Neutral Citation Number: [2014] EWCA Crim 2245

Case No: 201402543 A7

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM Southwark Crown Court**
**His Honour Judge Leonard QC**
**T20137220**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

**Before :**

**LORD JUSTICE TREACY**
**MR JUSTICE TURNER**
and
**HIS HONOUR JUDGE PERT QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)**

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**Between :**

**R**
**- and -**
**Frank Maxwell Clifford**

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**Richard Horwell QC** (instructed by **BCL Burton Copeland Solicitors**) for the **Appellant**
**Rosina Cottage QC & Tom Little** (instructed by **CPS**) for the **Crown**

Hearing dates : 9 October 2014

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# Approved Judgment

**Lord Justice Treacy :**

## Introduction

1. This offender, commonly known as Max Clifford, was convicted after a trial at Southwark Crown Court. He applies for leave to appeal against sentence, the matter having been referred by the Registrar to the full court. We grant leave.

2. On 2nd May 2014 he was sentenced to a total of 8 years on eight counts of indecent assault contrary to s14(1) of the Sexual Offences Act 1956.

3. Those counts related to four victims. The anonymity provisions in relation to victims of sexual crime are in place, and we shall refer to the victims as B, C, D and E. The offences took place between 1977 and 1984.

4. Counts 3-6 relate to B; these offences took place in 1977 and 1978. The appellant was sentenced to a total of 4 ½ years with 12 months for count 3, 18 months consecutive for count 4, 24 months consecutive for count 5, and 24 months concurrent for count 6.

5. Count 8 concerns victim C. A term of six months consecutive was imposed.

6. Counts 9 and 10 concern the victim D. In all, 21 months consecutive was imposed, represented by 6 months on count 9, to run concurrently with 21 months on count 10.

7. Count 11 concerns victim E. 15 months consecutive was imposed for this offence.

8. In addition the appellant was ordered to pay £55,000 towards the costs of the prosecution. On counts 1, 2 and 7, relating to other alleged victims, the jury either disagreed or acquitted.

## Counts 3-6

9. Counts 3-6 relate to victim B. She met the appellant whilst on holiday with her family in August 1977. The appellant told her and her family that she was pretty and that he could get her promotional work. Contact was maintained after their return to the UK. The appellant began grooming B telling her that she could be like Jodie Foster.

10. On one occasion he pretended to be somebody else on the phone and made her repeat sexual words. He asked her to come to his office where he made her take off her bra and made derogatory comments about her breasts as she did so. He visited B's home and gained the trust of her parents so that they agreed to let him take her out in his car. They believed that the appellant would take her to meet people who could help with her career, and he provided B with false stories about whom she had met to tell her parents. In all B went out in the car with him on about ten occasions.

11. The appellant would park in different places and abuse her in the car. He showed her his erect penis and told her to masturbate him and indeed showed her how to do it. This conduct is reflected in count 3, it occurred on some seven occasions.

12. Count 4 represents an occasion when the appellant penetrated B's vagina with his fingers as she sat in the passenger seat of his car. There was also evidence that he had degraded her by taking her to buy a revealing bra and then taking her to visit the home of a friend, telling her to dress in bra and pants to seduce the friend whilst he watched.

13. Count 5 and 6 represent the appellant making B perform oral sex on him. There were three such occasions, and counts 5 and 6 reflect the first and third. The appellant instructed B how to go about the task. On the second occasion the appellant told B that a photographer had been in some bushes and taken photographs of her performing oral sex. He said that the photographer wanted to publish the photographs but that he would be able to prevent that from happening.

14. B was extremely distressed and thought her life was over. She said that she was going to kill herself. This was no idle threat. After she had said this the appellant stopped contacting and visiting B.

15. The offences relating to B were the most serious on the indictment, she had only come forward after telling her sister and receiving protracted counselling. Her victim impact statement showed that after the abuse her life had been significantly affected in addition to the feelings of intimidation and fear which she had felt during the abuse.

**Count 8**

16. C was aged 19 when she was contacted by the appellant in 1982 after being offered a part in a movie. He pretended she was suitable for a role in a Charles Bronson film and told her he would need to take some photographs of her in lingerie. He then took photographs of her in his office wearing lingerie and tried to persuade her to put her legs apart for the camera. He engineered a telephone conversation with C in which another person pretended to be Charles Bronson. He grabbed C around her shoulders and tried to kiss her upon the lips. She struggled and he pushed her onto a sofa and lay on top of her trying to kiss her. He touched her legs and upper body during the struggle. Eventually C escaped by kicking the appellant between the legs.

**Counts 9 and 10**

17. D was aged 16 or 17 when she was introduced to the appellant in 1982-3, after she was told that he could assist in her career. He arranged to meet her in his London office. When she came in, he locked the door behind her. He told her to take her dress off so that he could see her figure. She was reluctant to do so but after the appellant had spoken further to her, she ended up taking off her dress. He said he was turned on by her tights, and began to grope her. This conduct is reflected in count 9.

18. As D was putting her dress back on, the appellant's wife telephoned. As he spoke to his wife, he pulled his erect penis out in front of D and began masturbating. When the call was over, the appellant approached D and tried to force his penis into her mouth. He managed to get it part of the way in. The appellant ejaculated over D's face and onto her shoulder.

19. The appellant then invited D to dinner with him and his wife and a third person, who he said would get her into a James Bond movie. The appellant told D that he wanted her to masturbate him under the table whilst he sat next to his wife. D left the office and although she received calls regarding the dinner, she never met the appellant again. Count 10 covers this conduct.

**Count 11**

20. E was 18 when she met the appellant in 1984; she was auditioning at a night club for a dancing job. The appellant approached her and asked if she was interested in acting. He told her he could get her a screen test for the new James Bond movie. He arranged for E to speak with the producer of the movie on the phone at the nightclub. Whoever she spoke to, (certainly not the producer), said that she could have the part on condition that she could establish whether the appellant was circumcised.

21. The appellant then took E into the gentleman's lavatory and locked the door. He put her hand on his penis and fondled her breasts whilst forcing her to masturbate him. Eventually he ejaculated and E made her escape and ran from the venue. As she was leaving the appellant told her that no one would believe her in a way which made clear the she was not to tell anyone.

**The effect on the victims**

22. We have already described the effects of the offending against B. C, D and E also provided statements to the court. Each was young and vulnerable at the time. Each was affected in respect of confidence and relationships and was harmed by what had been done to her. We have considered each of the statements made by the four victims with care. As s143(1) of the Criminal Justice Act 2003 states, in considering the seriousness of any offence the court must consider the offender's culpability and any harm which the offence caused. Sexual offending will by its very nature cause harm at the time the offence is committed, but it is well recognised that for many victims significant harm persists for a considerable period afterwards. This is a case where it is clear that the effect of what was done to the victims was not something from which they recovered quickly. The appellant's actions towards these victims had long term consequences for their lives. This is clearly a highly material circumstance for this court to consider.

**Aggravating features**

23. Looking at the matter in the round we identify the following aggravating features. There were four girls or young women involved; one of them was under 16. The offending took place over a period of several years. There was a significant age difference between the appellant and his victims. His offending involved an abuse of a powerful position coupled with deceit. In relation to B there was a clear abuse of trust and grooming. All of the victims were affected by what had happened to them. In relation to some counts there were findings of coercion.

## The appellant's character

24. By the time of sentence the appellant was 71. When he offended he would have been in his mid thirties to early forties. Thus, there was a significant age gap between himself and his victims. The appellant had never been convicted of any other criminal offence and the trial did not reveal any other evidence of sexual offending after the period with which the counts were concerned. Thus there was a period of nearly thirty years without further offending before these matters came to court and the appellant was convicted.

25. Over that period there was evidence before the Judge of a positive nature showing involvement in a variety of charitable works which the appellant had not publicised. The Judge also had a number of positive character references.

26. It is clear, however, that over the period of offending, these young women were targeted by the appellant who actively misled them and exploited their desire to succeed in their careers for his own purposes. The appellant was a dominant personality and in a powerful position within the world of entertainment and media. This enabled him to do what he did and to convince the victims that there was no point in complaining because no one would listen to them. He was thus able to lead a double life, progressing in his career, whilst his victims, affected by what he had done to them, felt powerless to complain.

## Mitigating Factors

27. The appellant lost potential credit by contesting the trial and in addition lost potential mitigation as he showed no remorse at any stage for what he had done. The fact that there had been a delay between his abuse of his victims and the matter coming to light is not a fact that avails him. His behaviour towards the victims coupled with his use of his prominent position meant that the delay involved was substantially of his own making. There is some mitigation available to the appellant based on the fact that he has not further offended since the mid 1980's and that the judge accepted he had done considerable charitable work during that period. However, his claims to credit in this respect are much reduced by the fact that this was offending of a serious sort. It is a well established principle of sentencing that the mitigation of good character weighs less in the scales where the offending is serious. The appellant is 71, he has some health difficulties but they are not of a nature significantly to affect matters. The appellant's age is noted but does again, not carry significant weight in the context of this case.

## Grounds of Appeal

28. The overall submission made by Mr Horwell QC is that the sentence of 8 years is manifestly excessive. His arguments consist of a number of strands. It was pointed out that the maximum sentence available in this case for any count of indecent assault is 2 years imprisonment. That was the case at the relevant time, although the maximum sentence for that type of activity was subsequently increased by Parliament. It is settled law that an offender is not to be sentenced on any count more severely than the maximum term available at the time of the commission of the offence. The increase in the statutory maximum has been accompanied by the development of sentencing

guidelines. The Sentencing Council's definitive guideline on sexual offences applies to the offences before the court. It came into effect on 1st April 2014.

29. Against that background, Mr Horwell argues that for a number of reasons the judge's approach to sentence resulted in an overall term which was too long. In particular, he submitted that the judge should not have approached counts 5 and 6, involving the performing of oral sex as being the equivalent of rape offences as they are now understood. Under the guidelines they carry severe sentences with a maximum available of life imprisonment. A similar submission could have been made in relation to count 10. The effect of this was unfair and disproportionate because of the very large disparity between the maximum sentence available at the time of the commission of the offence and the maximum available for rape in modern times.

30. Mr Horwell drew attention to paragraph 3 of Annex B of the definitive guideline which states;

> "..the court should have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003"

His submission was that the reference to equivalent offences in the guidelines may have led the judge into error. Annex B of the guideline is very closely based on the principles enunciated by this court in *R v H & Others (2012) 2 Cr App R (S) 21*. It seems to us firstly that the words "should have regard to" are important in setting the reference to equivalent offences in context. Equally, paragraph 1 of Annex B which makes clear that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence, and paragraph 4 which states that the court should not seek to establish the likely sentence had the offender been convicted shortly after the date of the offence, provide additional context. Paragraph 4 goes on to state that the seriousness of the offence (having regard to the culpability of the offender and the harm done), is the main consideration. The guideline is not seeking to impose an unthinking and mechanistic search for equivalent offences under the 2003 Act. What is required is that sentencing should reflect modern attitudes, (a proposition fully accepted by Mr Horwell), in the course of which the court may take account of the modern guidelines. The way in which the matter is dealt with in *R v H* at paragraph 47 (a) pithily sums up the position.

> "Sentence will be imposed at the date of sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive guidelines relevant to the situation revealed by the established facts "

In our judgment Annex B of the guideline reflects that approach.

31. In the circumstances of this case, the maximum sentence available on any individual count was markedly less than the maximum available for a number of offences under the 2003 Act, a fact of which the judge was perfectly aware. There was therefore, an inherent limitation on the count by count sentencing process which operated in favour of the appellant and operated as a counterbalance to higher figures in the guidelines.

32. In our view, the judge was entitled in the course of his sentencing remarks to observe that some of the offending would now be charged as offences as serious as rape or assault by penetration.

33. The judge was entitled to draw attention in this way to the gravity of this offending by modern standards, which are to be reflected if old offences such as these are sentenced in the present day.

34. The judge might more profitably have drawn attention to the starting points for a single offence of sexual assault or sexual activity with a child, which, on the facts of this case, would under the guidelines have starting points of 4 and 5 years respectively, again substantially above the maximum available at the relevant time.

35. It must be recognised in any event that the judge was sentencing in relation to a multiplicity of incidents involving four different victims. Even with the limitations on the maximum sentence per count, the judge was entitled to structure his sentence by imposing consecutive sentences which would reflect the overall criminality involved according to modern standards and attitudes. Moreover, the use of consecutive sentences was consistent with the Sentencing Council's guideline on totality (see page 7).

36. We are not persuaded that the reference to rape in regard to counts 5 and 6 distorted the sentencing process in the way asserted. The limited maximum sentences available coupled with the court's ability to deal with a series of offences in the way described ensured this.

37. A further submission made was that it was unfair to sentence an offender more heavily for committing an offence which he must be deemed to have known only carried 2 years imprisonment as opposed to the heavier term which would be available for a comparable offence under the 2003 Act. The court should have assessed the offender's culpability by reference to the 2 year maximum. We find such a proposition unsustainable. Firstly, the judge could not pass a sentence greater than 2 years for any individual offence; secondly the suggestion that the appellant would have been prepared to commit this offence in the knowledge that the maximum was 2 years but might not have had he been aware of a higher maximum available some years later is unreal. He deliberately committed these offences because he was sure he could get away with them, not because of some calculation as to the possible level of punishment. For a person like the appellant, the deterrent would be the possibility of exposure which he thought he had successfully guarded against, rather than the level of sentence available to the court. Moreover, it was no part of the appellant's case that he would not have committed these offences, had he thought that a greater maximum level of penalty than 2 years would subsequently be enacted by Parliament. His case was a total denial of any misconduct.

38. In written submissions it was tentatively suggested that there was a breach of Article 7(1) ECHR. This was somewhat modified in oral submission to the argument that if the letter of Article 7 was not breached, its spirit was. There is no question of a breach of Article 7 in this case by the imposition of a heavier penalty than what was applicable at the time the offence was committed, because the judge in no case exceeded the maximum sentence available. See *R (Uttley) v Secretary of State for the Home Department [2004] 1 WLR 2478,* and *R v H at paragraph 18.* See also *R v Bao*

*[2008] 2 Crim App R (S) 10* in relation to Article 7 and the use of sentencing guidelines which have become applicable by the date of sentence.

39. However, in an echo of his earlier submissions relating to the guidelines Mr Horwell invited the court to consider that if an offence is reclassified by statute and the maximum sentence is increased, then Article 7(1) is breached in fact or in spirit if the total sentence reflects a different offence and a higher maximum.

40. We do not accept in the circumstances there is a breach of Article 7 or anything approaching it. The court is entitled to reflect modern attitudes to historic offences, and to look to modern sentencing guidelines. Where the court looks to a modern offence containing equivalent elements to the historic offence and where the maximum under the 2003 Act is significantly higher, then the task of the judge will be to make due allowance for that. That is why the phase "have regard to" is used in paragraph 3 of Annex B to the guideline and why in *R v H* the court spoke of "measured reference" to guidelines. If the court proceeds in this way, then no complaint can be made. We find that there is no actual breach of Article 7(1), nor is there any breach of retrospectivity principles. The matter is to be tested by a consideration of whether the overall sentence imposed was excessive and disproportionate for the offending revealed taking into account modern sentencing practice.

41. A further submission made was that in imposing terms of 2 years in relation to counts 5 and 6, the judge imposed the maximum available in circumstances where he acknowledged that neither offence was the gravest imaginable of their type. Thus it is said that the principle in *Carroll [1995] 16 Crim App R (S) 488*, that the maximum for any offence should be reserved for the most serious offences of its kind was breached.

42. We do not think that consideration comes into play in this case. The sentences imposed on counts 5 and 6 were in fact ordered to run concurrently with one another. Had the judge decided to impose consecutive sentences of 12 months on each count for the two offences that would have given the same overall sentence of 2 years but could not have been the subject of any legitimate complaint given that the counts represented two distinct offences committed on separate occasions. We do not think there is any substance in this point, which merely reflects a choice as to the structure of the sentence legitimately open to the judge.

43. It is to be noted that with the exception of counts 5 and 6, the judge did not impose the maximum sentence on any count, and no criticism is made of the individual sentence on other counts. In relation to every count the judge respected the maximum available sentence of 2 years but was entitled to reflect the fact that different victims were involved at different points in time and that each of them had been subjected to significant sexual abuse. We are not persuaded that any of the grounds advanced by Mr Horwell concerning the approach to sentence are sustainable.

44. That however, is not the end of the matter, as there are two discrete further areas, which Mr Horwell says the judge fell into error during the sentencing process.

## Bad Character evidence

45. A discrete area of attack by Mr Horwell relates to the judge's handling of bad character evidence which was admitted during the course of the trial. The evidence consisted of a number of instances involving young women of a similar age to the victims in this case who gave evidence of sexual assaults of a similar type. The Crown had not included this bad character evidence in the indictment because it accepted it would be unable to prove that the appellant did not believe that any of the complainants was consenting to the sexual acts that took place. The evidence was admitted to rebut his defence that all the allegations were totally untrue and to demonstrate a propensity on his part to commit the type of offences contained in the indictment. In addition, the judge admitted evidence of a complaint of an indecent assault on a 12 year old said to have taken place in Spain. That count would have been on the indictment, but for the fact that it could not be tried here until the coming into force of section 72 of the Sexual Offences Act 2003.

46. Mr Horwell complains that when the judge came to sentence the judge wrongly took this evidence into account in aggravation of the sentence. Page 9F of the transcript says

> "….so long as I am sure that the events took place, as I am, I can take them into account as far as the evidence informs me as to the offences for you are to be sentenced".

Later at page 15B he said:

> "I have already explained why I feel able to take into account as context to the offences which I am to sentence you for, the other matters about which the jury heard convincing evidence "

47. Mr Horwell relied on *R v Canavan, Kidd and another [1998] 1 Cr App R (S) 243*. In that decision the court held that where a defendant has been convicted following a trial he cannot be sentenced for conduct which has not formed, expressly or by necessary implication, the subject of charges laid and proved against him. The only exception to this would be where a defendant has explicitly assented to counts on the indictment being treated as representative of a longer course of conduct. See *R v BDG [2003] 1 Cr App R (S) 26.*

48. For the Crown Ms Cottage QC submitted that what the judge did was not improper; he was entitled to look at the bad character material as context and background underlining the serious view to be taken of the predatory offences on the indictment. The judge was merely using the bad character evidence to underline the view he had taken of the indicted offences. He would still have passed the same sentence.

49. A sentencing judge is of course entitled to take account of all the relevant aggravating and mitigating features relating to the offences for which the offender is to be sentenced. These features will have formed part of the evidence in the case. In addition, the judge is entitled to assess the offender as a person, taken together with other information such as material in psychiatric, pre-sentence or antecedents' reports. Moreover, it seems to us that a judge would be entitled to draw on evidence given at the trial to reject unrealistic mitigation. See for example *R v Twisse [2001] 2 Cr App*

*R (S) 9*; where an offender charged with a single count claims this was an isolated transaction, this may be rejected if the evidence establishes that this was not the case. The offender should be given the appropriate sentence for a single offence but without the credit he would receive if it were an isolated incident. That, however, is not the situation here since no unrealistic mitigation had been advanced which required rebuttal of this sort. The convictions on the counts on the indictment meant that the judge was well aware that there were multiple offences committed over a significant period of time by a predatory offender against a series of victims.

50. The issue before us was considered in the case of Restivo which is reported as part of *R v Oakes and Other [2013] 2 Cr App R (S) 22*. In Restivo's case, which involved a murder committed in 2002, similar fact evidence was admitted of a murder of another woman, which took place in Italy in 1993. Restivo was closely linked to that offence but by the time of the trial for the 2002 murder he had not been convicted of the 1993 murder by an Italian court. Restivo was convicted of the 2002 murder, and in passing sentence the judge said that the evidence proved without doubt that Restivo was also guilty of the 1993 murder. Whilst he recognised that Restivo had not been convicted of that crime and would not sentence him in respect of it, he intended to approach sentence for the 2002 murder on the basis that Restivo had killed before. After taking into account the 1993 killing, he imposed a whole life order.

51. The appeal raised the question as to whether in assessing the appropriate minimum term the judge could take into account his assessment that the appellant had committed a previous murder with which he had not been charged and of which he had not been convicted. At paragraph 79 Lord Judge CJ commented that a defendant cannot simply be sentenced for offences for which he has not been convicted, on the basis that he has in fact committed them, subject to certain exceptions. He then continued:

> "…..the ability of the judge to make findings that other offences have been committed does not extend to reaching a non jury verdict about allegations put before the jury by way of similar fact evidence, at least unless the jury must have been satisfied that they were proved, or unless the defendant has been convicted of them in the past."

52. At paragraph 84 His Lordship continued

> "The principle is clear. Even when evidence which served to establish the defendant's guilt of an offence charged on the indictment is deployed as similar fact evidence, the sentencing decision cannot proceed on the basis that he is guilty of a distinct and separate offence of which he has not been convicted and which he denies. Although we sympathise with the judge's approach, it was inconsistent with what is now an axiomatic principle that, subject to considerations like those identified in [79] the ambit of the sentencing decision cannot extend to reflect a specific, distinct offence of which the offender has not been convicted."

53. In the present case the judge did not specifically say that he was treating the bad character evidence as an aggravating feature; he said he would take it into account insofar as it informed him as to the offences for which he had to pass sentence. However the judge had also said in terms that he rejected Mr Horwell's submission that this behaviour should be ignored entirely in the sentencing exercise, and he did set out at some length in his sentencing remarks the details of the bad character evidence. He devoted almost as much time to that as he did to the counts on the indictment. We think that the impression given must have been that the judge regarded this evidence as aggravating the case to some extent, albeit he did not say so in terms. What he did not do was explain what place it had had in the case. If he had said that it confirmed that the appellant was a serial predatory offender who abused his position in order to offend, that could not have been criticised. However the judge did not say that or anything similar; nor did he make clear that the bad character evidence would have no effect on the level of sentencing.

54. In the circumstances we consider that the judge's comments fell foul of the principle established in the case of *Canavan* and reiterated in subsequent decisions of this court including *R v Hartley [2012] 1 Cr App R 7*. However, it is clear to us that, working on the assumption that the judge did aggravate the sentence to some extent to reflect the bad character matters, he cannot have done so to any significant extent as the wording he used in passing sentence demonstrates. Having found that the judge was in error we have to approach the question of sentence afresh and consider whether it follows that the sentence passed was manifestly excessive. However before we do that, it is necessary to turn to another aspect of this appeal.

**The Appellant's conduct surrounding the trial**

55. In passing sentence the judge referred to certain behaviour of the appellant. Some of it had been commented on in the victims' impact statements. They had been upset by it. The judge said that the "additional element of trauma" caused by the applicant's "contemptuous attitude" was something that he would take into account in passing sentence. There were 3 specific matters identified by the judge.

56. First, there was behaviour prior to the trial. This was identified by the Crown in the hearing before us as consisting of (i) at the appellant's first appearance at the Magistrates Court in May 2013 the appellant informed reporters "this has been a nightmare, I am totally innocent of these allegations … these allegations are without foundation". (ii) Outside Southwark Crown Court on 4 October 2013 on the occasion of the PCMH hearing the appellant told reporters "I am totally innocent of these charges from the seven anonymous women … I don't think it is fair that they remain anonymous because their accusations are so damaging. Just the accusations. Effectively, I have been punished since I was arrested last December in a very public fashion while they remain totally anonymous". Both these statements were widely reported.

57. The Crown said that these can only have been intentional statements made by someone skilled in using the media for his own purposes. Mr Horwell submits that there was nothing objectionable in the matters relied on. In *Attorney General's Reference No. 38 of 2013 (Stuart Hall) 2014 1 Cr App R (S) 61*, the Court recognised that public denunciations of allegations can amount to a seriously aggravating feature. In that case, Hall had publicly denounced his victims in particularly virulent terms. In

the present case we do not regard either of the two statements made as being comparable. The first statement was a forceful claim of innocence reflected later in the defence advanced, but not directly referring to the victims. The second statement was a reiteration of innocence followed by a vehement complaint about the fact that the victims were entitled to anonymity. The reiteration of innocence again did not directly impugn the victims. The complaints about anonymity relate to a feature of the criminal process. They concern a topic which arouses public debate from time to time and which has been the subject of different views in Parliament on different occasions.

58. Whilst we readily understand that victims who were eventually vindicated would find such comments upsetting, we think that great care needs to be taken by sentencing courts not to elevate denials, albeit vehement, into something deserving of further punishment in the absence of some more explicit traducing of the victim. The court, of course, is perfectly entitled to reflect these matters in withholding available mitigation since the offender has shown no sign of remorse. Similarly, an offender who has contested the trial will lose what might be substantial credit for a guilty plea. We think that these remarks, properly considered, would of course justify a withholding of mitigation, but they should not have been used by way of positive aggravation.

59. The second matter considered by the judge was what he described as "reports of your attitude during the trial, laughing and shaking your head in the dock at the accusations made against you". This appears to derive from something said by a victim in her victim impact statement. The press reports themselves were never put before the court; nor was there any verification of them. Neither counsel had any recollection of the judge commenting on the appellant's conduct during the course of the trial. The only occasion that either could recall was an incident whereby a witness caused widespread laughter in court by derogatory comments about the appellant's genitalia. We note that the judge himself made no finding that the appellant had behaved as alleged, he merely referred to the victim as being very upset by the press reports. In those circumstances we think there is justification in the complaint that this was a matter which should not have been taken into account.

60. The third matter related to an incident after verdict, but before sentencing, which the judge had himself witnessed on television. The appellant had apparently stood behind a TV reporter outside the court whilst the reporter was on camera, making gestures which mimicked the reporter's actions. None of the victims had commented on this episode in their witness statements. The judge had regarded this behaviour as something designed to trivialise the trial. Whilst many would describe such antics as ridiculous, there was no evidence that the victims were aware of this conduct and the matter had not been dealt with as a contempt of court.

61. In the circumstances we do not think that this clowning should have been reflected in sentencing save in relation to withholding mitigation.

62. Since the judge's comments referred to an additional element of trauma caused by the matters we have analysed, it is clear that he must to some extent have regarded them as a factor increasing sentence. For the reasons given we do not think he was entitled to do so.

## Conclusion

63. The findings above demonstrate that were two areas of the case in which the judge wrongly treated matters as impacting upon sentence. The question for us is whether, stripping those matters out, the sentence imposed was manifestly excessive as Mr Horwell contends.

64. These were offences with a significant number of aggravating features already identified, but including two victims abused to the extent of penetrative activity, and a gross abuse of power and influence. We have noted the ongoing and long term effects on all the victims.

65. The effects on B's life have been particularly serious. The offences against her involved breach of trust and penetrative activity on more than one occasion. She was only fifteen at the time. We do not consider that a sentence of 4 ½ years to reflect what was done to her and its effects is in any way open to criticism.

66. As far as C is concerned, this was a unpleasant sexual assault on a different victim which was properly made the subject of a consecutive sentence of moderate length. As to D, count 10 involved the partial forcing of the penis into the victim's mouth followed by ejaculation. A further consecutive term was justified as it was in the case of E.

67. It seems to us that, after consideration of the individual offences and the application of modern sentencing attitudes reflected in the guidelines, but tempered by the need to have regard to the statutory maximum available at the time, an overall sentence of 8 years was justified and correct. We make this analysis without any reference to the factors that the judge wrongly took into account. Accordingly, although the judge below fell into error, it does not affect what was in fact a just and proportionate sentence; taking account of considerations of harm and culpability together with aggravating factors and such mitigation as was available to the appellant. Accordingly, this appeal is dismissed.