Neutral Citation Number: [2024] EWCA Crim 1183

Case No: **202400183 A4**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LIVERPOOL CROWN COURT
His Honour Judge Harris
URN 05A30272020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2024

Before :

LORD JUSTICE SINGH
MRS JUSTICE MAY
and
MR JUSTICE GRIFFITHS

- -

Between :

SMITH	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Brendan O'Leary (instructed by Draycott Browne Solicitors) for the **Appellant**

Hearing date: 12 September 2024

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Approved Judgment

This judgment was handed down remotely at 5pm on 8th October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

The provisions of the Sexual Offences Amendment Act 1992 apply in respect of the two complainants concerned in this case. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

MRS JUSTICE MAY :

Introduction

1. This case concerns historical sexual offences committed when the appellant was a child. In November 2023, aged 37, he was tried and convicted at the Crown Court at Liverpool on an indictment containing 12 counts of indecent assault contrary to s.14 of the Sexual Offences Act 1956 ("the 1956 Act"). The offences were committed over a number of years when he was aged 10-17, against two younger girls. On 18 December 2023 at the same court he was sentenced to 3 years imprisonment on Counts 1 and 2 (offences against C1) with a consecutive sentence of 4 years on Count 11 and concurrent sentences of 18m on Counts 3 and 10 and 2 years on Counts 4, 6, 7, 8, 9 and 12 (the offences against C2), resulting in a total sentence of 7 years imprisonment. He appeals that sentence with leave of the single judge.

Reporting restrictions

2. The provisions of the Sexual Offences Amendment Act 1992 apply. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as the victim of that offence. In this judgment we shall refer to the complainants as C1 and C2.

Facts

3. The case involved the appellant's abuse of C1 and C2 when their families were living in the same area. They were all children at the time. The abuse of C2 occurred on multiple occasions between Feb 1997 and April 2004 when C2 was aged 6-13 and the appellant was aged 10-17. The abuse consisted of touching and licking her vagina, digitally penetrating her vagina on multiple occasions (Counts 4-12) and on one occasion when she was 6 or 8 and he was 10 or 12 getting her to touch his penis (Count 3). The abuse of C1 happened on two occasions in 2000-2001 when she was 10 and the appellant was 14. On both occasions he licked her vagina (Counts 1 and 2).

4. C2 first told her mother about the appellant abusing her in September 2019. At that time, she did not want her mother to tell anyone else about it. In January 2020, C2 told her father. C2's father met with the appellant on 10th August 2020. The appellant said he was sorry, that he had been a child at the time and was a different person now. C2's father told the appellant that if he was sorry, he should go to the police and admit what he had done. It was then suggested that the appellant may have done something to C1 when she was a child. C2 decided to go to the police and made her first report to them on 27th October 2020. She gave an ABE interview on 5th November 2020. C1 was interviewed on 27th November 2020.

5. In her interview, C2 stated that the appellant would abuse her when she went to his house, which she did frequently. The appellant would get C2 on her own in a room and start to touch her down below. When she had been a lot younger, the appellant had tried to get her to touch him, which she did once and then said no. The appellant used to tell her to go to the bedroom, tell her not to tell anyone because they would get into trouble and then he would start touching her. Initially, the appellant touched

C2 over clothing but then he started to put his hands into her knickers and touch her vagina. The appellant would digitally penetrate C2's vagina and this would happen whenever she went to his house.

6. When C2 was around 12, the appellant locked her in a bathroom and put his mouth on her vagina. The appellant made her watch pornography while the adults were in another room. The appellant then put his hands down the back of C2's underwear and put his finger in her vagina, despite the fact that other people were in the room. C2 stated, "I'd sort of got to the point where I knew if I saw him, something was gonna happen". The touching happened around ten times at the appellant's first home address but he had also used his mouth on her genitals there as well. The appellant would go from using his hand, to using his mouth and then use his hand again. When the appellant performed oral sex on C2, he would use his hand and his tongue at the same time.

7. The same kind of thing happened after the appellant moved although it was less frequent. The appellant would always manage to get C2 on her own, for instance if she was in the toilet. The appellant would go in and do the same things he had always done. On one occasion in the toilet, someone else tried to enter but the door was locked. The appellant stopped what he was doing, waited for it to go quiet and then started touching C2's vagina again. On another occasion, the appellant took C2 into his parents' room and locked the door. He penetrated her vagina with his fingers and used his mouth on her. C2 said to the appellant that people were coming and his response was, "It'll be fine. Just don't say nothing". This happened when C2 was around 11 or 12 years old, the appellant four years older aged 15 or 16.

8. In her interview, C1 stated that she used to go to the appellant's house as she lived opposite him. As she played on the computer with him in his bedroom, the appellant put his mouth and tongue onto her vagina. This happened on two occasions when she was around 10 years old. On at least one of the occasions, she had been wearing her primary school uniform. She did not think that anything had gone inside her. She had some memory of giving one of her parents a note about it closer to the time it happened and that the appellant had been banned from their house from then on.

9. The appellant was interviewed on 4th December 2020 and answered no comment to all questions asked. By the time of trial he was aged 37; he had been married and had one child and was now in a relationship with a woman who had five children from a previous relationship, two of whom still lived with her. He had minor unrelated convictions dating back to 2007, none for any sexual offending.

Sentence

10. The judge had victim personal statements from both women, now in their 30s, which we have read with care. It is clear that the appellant's actions have had an enduring impact upon each of them, upon their mental health and upon their ability to make and enjoy adult relationships.

11. There was a Pre-Sentence Report from probation in which the author noted that the appellant accepted touching C1 and C2 inappropriately when they were all children, he told probation that he felt guilt about it and accepted that it would have caused them some harm.

12. A medical report dealt with the appellant's health and mobility issues: a very serious motorbike accident in 2012 had caused him serious and life-changing injuries. The appellant has had a number of procedures since then as a result of which he currently has no hip on his left side, he can walk only short distances with significant assistance; at home he is in a wheelchair and he uses a mobility scooter outside. He is in constant pain for which he takes strong medication.

13. A specialist neurodivergent assessment report concluded that the appellant has Autism Spectrum Disorder.

14. Both Prosecuting and Defence counsel produced a note for sentence, which we have also seen.

15. Having recorded the facts of the offences the judge noted that if the appellant had been convicted of the offences as an adult the sentences "would be far longer than I have power to impose on you". The judge noted the appellants current relationship and home life, his health difficulties and the autism assessment. He found that the autism assessment did not materially affect his view of the appellant's culpability. The judge referred to current sentencing guidelines for equivalent offences (sexual activity with a child under 13 and sexual activity with a child) , finding that harm fell into the highest category and noting that "for younger people aged 15 to 17 the sentence should be between half and two thirds of the adult sentence and a greater reduction if the offender was under 15 at the time of the offending".

16. The judge observed that the offences individually and collectively "are so serious that the twin principles of punishment and of deterrence outweigh any possibility of anything other than an immediate custodial sentence". (In parentheses we note that these principles apply to adult offenders whereas the appellant was a child at the time the offences were committed).

17. Dismissing the passage of time as a mitigating factor of little weight the judge said that he would take into account the appellant's current circumstances. He said that where the offending had carried on over a period he would take the mid-teenage years as the "appropriate point" but went on to note that "there are grave crimes in the indictment which in the case of a defendant over 10 can by themselves lead to long term detention". He then went on to pass the sentences which we have already indicated, arriving at each, as appears from the table included in his sentencing note uploaded to the Digital Case System, by reference to a notional adult sentence to which he applied a discount for age and mitigation.

Grounds of appeal

18. In his written advice and grounds Mr O'Leary, who represents the appellant on this appeal, as he did at trial and sentence, makes the following points:

    (1) In sentencing the appellant to 3 years imprisonment on Counts 1 and 2, the Judge failed to apply the guidance of the *Sentencing Council Guideline on Sexual Offences – Sentencing Children and Young People* in that he failed to give an appropriate deduction for the appellant's age and personal characteristics.

(2) In applying a reduction of one half from the appropriate sentence for adults in Counts 3, 4, 5, 6, 7 and 8, the Judge failed to apply the guidance of the *Sentencing Council Guideline on Sexual Offences – Sentencing Children and Young People* in that he failed to give an appropriate deduction for the appellant's age and personal characteristics.

(3) In passing consecutive sentences, the Judge failed to apply the principle of totality in that he failed to make a reduction in the any of the sentences to reflect the fact Counts 1 and 2 were consecutive to Counts 3-12.

(4) In passing a sentence of 4 years imprisonment on Count 11, the Judge erred by failing to identify or apply any reduction for the appellant's age.

Discussion and decision

19. Sentencing decisions such as the one faced by the judge in the present case are not at all straightforward. They require care and a consistent approach. The case of *Ahmed* [2023] EWCA Crim 281 (where the judgment of the court was given by Lord Burnett LCJ) is essential reading for all counsel and any court dealing with a case of historical sexual offending where the offences have been committed by an offender when they were a child (under 18).

20. In *Ahmed*, having reviewed all the relevant authorities, the Lord Chief Justice, giving the judgment of the court said this, under the heading "the Proper Approach":

> 21. …In our judgment, the applicable principles are clear. Those who are under the age of 18 when they offend have long been treated by Parliament, and by the courts, differently from those who are adults. That is because of a recognition that, in general, children are less culpable, and less morally responsible, for their acts than adults. They require a different approach to sentencing and are not to be treated as if they were just cut-down versions of adult offenders. The statutory provisions in force from time to time have frequently restricted the availability of custodial sentences for child offenders, whether by prohibiting them altogether for those below a certain age or, more commonly, by restricting on a basis of age the type and maximum length of custody in all but grave cases. All such provisions are in themselves a recognition by Parliament of the differing levels of culpability as between a child and an adult offender: that is one of the reasons why we are respectfully unable to agree with the distinction drawn in *Forbes* between cases where no custody would have been available, and cases where some form of custody (however far removed from modern sentencing powers) would have been available. There is, in our view, no reason why the distinction in levels of culpability should be lost merely because there has been an elapse of time which means that the offender is an adult when sentenced for offences committed as a child.
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> 22. Section 59(1) of the Sentencing Code requires every court, when sentencing or dealing with an offender who was under the age of 18 at the time of the offending, to follow the Children guideline except in the rare case when the court considers it would be contrary to the interests of justice to do so….we are unable to see any justification in logic or principle for the

> submission that those paragraphs should only be followed where the offender has only recently attained adulthood. They remain relevant, and therefore to be followed, however many years have elapsed between the offending and the sentencing. That is because the passage of time does not alter the fact of the offender's young age at the time of the offending. It does not increase the culpability which he bore at that time…. In our view, the application of the Children guideline requires sentencers to adopt a different approach between sentencing for historical offending committed as a child and sentencing for historical offending committed as an adult. That difference, and the resultant difference (which may be substantial) in the respective sentences, is in accordance with principle and reflects the special approach to the sentencing of child offenders."

21. The court in *Ahmed* went on to address a number of practical matters raised by the cases under appeal, before applying the above principles to each in turn.

The present case

22. On any view the present case demanded very careful consideration. The appellant had committed sexual offences against two young girls when he was aged 10-17 and had then stopped, committing no further sexual offences thereafter. 25 years later he was an adult living an apparently normal life, albeit seriously disabled from an accident in 2012. His victims, now themselves adult women, had sustained enduring harm from his actions as a boy.

23. The judge's approach to sentence reveals some of the errors in reasoning which the court in *Ahmed* sought conclusively to address. It is therefore particularly unfortunate that, although the judgment in *Ahmed* was handed down in March 2023, neither prosecution nor defence counsel referred the judge to it, or to the principles in it, in order to assist him in the complex sentencing exercise he had to perform in December 2023. It also made his task very much more difficult that neither prosecution nor defence put before the judge detailed information about the available sentences for children at the relevant times. He required that information in order to apply the guidance so authoritatively given in *Ahmed.* Because of the historical nature of that information, it is not easily or rapidly accessible. It is therefore essential that it should be provided to the judge by the prosecution in advance of the sentencing in every case in which the principles in *Ahmed* fall to be applied.

24. The judge said he had in mind the age of the appellant at the time the offences were committed, but at the same time there was little real consideration of what level of culpability should properly have been attributed, or what sentence a child of the age the appellant was then might have received. This resulted in some outcomes which were, in the light of *Ahmed*, surprising and in our view plainly excessive: for instance, in addressing the two offences against C1, involving two occasions of licking her vagina when she was 10 and the appellant was 14 the judge took the starting point in the current adult guideline for a 1B offence of 4 years. He said that as this was not the appellant's first offence an adult would have received 4 ½ years and that, discounting to reflect age, the sentence would be 3 years. Yet in respect of multiple occasions of similar offending against C2, at the same age, the judge passed a concurrent sentence of 2 years, as being half the adult sentence. When observing in relation to C1 that this was not the appellant's first offence the judge must have been referring to the offences

against C2 which were before this in time, yet at age 14 the appellant had had no previous convictions or cautions.

25. Applying the *Ahmed* principles to the facts of this case, it is first necessary to identify what sentences would have been available to a court sentencing the appellant at the age he was when the various offences were committed. As was noted in *Ahmed* (at [25]) there is a section in *Current Sentencing Practice* where the editors provide a series of helpful tables showing what types of disposal would historically have been available for children of a specific age charged with sexual offences.

26. All the offences in the present case were ones of indecent assault under s.14 of the 1956 Act. Indecent assault of a child under 14 committed before 1 October 1997 carried a maximum sentence of 2 years; after that date the maximum sentence was 10 years. This gives rise to an immediate difficulty in respect of counts where the time period given in the particulars of the offence straddles the date of 1 October 1997, affecting Counts 3, 4, 5, 6 and 7 on the indictment here. The same point arose in *Ahmed* where the court said this, at [83]:

> "The situation which arose in the appellant's case, namely changes in the maximum available custodial sentence over the period of the indictment, will not be uncommon in historical cases. In the appellant's case, no account was taken of these changes in view of the approach to sentence taken by the parties and the judge. The indictment period spanned more than one significant boundary. In future, where significant boundaries are apparent, consideration should be given to the drafting of indictments to take account of those boundaries. By way of example, in this case the offences in counts 5 to 11 could have been the subject of separate counts in each case i.e. one count charging an offence in the period up to 1 October 1992 and one count charging an offence after 1 October 1992. Had that been done, the sentencing judge would have been informed by the jury's verdicts of the applicable sentencing regime."

27. Given the way in which we propose to deal with the sentences on these and other counts relating to the offences committed when the appellant was aged 10-14 the fact that some of the offences as indicted straddled a key date will not ultimately affect the final sentence, but in another case it might, accordingly those preparing indictments in these historical sexual offending cases should be alive to the point.

28. It is convenient to consider the offences in groups as follows:

(1) Counts 1 and 2 (2 occasions of licking C1's vagina) occurring in 2000/2001 when C1 was aged 8 and the appellant was aged 14.

(2) Counts 3, 4, 5, 6, 7 and 8 (one incident of making C2 touch his penis together with multiple incidents of digital penetration and licking C2's vagina) taking place over the period 1997-2001 when C2 was aged 6-10 and the appellant was aged 10-14.

(3) Counts 9, 10, 11 and 12 (multiple incidents of digital penetration and licking C2's vagina) taking place over the period 2001-2004 when C2 was aged 10-13 and the appellant was aged 14-17.

29. The sentences available for a 14 year old offender charged with indecent assault in 2001 included:

    (a) A sentence of detention under s.91 of the PCC(S)A 2000 for "grave crimes", specified as including an offence under s.14 of the 1956 Act. As youth court sentencing powers are restricted to 2 years maximum, in practice a child would only have received a sentence under s.91 if the youth court had seen fit to refer the case to the Crown Court.

    (b) A Detention and Training Order (DTO) for set periods of 4, 6, 8, 10, 12, 18 or 24 months, provided the court was satisfied that the child before it was a "persistent offender".

    (c) From 1 March 1998, a referral order, being a community-based order for child offenders aged 10-17.

30. In our view, a youth court dealing with a 14 year old boy convicted of the indecent assaults comprised within Counts 1-8 would not have referred the case to the Crown Court. Had the youth court been of the opinion that the appellant was a "persistent offender" at that time then it might have been open to the magistrates to have considered a DTO. However, leaving aside the question as to whether the appellant at 14 would have been characterised as a "persistent offender", we believe that, given his young age at the time; a referral order would have been the most likely outcome. Had these offences stood alone, therefore, and applying the principles discussed in *Ahmed*, we do not think that a sentence of imprisonment could rightly have been imposed upon the appellant on any of Counts 1-8, despite the fact that he is now an adult of 37. It follows that the 3-year consecutive sentence passed in respect of two occasions of licking C1's vagina when she was 10 and the appellant was 14 was wrong in principle, since a boy of that age would not have received a custodial sentence for those offences at that time, let alone one of that length.

31. Crucially, however, the offences committed when the appellant was aged 10-14 did not stand alone. As demonstrated by the convictions on Counts 9 to 12, the appellant continued to offend against C2 on multiple occasions over the next 3-4 years until he was 17 and she was 12-13. As the judge pointed out, the harm sustained to C1 and, in particular, C2 has been very severe, moreover by the age of 17 the appellant's level of culpability was clearly far greater than at age 14, not just because he was older but also because of the multiple occasions of abuse to which he had regularly subjected C2 throughout that time.

32. At age 17 in 2004 a sentence of detention under s.91 was available for an offence under s.14 of the 1956 Act. The Sentencing Council's first publication of a guideline on sentencing children and young people was not until 7 March 2017 and thus would not have been available in 2004. However, the key principles applicable to child sentencing, of welfare and prevention of further offending, were by then well-established, with custody recognised as a disposal of last resort for the under-18s. Despite being a sentence of last resort, however, in our view by the time the appellant had reached 17, the continued offending against C2 together with the impact of his offending upon C1 and C2 would inevitably have led to a court imposing a sentence of detention.

33. As to the appropriate level of sentence, we start by considering what sentence a 17-year old convicted of comparable offences would receive now for, as indicated in *Ahmed* at [29], "the sentence which would have been imposed at the time is very unlikely to have been more severe than the sentence which would be imposed on a child for comparable offending now". The judge here took Count 11 as the lead offence for all the offending against C2 and identified sexual assault of a child under 13 as the modern equivalent, placing the offending in Category 1B where there is a starting point of 4 years with a range of 3-7 years. The judge did not say so in terms, but it appears from his remarks that he took a notional sentence of 7 years after trial for an adult, which he discounted to 4 years for personal mitigation, including taking account of the fact that the appellant was a child at the time. We think that he was right to take a sentence of 7 years for an adult, given the (by then) very considerable history of this appellant's offending. However, for the reasons we shall give shortly, in our view the 4-year sentence should properly be taken as encompassing all the offending against both C1 and C2.

34. The current Sentencing Council Overarching Guideline *Sexual Offences – Sentencing Children and Young People* indicates that, where the court has satisfied itself that custody is the only appropriate disposal for a child (and there are a number of prior considerations set out in the guideline to be addressed before reaching that point), then:

> "When considering the relevant adult guideline, the court **may** feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.** This reduction should be applied before any reduction for a plea of guilty." (at para. 6.46, emphasis in original)

35. As we have already said, a court dealing with this appellant aged 17 must have concluded that, albeit as a sentence of last resort, custody was the only appropriate disposal in his case. The sentence of 4 years arrived at by the judge here falls within the above guidance, being just less than two thirds of the adult sentence. Accordingly, we see no reason to disturb the sentence on Count 11, nor, for the same reasons, the concurrent sentences of 2 years passed on each of Counts 9, 10 and 12.

36. The position is different so far as Counts 1 to 8 are concerned. As indicated above a court is highly unlikely to have imposed a custodial sentence on the appellant for the offending committed when he was aged 10 to 14; it would be inappropriate therefore for the final sentence to be increased by reference to that offending. In *Ahmed* (at [30], the suggested approach to offending which starts at a young age and continues over a number of years is to pass a sentence on the later offending which takes into account earlier offending, passing concurrent sentences for the earlier offences. We consider that that is the correct approach here.

37. As a first step therefore, we quash the order making the sentence on Count 11 consecutive to the sentence on Count 1. We also propose to reduce the length of the sentences passed on Counts 1 to 8, and to make such sentences run concurrently, to

reflect the appellant's young age (10-14) at the time these offences were committed. These offences would not have attracted a custodial sentence had they stood alone but as the appellant is subject to a custodial sentence for the later offending, and as it was technically open to a youth court in 2001 to pass a short custodial sentence on a child of 14 convicted of an offence under s.14 of the 1956 Act, we propose to replace the sentences on each of Counts 1 to 8 with one of 4 months concurrent.

Conclusion

38. The sentences on Counts 1, 2, 3, 4, 5, 6, 7 and 8 are quashed and replaced in each case with one of 4 months, each to be served concurrently with the sentence on Count 11. The sentences on Counts 9, 10 and 12 remain 2 years concurrent. The sentence on Count 11 becomes the lead sentence for all other offences and remains at 4 years.

39. The total sentence is accordingly one of 4 years; to that extent only this appeal is allowed.