Neutral Citation Number: [2023] EWCA Crim 281

Case No: 202200684 B2, 202203178 A3, 202202960 AW, 202202835 A2, 202201844 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
The Crown Court at Sheffield (Ahmed)
The Crown Court at Bradford (Stansfield, Priestley)
The Crown Court at Nottingham (RW)
The Crown Court at Sheffield (Hodgkinson)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2023

Before:

THE LORD BURNETT OF MALDON
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE HOLROYDE, VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
and
LORD JUSTICE WILLIAM DAVIS

- -

Between:

Rex	**Respondent**
- and -	
Nazir Ahmed	
David Stansfield	
Steven Priestley	
RW	**Applicants/**
Peter Hodgkinson	**Appellants**

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- -

Imran Khan KC appeared as lead counsel for the **Applicants/Appellants**
Tom Little KC appeared as lead counsel for the **Respondent**

In addition:
Chloe Gardner (instructed by **Imran Khan and Partners)** for **Ahmed**
Denise Breen-Lawton (instructed by **The Crown Prosecution** Service) for the **Respondent**

David McGonigal (instructed by **Alastair Bateman**) for **Stansfield**
Helen Chapman (instructed by **The Crown Prosecution** Service) for the **Respondent**

Adam Lodge (instructed by **Burton Copeland LLP** for **Priestley**
Dominic Connolly (instructed by **The Crown Prosecution** Service) for the **Respondent**

Andrew Wesley (instructed by **VHS Fletchers**) for **RW**
Andrew Howarth (instructed by **The Crown Prosecution** Service) for the **Respondent**

Amy Earnshaw (instructed by **Grainger Appleyard**) for **Hodgkinson**
Christopher Dunn (instructed by **The Crown Prosecution** Service) for the **Respondent**

Hearing date: 18 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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WARNING: Reporting restrictions apply to this judgment, as stated in paragraphs 2 and 86

Lord Burnett of Maldon CJ:

1. What is the correct approach to sentencing an adult for an offence committed when he was a child? That question arises in each of the five cases which are before the court. For that reason, although otherwise unconnected, they have been heard together before this Special Court. Individually and collectively, they provide an opportunity to address a suggested tension between previous decisions of this court.

2. Each of the cases concerns sexual offending. Each of the victims of that offending is entitled to the lifelong protection to the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of these offences.

The Legal Framework

3. We begin by setting out the legal framework and referring to the principal case law relevant to the issues of principle.

4. By section 44(1) of the Children and Young Persons Act 1933:

> "Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."

5. By section 37 of the Crime and Disorder Act 1998:

> "(1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.
>
> (2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim."

6. By section 59(1) of the Sentencing Code (which reproduced a provision previously contained in section 125 of the Coroners and Justice Act 2009) –

> "(1) Every court-
>
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
>
> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
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> unless the court is satisfied that it would be contrary to the interests of justice to do so."

7. In *R v. Ghafoor* [2002] EWCA Crim 1857, [2003] 1 Cr App R (S) 84 Dyson LJ said at [31] to [32]:

> "31. The approach to be adopted where a defendant crosses a relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as "a powerful factor". That is for the obvious reason that, as [counsel] points out, the philosophy of restricting sentencing powers in relation to young persons reflects both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults, and (b) the recognition that, in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults. It should be noted that the "starting point" is not the *maximum* sentence that could lawfully have been imposed, but the sentence that the offender would have been likely to receive.
>
> 32. So the sentence that would have been passed at the date of the commission of the offence is a "powerful factor". It is the starting point, and other factors may have to be considered. But in our judgment, there have to be good reasons for departing from the starting point. An examination of the authorities to which we have been referred shows that, although the court has looked at other factors to see whether there should be a departure from the starting point, it is not obvious that there has in fact been a departure in any of them. This serves to demonstrate how powerful a factor the starting point is. That is because justice requires there to be good reason to pass a sentence higher than would have been passed at the date of the commission of the offence."

8. In *R v. Forbes and others* [2016] EWCA Crim 1388, [2017] 1 WLR 53 a Special Court considered the correct approach to sentencing for historical crimes. As is well known, it held, following the approach set out in the earlier case of *R v H (J)* [2011] EWCA Crim 2753, [2021] 1 WLR 1416, that an offender must be sentenced in accordance with the regime applicable at the date of sentencing, not the regime which was in force at the time of the offending. However, the sentence must be limited to the maximum sentence available at the time of the offending, unless the maximum had been reduced in the meantime, in which case the lower maximum would apply. The court also held that sentencers should not apply in a mechanistic way current sentencing guidelines premised on greatly increased maximum sentences: rather, they should make measured reference to those guidelines to arrive at the appropriate sentence.

9. At [13] the court held, having regard to article 7 of the European Convention on Human Rights ("article 7") and the common law requirements of fairness, that it would not be right to impose a custodial sentence on an adult defendant if, at the time of the offending, no custodial sentence at all could have been imposed on him because of his

young age. The court cautioned, however, that the rare circumstances of such a case should not be regarded as an encouragement to sentencers to consider a similar exercise in any other situation.

10. *R v. Lickorish* [2017] EWCA Crim 43, [2019] 4 WLR 27 is one example of subsequent cases in which the principles stated in *H(J)* and *Forbes* were applied. At [14] the court reiterated that, if custody was available in the offender's case at the time of the offending, the offender's age at that time would be relevant only to the assessment of culpability:

> "The only constraint in those circumstances on the powers of the sentencing court is the statutory maximum for the offence. The court should not analyse the nature of the custody available for a young offender at the time, the maximum length of that custody, the court's powers to commit for sentence as a grave crime or the principles governing sentencing of young offenders, insofar as they go beyond the importance of assessing culpability and maturity."

11. At the time when the sentences considered in *H(J)*, *Forbes* and *Lickorish* were imposed, the guideline Overarching principles – sentencing youths, published in November 2009 by the Sentencing Guidelines Council ("the SGC Youth guideline"), was in force. Also in force was the Sentencing Council's Sexual offences guideline. In *Forbes* at [22] the court said:

> "When sentencing an adult offender, the Youth Guidelines and Part 7 of the original Sentencing Guidelines Council Sexual Offences Guideline (in relation to sentencing young offenders for offences with a lower statutory maximum sentence under the 2003 Act) will not be generally applicable as they are predicated on the basis that the offender is still a youth. Their relevance in these circumstances is confined to the emphasis placed in each on the significance of immaturity at the time of the offending to the assessment of culpability. They are not relevant for any other purpose."

12. On 1 June 2017 the Sentencing Council's overarching principles guideline Sentencing children and young people ("the Children guideline") came into effect. Its opening paragraph refers to the statutory principles, mentioned above, which require a court sentencing a child or young person to have regard to the principal aim of the youth justice system and the welfare of the child or young person. It emphasises the need for sentencing in such cases to be focused on rehabilitation where possible, and at paragraph 1.5 explains the reasons why a child offender may be regarded as less culpable than an adult. It is, of course, primarily directed to the sentencing of those aged under 18 when convicted. It does, however, give the following guidance about sentencing an offender who has crossed a significant age threshold between committing the offence and being found guilty of it:

> "6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the finding of guilt being greater than that available

> on the date on which the offence was committed (primarily turning 12, 15 or 18 years old).
>
> 6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:
>
> • the punishment of offenders.
> • the reduction of crime (including its reduction by deterrence).
> • the reform and rehabilitation of offenders.
> • the protection of the public; and
> • the making of reparation by offenders to persons affected by their offences.
>
> 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 the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate".

13. That guidance was considered in *R v. Limon* [2022] EWCA Crim 39, [2022] 4 WLR 37. At [30] the court said:

> "Commonly, of course, the application of those principles will arise in a case in which the offender is a young adult when convicted of offences committed a comparatively short time earlier as a child. But we see no reason in principle or logic not to apply them also to a case in which many years have passed between the offending and the conviction and sentence. In such a case, as in the more common type of case, the important point is that it would be wrong to overlook the principles contained in the paragraphs we have quoted from the Children guideline. As [counsel] eloquently put it in his submissions, "The passage of time does not imbue the appellant with any greater culpability or moral responsibility than he had at the time of the offence". The importance of that observation for present purposes is that Parliament has consistently legislated over the years in ways which reflect the lesser culpability and lower moral responsibility of a child offender by making special provision for his punishment which explicitly distinguishes him from those of full age and understanding. Thus, however many years have passed since the commission of the offences, the principles in the Children guideline are relevant; and by section 59(1) of the Sentencing Code, every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the

> offender's case, unless it is satisfied that it would be contrary to the interests of justice to do so."

14. The court went on to say, at [31], that it did not regard that view as inconsistent with *Forbes*, where the court had been considering whether sentences offended against article 7:

> "As we have already ruled, Article 7(1) was not a bar to the judge in the present case passing a total sentence in excess of the sentence which could have been imposed at the time of the offences. The Children guideline, however, raises a different point. Even though a longer sentence would not offend against Article 7(1), it must, for reasons of fairness, be tempered by reference to the sentence which would have been imposed at the time of the offending."

15. In allowing the appeal against sentence, the court held, at [34], that the sentencer, in accordance with the Children guideline –

> "… should have taken as his starting point the sentence likely to have been imposed at the time of the offending, and the maximum sentence which could then have been imposed. For the reasons we have given, the starting point should accordingly have been a total sentence of 12 months. That need not necessarily have been the end point. In the circumstances of this case, however, … we are not persuaded that there is any good reason why the adult appellant in 2021 should have been sentenced more severely that the adolescent appellant could or would have been sentenced in 1994 or 1995."

16. In *Attorney General's Reference, R v. Priestley* [2022] EWCA Crim 1208, [2023] 1 Cr App R (S) 18 it was submitted on behalf of the Attorney General that the decision in *Limon* was reached *per incuriam*: the court in *Limon* had pointed to the fact that the Children guideline had not been in force at the time of the cases considered in *Forbes*; but the SGC Youth guideline had been in force at that time, and paragraph 5 of it had contained statements to the same effect as paragraphs 6.1 to 6.3 in the Children guideline. The court considered that submission, albeit *obiter*, and rejected it. It observed that the court in *Forbes* had not referred to paragraph 5.2 of the SGC Youth guideline, which specifically related to the approach to be taken when an offender had attained the age of 18 since his offending, and so was not "predicated on the basis that the offender is still a youth".

17. At [36] the court in *Priestley* concluded:

> "In *Forbes* the reference to the youth guideline indicates that the court had not considered paragraph 5.2 of that guideline. Had the court done so, it could not have said that the guideline was predicated on the basis identified. We consider that the guidance in *Forbes* was designed to prevent a court dealing with historic sexual offences being required to consider the general level of sentencing current at the time of the commission of the offences

> many years before. That is not the exercise in which the court engaged in *Limon*. The agreed position in that case was that the maximum sentence which could have been imposed on the offender by reference to the provisions of section 1B of the Criminal Justice Act 1982 (had he been sentenced at the time of the offences) would have been 12 months' detention. Taking account of that legislative provision did not involve any qualitative departure from the principles in *Forbes*."

The Submissions in Outline

18. Mr Khan KC submits on behalf of the appellants and applicants that the correct approach is that set out in *Limon*. He submits that the Children guideline must be followed in cases where the offender, whatever his age at the time of sentencing, was a child at the time of the offending. He submits that the court should take as its starting point the sentence likely to have been imposed at the time of the offending and should consider the maximum sentence then available in the offender's case. In rare cases, a sentence exceeding that maximum might be imposed, though the court in such circumstances would be limited to the statutory maximum sentence available for an adult offender at the time of the offending. Although a longer sentence would not offend against article 7(1), it must for reasons of fairness be tempered by reference to the sentence which would have been imposed at the time of the offending. He accordingly submits that in *H(J)* and *Forbes* the court wrongly treated the SGC Youth guideline as applying only to an offender who was still under 18 at the time of conviction, and wrongly overlooked paragraph 5 of that guideline.

19. Mr Little KC submits on behalf of the respondent that this court took a wrong turn in *Limon* and *Priestley*, and that *Forbes* should be followed. In very brief summary, he submits that paragraphs 6.1 to 6.3 of the Children guideline only apply to cases where there is "a relative temporal proximity" between the date of the offence and the date of conviction, and not to historical cases of sexual offending many years ago. In historical cases, he submits, *Forbes* requires the sentencer to consider only whether, at the time of the offending, the defendant could have received some form of custodial sentence: if he could, the fact that the maximum sentence for a youth of his age was lower than that which could be imposed on an adult did not place any limit on the sentence he could now receive as an adult. Relying on what was said in *H(J)* at [47(b)], he suggests that any other approach would be wholly impracticable, because it would be "extraordinarily difficult, if not impossible" for a judge now to form a view of some aspects of sentencing in the 1970s or 1980s. Mr Little accepted that the defendant's age at the time of the offending would be a significant factor in assessing his culpability but argued that the judgments in *H(J)* and *Forbes* do not admit of any exception in relation to child offenders, as was made clear in *Lickorish*.

20. These core points were amplified in the written and oral submissions, all of which we have considered.

The Proper Approach

21. We have reflected on those submissions. 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.

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. Paragraphs 6.1 to 6.3 of that guideline are relevant in such circumstances, and 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. We naturally hesitate to differ from the decisions in *H(J)* and *Forbes*; but insofar as those cases adopted a different approach, it is our respectful view that the court did not have regard to the passages in the SGC Youth guideline which were to substantially the same effect as paragraphs 6.1 to 6.3 in the current Children guideline. 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.

23. We make the following observations about the practical difficulties which it is suggested will arise if *H(J)* and *Forbes* are not followed.

24. First, we recognise that the approach set out in *Limon* and *Priestley* requires a sentencer to undertake what may be a difficult exercise in considering what would have been likely to happen in a sentencing process many years ago. In a case in which some form of custody would have been available for the child offender, advocates will accordingly need to research not only the statutory maximum sentence for the offence but also the types and lengths of custodial sentences which would have been available in the offender's case. However, judges are experienced in grappling with the various difficulties which can arise in the context of sentencing for historical offences. In any event, if principled application of the law requires difficulties to be confronted, then they must be.

25. Moreover, we are not persuaded that the difficulties are as daunting as Mr Little suggested. First, the learned editors of *Current Sentencing Practice* have provided (currently at Chapter A8, Non-recent offences, in volume 2) a most helpful table showing the historically available sentences for offenders aged between 10 and 17 at the date of their offences.

26. Secondly, there may have been in force at the date of offending a relevant sentencing guideline published by the SGC or by the Sentencing Council (including the latter's guideline Sexual offences – sentencing children and young people).

27. Thirdly, the legislative provisions which have from time-to-time limited sentences by reference to the age of the offender have often done so by creating, in addition to non-custodial sentences, one form of custodial sentence with a comparatively low maximum and another form of custodial sentence, applicable to grave offences, with a much longer maximum. In such circumstances, the sentencer will need to consider first which of those types of sentence would likely have been imposed if the child offender had been sentenced shortly after his offending. The decision on that point may often go a long way to assisting the sentencer to reach a decision as to what length of sentence would have been likely.

28. Fourthly, in a case where the sentencer must consider multiple offences by the child offender, the chronology and circumstances of the offending will sometimes (though not always) enable the sentencer to focus on the likely sentence at the time for the offending as a whole.

29. Fifthly, sentencers will be assisted by the reflection that the sentence which would probably 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.

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.

31. We would add that 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.

32. We therefore answer as follows the question posed at the start of this judgment:

    i) Whatever may be the offender's age at the time of conviction and sentence, the Children guideline is relevant and must be followed unless the court is satisfied that it would be contrary to the interests of justice to do so.

ii) The court must have regard to (though is not necessarily restricted by: see (v) below) the maximum sentence which was available in the case of the offender at or shortly after the time of his offending. Depending on the nature of the offending and the age of the offender, that maximum may be (a) the same as would have applied to an adult offender; (b) limited by statutory provisions setting a different maximum for an offender who had not attained a particular age; or (c) limited by statutory provisions restricting the availability of different types or lengths of custodial sentence according to the age of the offender.

iii) The court must take as its starting point the sentence which it considers was likely to have been imposed if the child offender had been sentenced shortly after the offence.

iv) If in all the circumstances of the case the child offender could not in law have been sentenced (at the time of his offending) to any form of custody, then no custodial sentence may be imposed.

v) Where some form of custody was available, the court is not necessarily bound by the maximum applicable to the child offender. The court should, however, only exceed that maximum where there is good reason to do so. In this regard, the mere fact that the offender has now attained adulthood is not in itself a good reason. We would add that we find it very difficult to think of circumstances in which a good reason could properly be found, and we respectfully doubt the decision in *Forbes* in this respect. However, the point was not specifically argued before us, and a decision about it must therefore await a case in which it is directly raised.

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.

33. We emphasise that nothing in this judgment affects the approach set out in *H(J)* and *Forbes* in relation to the sentencing of adult offenders for crimes committed after they had attained the age of 18.

34. We turn to consider the individual applications and appeals.

Nazir Ahmed

35. Nazir Ahmed, now aged 65, was convicted in January 2022 of offences of buggery and attempted rape which he had committed in the early 1970s, when he was aged between

14 and 17. He was sentenced by Lavender J, in the Crown Court at Sheffield, to a total of five years six months' imprisonment. His application for leave to appeal against that total sentence has been referred to the full court by the Registrar.

36. The victims of the offences were a brother ("C1") and sister ("C2"). The offences were committed when they were staying overnight at the applicant's family home, or the applicant was staying overnight at their home. C1 was aged nine or ten, and C2 was aged four or five, when the offences were committed. The applicant was convicted on count 1 of buggery of C1 in 1971 or 1972, and on counts 3 and 4 of two offences of attempted rape of C2 in 1973 or 1974. The judge sentenced on the basis that the applicant was aged 14 at the time of the offence against C1, which involved penile penetration of C1's anus; and aged 16 at the time of the offences against C2, which involved attempts by the applicant to insert his penis into C2's vagina. The offences were not reported to the police until 2016.

37. The judge in his sentencing remarks referred to the profound and lifelong effects of these offences on the victims. He also referred to the young age of the applicant at the material times and noted that the Children guideline required him to take as his starting point the sentence likely to have been imposed at the date of the offending.

38. The judge observed that the maximum sentence which could have been imposed on count 1 was life imprisonment. A 14 year old defendant in 1971 or 1972 could only have received a custodial sentence of more than six months if the court were satisfied that none of the other ways of dealing with the offence was suitable. The judge was sure that a court sentencing at that time would have reached that conclusion. He assessed the offence as falling within category 3B of the guideline applicable to the equivalent modern offence of rape of a child under 13. He regarded the harm suffered by C1 as sufficiently severe to constitute an aggravating feature. The principal mitigating factors were the applicant's youth and immaturity at the time and the effect of his imprisonment on his wife, who suffered from significant medical issues.

39. As to counts 3 and 4, the judge bore in mind that they were offences of attempt. He assessed them as falling within category 2B of the guideline for rape of a child under 13, because C2 was particularly vulnerable due to her extreme youth. At the time of the offending, the maximum custodial sentence which the applicant could have received was two years' borstal training. The judge considered whether this was one of those rare case in which a longer sentence than that maximum should be imposed but concluded that it was not.

40. Having regard to totality, the judge imposed a sentence of three years six months' imprisonment on count 1. On each of counts 3 and 4 he imposed sentences of two years' imprisonment, those sentences being concurrent with one another but consecutive to the sentence on count 1.

41. On the applicant's behalf, Mr Khan KC, assisted by Ms Gardner who has been good enough to appear pro bono, submits that the total sentence was manifestly excessive. He challenges the judge's approach to the count 1 offence, the judge's assessment of the extent of the harm suffered by C1, and the judge's application of the guidelines. He further submits that the judge did not give sufficient weight to the applicant's age and immaturity.

42. Each of the grounds of appeal has been opposed in written submissions by Mr Little KC.

43. The very long passage of time between the offending and the convictions made this a particularly difficult case to sentence. The judge, and counsel, took care to research the sentencing provisions which would have applied to the applicant at the times of the offences. It follows from what has been said earlier in this judgment that the judge was correct to take the starting point required by the Children guideline. The issue at the heart of the appeal is whether the judge was correct to conclude that the sentences likely to have been imposed at the times of the offending were a custodial term exceeding six months on count 1, and Borstal training on counts 3 and 4.

44. With respect to the judge, we are persuaded that he fell into error in relation to count 1. Consistently with the principles we have stated, it is necessary first to consider the likely sentence at the time of the offending, without reference to modern levels of sentencing. If the applicant had been sentenced shortly after the count 1 offence, the court would have been dealing with a child of 14, with no previous convictions, for a single offence of buggery. The judge was confident that such a court would have decided that neither custody for up to six months, nor any other lawful way of dealing with the applicant, was suitable. In the circumstances of this case, we do not agree. In our view, whilst the case might have been regarded as coming close to the borderline, a custodial sentence of six months would probably have been regarded as a suitable penalty. Had the judge come to that conclusion, he could have considered whether it was appropriate to increase the term of 6 months to reflect the purposes of sentencing applicable to an adult. He did not, however, indicate any reason why he might have done so, and we can see none.

45. Counts 3 and 4 were two offences committed by a teenager of 14 against a very young victim. Although they were attempts, it appears that the applicant came close to penetrating C2's vagina. In those circumstances, we are not persuaded that there can be any criticism of the judge's decision that the likely punishment at the time would have been Borstal training. On the other hand, we do not think it necessary to increase the sentences imposed on the basis that a sentence of Borstal training could be treated as equivalent to four years' imprisonment.

46. For those reasons, we grant leave to appeal. We allow the appeal to this extent: we quash the sentence imposed on count 1 and substitute for it a sentence of six months' imprisonment. The sentences on counts 3 and 4 remain as before and, as before, will run concurrently with each other but consecutive to the sentence on count 1. Thus, the total sentence becomes one of two years six months' imprisonment.

47. Although notification requirements apply by operation of law rather than as part of the sentence of the court, we add this for the information of the appellant. By reason of his convictions on counts 3 and 4, he will be subject to the notification requirements for ten years. Analysis of the statutory provisions applicable to the count 1 offence leads to the conclusion that no notification requirements arise consequent on that conviction.

David Stansfield

48. On 28 June 2022 in the Crown Court at Sheffield David Stansfield was convicted of the offences as set out in the table below. He was sentenced on 10 October 2022. The sentences are shown in the table.

Count	Offence	Sentence	Consecutive or Concurrent
12	Indecent assault – s.14(1) Sexual Offences Act 1956 *15.04.1975 – 14.04.1976 (Specific count)*	No separate penalty	
13	Rape – s.1(1) Sexual Offences Act 1956 *19.05.1975 – 16.04.1985 (Multiple count)*	16 years plus a further licence period of 1 year	
14	Indecent assault – s.14(1) Sexual Offences Act 1956 *16.05.1975 – 16.04.1984 (Multiple count)*	4 years	Concurrent
16	Indecency with a child – s.1(1) Indecency with Children Act 1960 *16.09.1977 – 17.09.1978 (Specific count)*	1 year	Concurrent
17	Indecency with a child – s.1(1) Indecency with Children Act 1960 *16.09.1977 – 17.09.1978 (Specific count)*	1 year	Concurrent
18	Rape – s.1(1) Sexual Offences Act 1956 *01.09.1975 – 30.11.1976 (Specific count)*	7 years	Concurrent
19	Rape – s.1(1) Sexual Offences Act 1956 *01.09.1975 – 30.11.1976 (Specific count)*	7 years	Concurrent

49. The victim of the offences in counts 12, 13 and 14 was a girl, JK. She was born on 15 April 1971. Count 12 was charged as a specific offence committed when JK was aged 4 and Stansfield was aged 13 or 14. Count 13 was pleaded as a multiple incident count in that it was said that Stansfield raped JK on at least two occasions. The indictment period encompassed JK's fourth and thirteenth birthdays. Stansfield was aged between 14 and 23 over the same period. Count 14 was also a multiple incident count in that at least two indecent assaults were pleaded. The indictment period in relation to that count ran between JK's fourth and twelfth birthdays. Stansfield was aged between 13 and 22.

50. The victim of the offences in counts 16 and 17 was a boy, LM. He was born on 15 September 1969. Counts 16 and 17 were charged as specific offences committed when LM was aged 8 and Stansfield was aged 16 or 17.

51. The victim of the offences in counts 18 and 19 was a girl, NP. She was born on 9 December 1998. Both counts were charged as specific offences committed when NP was aged six or seven and Stansfield was aged 14 or 15.

52. David Stansfield was born on 19 May 1961. Most of the offending on the indictment occurred when he was aged between 14 and 16. However, the judge found that Stansfield had committed one of the offences of rape reflected in count 13 when he had passed his twenty first birthday.

53. The Registrar has referred Stansfield's application for leave to appeal against sentence to the full Court. We grant leave to appeal.

54. The appellant was tried with his elder brother, the brother being 12 years the appellant's senior. The brother was convicted of raping JK on more than 30 occasions over a period of ten years. The brother was also convicted of cruelty to LM and of serious sexual offences against an older woman. The judge described the appellant when he first started offending as young, immature and lacking in guidance. The context in which the appellant's offending began, namely serious sexual offences being committed by his elder brother, was relevant to the appellant's culpability.

55. The appellant first sexually abused JK when he was aged 13. JK was no more than four or five at this time. The appellant would be with JK and LM. He would persuade LM to leave him alone with JK by giving him alcohol and cigarettes. He vaginally raped JK. On the first occasion that this happened the evidence did not show that appellant had reached his fourteenth birthday. Thus, the incident was charged as indecent assault (count 12). There were at least two other occasions on which the appellant vaginally raped JK, those incidents being charged as rape (count 13). As we have already said, the judge found as a fact that one of those incidents occurred when the appellant was over 21. There were also at least two occasions on which the appellant orally raped JK. These incidents were charged as indecent assault (count 14). After orally raping JK the appellant urinated into her mouth.

56. The offending in relation to LM consisted of the appellant instructing him how to masturbate and watching him as he attempted to masturbate. The appellant also masturbated in front of LM. The relevant counts (counts 16 and 17) charged a single incident in each case.

57. The final victim of the appellant's sexual offending was NP. When she was aged around seven and the appellant was 14 or 15, she was raped vaginally by him on two separate occasions. The first incident occurred in a bathroom. The appellant told NP to lie on the floor. He removed her underwear. He placed his erect penis into her vagina. The second incident occurred in similar circumstances.

58. Because the judge found that one of the offences charged in count 13 had been committed by the appellant when he was over 21, he treated that as the lead offence. He applied the current guideline in relation to rape of a child under 13. He found that harm was in Category 2 because (a) there had been violence or threats of violence, (b) JK was particularly vulnerable and (c) there had been additional degradation and humiliation when the appellant had urinated in JK's mouth. He concluded that culpability was high because (a) the appellant had previously been violent to JK in his earlier sexual offending against her and (b) the appellant due to his age and maturity owed JK a duty of care. An offence in Category 2A has a starting point of 13 years. The judge said that the other offending would be treated as aggravating the lead offence so that the sentence in respect of count 13 would reflect the entirety of the offending.

59. In relation to counts 18 and 19 (the specific offences of rape of NP when the appellant was aged 14 or 15) the judge found that the offences fell into Category 2B in the adult guideline. A Category 2B offence has a starting point of 10 years. The judge imposed concurrent sentences of seven years' imprisonment, although he did not explain why he applied an apparent discount of three years or 30%.

60. The first ground of appeal relates to the categorisation of the lead offence in count 13. This argument is unconnected to the age of the appellant at the time of the offending and the maximum sentence then available. It is conceded that the judge was entitled to sentence the lead offence on the basis that the appellant was an adult at the relevant time. Further, the judge was bound to apply the current adult guidelines for the offence of rape of a child under 13. The appellant accepts that violence or threats of violence were part and parcel of the offence and that JK was particularly vulnerable. Thus, harm was properly put into Category 2. The submission is that the judge erred in his assessment of culpability. In using the violence involved in earlier sexual offending as "previous violence against victim", the judge was guilty of double counting. Such violence had been considered in the assessment of harm. Further, the judge erred when he concluded that the appellant's position vis-à-vis JK meant that there was an abuse of trust.

61. We agree with the submissions in relation to the categorisation of culpability. The judge equated the violence involved in earlier sexual offending (which led to increased harm) with previous violence against the victim. This meant that the same factor was accounted for twice in the overall assessment of culpability and harm. The factor of "previous violence against victim" is intended to capture offences committed against a background of violence sufficient to intimidate the victim in respect of later sexual offending.

62. We also agree that this was not a case of abuse of trust. The appellant was someone who performed what the judge referred to as child sitting responsibilities. These responsibilities were assumed on an *ad hoc* basis. This relationship could not and did not create any breach of trust. That is clear from the analysis in *Forbes* at [17] and [18].

> "Whilst we understand that in the colloquial sense the children's parents would have trusted a cousin, other relation or a neighbour (as in the case of *Forbes* – see paragraph 47 and *Farlow* - paragraph 208) to behave properly towards their young children, the phrase "abuse of trust", as used in the guideline, connotes something rather more than that. The mere fact of association or the fact that one sibling is older than another does not necessarily amount to breach of trust in this context. The observations in [54] of *R v H* should be read in this light.
>
> The phrase plainly includes a relationship such as that which exists between a pupil and a teacher (as in the case of Clark who grossly abused his position of trust as a teacher at a boys' preparatory school by a sustained course of conduct over 7 years – see paragraphs 70 and following), a priest and children in a school for those from disturbed backgrounds (as in the appeal of *McCallen* - see paragraphs 86-92 and 97) or a scoutmaster and boys in his charge (as in the case of Warren to which we have already referred). It may also include parental or quasi-parental relationships or arise from an ad hoc situation, for example, where a late-night taxi driver takes a lone female fare. What is necessary is a close examination of the facts and clear justification given if abuse of trust is to be found."

63. We consider that on analysis of the facts in this case the judge should have concluded that there was no abuse of trust. It follows that the lead offence fell into Category 2B with a starting point of ten years' custody. The second ground of appeal is that the judge paid no or no sufficient regard to the age and maturity of the appellant when most of the offences were committed. The appellant was 14 or 15 when he raped NP. The bulk of the offending involving JK occurred when the appellant was aged 14 to 16. This is not a case in which the maximum available sentence at the time of the offences is a relevant factor. The rapes of JK and NP were offences in respect of which the appellant could have been sent to detention pursuant to Section 53 of the Children and Young Persons Act 1933 for any period not exceeding the maximum sentence for the offence. In each case the maximum sentence was custody for life.

64. However, that is not an end of the matter. The judge's approach to the sentence in relation to NP is instructive. He applied the adult guideline and then discounted the adult sentence by 30%. Yet the offences were committed when the appellant was 14 or 15. Assuming that the appellant had been sentenced at the time of the offences, he may or may not have been made the subject of long-term detention. Any period of detention would have been significantly less than seven years' custody. The judge did not give sufficient weight to the age of the appellant when the majority of the offences were committed. Had he done so, he would have concluded that offending when the appellant was 14, 15 or 16, had sentence been imposed at the time of that offending, would not have attracted a long term of detention.

65. The judge used the offending when the appellant was aged 14 to 16 as an aggravating factor in relation to the sentence on the lead offence. The circumstances which applied in the appellant's case were very unusual. He fell to be sentenced for an offence committed as an adult when he had also committed offences five, six or seven years

earlier. This meant that the sentencing exercise facing the judge was far from straightforward. Given the seriousness of the offence committed when the appellant was an adult, the aggravating effect of the much earlier offending was limited. The earlier offences were committed by someone who was young, immature and lacking in guidance.

66. We are satisfied that the sentences imposed on the appellant were manifestly excessive and wrong in principle. We shall quash the sentences imposed on counts 13, 14, 18 and 19. On count 13 we shall substitute a special custodial sentence consisting of a custodial term of 11 years and a further licence period of one year. This is on the basis that the rape of JK when the appellant was an adult was a Category 2B offence and that the aggravating effect of the appellant's offending when he was much younger should add perhaps a year to the overall sentence. On counts 14, 18 and 19 we shall substitute sentences of two years' imprisonment to run concurrently to the lead sentence, those sentences reflecting the age and immaturity of the appellant at the time of the commission of the offences. The other sentences will remain unaltered.

67. The total sentence now will be a special custodial sentence comprising a custodial term of 11 years and a further licence period of one year.

Steven Priestley

68. On 25 March 2022 in the Crown Court at Bradford Steven Priestley was convicted of 11 offences as set out in the table below. He was sentenced on 13 June 2022. The sentences are shown in the table.

Count	**Offence**	**Applicant's age at time of offending (D.O.B 25.03.75)**	**Sentence**
1	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *01.09.1989 – 01.02.1990* *Complainant: AB (aged 4)*	14 years	32 months' imprisonment
2	Indecency with a child contrary to s.1(1) Indecency with Children Act 1960 *01.09.1989 – 01.02.1990* *Complainant: AB (aged 4)*	14 years	15 months' imprisonment
3	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *01.09.1990 – 01.02.1991* *Complainant: AB (aged 5)*	15 years	32 months' imprisonment
4	Indecency with a child contrary to s.1(1) Indecency with Children Act 1960 *01.09.1990 – 01.02.1991* *Complainant: AB (aged 5)*	15 years	15 months' imprisonment

5	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *05.04.1992 – 25.09.1993* *Complainant: AB (aged 7-8)*	17-18 years *App turned 18 years on 25.03.93*	15 months' imprisonment
6	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *05.04.1992 – 25.09.1993* *Complainant: AB (aged 7-8)*	17/18 years *App turned 18 years on 25.03.93*	32 months' imprisonment
7	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *05.04.1992 – 25.09.1993* *Complainant: CD (aged 7-8)*	17-18 years *App turned 18 years on 25.03.93*	32 months' imprisonment
8	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *05.04.1992 – 25.09.1993* *Complainant: CD (aged 7-8)*	17-18 years *App turned 18 years on 25.03.93*	32 months' imprisonment
9	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *05.04.1992 – 25.09.1993* *Complainant: CD (aged 7-8)*	17-18 years *App turned 18 years on 25.03.93*	32 months' imprisonment
10	Indecent assault on a male person, contrary to s.15 Sexual Offences Act 1956 *05.04.1992 – 25.09.1994* *Complainant: CD (aged 7-9)*	17-19 years *App turned 18 years on 25.03.93*	32 months' imprisonment
11	Indecency with a child contrary to s.1(1) Indecency with Children Act 1960 *05.04.1992 – 25.09.1994* *Complainant: CD (aged 7-9)*	17-19 years *App turned 18 years on 25.03.93*	15 months' imprisonment

All sentences were ordered to run concurrently. The total sentence was 32 months' imprisonment.

69. The Attorney General applied for leave to refer the sentence as unduly lenient pursuant to Section 36 of the Criminal Justice Act 1988. The application was heard on 1 September 2022. Leave to refer was refused. The court reserved its reasons. Judgment was handed down on 7 September 2022: *R v. Priestly* [2022] EWCA Crim 1208, [2023] 1 Cr App R (S) 18.

70. The application for leave was made on the basis that a period of imprisonment of 54 months did not reflect the sentence that should have been imposed by reference to current adult sentencing guidelines for the equivalent offences under the Sexual Offences Act 2003. The period of 54 months' custody was identified by the judge as

the appropriate adult sentence before he discounted the sentence by 40% to take account of Priestley's age when he committed the offences. The Attorney did not take issue with the judge's discount for age. Rather, the submission was that the custodial term before that discount should have been significantly longer. The court disagreed with that submission for the reasons given at [22] to [26] of the judgment.

71. The Attorney also raised the issue of a potential tension between *Forbes* and *Limon* about the approach to be taken to offenders being sentenced for historical offences. Given the approach taken by the sentencing judge who did not refer to *Limon* and who applied the guidance in *Forbes*, the issue did not arise for determination. However, since there had been full argument on the point, the court offered its observations on the extent to which *Forbes* and *Limon* were inconsistent. The court noted that there had been no appeal against sentence by Priestley and that it would be inappropriate to speculate what the position would have been had the sentencing judge taken *Limon* into account when imposing sentence.

72. It is in the context of that history that Priestley now applies for leave to appeal against sentence and for an extension of time of 85 days. He seeks to argue that, although the sentencing judge was not referred to *Limon*, this court should be given the opportunity to consider the impact of *Limon* on the sentence imposed. We are not impressed by this argument. *Limon* was decided and widely reported months before Priestley was sentenced. But nothing was said to draw the sentencing judge's attention to *Limon*. When the application for a reference pursuant to Section 36 of the 1988 Act was made, the potential relevance of *Limon* was plain yet no application for leave to appeal against sentence was made. We shall extend time and grant leave only because Priestley's case may raise issues which do not arise in any other case under consideration in these conjoined appeals.

73. The factual background to the appellant's offending is set out in the court's reserved judgment in relation to the application to refer at [4] to [12]. We do not need to say anything further in relation to the facts. The first four counts on the indictment related to sexual assaults on AB, then aged four or five, when the appellant was aged 14 or 15. The appellant was 14 when he committed the offences charged in counts 1 and 2. Had he been sentenced at the time of the commission of the offences, the maximum sentence which could have been imposed would have been four months' custody. At the time of the offences charged in counts 3 and 4 the appellant was 15. The maximum sentence had the appellant been sentenced at the time of the commission of the offences would have been 12 months' custody. These maxima were in Section 1B(1)(b) of the Criminal Justice Act 1982 which was the statutory regime as it then applied to offenders of that age.

74. Counts 5 to 9 on the indictment were charged as offences committed between 5 April 1992 and 25 September 1993. Counts 10 and 11 covered a wider time span, namely 5 April 1992 to 25 September 1994. At the start of the indictment period the appellant was 17. At that point the maximum custodial sentence which could have been imposed on him was 10 years: Section 1A of the 1982 Act. On 1 October 1992 there was an amendment to the legislation. The maximum custodial sentence which then could be imposed for these offences on a 17 year old was reduced to 12 months' custody: Section 1B of the 1982 Act. The appellant turned 18 on 25 March 1993. He then could be sentenced as an adult. The maximum custodial sentence reverted to ten years.

75. Count 11 charged indecency with a child. The maximum custodial sentence for an adult was two years' custody throughout the indictment period. Section 1B of the 1982 Act applied to this count for the period between 1 October 1992 and the appellant's eighteenth birthday.

76. Applying the principles which we have already set out, there can be no doubt that the sentences imposed on counts 1 to 4 were manifestly excessive and wrong in principle. At the time of the commission of the offences the court's power to send an offender aged 14 or 15 to custody was limited by Section 1B(1)(b) of the 1982 Act. There is nothing about the appellant or the offences which would justify a departure from the usual approach where the court's sentencing powers at the time of the offending were limited. For offences for which a 14 year old could be sentenced to a maximum of four months' custody and a 15 year old to a maximum of 12 months' custody, the judge imposed sentences of 32 months' custody. He was not alerted to the statutory restrictions which applied in 1990 and 1991 or to the approach taken in *Limon*. Had he been, we are satisfied that he would not have imposed the sentences he did. On counts 1 and 2 the judge would have imposed concurrent sentences of four months' imprisonment. The sentences on counts 3 and 4 would have been concurrent terms of 12 months' imprisonment.

77. The position in relation to counts 5 to 11 is not straightforward. The indictment period crossed two significant boundaries. The first of these was 1 October 1992 when the amendment to the 1982 Act limited the sentence for a 17 year old to 12 months' custody. The second was 25 March 1993 when the appellant turned 18 and the adult sentence was available in his case. None of the offences on the indictment was identified as having occurred on a particular date. The sentencing judge made no finding of fact as to when any particular offence had occurred. Given the approach he took to the sentencing exercise, there was no need for him to do so.

78. It is argued on behalf of the appellant that this court cannot make its own finding of fact as to when any offence charged in counts 5 to 11 was committed. When applying for leave to refer the sentences imposed on the appellant, the Attorney General submitted that the terms of the indictment coupled with a comment made by the sentencing judge justified a finding that at least one offence could have been committed when the appellant had passed his eighteenth birthday. The court rejected that submission. It concluded that all the offences could have been committed before the appellant's eighteenth birthday and that this was the basis on which sentence had to be imposed. The appellant submits that this conclusion means that we cannot make any finding as to when the offences occurred within the period up to the appellant's eighteenth birthday. The consequence of that is that all of the offences may have occurred between 1 October 1992 and 25 March 1993. In that event Section 1B of the 1982 Act would apply and the maximum custodial term to which the appellant could have been sentenced would have been 12 months' custody.

79. We reject the argument that, as a consequence of the court's conclusion when considering the submission of the Attorney General as set out above, we cannot make any finding as to when the offending occurred whilst the appellant was 17. When considering the question of when offences had been committed in the context of the application to refer the sentence, the court was concerned solely with whether it could be satisfied that offending had occurred when the appellant was 18. This would have been of significance in assessing whether the sentencing judge fell into error in

discounting the adult sentence by 40%. The court at that point was not concerned with the state of the evidence about the circumstances and context of the offences. In the absence of any findings of fact by the sentencing judge, we are entitled to consider the evidence called at trial and to determine whether that evidence demonstrates clearly the period during which the offending in counts 5 to 11 occurred.

80. The evidence in chief of the two victims consisted of the Achieving Best Evidence ("ABE") interview of each victim. We have the transcripts of those interviews. Thus, we can be sure of the evidence given in chief by each victim. AB did not give any clear indication as to when the offending had occurred save that he had been very young and that he recalled the appellant still being at school. AB was clear that the abuse reflected in counts 5 and 6 on the indictment had occurred in the presence of CD at the home of his grandmother. CD's evidence was that the abuse had begun after his grandfather had died. His mother had travelled "quite soon afterwards" to see his "nan" to made sure that she was coping with the loss of her husband. The abuse commenced at this point and continued with further visits. CD placed the starting point "around the springtime". The grandfather died on 4 April 1992. The indictment period commenced the day after his death. The evidence of AB and CD taken together establishes that the abuse began soon after the death of the grandfather and in the springtime. The challenge to their evidence was as to whether any sexual abuse had occurred at all. Counsel who conducted the appeal had appeared for the appellant at trial. He confirmed that the evidence in relation to timings remained as set out in the ABE interviews. That evidence was not the subject of any testing at trial. In those circumstances we can and do find that the offending in counts 5 to 11 occurred in the months following the death of the grandfather in April 1992. Most if not all the offences were committed prior to October 1992.

81. In those circumstances, had the sentencing judge been required to apply his mind to the issue, he would have concluded that the custodial sentence available at the time of the offending would have been 10 years' custody due to the application of Section 1A of the 1982 Act.

82. No complaint is made of the judge's assessment of the appropriate adult sentence for the offending reflected in counts 5 to 11. There was no statutory impediment to him concluding that 54 months' custody would have been the proper adult sentence applying current guidelines. The judge discounted the sentence by 40% to take account of the appellant's age at the time of the offences. If anything, that was a generous discount for someone who had offended on a number of occasions when he was 17. The sentences imposed on counts 5 to 11 were neither wrong in principle nor manifestly excessive.

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.

84. In the event, we allow the appeal in relation to the sentences imposed by the judge on counts 1 to 4. We quash the sentences of imprisonment imposed on those counts. For the reasons we have given we are satisfied that the sentences on counts 1 and 2 should be four months' imprisonment and the sentences on counts 3 and 4 should be 12 months' imprisonment. We substitute those sentences for the sentences imposed by the judge. We dismiss the appeal in relation to counts 5 to 11.

RW

85. This application for an extension of time of seven days for leave to appeal against sentence has been referred by the Registrar to the full Court. The extension of time is required solely because of an administrative error by the solicitors who lodged the application. We shall extend time and grant leave to appeal against sentence.

86. The relationship between the appellant and the victim of his offences is such that, were we not to anonymise him, the protection to the victims afforded by the Sexual Offences (Amendment) Act 1992 would be illusory. The case must be reported as *R v RW*.

87. On 2 December 2021 in the Crown Court at Nottingham the appellant pleaded guilty to count 3 on an indictment containing 8 counts, count 3 charging the appellant with rape of a child under the age of 13. This plea was tendered at the Plea and Trial Preparation Hearing ("PTPH"). Pleas of not guilty were tendered to all other counts.

88. On 7 February 2022 the appellant was re-arraigned and pleaded guilty to count 1 (sexual intercourse with a girl under 13), count 2 (indecent assault), count 4 (rape of a child under 13) and count 5 (assault by penetration of a child under 13). The prosecution chose not to proceed in relation to the remaining counts. They were left on the file on the usual terms.

89. On 16 August 2022 the appellant was sentenced as follows:

Count on indictment	**Offence**	**Sentence**	**Consecutive or Concurrent**
1	Sexual Intercourse with a Girl Under 13 Years – s.5 Sexual Offences Act 1956	4 years and 9 months' imprisonment	Concurrent with Count 4
2	Indecent Assault – s.14 Sexual Offences Act 1956	1 year and 7 months' imprisonment	Concurrent with Count 4
3	Rape of a Child Under 13 – s.5(1) Sexual Offences Act	5 years and 7 months' imprisonment	Concurrent with Count 4

	2003		
4	Rape of a Child Under 13	6 years' imprisonment	
5	Assault of a Child Under 13 by Penetration – s.6(1) Sexual Offences Act 2003	4 years' imprisonment	Concurrent

The total sentence imposed was 6 years' imprisonment.

90. The period of offending identified in counts 1 and 2 was 1 September 2003 to 1 May 2004. 1 September 2003 was the appellant's tenth birthday. That was the date of criminal responsibility so far as he was concerned. The period of offending in counts 3, 4 and 5 was 1 May 2004 to 21 August 2008. This reflected the commencement of the Sexual Offences Act 2003 and a date when the appellant was 14. The evidence demonstrated that his offending had ceased by that point.

91. Each count pleaded that the relevant behaviour had occurred on no fewer than 3 occasions in the period covered by the count. There was no basis of plea which accepted any greater frequency of offending. Thus, the appellant fell to be sentenced for repeated but not continuous offending.

92. The victim of the appellant's offences was his younger sister, R. The appellant was two years older than his sister. They lived together at the family home in Nottingham. Their father had committed suicide when the appellant was aged four. Their mother formed another relationship with a man who lived in the family home. At some point he suffered a stroke which meant that he slept downstairs. He required considerable care from the mother of the appellant and R who also suffered from depression. The appellant and R were left without proper care and supervision.

93. The appellant began sexually to touch and to abuse R when he was only eight and she was aged six. The appellant had already experienced a troubled childhood by that point. One striking aspect of his formative years was that he had discovered the body of his father after the father's suicide. The appellant himself had been the subject of sexual abuse by older children before he began to abuse his sister. He had had access to pornography from a very young age.

94. The sexual abuse of R began when the appellant came into the family bathroom after she had taken a shower. He touched her naked chest and her vagina. He attempted to penetrate R with his fingers. Matters went no further at this stage. The incident was mentioned to a teacher at the appellant's and R's school. Local children's services became involved. The only step taken was to put the children into separate bedrooms.

95. Count 1 (penetration by the appellant with his penis of R's vagina) and count 2 (digital penetration of R's vagina) represent the sexual abuse on no fewer than three occasions of R by the appellant between September 2003 and May 2004. He was ten during this period and R was eight.

96. The sexual abuse continued after the appellant's eleventh birthday until he was 14. He raped R vaginally (count 3), he digitally penetrated her vagina (count 5) and he put his penis into her mouth i.e., oral rape (count 4). The offending mainly happened at night after the appellant and R had gone to bed. The appellant would call R into his bedroom where he would require her to perform oral sex on him before he had vaginal intercourse with her. He would ejaculate into her. The digital penetration was rough causing R to bleed. The appellant told R to keep quiet about his behaviour.

97. The sexual abuse ceased before the appellant's fifteenth birthday. R told the appellant that she did not wish his conduct to continue. He desisted. R was approaching her thirteenth birthday by this time i.e., 2008. She complained to the police and provided an ABE interview in 2019 setting out her allegations of what the appellant had done. The appellant was interviewed in April 2020. He admitted some forms of sexual activity with R but said that the activity was consensual. He denied the conduct which in due course formed the basis of the indictment. He was charged by postal requisition in August 2021 with a first appearance at the magistrates' court in September 2021.

98. R provided a second ABE interview which dealt with the effect of the appellant's offending on her. She had suffered extreme low esteem throughout her teenage and later years. She had self-harmed on occasion. She had been prescribed anti-psychotic medication. The sentencing judge summarised the position by saying that R had suffered a severe psychological impact.

99. By the time of sentence the appellant was a man of 28. He had had a long-term relationship for about six years between the ages of 20 and 25. He then entered another relationship during which he and his partner had a child. The relationship ended when he was charged with the offences against his sister. In June 2022 he had weekly supervised access to his child. His ex-partner was supportive of this. The appellant had been in work for almost all his adult life. At the time of sentencing, he ran his own maintenance business providing small building works and car repairs.

100. Both the pre-sentence report and a psychiatric report assessed the risk posed by the appellant as low. The author of the pre-sentence report summarised the position as follows:

> "…whilst early onset sexual offending is a risk factor, there's no evidence that this continued. Although [RW] did have the capacity to engage in sexual abuse where consent was unclear, it may have been understandable due to his age, and if at that time of his life there were some skewed family beliefs. [RW] is probably a very different person now, and there is no evidence he currently poses a risk to female children."

The psychiatric report reached a similar conclusion:

> "Based on the following; very young age when the alleged incident occurred, small age gap between him and the complainant, reviewing the likely drivers behind his behaviour, no evidence of further offending or sexual offending behaviours, no sexual deviant or pro-violent attitudes, stable employment and support, since had positive relationships and he does not

> evidence any severe or enduring mental disorder I would conclude his future risk as low."

101. In his sentencing remarks the judge acknowledged all the factors which affected the appellant at the time of the offending: his very troubled young childhood; the lack of any parental supervision; the abuse to which the appellant had been subjected. He accepted that the appellant had voluntarily desisted from the abuse of his sister and that he did not pose any continuing risk.

102. The judge identified as a significant aggravating factor the psychological damage suffered by R. He also noted that the appellant appeared even at the time of sentence to lack insight into the effect the sexual abuse had had on her. The judge rejected the proposition that he should apply the principles applicable to the sentencing of children and young people in relation to the appellant's sentence. He said, "I am not sentencing a youth, I am sentencing a 28 year old man". The judge explained his approach as follows: arrive at the appropriate adult sentence following the current guideline; reduce that term by 50% to take account of the age of the appellant at the time of the offending; apply the appropriate reduction for the plea of guilty, namely 25% for the plea tendered at PTPH and 20% for the later pleas. In relation to count 1, namely sexual intercourse with R when the appellant was aged ten, the judge took the appropriate adult sentence as 12 years' custody. In relation to counts 3 and 4, namely vaginal and oral rape of R when the appellant was aged between 11 and 14, the appropriate adult sentence was identified as being 15 years' custody. Applying the reductions for age and plea, the sentences were as we have set out above.

103. This is not a case in which, had the appellant been sentenced at the time of the commission of the offences, there would have been some statutory restriction on the maximum available sentence. All of the offences (with the exception of count 2 – indecent assault) were punishable in the case of an adult with a period of imprisonment for life i.e. in excess of 14 years. Therefore, even a ten year old could have been sent to detention for a period up to the maximum sentence for an adult: Section 91 Powers of Criminal Courts (Sentencing) Act 2000. Section 91 also applied to the offence of indecent assault. A court in 2004 could have imposed a sentence of detention in relation to count 2 up to a maximum term of ten years i.e., the maximum sentence for an adult. Detention would have been available throughout the period of the appellant's offending.

104. However, the notional availability of long-term detention at the time of the commission of the offences cannot dictate the approach to sentencing someone in the appellant's position. The general principles set out above must be applied. With respect to the sentencing judge, his assertion that he was not sentencing a youth betrayed an error in his approach to sentencing the appellant. The appellant was to be sentenced for offences he had committed as a child. He had begun his offending behaviour even before he had reached the age of criminal responsibility. All the circumstances indicated that his culpability was far removed from that of an adult or even an older teenager. The judge may have been sentencing a 28 year old man because time had passed since the commission of the offences. That did not mean that the sentence was to be fixed by reference to a mature adult. The offences had been committed by a child.

105. The Children guideline deals in detail with the proper approach to the sentencing of children. This was the approach which should have been taken in the appellant's case. We note two passages in the guideline. First, at 1.5:

> "It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour…."

This passage was clearly relevant to the appellant and his position at the time he committed the offences.

Second, at 6.48:

> "There is an expectation that custodial sentences will be particularly rare for a child or young person aged 14 or under. If custody is imposed, it should be for a shorter length of time than that which a young person aged 15 – 17 would receive if found guilty of the same offence. For a child or young person aged 14 or under the sentence should normally be imposed in a youth court (except in cases of homicide or when the dangerous offender criteria are met)."

This passage recognises that a child aged 14 or under will be in a different position from older teenagers. This will be particularly true if the offending commenced when the child was only ten. The guideline refers to sentences available in a youth court. In practical terms, that indicates that normally the sentence should not exceed two years' custody.

106. We are satisfied that the sentences imposed by the judge were wrong in principle because he did not approach the sentencing exercise by reference to the age of the appellant when he committed the offences. As a result, the sentences imposed were manifestly excessive. The grounds of appeal argue that, had the offending been disclosed at the time, it is possible that the appellant would have been diverted away from the criminal justice system. Even if the case had been prosecuted, a custodial sentence would have been unlikely. Any custodial sentence would not have been anywhere near the length of the sentence imposed by the judge. We consider that, given the period over which the offending took place and in the light of the psychological damage suffered by R, it is reasonable to proceed on the basis that the case would have been prosecuted. We do not agree that a custodial sentence would have been unlikely. A court faced with someone in the appellant's position as at the date of the offending

would be anxious to provide rehabilitative measures. Given the family circumstances of the appellant, such measures could have been provided within the context of a period of detention. We agree that the sentence would have been far below the sentences imposed by the judge. Taking account of the reduction for the pleas of guilty, we conclude that a sentence of 18 months' custody in respect of counts 3 and 4 (rape of a child under 13) would have been appropriate with shorter concurrent sentences on the other counts.

107. We quash the sentences imposed by the sentencing judge. In respect of counts 3 and 4 we substitute concurrent sentences of 18 months' imprisonment. In respect of all other counts, we substitute concurrent sentences of 12 months' imprisonment. The total sentence now will be 18 months' imprisonment. To that extent the appeal is allowed.

Peter Hodgkinson

108. On 15 December 2021 in the Crown Court at Sheffield Peter Hodgkinson pleaded guilty to counts 1 and 9 on a 14 count indictment. He pleaded not guilty to the other counts on the indictment. Count 1 charged a single incident of indecent assault contrary to Section 14(1) of the Sexual Offences Act 1956. The offence was committed on a date between 23 December 1972 and 3 October 1976. The victim, E, was a girl aged between nine and 12. Hodgkinson was aged between 16 and 19. His eighteenth was on 20 November 1974. Count 9 also charged indecent assault contrary to the 1956 Act. The nature of the assault was not the same as that charged in count 1 although the victim was the same as in count 1. It was a multiple incident count albeit that the number of incidents was "no fewer than two occasions". The indictment period was 3 October 1976 to 3 October 1977.

109. On 22 February 2022 Hodgkinson pleaded guilty on re-arraignment to counts 2, 11, 12 and 13. Count 2 was a multiple incident count. It charged the same type of indecent assault as that alleged in count 1. The period of the offending was the same as count 1 as was the victim. The indecent assaults had occurred on no fewer than 20 occasions.

110. Counts 11, 12 and 13 related to a second victim, G, a girl aged between seven and 12 during the indictment period. Each count identified a period of offending between 23 December 1972 and 2 May 1978. Count 11 charged a single incident of indecent assault. Count 12 was a multiple incident count charging the same type of indecent assault as in count 11. The indecent assaults had occurred on no fewer than 10 occasions. Count 13 charged a single incident of indecent assault of a different type from that charged in counts 11 and 12.

111. The remaining counts on the indictment in relation to which Hodgkinson maintained his pleas of not guilty were ordered to lie on the file on the usual terms.

112. On 27 May 2022 Hodgkinson was sentenced in respect of the counts to which he had pleaded guilty. The sentence imposed was varied pursuant to Section 385 of the Sentencing Code 2020 on 14 July 2022. We shall refer solely to the sentence as it was varied. The sentences are shown in the table below.

Count	Offence	Sentence	Consecutive or Concurrent
1	Indecent Assault contrary to s.14(1) Sexual Offences Act 1956 *23.12.1972 – 03.10.1976* *(Single incident)*	A Special Custodial sentence: 2 year custodial term 1 year's extended licence	Concurrent
2	Indecent Assault contrary to s.14(1) Sexual Offences Act 1956 *23.12.1972 – 03.10.1976* *(Multiple count)*	A Special Custodial sentence: 3 year custodial term 1 year's extended licence	Concurrent
9	Indecent Assault contrary to s.14(1) Sexual Offences Act 1956 *03.10.1976 – 03.10.1977* *(Multiple count)*	1 year's imprisonment	Concurrent
11	Indecent Assault contrary to s.14(1) Sexual Offences Act 1956 *23.12.1972 – 02.05.1978* *(Single incident)*	A Special Custodial sentence: 2 year custodial term 1 year's extended licence	Concurrent
12	Indecent Assault contrary to s.14(1) Sexual Offences Act 1956 *23.12.1972 – 02.05.1978* *(Multiple count)*	A Special Custodial sentence: 3 year custodial term 1 year's extended licence	Consecutive to Count 2
13	Indecent Assault contrary to s.14(1) Sexual Offences Act 1956 *23.12.1972 – 02.05.1978* *(Single incident)*	2 years' imprisonment	Concurrent

113. The total sentence was a special custodial sentence for an offender of particular concern made up of a custodial period of six years and a further licence period of two years.

114. Hodgkinson appeals against that sentence with the leave of the single judge.

115. The appellant is now aged 66. He was born in November 1956. Prior to the matters with which we are concerned, he was a man without previous convictions. The offences to which he pleaded guilty were committed by him when he was aged between 16 and 21. E and G are sisters. In 1972 their father died. Their mother was unable to cope with her four children. As a result, E and G together with their two brothers moved to a house in Yorkshire. They were then aged nine and seven respectively. The appellant lived at the house. He was 16 when they moved in.

116. Shortly after E and G arrived at the house, the appellant began to bully E. The bullying principally consisted of physical violence. E was regularly reduced to tears by the appellant's behaviour. The appellant then moved on to sexual abuse. He took whatever opportunity he could digitally to penetrate E's vagina. Counts 1 and 2 reflected this offending, count 1 being a single incident count and count 2 representing at least 20 episodes of digital penetration when E was aged between nine and 12. On one occasion the appellant rubbed E's hand on his penis. This was the indecent assault charged in count 9. E was aged 13 or 14 at this point. When she was 14 E began her periods. She was told by those in whose care she was that she was not to allow any boy to touch her. From this point E pushed off the appellant when he tried to assault her sexually. He soon desisted from those attempts.

117. The appellant moved on to sexually assaulting G. Just as he did in relation to E, he digitally penetrated her when she was aged between seven and 12. Count 11 was a single incident of digital penetration. Count 12 was a multiple incident count reflecting at least ten incidents. The appellant was aged up to 21 when he committed the offences. Count 13 was a single episode of the appellant rubbing G's hand on his penis. G ran away from the house where she was living with the appellant when she was aged around 13. Although she was subsequently returned to the house, she and her sister were able to move out not long after. The appellant no longer had contact with E and G and the sexual abuse ceased.

118. In 1992 G together with members of her family went to the appellant's home to confront him. He made limited admissions of sexual abuse. G spoke to the police at that time. She did not feel strong enough to make a formal complaint against the appellant. In 2018 E and G complained to the police about what the appellant had done. The appellant was interviewed in 2019. He said that his behaviour was more romantic than sexual. He had a crush on E. He accepted that he had touched her inappropriately. He said that it was affection that had gone too far. He regretted what he had done. He also admitted digital penetration of G.

119. In his sentencing remarks the judge addressed the issue of the age of the appellant when he committed the offences. This was in the context of a submission made on behalf of the appellant that the indictment was drawn in such a way that it could not be said with certainty that any offending had occurred after the appellant had reached his seventeenth birthday. If that were the case, the maximum available sentence would have been 12 months' custody. The judge noted that, whatever technical argument might be raised in relation to the indictment, there had been a concession made on behalf of the appellant that offending had occurred multiple times when the appellant was an adult i.e., 18 or over. Thus, he sentenced on that basis. He did not refer to any statutory restriction in relation to sentencing powers at the time of the offending.

120. The judge explained that he would sentence with a measured reference to the current sentencing guideline for the equivalent offence. He also noted the relevance of the Children guideline. The judge also said that there would be a reduction for the pleas of guilty. He did not indicate what the reduction would be or the basis for that reduction.

121. Before imposing the custodial sentences, the judge said this:

> "I have to try and arrive at a just sentence, which is the lowest commensurate sentence. It is immensely difficult because of you passing from being a youth to an adult during the course of the offending and because of the maximum that applied in those days compared to the maximum that apply in these days."

122. The original grounds of appeal in respect of which the single judge gave leave were threefold. First, the judge did not explain where he put the offending within the current guideline. It appeared that the judge considered that, before any reduction for the pleas of guilty, the offences justified sentences close to the maximum for the offence of indecent assault i.e., five years' custody. That was manifestly excessive. Secondly, whilst the judge referred to the Children guideline, he did not appear to have made any allowance for the appellant's age and immaturity at the time of the offending. Thirdly, the judge did not indicate the reduction given for the pleas of guilty. It was impossible to tell whether sufficient credit had been given.

123. The appeal was listed on 6 December 2022. The court then concluded that the gravamen of the appeal was none of the matters set out in the original grounds. Rather, the sentencing judge had not considered the maximum available sentence at the time of the offending when the appellant was aged between 17 and 20. The court observed that, given the maximum term for the offence of indecent assault, the appellant could not have been subject to long term detention, the relevant provision then being Section 53 of the Children and Young Persons Act 1933. The longest custodial sentence available would have been borstal training in respect of which an offender convicted in 1972 to 1978 could not have been detained for longer than two years. The court ordered the appellant to lodge fresh grounds if that was the course he wished to take.

124. Fresh grounds of appeal have been lodged. The principal ground now advanced is that suggested by the court at the hearing on 6 December 2022. It is acknowledged that this point had not been raised in the Crown Court. Counsel accepts that she was not aware of it until the hearing on 6 December 2022. We give leave for the new ground to be argued. The appellant bears no responsibility for the failure to raise the issue in the Crown Court. The ground has merit.

125. The maximum sentence for indecent assault during the indictment period was five years. As the court observed on 6 December 2022 the offence was not one for which long term detention would have been available had the appellant been sentenced at the time of the commission of the offences. Rather, the available custodial sentence would have been Borstal training. We have already considered the effect of such a sentence in our determination of the appeal of Ahmed. The effect of a sentence of Borstal training is the same in the appellant's case as in the case of Ahmed. Counsel for this appellant concedes that the combination of the maximum initial period of custody of two years coupled with a period of supervision expiring four years from the date of the

imposition of the sentence corresponds to a determinate term of four years' custody, with release on licence at the half way point of the term. Applying the principles we have set out earlier in this judgment, the appellant should not have been sentenced to a custodial term in excess of four years. There is nothing exceptional about his case which would justify a departure from those principles.

126. The assaults committed by the appellant today would be charged as assault by penetration of a child under 13. The offences could be considered to fall into Category 2B in the current guideline given the vulnerability of the victims due to their personal circumstances. The starting point for an adult offender would be eight years' custody for a single offence. In relation to both E and G there were multiple assaults. The category range extends to 13 years' custody. In those circumstances it is not surprising that the judge imposed custodial sentences of three years in relation to each victim. Absent any restriction on the available custodial sentence at the time of the offending, those custodial terms properly reflected the age of the appellant at the time he committed the offences. This is not a case of a 15 or 16 year old committing sexual assaults. The appellant was offending when he was 18, 19 and 20. The appellant's pleas of guilty were indicated piecemeal. The pleas to the most serious counts were tendered approximately two months after the PTPH. Although the judge did not identify the reduction he applied, it could not properly have been more than 15% to 20%. Without engaging in a mathematical exercise, there is no reason to conclude that insufficient reduction was made.

127. The sentences imposed by the judge exceeded the maximum available custodial term had the appellant been sentenced at the time of the commission of the offences. The judge was unaware of this issue because it had not been drawn to his attention. However, we are satisfied that the sentences he imposed were wrong in principle and manifestly excessive. The total custodial term of six years was significantly greater than the term which would have been available in 1979 or thereabouts.

128. It was appropriate for consecutive sentences to be imposed in relation to the two different victims. Taking into account the appellant's age when he committed the offences, namely a young adult rather than a child, immediate custodial terms of some length were justified. In those circumstances and taking account of the maximum custodial term available at the time of the offending, we conclude that the proper course is to quash the sentences imposed on counts 2 and 12 of the indictment. We shall substitute in each case a special custodial sentence consisting of a custodial term of two years with an extended licence of one year. Those sentences will run consecutively. All other sentences imposed by the judge will remain unaltered. The consequence will be that the appellant now will be subject to a special custodial sentence comprising a custodial term of four years and an extended licence period of two years.

129. The special custodial sentence we have substituted for the sentence imposed by the judge below will take effect from the date on which sentence first was imposed in the Crown Court, namely 27 May 2022. As we have indicated, the sentence was varied pursuant to the slip rule on 14 July 2022. In the Crown Court there was an issue as to whether the variation of the sentence in July 2022 meant that the provisions of Section 131 of the Police, Crime, Sentencing and Courts Act 2022 applied to the sentence imposed on the appellant. Section 131 came into force on 28 June 2022. Prior to that date the requisite custodial term for a defendant subject to a special custodial sentence was one half of the custodial term. Section 131(2) provides that, in relation to a

sentence imposed after 28 June 2022, the requisite custodial term is two thirds of the custodial term. The judge told the appellant that he would serve two thirds of the custodial term though he later said that the length of the requisite custodial term was not a matter for the court. Where a sentence is varied under the slip rule, the sentence, as so varied, takes effect from the beginning of the day on which it was originally imposed, unless the court directs otherwise: Section 385(5) Sentencing Code 2020. The judge did not direct otherwise. Therefore, Section 131(2) of the 2022 Act did not apply to the sentence imposed by the judge (as varied). For our purposes this issue is academic. The special custodial sentence consisting of a custodial period of 4 years and an licence period of 2 years to which the appellant now is subject took effect from 27 May 2022. The requisite custodial term applicable to the appellant is one half of the custodial term.

130. To that extent the appeal is allowed.