the time was ten years' imprisonment. The modern equivalent of the offence under counts 3 and 4 (touching C1's penis) was that under section 7 of the 2003 Act, sexual assault of a child under the age of 13.

12. As for counts 5 and 6 (causing C1 to suck the appellant's penis), the modern equivalent was that under section 5 of the 2003 Act, rape of a child under the age of 13.

13. In respect of the offending against C1, the judge also took account of the fact that the

appellant himself was a child of between 14 and 17 years of age at the time. He considered the sentencing guidelines for children and young persons. The maximum sentences set out above were those for adult offenders. The judge considered the position as it would have applied to the appellant were he to have been sentenced at or shortly after the offending against C1.

14. As for the offences against C2, the modern equivalent for counts 7 and 8 (touching C2's penis) was that under section 7 of the 2003 Act. For counts 9, 10 and 13 (inserting C2's penis into the appellant's mouth), the modern equivalent was that under section 8 of the 2003 Act. For counts 13, 14 and 15 (licking C2's anus), the modern equivalent was that under section 9 of the 2003 Act.

15. Count 5 was treated as the lead offence in respect of C1. The judge considered the current sentencing guidelines and found that whilst the harm fell into category 3, culpability fell into category A. That was due to the planning involved and the deliberate isolation of the victim by the appellant taking him into his home.

16. The aggravating features included ejaculation and – at least in part – the victim having to leave home.

17. The mitigating features were the appellant's good character (then and now), his young age at the time and his lack of maturity.

18. In relation to C2, the lead offence was taken to be that under count 10, which was found to fall into category 2 for harm and category A for culpability. The latter was due to the use of alcohol to commit the offences, the grooming behaviour and the substantial breach of trust, given the fostering relationship.

19. The aggravating features included: the location of the offence; the presence of another child; and the fact that the victim found it necessary to leave home.

20. The mitigating features included: the appellant's good character (then and now), although we note that this was offending committed against the background of the earlier offending against C1; his exemplary conduct; and his charitable work.

21. Having concluded for the purposes of section 278 of the Sentencing Act 2020 that the appellant was not an offender of particular concern, as he had not been over 18 at the time of the offending against C1, the judge turned to his sentences. He noted that the sentences available as against a person aged 14 and 15 at the time were: approved school for a maximum of three years, or detention for up to three months. By the time he was 16 (in 1968 and 1969), the appellant was also liable to a sentence of Borstal training for a maximum of two years.

22. Having regard to the decision in *R v Nazir Ahmed and Others* [2023] EWCA Crim 281, the judge considered that a sentence of Borstal training for two years, which would include two years under supervision, thereafter, was equivalent to a sentence of four years' imprisonment. The judge decided that the appropriate way to structure the sentence would be to impose one sentence for C2 and a consecutive sentence for C1. In so doing, he rejected a submission by counsel on behalf of the appellant that the sentences should run concurrently with each other. The judge proceeded to sentence as follows:

> "I take count 10 as being the lead offence for [C2]. It is a specimen, but it is the modern equivalent of section 8(ii)(d) of the Sexual Offences Act 2003, namely oral penetration of your mouth in your capacity as his foster father to a child in your care. I take into account the prolonged period of the abuse,

> from the ages of 10 to 14 and the impact that it has had upon him.
>
> It seems to me that limiting myself, as I must, to the maximum sentence available at the time of ten years, reminding myself that that is for a single offence and there are numerous offences in this case, the maximum sentence is the appropriate starting point; that is ten years' imprisonment which I discount by one year for mitigation, principally your character, to nine years' imprisonment. There can be no reduction for credit because you did not plead guilty. So, for [C2] on count 10 it is nine years' imprisonment; on count 7, seven years, concurrent; on count 8, seven years, concurrent; on count 9, seven years, concurrent; on count 13, six years, concurrent; on count 14, four years, concurrent; on count 15, four years, concurrent. A total sentence for [C2] of nine years.
>
> For [C1] I take count 5, oral rape as it would be described today, as being the lead offence. I discount from the maximum sentence of ten years to reflect not only your age at the time, the sentencing regime at the time and the Sentencing Council's guideline on sentencing of young people. It seems to me that the appropriate sentence, taking all of those matters into account, is four years' imprisonment, concurrent to the nine years making a total sentence of thirteen years. Those four years reflecting, as I have already said, two years of borstal training which seems to me to be the sentence that would have been imposed upon you at the time and knowing that that was not an isolated incident or an adolescent but something that led to the more serious offending involving [C2] in due course.
>
> So, four years on count 5; count 1, two years, that is the maximum; count 2, two years, the maximum; count 3, four years; count 4, four years; count 6, four years. All of those concurrent [with] each other and concurrent [with] count 5. So, the total sentence, as I have said, for [C2] and [C1] is thirteen years' imprisonment."

The Grounds of Appeal

23. There are two principal grounds of appeal. First, it is said that the sentence of four years' imprisonment in respect of the offending against C1 was wrong in law and manifestly excessive, as the maximum sentence available for a child offender at the time was six months' detention, and that it was incorrect to equate Borstal training with detention to justify a longer custodial sentence. Second, it is said that the overall sentence of nine years' imprisonment on count 10 was manifestly excessive and that by imposing consecutive sentences for counts 5

and 10, the judge gave insufficient consideration to the principle of totality.

24. In developing ground 1, Mr Purcell, who appears for the appellant as he did below, submits that, pursuant to the Criminal Justice Act 1961 and as set out in the table at A8-1325 in the Current Sentencing Practice, the maximum custodial term available at the time was clearly six months. Borstal training was an alternative to detention and could not be treated as equivalent for modern sentencing purposes. Furthermore, it is submitted that the judge erred in his approach by taking a starting point for the modern equivalent offence under section 5 of the 2003 Act of ten years' custody, and then applying a discount for the appellant's age at the time. Instead, it is said that the judge ought to have considered the sentences available at the time.

25. As to ground 2, Mr Purcell submits that the overall sentence was manifestly excessive, when compared to the sentences imposed in other cases. He has referred the court to *Attorney General's Refence No 5 of 2001 (R v Terence Culshaw)* [2001] EWCA Crim 771, [2001] 2 Cr App R(s) 106, and *Attorney General's Reference No 53 of 2004 (R v Allan Lowe)* [2005] 1 Cr App R(S) 61. The submissions in respect of those matters were not developed in oral submissions before us.

26. Finally, Mr Purcell submits that the issue of totality was given insufficient consideration in that the judge appears to have imposed the maximum sentences for the earlier offending against C1 on the basis that, amongst other matters, such offending was not a "childhood lapse". It was suggested that, having regard to totality, a concurrent sentence with an uplift would have been a more appropriate approach.

Discussion

27. Mr Purcell's first point, namely that only a sentence of up to six months' custody was

available is, in our view, unarguable. In *Ahmed* it was stated at [31]:

> "… the approach to a sentence of Borstal training available at the time of offending became common ground before us. In determining what length of custodial sentence should now be imposed to reflect the sentence, which was likely at the time of the offending, a sentence of Borstal training (which would have comprised detention for up to two years, followed by supervision for a further two years) can properly be reflected by a sentence of up to four years' imprisonment. That would reflect current early release provisions."

Mr Purcell submits that it was wrong in principle to treat a sentence of Borstal training as equivalent to a term of imprisonment imposed now. He submits that there was no argument about that issue before the court in *Ahmed*, and that this court should not take the same approach.

28. We do not accept that submission. The judgment in *Ahmed* was given by a constitution of the Court of Appeal (Criminal Division), that included the Lord Chief Justice, Holroyde VP and William Davis LJ; it provides guidance on, amongst other matters, the approach to be taken in sentencing defendants who were children at the time of the offending and when a different sentencing regime applied. As such, this Court would be slow to treat any part of the judgment in *Ahmed* as less authoritative on the basis that a matter was “common ground” in that case, Mr Purcell accepts that Borstal training was available as an alternative to detention. There is nothing to suggest that the court would have been bound to opt for detention, as opposed to Borstal. Furthermore, a period of Borstal training was, as the Court of Appeal confirmed in *Ahmed*, a period of "detention for up to two years, followed by supervision for a further two years". In our view, the modern-day equivalent would be a period of detention in a young offender institution which, although not described as "imprisonment", is still a custodial sentence. If Mr Purcell were correct, then a sentence of imprisonment would not be available in respect of any adult whose offending as a child would at the time of offending

have attracted detention in a young offender institution.

29. The Court of Appeal has expressly confirmed that a sentence of Borstal training can properly be reflected by a sentence of up to four years' imprisonment. There was, in our judgment, no error of principle in the judge's approach to this aspect of the sentence.

30. Mr Purcell's next point was that the sentence of four years' imprisonment for count 5 was manifestly excessive. As to this point, the single judge said:

> "The maximum sentence at the time for indecent assault on a male was ten years at the time of the offending. Given the totality of offending within counts 1 to 6,and taking account of the aggravating and mitigating circumstances as identified by the sentencing judge, it is not reasonably arguable that a sentence of four years (by reference to the borstal equivalent referred to above) was manifestly excessive."

Having reviewed the matter afresh, we agree with the single judge. The figure of four years was reflective of the totality of offending under counts 1 to 6. Even if the sentence for count 5 on its own had warranted a sentence that was lower than the maximum available, the judge would have been entitled to uplift that to the maximum, to take account of the other offending and to reflect the overall criminality involved.

31. Whilst the judge, in describing how he reached his sentence, made reference to the maximum for an adult offender and then applied a discount for age, it is clear from a proper reading of the entirety of the sentencing remarks that the justification for imposing the maximum was the multiple offending involved. At 9C of the sentencing remarks, the judge said as follows:

> "[The] four years [reflected] … two years of borstal training

> which seems to me to be the sentence that would have been imposed upon you at the time and knowing that that was not an isolated incident [as] an adolescent but something that led to the more serious offending involving [C2] in due course."

That approach was entirely consistent, in our view, with that required of the court when faced with historic offending by an offender who was a child at the time, that is to take as its starting point the sentence which it considers was likely to have been imposed at the time: see *Ahmed* at [32(iii)].

32. The principle of totality was mentioned by the judge, albeit briefly, when he summarised counsel's submission that the sentences ought to be concurrent. The submission before us is that in deciding to impose consecutive sentences, the judge failed to have sufficient regard to totality; he ought to have stepped back and considered the overall sentence of 13 years' imprisonment and made a downward adjustment from it.

33. We disagree with that submission. It was open to the judge to impose consecutive sentences for this offending against two victims, separated by some 20 years. In some cases where offending occurs both as a child and as an adult, it may be appropriate to treat the adult offending as the lead count and to pass concurrent sentences for the past offending. Such an approach was contemplated in *Ahmed*, where the court said:

> "30. Lastly, where the offender has committed offences both as a child and as an adult, it will commonly be the case that the later offending is the most serious aspect of the overall criminality and can be taken as the lead offence(s), with concurrent sentences imposed for the earlier offences. In such circumstances the key considerations for the court are likely to be an assessment of the extent to which the offending as a child aggravates the offending as an adult, and the application of the principle of totality."

That does not, however, mandate concurrent sentences in all cases where offending straddles childhood and adulthood. Concurrent sentences may be appropriate where the offending against the same victim crosses an age threshold, or there is some other feature that links the offending over time. Where, however, the offending in adulthood is entirely separate from that committed as a child, it is open to the judge to impose consecutive sentences.

34. It is also submitted that certain observations made by the judge as to the later offending led to him applying the maximum sentence of four years' imprisonment for the offending against C1, and that in so doing the judge failed to have proper regard to the principle of totality. These observations included the judge's views that the earlier offending was not a childhood lapse, but "rather it was the appellant's latent homosexuality being satisfied by the criminal abuses of other people".

35. In so far as the judge took account of the fact that this was not an isolated incident, or a childhood lapse, that was again something that he was entitled to do, as held in *Ahmed* at [32(vi)]:

> "32. …
>
> vi) The starting point taken in accordance with (iii) above will not necessarily be the end point. Subsequent events may enable the court to be sure that the culpability of the child offender was higher, or lower, than would likely have been apparent at the time of the offending. They may show that an offence was not, as it might have seemed at the time, an isolated lapse by a child, but rather a part of a continuing course of conduct. The passage of time may enable the court to be sure that the harm caused by the offending was greater than would likely have been apparent at that time. Because the court is sentencing an adult, it must have regard to the purposes of sentencing set out in section 57 of the Sentencing Code. In each case, the issue for the court to resolve will be whether there is good reason to impose on the adult a sentence more severe than he would have been likely to have received if he had been sentenced soon after the offence as a child."

36. It is clear that in the present case the judge considered that a sentence of four years' imprisonment was appropriate, in part because the appellant's subsequent offending demonstrated that it was not a childhood lapse and that the culpability was therefore somewhat greater.

37. Having carefully considered the judge's sentencing remarks as a whole and noting that there does not appear to have been any evidence that the appellant's sexuality had anything to do with the offending, we do not agree that the sentence of four years' imprisonment for the earlier offending was reached by reference to that matter. It is a matter that is, unlike the observation that the earlier offending was not an adolescent lapse, notably absent from the judge's reasoning set out at page 9C-D for imposing a sentence of four years' imprisonment. In our judgment, the sentence of four years' imprisonment was neither wrong in principle, nor manifestly excessive.

38. As consecutive sentences were appropriate; we do not consider that there has been any breach of totality principles. A proper application of those principles does not always require a downwards adjustment of the overall sentence whenever such sentences are imposed. Such an adjustment may be appropriate where the various offences form part of a single overall course of offending conduct or were part of a linked series of offences. On the other hand, an adjustment may not be required where, as in the present case, the offences committed as a child and as an adult were wholly distinct.

39. The question in each case is whether the overall sentence was just and proportionate. In the circumstances of this case, where the offending against C1 and C2 was entirely unrelated, the overall sentence of 13 years' imprisonment was, in our judgment, just and proportionate; it was far from being excessive, let alone manifestly so.

40. Accordingly, for these reasons, the appeal against sentence is dismissed.

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

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