IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1353

No. 202201262 A3

Royal Courts of Justice

Wednesday, 5 October 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE CHEEMA GRUBB
MRS JUSTICE HILL

REX
V
PHILIP BOARDMAN

REPORTING RESTRICTIONS APPLY:
Sexual Offences (Amendment) Act 1992

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MR S SWIFT appeared on behalf of the Applicant.

THE CROWN did not attend and were not represented.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under these 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 the person as the victim of the offence.

2 We shall refer to the victim in this case throughout as "C" in order to preserve his anonymity.

3 On 27 January 2022 in the Crown Court at Liverpool, Philip Boardman (now aged 46), was convicted of four counts of indecent assault on a male aged between six and ten years. The offences were committed in a period between July 1990 and July 1994. Counts 1 and 2 were multiple incident counts alleging in each case assaults on no less than ten occasions. Counts 3 and 4 were charged as single incidents. On 1 April 2022 Boardman was sentenced as follows: on Counts 1 and 2, 12 months' imprisonment; on Counts 3 and 4, 4 years' imprisonment. All those sentences were ordered to run concurrently, making a total of 4 years' imprisonment.

4 He now renews his application for leave to appeal against sentence after refusal by the single judge.

5 C was born in July 1984. In July 1990, when he was just 6, the applicant, who then was aged 14, moved into the home that C shared with his mother. C's evidence at trial was that it was not long after the applicant moved in that the applicant began sexually to abuse him. The applicant would go into C's room and get into C's bed, the applicant being naked. The applicant would then hug him from behind, stroke his thigh and touch C's penis. The applicant would remove or pull down C's boxer shorts in order to allow that to happen. Having touched C, the applicant then would take C's hand and cause him to masturbate the applicant. C was not aware of any ejaculation at any point. This behaviour happened on a regular basis. C's evidence was that it happened on at least 100 different occasions, possibly more, such that C was terrified to go to bed.

6 Counts 1 and 2 on the indictment reflected these sexual assaults. As we have said, the indictment charged, "at least 10 occasions". We are satisfied that that was sufficient to allow the judge to conclude that the assaults occurred regularly and amounted to a course of conduct. Counts 3 and 4 reflected C's evidence in relation to more serious sexual assaults. On two occasions the applicant put his penis into C's mouth, that being behaviour which would amount now to rape of a child under the age of 13. As we have said, those counts were single incidents. Thus, the judge had to sentence for two specific occasions on which the applicant had put his penis into C's mouth.

7 The judge, in addition to that evidence from C, had a victim personal statement from him describing how throughout his life he had suffered with insomnia, depression and anxiety. The victim personal statement set out the significant effects of those mental health problems on his everyday life.

8 The statement concluded with these words:

> "What happened in my youth destroyed my mental health, and my mental health has been a constant obstacle to everything else in my life. I have no happy time to get back to. I have no future to focus on. I've never been unafraid or felt safe. I've never been happy. I've never had a

> good opinion of the world or the people in it. I trust no-one and never relax or let my guard down. That's what it did to me."

9 The judge had a Pre-sentence Report which revealed that to its author the applicant had maintained his denial of the offences. The author of the report said in relation to the applicant that he: "[...] appears primarily concerned about his own needs as opposed to considerate of wider implications."

10 On the other hand, the report revealed that the applicant at the time of the sentence was married, with two sons, aged 13 and 8. He had a good work history as health a care assistant in hospitals, then as an ambulance technician or more recently, for a medical company transferring confidential items, such as specimens.

11 The judge, in addition to the report, had letters from the applicant's wife describing him as a caring, fun-loving and devoted dad and very caring husband, and the applicant's parents-in-law speaking of him as a hard-working, caring, family man.

12 In reaching his sentencing decision, the judge began with reference to the guideline for historic sexual offences set out in Annex B of the Sentencing Council Definitive Guideline, as explained in *R v Forbes & Ors* [2016] EWCA Crim 1388. The judge identified the three core principles. First, the applicant was to be sentenced in accordance with the sentencing regime applicable at the date of sentence. Second, the sentence had to be limited to the maximum sentence available at the date of commission of the offence. That maximum in relation to each of the offences for which the applicant had to be sentenced was 10 years. Third, the court had to have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003. The judge identified that Counts 1 and 2 would today be charged as sexual assault of a child under 13, and Counts 3 and 4 as rape of a child under 13.

13 The judge properly identified the appropriate starting point for each of the offences in relation to sexual assault of a child under 13. A single offence would have fallen into Category 1B with a starting point of four years and a category range of three to seven years.

14 In relation to rape of a child under 13, the offences fell into Category 2B, that providing a starting point of 10 years with a range of 8 to 13 years.

15 The judge then went on to consider the impact of the defendant's age at the time of the offending. He first cited the guideline for historic sexual offences to which we have already referred, which states:

> "If the offender was very young and immature at the time of the offence, depending on the circumstances of the offence, this may be regarded as personal mitigation."

16 He referred to the further explanation of this principle as provided in *Forbes* and the subsequent case of *R v L* [2017] EWCA Crim 43. That essential principle can be expressed as follows. If custody was available for the offending at the time of the offending for that offender, the age of the offender at the time of the commission of the offence is relevant only to the assessment of culpability. The only constraint on the sentencing court in those circumstances will be the statutory maximum for the offence. The court should not analyse the principles governing the sentencing of young offenders in so far as they go beyond the importance of assessing culpability and maturity.

17 Having considered those matters the judge then turned to the more recent case of *R v Limon* [2020] EWCA Crim 39. In that case the court was concerned with

> "[…] the correct approach to sentencing, when the maximum sentence available to the court, if the offender had been convicted at the time of the offences, would by reason of his age have been subjected to a restriction which does not apply to an adult."

18 In that regard the court in *Limon* referred to the current guideline on sentencing children and young persons, in particular paragraphs 6.1 to 6.3, dealing with defendants who crossed a significant age threshold between commission of offence and sentence. The paragraph of particular concern in the case of *Limon* was paragraph 6.3 which reads as follows:

> "6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time of the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate."

19 The Judge went on to note what was said at paragraph 34 of *Limon*, where the court concluded that the judge in that case should have taken as his starting point the sentence likely to have been imposed at the time of the offending, the maximum sentence at that time being one of 12 months. The court went to say that this was not necessarily the end point, but, in the circumstances which arose in *Limon,* a sentence restricted to 12 months, that being the maximum sentence then available for somebody of the relevant age at the date of the offending, was the appropriate sentence.

20 Having considered all of those matters, the judge accepted that his starting point had to be 12 months' imprisonment, that being the maximum sentence that would have been available when sentencing a person under 18 at the time of the commission of the offences. However, he referred to the indication in *Limon* to such a maximum not necessarily being the end point, and observed that there were cases where it would be appropriate to go beyond the maximum. His conclusion was that this was such a case, given the repeated nature of the offending and the level of harm suffered by the victim. He concluded that, had the offender been an adult, the total sentence today would have been something in the region of 16 years. However, taking into account his age at the time of the commission of the offences, he imposed the sentences to which we have already referred.

21 In the grounds of appeal as considered and rejected by the single judge, Mr Steven Swift, who has appeared before us to argue these grounds orally on the renewed application for leave, first submits that there was no question but that the appellant in this case, had he been sentenced at the time of the commission of the offences, could not have been sentenced to more than 12 months' detention in a young offenders' institution. He cites at some length the relevant paragraphs in *Limon* and argues that there was no justification for any increase beyond the maximum sentence available, given that, as he put it in his written grounds, this case was on "all fours" with *Limon*.

22 Since his grounds were prepared and since they were rejected by the single judge, there has been a further decision of this court in *R v Priestley* [2022] EWCA Crim 1208. It included observations on the apparent tension between *Forbes* and the subsequent cases of *L* and *Limon*. The court in *Priestley* considered that in an appropriate case it might be necessary to assemble a special court of five judges to resolve that issue. Mr Swift submitted in writing that this may be a case for such a special court to be assembled.

23 We disagree. The judge here applied what was said in *Limon*. He did not purport to do anything else. Mr Swift's complaint is that he was not justified in concluding that this was a rare case in which it was appropriate to impose a sentence beyond the maximum the court could have imposed at the time of the commission of the offence. The way this case unfolded does not provide the basis for a court to resolve any conflict between *Forbes* and *Limon*.

24 We, therefore, consider the arguments of Mr Swift purely by reference to the facts of this case. At the centre of his submissions is the proposition that this case is factually indistinguishable from *Limon*. On that basis the Judge was not entitled to treat the applicant's case as one justifying a departure from the general rule as set out in paragraph 6.3 of the guideline to which we already have referred. This proposition in our view is misconceived. The court in *Limon* did not purport to set out a factual framework which required a specific outcome. In *Limon* the judge at first instance had not considered the impact of paragraph 6.3 of the relevant guideline or its application to the facts in the case. It followed that this court was left having to make its own decision and reach its own view on the proper course.

25 In the applicant's case, as we have already rehearsed, the judge considered the implications of paragraph 6.3 at some length. His consideration was informed by the fact that he conducted the trial and by the multiple incidents charged in Counts 1 and 2 on the indictment. He had seen C give evidence. This enabled him to reach a clear view as to the level of harm suffered by C, as described in his victim personal statement. For us to interfere with the judge's sentence in this case, we would have to be persuaded that the conclusion reached by him was not one reasonably open to him.

26 Mr Swift's submission, put simply, is that we should reach that conclusion. This submission could only succeed if we were sure that the judge plainly had fallen into error. We are quite satisfied that we cannot reach this conclusion. Indeed, we are satisfied that he did not fall into error.

27 We emphasise the following. The judge had conducted the trial. That will always play a significant role in assessing a judge's view of an appropriate sentence. He was well aware of the guidance in *Limon*, having discussed it at considerable length. His sentencing remarks reveal a close and careful analysis of all relevant matters. It cannot be said that his judgment displayed any clear error in approach, as required by the guideline or the authorities.

28 Mr Swift orally submitted that to look at the seriousness of the offence, as the judge did, undermines the effect of the guideline and the need to reflect the culpability of somebody who is only 14, 15, 16 or 17 at the time of the offending. Paragraph 6.3 allows for rare cases, and a rare case will undoubtedly, in our view, include a case which is of particular seriousness.

29 In our judgment, the single judge was quite right to refuse leave in this case. As he said:

> "Whilst there were factual similarities between your case and *Limon*, they did not bind the Judge to pass a similar sentence in your case or invalidate his reasons for passing a longer sentence. Your sentence was within the range open to the Judge and reflected his factual assessment after conducting the trial and hearing the witnesses."

30 It follows that we refuse this renewed application.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge