Neutral Citation Number: [2023] EWCA Crim 789

Case No: 202203477 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
HER HONOUR JUDGE ENGLISH
Indictment No T20207689

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2023

Before :

LADY JUSTICE ANDREWS
MR JUSTICE CHOUDHURY
and
HER HONOUR JUDGE MUNRO KC

- -

Between :

WJ	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Michael Stradling (instructed by **T V Edwards LLP**) for the **Appellant**

Hearing date: 30 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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

LADY JUSTICE ANDREWS:

INTRODUCTION

1. This case was listed as a renewed application for leave to appeal against sentence following refusal by the Single Judge. At the start of the hearing, for reasons which will become apparent, we informed the applicant's counsel, Mr Stradling, that we would grant leave to appeal and proceed to hear argument on the substantive issues. Having done so, we decided to reserve judgment because the appeal raises an important issue of principle.

2. On 12 April 2022 in the Crown Court at Snaresbrook before Her Honour Judge English ("the Judge") and a jury, the Appellant was convicted of four counts of Indecent Assault on a Male Person contrary to s.15(1) of the Sexual Offences Act 1956 and one count of buggery contrary to s.12(1) of that Act. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. This means that no matter relating to the complainant shall be included in any publication if it is likely to lead to his identification as the victim of these offences. This prohibition applies throughout the complainant's lifetime unless waived or lifted in accordance with s.3 of that Act.

3. The Appellant, whom we shall call WJ, is now aged 69. He is the father of four children, one of whom, M, is the complainant. Between 1975 and 1982, when M was aged between 5 and 11, the Appellant committed what the Judge aptly described as a "veritable litany of sexual offending" against M. These assaults took place in the family home, at night, when M's mother was out at work. They involved multiple incidents of masturbating M's penis, digital penetration of M's anus and one occasion of penile anal penetration. The Appellant would sexually assault M for a period of months at a time, then stop for a while, before resuming again. This pattern continued until M was around 10 or 11 years old when the abuse finally stopped.

4. At the start of the offending period M shared a bedroom with two of his siblings. When the Appellant came home having been out drinking, he would come into the children's bedroom to say goodnight. He would kiss each of them on the cheek and then leave the room. A while later he would return and lay down on M's bed. He would then rub his hands on M's leg, under his pyjamas and between his legs. This progressed to touching M's penis and subsequently to touching M's anus. This behaviour become a regular occurrence.

5. By the time M was given his own bedroom, he had started wetting the bed. The Appellant's abuse of M worsened. One night, the Appellant lay on top of M and rubbed himself against him. This hurt M so much that he cried. The Appellant used to tell M that "this is our secret, this is between us". M was too afraid to tell anyone what was happening. He would stay at his grandmother's home almost every weekend because he felt safe there. However, the Appellant came to the grandmother's house one night and assaulted M in the bedroom there.

6. The Appellant would masturbate M's penis almost every time he entered M's bedroom. This was the most frequent type of assault and formed the basis of the indecent assaults under Counts 1 and 2 on the indictment, Count 2 being a multiple occasion count. M's recollection was that the digital penetration of his anus happened

a few times. These formed the basis of further indecent assault charges under Count 3 (first occasion) and Count 4 (2 further occasions).

7. On one occasion, when M was around 7 years old, the Appellant penetrated M's anus with his penis. M cried and screamed so much that the Appellant was forced to stop. However, this was not before M noticed a wet sensation around his bottom and a "funny smell" which he much later identified as sperm. After the Appellant stopped trying to penetrate him he continued to fondle M's penis for a while before leaving. This incident formed the basis of Count 5.

8. The effect of these assaults on M's life has been profound. There is a long history of drug addiction, alcoholism, depression and impaired relationships with those close to him, including M's own children. He has attempted to take his own life on more than one occasion. The Judge rightly found that the offending resulted in severe psychological harm.

THE SENTENCE OF THE COURT BELOW

9. On 4 November 2022 the Appellant was sentenced for all these offences. Quite understandably, as she had presided over the trial, the Judge did not require a pre-sentence report. It is unnecessary for one to be prepared for the purposes of the appeal.

10. The Appellant was not of previous good character. In 2010 he was sentenced to a total of five years' imprisonment for the rape of a female under 16 and two offences of indecent assault of a female under 16. Those offences were committed in the period between 1970 and 1972 and therefore predated the sexual abuse of M.

11. Under present legislation, Count 5 would be charged as rape of a child under 13 years. The maximum sentence is life imprisonment (as it is for the offence of buggery) but with a range of 6 to 19 years' custody.

12. Section 15(1) of the Sexual Offences Act 1956 is an "abolished offence" for the purposes of Schedule 13 of the Sentencing Act 2020. The equivalent offence for Counts 3 and 4 would be assault of a child under 13 by penetration, section 6(1) of the Sexual Offences Act 2003. The maximum sentence for that offence is life imprisonment with a range of 2 to 19 years' custody. The equivalent offence for Counts 1 and 2 would be sexual assault of a child under 13, section 7(1) of the Sexual Offences Act. That is not an offence listed under Schedule 13. The maximum sentence is 14 years' imprisonment, with a range of Community Order to 9 years' custody.

13. The Court could not impose a greater sentence than the maximum which applied at the time the offences were committed, which in the case of Counts 1 to 4 inclusive was 10 years' imprisonment.

14. As in any case involving multiple historical sex offences of varying types, this was a difficult sentencing exercise. It was one which the Judge approached with care. Applying present day Sentencing Guidelines, but having regard to the maximum sentences available at the time of the offences, she considered that each of the offences fell within Category 2 harm and Category A culpability because of the

severe psychological harm suffered by M and the gross abuse of trust and grooming involved. We note that the severe psychological harm suffered by M would have justified placing Counts 1 and 2 into category 1A of the Guidelines for those offences. By placing them into Category 2A the judge was perhaps more charitable to the Appellant than was warranted. In any event, the offending fell into the area where the range of sentences for the two categories under the Guidelines would overlap.

15. A Category 2A offence of assault of a child under 13 by penetration has a starting point of 11 years, one year higher than the maximum permissible for these historical offences, and a range of 7 to 15 years' custody. A category 2A offence of sexual assault of a child under 13 has a starting point of 4 years and a range of 3 to 7 years' custody. Category 1A has a starting point of 6 years and a range of 4 to 9.

16. The Judge noted the aggravating features of ejaculation in relation to Count 5, the commission of the offences in the presence of other children in relation to Counts 1 and 2, and across all five counts, the fact that the abuse took place after the Appellant had consumed alcohol and the fact that the Appellant took steps to prevent M from telling anyone what was happening to him. It is clear from her sentencing remarks that the Judge would have had no hesitation in finding the Appellant to be a dangerous offender but for the fact that the offences committed against M were over 40 years old, and there was no evidence that he had committed any offences since then.

17. The Judge sentenced the Appellant to a special custodial sentence of 17 years on Count 5, under s.278 of the Sentencing Code, comprising a 16-year custodial term and a 1-year extended licence period. However she imposed no separate penalty in respect of the offences which were the subject of counts 1 to 4 on the indictment. This was despite the fact the indecent assaults charged on counts 3 and 4, which involved penetration, would also have attracted special custodial sentences under s.278. Her explanation for taking that course was as follows:

> " … in relation to counts 3, 4 and 5, I note that I need to deal with you as an offender of particular concern for the purposes of section 278 of the Sentencing Code. There can be no doubt that bearing in mind that I am dealing with you for what the jury clearly judged to be a prolonged campaign of abuse that occurred over a number of years and involved three distinct types of offending behaviour, there would be nothing objectionable in the passing of consecutive sentences in relation to some of these counts. However, having regard to the need to keep the principle of totality well in mind, it seems to me more appropriate to aggregate the sentences in this case to reflect the overall gravamen of your offending in the sentence for the most serious of these counts, count 5, and then to pass no separate penalty in relation to the remaining counts. And this is what I intend to do."

18. The Judge noted the absence of any significant mitigation, in particular the "complete absence of any semblance of remorse for what [WJ], a father, did to his son". The Judge took account of the Appellant's age and medical condition. As to the latter, the Judge had regard to medical records which indicated that the Appellant suffers various medical conditions, including ischaemic heart disease, angina, COPD, asthma, diabetes, epilepsy, depression, spinal problems and hearing issues. It was noted that

the Appellant had suffered a heart attack in 2004, which had required coronary intervention, and that he remains on a number of medications to deal with his ongoing health issues. The Judge had no doubt that these could be accommodated by the healthcare services within the prison system.

19. The Judge noted that the starting point for Count 5, which was a Category A2 offence, would be 13 years' imprisonment if he was being sentenced for that single offence alone, uplifted to 15 years to take account of the aggravating features. However, as the Judge proposed to pass a sentence designed to reflect the entirety of his offending across all five counts, she concluded that the appropriate starting point was one of 18 years. This was subject to a small downward adjustment to 17 years to take account of the Appellant's age and health issues. The resulting sentence comprised a custodial term of 16 years plus a further year on licence. The Judge imposed no separate penalty in relation to Counts 1, 2, 3 and 4.

20. The Judge concluded her sentencing remarks by stating that the Appellant would be eligible for release at the "halfway point of the custodial term." This was an error. Because the sentence was passed after 26 June 2022, the Appellant would have to serve two-thirds of the custodial element of the sentence passed under s.278 before becoming eligible for release.

21. The Appellant sought leave to appeal against the sentence for the offence of buggery on the grounds that it was manifestly excessive. It was contended in the Advice and Grounds of Appeal that insufficient weight was given to the mitigating factors of the Appellant's age and health when determining the custodial term of the sentence, or alternatively that the Judge fell into error in the calculation of the sentence in relation to those mitigating factors. This was based on an inference drawn from the fact that the Judge erroneously informed the Appellant that he would be eligible for release when he had served half his sentence, that she must have intended that he should serve eight years in custody rather than the minimum of twelve years that the sentence she passed would require.

22. As the Single Judge correctly stated when refusing leave to appeal, and as confirmed by this Court in *R v Patel* [2021] EWCA Crim 231 and *R v LN* [2023] EWCA Crim 371, the release provisions are irrelevant to the fixing of the appropriate custodial term. If a 16-year custodial term is otherwise appropriate, it would be wrong in principle to reason that, since two-thirds of 12 equals half of 16, a custodial term of 12 years should be imposed instead if the sentence will attract release provisions based on two-thirds rather than half. A similar argument was raised and rejected in *LN*.

23. The Single Judge went on to say that:

> "HH Judge English explained at some length, with clarity and care, how serious your offending was, where it fell within applicable Sentencing Council Guidelines, and how she identified and took into account the aggravating and mitigating features present. There is no arguable error in any of that, and no credible argument that the resulting custodial term (16 years) is manifestly excessive."

24. We agree with all those observations, and had this been the only issue raised, we would have refused the renewed application for leave to appeal. However, the

sentences of no separate penalty in respect of counts 1 to 4 remained a matter of concern. Before the matter was considered by the Single Judge, the Registrar had invited submissions from counsel on the question whether the sentences passed on Counts 3 and 4 were unlawful. The question which she asked them to consider was whether a special custodial sentence for offenders of particular concern was mandated by s.278 of the Sentencing Act 2020.

25. In response to the Registrar's invitation both prosecuting counsel, in a Respondents' Notice, and Mr Stradling, in a helpful note, agreed that the sentences on those two counts were unlawful, and that the Appellant should have received a sentence for offenders of particular concern pursuant to s.278 of the Sentencing Code in respect of his convictions on those counts. The only question for the Court of Appeal (Criminal Division) was how to adjust the sentences in a way that did not result in the Appellant receiving an increased sentence.

26. The Single Judge, however, disagreed with their view. He interpreted the provisions of s.278 as applying only in the event that the Judge decided to pass a custodial sentence for an offence falling within Schedule 13. He said that because the Judge did not impose a sentence of imprisonment, those provisions were not engaged. Section 278 did not mandate that a custodial sentence be imposed so as to engage the requirement to add a 1-year extended licence period.

27. In his helpful written and oral submissions in support of the renewed application Mr Stradling maintained his previous stance, notwithstanding the views of the Single Judge.

DISCUSSION

28. Section 11 of the Criminal Appeal Act 1968 provides, so far as is relevant, as follows:

> "(1) … an appeal against sentence… under section 9… of this Act, lies only with the leave of the Court of Appeal.
>
> (2) Where the Crown Court in dealing with an offender … on his conviction on indictment… has passed on him two or more sentences in the same proceeding…an appeal or application for leave to appeal against any one of those sentences shall be treated as an appeal or application in respect of both or all of them.
>
> (3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may:
>
> (a) quash any sentence or order which is the subject of the appeal; and
>
> (b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence,

> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with in the court below.”

29. Section 278 of the Sentencing Act 2020 provides, so far as is relevant, that:

> “ (1) This section applies where the court imposes a sentence of imprisonment for an offence where
>
> (a) the offence is listed in Schedule 13
>
> (b) the person … is aged 21 or over when convicted of the offence; and
>
> (c) the court does not impose [any] of the following for the offence (or for an offence associated with it) –
>
> (i) an extended sentence under section 279 …
>
> (ii) a sentence of imprisonment for life.
>
> (2) The term of the sentence must be equal to the aggregate of
>
> (a) the appropriate custodial term, and
>
> (b) a further period of 1 year for which the offender is to be subject to a licence
>
> and must not exceed the maximum term for which the offence is punishable.”

30. In *R v LF* [2016] EWCA Crim 561, [2016] 2 Cr App Rep (S) 30, guidance was given in respect of the precursor to s.278, s.236A of the Criminal Justice Act 2003. S.236A was structured differently. It was also couched in slightly different terms. It provided that subsection (2) applied where a person was convicted of an offence listed in Schedule 18A (the equivalent of Schedule 13 to the Sentencing Act 2020); was aged over 18; and the court does not impose a sentence of imprisonment for life or an extended sentence. Subsection (2) began with the words “if the court imposes a sentence of imprisonment for the offence” and then mandated the imposition of a special custodial sentence, in a similar manner to s.278(2) of the Sentencing Code.

31. The judgment of the Court was delivered by Treacy LJ. He said, at paragraphs 12 and 13, that s.236A did not preclude the Court from imposing a non-custodial sentence such as a community order for an offence listed in the Schedule, as there may be exceptional cases where, for example, a lengthy community order with a requirement of participation in a sex offender treatment programme may be the most appropriate form of sentence. Although the language of the statute did not appear to preclude the Court from passing a suspended sentence, for pragmatic reasons a sentence of imprisonment which would attract the provisions of s.236A should not be suspended; in circumstance that would otherwise warrant suspension of the sentence, the court should pass a community sentence instead.

32. In paragraphs 16 to 18 Treacy LJ stated that if the Court was passing concurrent sentences for multiple offences including more than one s.236A offence there should be no particular difficulty; the extended licence period for each count will run concurrently and an offender will not be eligible for release until the relevant portion of the longest of the concurrent terms has been served.

33. Unlike s.236A of the 2003 Act, s.278(1) does not state "*if* the court imposes a sentence of imprisonment" but "*where* the court imposes a sentence of imprisonment for an offence [listed in Schedule 13]." It seems clear from the context that Parliament envisaged that if the offence is listed in the Schedule a custodial sentence would usually be imposed, as they are all offences of a very serious nature. However, it does not follow that a custodial sentence is mandated in every case. Although the section could be interpreted as requiring a special custodial sentence to be imposed in all cases where a life sentence or extended sentence is not imposed, the more natural interpretation of the phrase "where the court imposes a sentence of imprisonment" is that it is addressing the situation in which the court has decided that a custodial sentence should be imposed.

34. We therefore agree with the Single Judge that s.278 does not in terms oblige the Judge to pass a custodial sentence, although it assumes that this is likely to happen. Parliament has deliberately left open the possibility of a non-custodial sentence. As Treacy LJ observed in relation to its predecessor, cases in which a community sentence would be appropriate for offences of this type would be exceptional. But it does not follow from this that there was no error of law in the sentences passed by the Judge.

35. Section 59(1)(a) of the Sentencing Code provides that every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case, unless the court is satisfied that it would be contrary to the interests of justice to do so. The sentencing judge must justify any departure from the sentencing guidelines. In the present case, all the offending was recognised to have passed the custody threshold and an application of the guidelines for the offences themselves would have resulted in substantial custodial sentences. The *shortest* sentence at the bottom end of the range identified by the Judge for a single offence of the type charged under Counts 1 and 2, would have been 3 years.

36. The only reason given by the Judge for imposing no separate penalty was totality. We are in no doubt that the Appellant should have been sentenced differently. It is only ever appropriate to impose no separate penalty for additional offences, if the additional criminality involved in the offences concerned has been fully and adequately reflected in the sentences imposed for the other offence or offences. That was not this case.

37. The Judge could not have been satisfied that it was in the interests of justice to impose no separate penalty for the multiple sexual assaults, including assaults by penetration, that formed the subject of counts 1 to 4. Nor did she say that it was in the interests of justice. She took the course that she did because of a misapplication of the Totality Guideline. The additional criminality involved in the offending which formed the basis of counts 1 to 4 was very far from minimal. It was wrong in principle to impose no separate penalty for serious sexual offences which plainly crossed the custody

threshold and each of which merited substantial custodial sentences under the applicable sentencing guidelines.

38. A proper application of the Totality Guideline would either have resulted in the passing of consecutive sentences for each of the three categories of offending, with appropriate downward adjustments to ensure that the cumulative sentence was proportionate; or in the passing of a sentence on the lead offence (count 5) uplifted to take the overall criminality of WJ's behaviour into account, with shorter concurrent custodial sentences for the other offences. In the case of counts 3 and 4 those concurrent sentences would have been required to comply with s.278, but as Treacy LJ explained, the extended licence periods would run concurrently to the extended licence period in respect of count 5.

39. In *R v LN* (above) the sexual offending to which the appellant in that case had pleaded guilty was of a very similar nature and committed in a similar timeframe. There were two complainants although most of the offences were committed against one of them. Some of the offences would have been charged under current legislation as assaults by penetration of a child aged under 13, and would have fallen within category 2A; others would have been charged as sexual assault of a child under 13 and would have fallen within category 1A. In that case, the sentencing process was more complicated because the judge had passed consecutive sentences. The Court held that there was nothing wrong with the overall tariff, but the determinate sentences should have been pronounced first and the sentences under s.278 should have been pronounced separately. They restructured the sentences to reflect this. They also clarified how, in such a case, the time at which the offender is eligible to be considered by the Parole Board for release is to be calculated.

40. Mr Stradling submitted that any restructuring of the sentences in the present case under s.11(3) of the Criminal Appeal Act which involved passing determinate sentences of imprisonment on counts 1 and 2, and special custodial sentences on counts 3 and 4, must necessarily involve a reduction in the sentence imposed on count 5 in order to avoid the prohibition on dealing with the Appellant more severely than he was dealt with in the court below. He argued that at present if, hypothetically, the sentence imposed on Count 5 were to be quashed at some future stage, this would result in the Appellant serving no other custodial sentence, whereas that would not happen were the court to impose custodial sentences for the other offences.

41. That argument is misconceived. If it were correct, this Court could never adjust unlawful sentences upwards in an appropriate case, e.g. to reflect a mandatory minimum term, whilst at the same time maintaining a longer concurrent sentence for the lead offence. The Court is required to compare the sentences it intends to substitute with the overall sentence passed by the Judge. If the total custodial term is no greater than it would otherwise have been, and the Appellant's licence period is not extended, he will not be dealt with more severely.

42. There was more force in Mr Stradling's other point that the Court should make some (downward) adjustment to the other sentences to take account of the fact that the Judge had already reflected the overall criminality of the Appellant's behaviour in the uplift of 3 years to her sentence on Count 5 before taking a year off for mitigation.

43. Starting first with the sentences for Counts 1 and 2, these offences were on the cusp of categories 2A and 1A, and after taking into account the aggravating and mitigating features, including the multiplicity of offences committed over a lengthy period, they warranted a determinate sentence of 6 years' imprisonment, which we will reduce to 5 years to reflect part of the uplift on Count 5 referable to the overall criminality.

44. Turning to Counts 3 and 4, we take into account that the starting point in the Guidelines for a single offence charged under s.6 of the Sexual Offences Act (11 years) is a year longer than the maximum sentence that could be imposed for the historical offences of digital penetration which were charged as indecent assaults. Bearing that in mind, were we to start at the bottom of the current sentencing range, which is 7 years, take into account the aggravating and mitigating features identified by the Judge, and make a further downward adjustment of 2 years to reflect the remainder of the relevant uplift on Count 5, a concurrent special custodial sentence for each of these offences under s. 278 of 6 years, comprising 5 years' custody and an extended licence period of 1 year, would be appropriate.

45. Having granted leave to appeal, as indicated at the start of this judgment, we allow the appeal to the extent of quashing the sentences of no separate penalty on Counts 1 to 4 inclusive and substituting the following sentences:

On each of Counts 1 and 2, determinate sentences of 5 years' imprisonment;

On each of Counts 3 and 4, special custodial sentences of 6 years comprising a custodial term of 5 years and an extended licence period of 1 year.

All these sentences are to run concurrently to each other and to the special custodial sentence of 17 years comprising a custodial term of 16 years and 1 year's extended licence which was imposed on Count 5. The appeal against the sentence imposed on that Count is dismissed. That sentence remains unaltered, as do all the ancillary orders made by the Judge.

46. Finally, in keeping with the approach of this Court in *LN*, we clarify that the Appellant will become eligible for consideration for release by the Parole Board when he has served two-thirds of the custodial term of the longest of the concurrent sentences, i.e. the sentence imposed on Count 5.