Neutral Citation Number: [2012] EWCA Crim 1119

Case No: 201201418 A1 and 201201420 A1

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2012

Before :

LORD JUSTICE PITCHFORD
MRS JUSTICE MACUR DBE
and
THE RECORDER OF CARLISLE (HHJ BATTY QC)

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REFERENCE BY THE ATTORNEY GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988
ATTORNEY GENERAL'S REFERENCE Nos. 011 and 012 of 2012
(Roshane Channer and Ruben Monteiro)

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The Attorney General, Mr D Grieve, QC MP, appeared in person with Miss B Cheema
Ms Y Punjani (instructed by **Healey Colbon - Solicitors**) for **Channer**
Ms M Rajshakha (instructed by **Healey Colbon - Solicitors**) for **Monteiro**

Hearing date: 2 May 2012

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Approved Judgment

Lord Justice Pitchford :

1. This is an application made under section 36 Criminal Justice Act 1988 by HM Attorney General for leave to refer sentences of 40 months imprisonment imposed for offences of rape of a child contrary to section 5 Sexual Offences Act 2003. We grant leave.

Introduction

2. The offenders, Roshane Channer and Ruben Monteiro, are both aged 21 years. At the date when their offences were committed, 11 July 2011, they were aged 20 years. They were each charged in separate indictments with the rape of the same child under the age of 13 years on the same occasion, Channer by penetration of the child's vagina with his penis and Monteiro by penetration of her mouth with his penis. Channer pleaded guilty to the indictment on 30 August 2011 before HHJ Farrell QC at Luton Crown Court. Monteiro pleaded guilty before the same judge at the same court on 18 October 2011. On 10 February 2012 the offenders were each sentenced to a term of 40 months imprisonment. This was a technical inaccuracy. The sentences should have been expressed as detention in a Young Offender Institution. In Channer's case 178 days, and in Monteiro's case 130 days, were ordered to count towards sentence for the purposes of section 240 Criminal Justice Act 2003. In addition, the judge imposed a Sexual Offences Prevention Order in each case.

3. The sentencing task which arose for the judge was the proper assessment of the seriousness of the offences. As the Sentencing Guidelines Council guideline on offences contrary to the Sexual Offences Act 2003 explains, at page 5, paragraph 1.2, the seriousness of the offence is to be determined by reference to two main factors, the culpability of the offender and the harm either caused or risked by the offence, including the impact on the victim. Where there is an imbalance between culpability and harm, the culpability of the offender in the particular circumstances of the case should be the primary factor in determining the seriousness of the offence. Since these were sexual offences committed against a child under the age of 13 years the levels of both harm and culpability are inevitably high.

4. The victim was aged 11 years at the time of the offences. The offenders maintained that they thought she was much older. Furthermore, they were charged with the rape of a child who could not in law consent to sexual intercourse, but the offenders asserted that she was a "willing participant". The impact of these issues in the assessment of the seriousness of a section 5 offence has previously been considered by this court in *Attorney General's References numbers 74 and 83 of 2007 (Keith Fenn and Simon Foster)* [2007] EWCA Crim 2550, [2008] 1 Cr AppR (S) 110, and it will be necessary to examine with some care the assistance then given.

The offences

5. The complainant lived at home with her mother and step-father. Her two older sisters had left home. The complainant had been close to her grandmother who died in 2009. Her death had a traumatic effect on the complainant. According to her mother her behaviour deteriorated. She self-harmed. Background information suggests that there was indifferent parental supervision. The complainant took to staying out late at night, a practice which placed her at risk. In November 2010 she was, she alleged, raped by

a man in a house when similar activity was taking place between two other men and two other girls who were relatives of the complainant. More recently, the complainant said, she had been subjected to rape by four males in an alleyway. On the night of 11 July 2011 the complainant was out late while her mother was working. She lost contact with her female friend and found herself alone in Luton town centre. The judge was informed that the complainant had consumed drugs and/or alcohol earlier in the evening. She was approached by a 16 year old boy who was well known to the complainant's family. He was the son of her mother's best friend. The boy at first threatened to tell her mother that she had been with men and then told her that she should go with him to do something for him. Without knowing what it was that he wanted of her the complainant accompanied him to the Iceland store. Outside the store she saw the two offenders. She was taken by all three males to the flats opposite and, once inside, up some stairs to a landing. In her ABE interview the complainant said she felt uncomfortable and was scared. By this time, present with the complainant were the 16 year old, another young male of similar age, and the two offenders.

6. The complainant said that neither of the offenders spoke much. Her top was removed and her trousers were pulled down. Channer stood behind her, bent her at the hip and penetrated her vagina from the rear. He told her that he was going to use a condom but the complainant could not tell whether he did or not. In her interview the complainant said that she tried to stop it but he kept forcing her. Monteiro then joined in. He, in a sitting or semi-sitting position in front of the complainant, held her head and placed his penis in her mouth. He grasped her hair and by that means moved her mouth over his penis. She described feeling as though she was going to choke and vomit. At this time the complainant was aware that the 16 year old who had taken her to the offenders was filming the event on a mobile telephone.

7. There is no evidence that either man ejaculated. When the act was over the complainant was permitted to leave and she went home. In the morning her mother enquired what had happened the night before. The complainant told her that she had been out with friends. The incident came to light in this way - the 16 year old sent the footage from his mobile phone to his step-sister. She downloaded the material to her mother's computer. The complainant's mother learned of the film doing the rounds and the police were informed. The footage was recovered from the computer and the step-sister's mobile phone. The first film depicted sexual intercourse between Channer and the complainant. The second depicted both men penetrating the complainant. In the first film Channer smiled at the camera. As a result he was arrested on 15 August. Later, Monteiro was identified from stills and he was arrested on 1 October. Neither man made any comment in interview. Monteiro's attitude appeared to be one of unconcern. The complainant's account of sexual exploitation in and since November 2010 came to light. The 16 year old was not prosecuted for any offence.

8. The complainant was medically examined on 15 July 2011. She was 5'4" in height and weighed 89 kilograms, almost 14 stones, described as morbidly obese. She appeared well and healthy but emotionally subdued and upset. She complained of tenderness over the supra-pubic area. Genital examination revealed disruption of the hymen which was, in general, consistent with the girl's accounts of sexual activity.

She was suffering a sexually transmitted infection but it pre-dated the current offences.

9. The police investigation led to the involvement of Social Services. The complainant was removed from her maternal home and placed with foster parents with whom it appeared she was settled, happier and well behaved.

The sentence hearings

10. The case was first listed for sentence on 8 November 2011. The facts were opened by Ms Elliott for the prosecution. The judge was plainly familiar with the contents of the papers. Counsel referred the judge to the guideline for rape contrary to section 5 involving children under the age of 13. The prosecution submitted that in the presence of the aggravating feature that the offences were committed by two men in the presence of others (level 2), the recommended starting point was 13 years custody and the range 11 – 17 years custody (Sentencing Guidelines Council guideline Sexual Offences Act 2003, page 25). The judge was referred to a summary of the court's judgment in *Fenn and Foster* in Banks on Sentencing.

11. Both offenders pleaded guilty on a written basis, namely that the complainant was "a willing participant". The prosecution accepted that basis and endorsed the documents. At that stage the judge did not indicate whether he was prepared to accept their basis of plea and it became apparent to the judge that although there had been no written claim by the offenders as to their belief of the complainant's age, there was a live issue as to that belief. The police had interviewed the 16 year old boy who said that he told the offenders that she was "only 11". The offenders were said to have responded that she must be aged 15 years at least. At the hearing counsel for the offenders were instructed that the offenders believed the complainant had been aged 16 years. The prosecution was not in a position on that day to prove that the offenders knew the complainant's true age. Counsel for Monteiro indicated that the offenders might well wish to give evidence in support of their assertion. The judge properly and sensibly adjourned the sentence hearing to enable a *Newton* hearing to take place and the prosecution to prepare its evidence.

12. The adjourned hearing was held on 10 February 2012. In the result the prosecution was unable to adduce any direct evidence of the conversation between the 16 year old and the offenders as to the age of the complainant. The judge indicated that, having seen the first recording of Channer's activity, during which the complainant could be seen apparently smiling at the camera, he would sentence on the basis that the complainant had been a "willing" participant. He had also viewed the ABE interview. His provisional judgement was that the offenders could reasonably have thought that the complainant was aged 14 years but no older. The judge identified three aggravating features of the offences: first, that there was more than one offender each committing an offence in the presence of the other, second, that they gave implicit approval to the filming of the incident by and in the presence of young males and, third, the offenders used the complainant for casual sex, not being concerned what her age actually was. The judge having given this indication, neither offender elected to give evidence.

13. The judge opened his sentencing remarks with the following description of the offences:

> "Each of you has pleaded guilty to the single count on each of your separate indictments of rape of a child under the age of 13. The victim of these two rapes was a vulnerable 11 year old girl who had clearly been subjected to a period of systematic sexual exploitation. Each of you two willingly used this child for your own sexual gratification. It is made all the more abhorrent by your casual attitude to sexual relationships. You see it purely from your own perspective, using another person, in this case a young child, without a care for the consequences. It is aggravated even further in this particular case by the fact that it was a group act and that the event was videoed. I have had here evidence in relation to the act itself and have had to see the short video that was taken of you two raping this young girl. I have also watched part of the ABE … video in order to assess the age of the girl, having regard to submissions which were made to me as to your belief in her age. She was in fact 11 years of age at the material time. But, as I have already found in this instance … you knew or reasonably believed that she was about 14 years of age at the material time. It is conceded by the prosecution that despite her age she was a "willing" participant in this act. Notwithstanding that, this particular provision is there to protect…young girls from this type of behaviour and to protect them from themselves."

14. The judge went on to note the wide disparity in ages between the offender and the complainant, even the complainant's age as they believed it to be. The judge specified the following factors in mitigation: (1) The "willingness" of the complainant, (2) the pleas at the first opportunity, (3) some, but limited, remorse, and (4) the absence of convictions for sexual offences.

15. The judge acknowledged the sentencing guidelines' starting point and range but this was, he said, an exceptional case which required him to depart from the guideline. He could not conclude that the current offences could be compared with those in the case of *Cleverley* [2010] EWCA Crim 1842. They were much more serious. He would take a starting point of 5 years imprisonment which, after discount of one-third for the guilty pleas, produced sentences of 40 months imprisonment. In his sentencing remarks the judge said:

> "As far as the sentence itself is concerned, as has been argued before me, I must apply the Sentencing Guidelines Council's guidance in relation to sentences unless there are exceptional circumstances which enable me to say, in the interests of justice, that I should depart. The sentencing guidelines put the starting point for this type of offence at thirteen years, with a range of eleven to seventeen years. But, those guidelines were not designed with this type of offence that you have each pleaded guilty to in this particular case, because of the fact that, despite her age, … this was consensual in the sense that she was a willing participant; and, secondly, because of the fact that you, as I have already found, reasonably believed her to be fourteen, not as young as eleven."

It is this conclusion of the judge which requires examination by reference to the scheme of the Sexual Offences Act 2003 and the guidelines for sentencing.

Submissions

16. It is now submitted by the Attorney General that the sentences imposed were unduly lenient. The Attorney's detailed submissions can be summarised as follows:

i) The learned judge failed to apply the sentencing guidelines. There was no justification for his departure from the starting point and range indicated at page 25 of the guidelines for offences contrary to the Sexual Offences Act 2003. Notwithstanding the apparent age of the complainant and her "willingness" to engage in sexual activity, the aggravating features of the offences identified by the judge should have kept the starting point within the guideline range, that is 11-17 years custody; alternatively, it was submitted, the judge's starting point fell so far below the range that the sentences imposed were unduly lenient;

ii) The judge over-emphasised the apparent age of the complainant and failed to place sufficient weight upon the obligation upon the offenders to make enquiries as to the age of the child;

iii) The judge gave too much weight to the "willingness" of the complainant. What was happening in reality was the opportunistic exploitation of a young girl, who was plainly vulnerable, for sexual self gratification;

iv) The judge failed to place sufficient weight on the harm inevitably caused by the offence. Activity of this nature at the expense of an 11 year old girl was bound to have a severe effect upon her long term emotional well-being.

17. For the offenders, Ms Punjani and Ms Rajshakha reminded the court of the findings of fact made by the judge at the *Newton* hearing. Those facts entitled the judge to depart from the sentencing guideline, on the authority of *Fenn and Foster*. The judge balanced the aggravating and mitigating features, found that there was exploitation of the complainant and reached his starting point accordingly. It was conceded that the resultant sentences might be regarded as lenient but not, it was submitted, unduly lenient.

The approach of the Sexual Offences Act to adults and children

18. The Sexual Offences Act 2003 created the following non-consensual offences in respect of sexual activity towards persons aged 16 or over (although they apply to victims of any age): rape (section 1), assault by penetration (section 2), sexual assault (section 3) and causing a person to engage in sexual activity without consent (section 4). It is a defence to each such charge that the offender reasonably believed that the victim was consenting. The maximum sentence for offences contrary to section 1 and section 2 is imprisonment for life. The maximum sentence for offences contrary to section 3 is 10 years imprisonment. The maximum sentence for an offence contrary to section 4 is, when the sexual activity comprises penetration of the vagina, anus or mouth of the victim (and in certain other circumstances, see section 4(4))), imprisonment for life.

19. Sections 5 - 8 of the Sexual Offences Act 2003 created a second group of sexual offences against children under the age of 13 which mirror the non-consensual offences created by sections 1 – 4 of the Act: rape of a child under 13 (section 5), assault of a child under 13 by penetration (section 6), sexual assault of a child under 13 (section 7), and causing or inciting a child under 13 to engage in sexual activity (section 8). It is no defence to any of these charges that the child consented or that the offender believed that the child was consenting to the sexual activity concerned, or that the offender believed the child to be older than 13, or indeed older than 15.

20. The maximum sentence for offences contrary to sections 5 and 6, and section 8 when the offence involves penetration of the vagina, anus or mouth with the penis (and in certain other circumstances, see section 8(2)), is imprisonment for life. This is the same maximum as for the equivalent offences under sections 1, 2 and 4 (rape, assault by penetration, and causing a person to engage in sexual activity without consent). The maximum sentence for offences contrary to section 7 is 14 years, which compares with the maximum of 10 years imprisonment for the equivalent offence against adults under section 3 (sexual assault). It is clear that Parliament intended to criminalise sexual conduct towards children under the age of 13 whether they 'consented' or not.

21. The Act created a third group of offences aimed at offences committed by adults against children aged between 13 and 15 years, although they may also be charged when the victim is a child under 13 years: sexual activity with a child under the age of 16 years (section 9), causing or inciting a child under the age of 16 to engage in sexual activity (section 10), engaging in sexual activity in the presence of a child under the age of 16 (section 11), and causing a child under the age of 16 to watch a sex act (section 12). It is no defence to any of these charges that the child consented or that the offender believed the child to be consenting to the sexual activity concerned. When the child was aged under 13 years a reasonable belief that the child was aged over 13 years, or over 15 years, is no defence. It is, however, a defence to each of these charges, if the child was aged 13 – 15 years, that the offender reasonably believed the child to be aged 16 or over.

22. The maximum sentence for the offence of sexual activity with a child aged 13 – 15 years, when the sexual activity involves penetration of the vagina, anus or mouth of the victim by the penis (and in certain other circumstances, see section 9(2)), is a term of 14 years imprisonment (c.f. life imprisonment for offences contrary to sections 4 and 8); similarly for offences contrary to section 10. The maximum sentence for offences contrary to section 11 is 10 years imprisonment; similarly for offences contrary to section 12.

23. By section 13 of the Act a person under the age of 18 commits an offence if he does anything which would be an offence under sections 9 – 12 if he were aged 18. The maximum sentence for such an offence is 5 years custody.

The sentencing guideline

24. The sexual offences guideline at page 5 paragraphs 1.6 – 1.8 identifies, in addition to the need to assess harm and culpability, the requirements of deterrence. At paragraphs 1.10 and 1.11 the guideline states:

> "**The harm caused by sexual offences**

1.10 All sexual offences where the activity is non- consensual, coercive or exploitative result in harm. Harm is also inherent where victims ostensibly consent but where there capacity to give informed consent is affected by their youth or mental disorders:

1.11 The effects of sexual offending may be physical and/or psychological. The physical effects – injury, pregnancy or sexually transmitted infections – may be very serious. The psychological effects may be equally or even more serious, but much less obvious (even unascertainable) at the time of sentencing. They may include any or all of the following (although this list is not intended to be comprehensive and items are not listed in any form of priority):

- *Violation of the victim's sexual autonomy*
- *Fear*
- *Humiliation*
- *Degradation*
- *Shame*
- *Embarrassment*
- *Inability to trust*
- *Inability to form personal or intimate relationship in adulthood*
- *Self-harm or suicide*."

25. At page 6, paragraph 1.12, the guideline explains that exploitative activity is inherently harmful and that in itself increases the offenders' culpability. The Sentencing Guidelines Council gave specific consideration to those offences in respect of which consent could not be given as a matter of law. At page 19, paragraph 2.7 and following the guideline states:

"**The Age of the Victim**

2.7 The extreme youth or old age of a victim should be an aggravating factor.

2.8 In addition, in principle, the younger the child and the greater the age gap between the offender and the victim, the higher the sentence should be.

2.9 However, the youth and immaturity of the offender must also be taken into account in each case.

[Note that at paragraph 1.15 the Council observed:

"The age of the offender will be significant in the sentencing exercise in relation to non-consensual offences, where no special sentencing provisions have been provided for on the legislation. Its significance is particularly acute in relation to the strict liability offences such as 'rape of a child under 13', where the maximum penalty is life imprisonment, especially if an offender is very young and the disparity in age between the offender and the victim is very small."]

2.10 The court in *Millberry* adopted the principle that a sexual offence against a child is more serious than the same offence perpetrated against an adult and attracts a higher starting point. No distinction was made between children age 13 and over but under 16, and those aged under 13.

2.11 Special weight has subsequently been accorded to the protection of very young children by the introduction of a range of strict liability offences in the SOA 2003 specifically designed to protect children under 13:

- The offences of "rape of a child under 13", "assault by penetration of a child under 13", and "causing a child under 13 to engage in sexual activity" where the activity included sexual penetration carry the maximum life penalty.

- The maximum penalty for the new offence of "sexual assault of a child under 13" is 14 years, as opposed to a maximum of 10 years for the generic "sexual assault" offence.

2.12 In keeping with the principles of protection established in the SOA 2003, the Council has determined that:

- Higher starting points in cases involving victims under 13 should normally apply, but there may be exceptions;

- Particular care will need to be taken when applying the starting points in certain cases, such as those involving young offenders or offenders whose judgment is impaired by a mental disorder; and

- Proximity in age between a young victim and an offender is also a relevant consideration."

26. At page 21, paragraph 2.16, the Guideline continues:

> "2.16 All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due consideration whether the victim was able to, or did in fact give consent.
>
> 2.17 Notwithstanding paragraph 2.11 above, there will be cases involving victims under 13 years of age where there was, *in fact,* consent where, *in law,* it cannot be given. In such circumstances, presence of consent may be material in relation to sentence, particularly in relation to a young offender where there is close proximity in age between the victim and offender or where the mental capacity or maturity of the offender is impaired.
>
> 2.18 Where there was reasonable belief on the part of a young offender that the victim was 16 this can be taken into consideration as a mitigating factor."

27. It is to be noted that in paragraphs 2.17 and 2.18 the SGC did not *require* any distinction to be drawn between 'consensual' and 'non-consensual' offences when the victim was aged under 13 years and the offender was an adult. It is said that factual consent *may* be material, and may be particularly material when there is a close proximity in the ages of the offender and the victim, or the offender is immature or a person whose mental capacity is impaired. Secondly, the Council did not recognise that reasonable belief that a victim under the age of 13 years was aged between 13 and 15 years was capable of amounting to a mitigating factor, only that a reasonable belief that the victim was aged 16 years *can* be taken into account as a mitigating factor.

28. The Sentencing Guideline Council's table of starting points and ranges for the offence of rape at page 25 embraces offences committed in different circumstances against adults, children aged between 13 and 15 years, and children under the age of 13 as follows:

Type/nature of activity	**Starting points**	**Sentencing ranges**
Repeated rape of same victim over a course of time or rape involving multiple victims	**15 years custody**	**13–19 years custody**
Rape accompanied by any one of the following: abduction or detention; offender aware that he is suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; offence motivated by prejudice (race, religion, sexual orientation, physical disability); sustained attack	**13 years custody** if the victim is under 13 **10 years custody** if the victim is a child aged 13 or over but under 16 **8 years custody** if the victim is 16 or over	**11–17 years custody** **8–13 years custody** **6–11 years custody**
Single offence of rape by single offender	**10 years custody** if the victim is under 13 **8 years custody** if the victim is 13 or over but under 16 **5 years custody** if the victim is 16 or over	**8–13 years custody** **6–11 years custody** **4–8 years custody**

29. At page 26 the Council lists "Additional" aggravating and mitigating factors. The aggravating factors say nothing about age or lack of consent. Additional mitigating features to be considered where the victim is under 16 are:

> "Sexual activity between two children (one of whom is the offender) was mutually agreed and experimental, [and/or]
>
> Reasonable belief (by a young offender) that the victim was aged 16 or over"

Nowhere in the guideline does the Council recognise 'consent' by a victim under the age of 13, or reasonable belief that a victim under the age of 13 was aged 13 – 15, as a mitigating factor in favour of an adult offender.

30. These provisions in the guidelines and the statutory purpose behind section 5 of the Sexual Offences Act 2003 were considered closely by the court in *Attorney General's References Nos. 74 and 83 of 2007 (Fenn and Foster) [supra]*. In particular we would repeat paragraphs 36 and 48 of the White Paper "Protecting the Public" to which the Vice President, Latham LJ, giving the judgment of the court, drew attention at paragraph 5:

> "36. We believe that there is an age below which consent or not of a child should not be legally significant. Below this age there should be no question that the child agreed to the sexual

> activity. We are therefore proposing that children under the age of 13 should be deemed incapable of giving legally significant consent to any form of sexual activity. The effect of this rule would be that anyone found guilty of sexual activity involving direct physical contact with a child aged 12 or under will be guilty of one of the non-consensual sex offences described in chapter 3. Any sexual intercourse with a child of 13 will be charged as rape. Issues of consent will not be relevant and no alternative verdict will be possible…
>
> 48. There may be circumstances where sexual activity takes place with the ostensible consent of both parties but where one of the parties is in such a great position of power over the other that the sexual activity is wrong which would come within the realms of the criminal law. The most obvious cases involve children and vulnerable people with learning disabilities or mental disorders. The offences in this chapter deal with such cases."

31. In an important passage at paragraphs 11-14 of his judgment the Vice President gave consideration to the assessment of culpability where ostensible consent or apparent age is an issue. Having drawn attention to paragraphs 2.16 and 2.17 of the guideline he continued:

> "11. When considering culpability, therefore, actual consent is recognised as being capable of being a mitigating factor. However, careful consideration should be given in all cases, but particularly where there is a significant discrepancy in age, to the extent to which ostensible consent has been obtained opportunistically, or by means of coercion, which may be subtle, or exploitation, which will be particularly relevant in cases where there may have been an element of grooming. In those cases ostensible consent may well have little value as mitigation.
>
> 12. We use the word "opportunistic" to describe those occasions when the sexual activity does not occur in any form of relationship, which is a matter referred to in [9] of *Corran* [2005] 2 Cr App R (S) 73 (page 453). These will usually be occasions where the sexual activity is likely to be solely for the gratification of the offender. Although in such cases there will not have been the aggravating feature of planning, the need for the protection of the child, from both the predator and from him or herself, is particularly marked. Then, as in all cases, the difference in age between the offender and the child will be of great significance.
>
> 13. As far as apparent age is concerned, the definitive guideline only refers to it as being capable of being a mitigating factor. In the case of a young offender, that is an offender under the age of 18, where such an offender reasonably believes …

> the other person to be 16 or over. This reflects two aspects of the scheme of the Sexual Offences Act. The first is that there is a special sentencing regime for young offenders to which we have already referred but which does not apply to offences under section 5. Secondly, in relation to offences against those aged between 13 and 16, it is a defence to establish a reasonable belief that the other person is 16 or over. It seems to us that inherent in this approach is the view that any adult who embarks on sexual activity with a young person does so at their own risk. Just as anyone in relation to consent has to give due consideration as to whether the victim was able to or did in fact give consent, failure to give due consideration to age will in itself be a substantial element in the culpability of the offence. However that does not mean that a reasonable belief that the victim is 16 or over cannot be a mitigating factor for an adult, that is a person over the age of 18, but the older the offender the less relevant a mistake as to age, even if reasonably held, will be.
>
> 14. In determining the extent to which mitigation relating to consent or age can justify departing from the sentencing bracket, it may be helpful to consider the guidelines on penetrative sexual activity with a person under the age of 16 contrary to section 9 of the Sexual Offences Act, if the offender does not reasonably believe that the other person is 16 or over. The maximum sentence for an adult is now 14 years imprisonment. In the definitive guideline, the Council gives 4 years as the starting point and a sentencing range of 3-7 years. Bearing in mind the legislative purpose of creating the absolute offence under section 5 of the Sexual Offences Act for victims under 13, this would suggest that 4 years would be the minimum subject to plea and personal mitigation in the case of a young adult even where there is ostensible consent and reasonable belief that the victim was 16 or over. We would not wish however to exclude the possibility of a non-custodial sentence in exceptional circumstances."

32. The court in *Fenn and Foster* was not suggesting at paragraph 14 that, merely because the victim gave "ostensible consent" and the offender reasonably believed that victim was aged 16 or over, the starting point and sentencing ranges for section 9 offences would apply to convictions under section 5 of the Act; still less was the court suggesting that the guideline for section 9 offences should apply when the offender reasonably believed the victim to be aged 13-15 years. The Vice President was pointing out only that the guideline for section 9 offences gave an indication that, in the case of a young adult who reasonably believed the victim was aged 16 or over, where the sexual activity was consensual, the *minimum* starting point would be 4 years. It remained necessary carefully to consider all the circumstances, including the nature of the encounter with the victim and the respective ages of the offender and the victim (paragraphs 11-13).

33. The court in *Fenn and Foster* increased sentences for offences contrary to section 5(1). The offenders were aged 24 years and 26 years. Their victims were, respectively, aged 10 years 9 months and 12 years 6 months. Both offenders said that they believed the girl to be aged 16. A doctor who examined the 10 year old reported that "she would easily pass for someone in her late teens". The other girl had made efforts to pass herself off as 16. In both cases there had been preliminary mutual familiarity leading to intercourse. The court regarded the offenders' behaviour as "an opportunistic piece of sexual gratification" at the expense of a young girl which required the protection of the courts in the form of significant sentences. In both cases the minimum starting point before discount for guilty pleas was 6 years custody.

Discussion

34. The plain purpose of section 5 of the Sexual Offences Act 2003 was to render immaterial to criminal responsibility for the rape of a person under the age of 13 years the actual or ostensible consent of the victim. The maximum sentence for rape of an adult or a child who does not consent and for rape of a child under 13 who does consent is in each case imprisonment for life. While, therefore, an offence contrary to section 5 will always be a serious offence, section 5 embraces a wide range of seriousness, from forced non-consensual sexual intercourse between an older man and a very young victim to consensual experimental sexual intercourse between an immature 18 year old and a sexually experienced victim whom he reasonably believed to be aged 16 or over. Such a wide range of seriousness is captured by the section 5 offence that the Sentencing Guideline Council recognised the need to do justice by identifying the particular harm caused by and the culpability of the offender. The sentencing guideline does not expressly distinguish between the upper and lower ends of the range of seriousness, save by reference to the overall range of 8 – 19 years at page 25, but it does provide the sentencing judge with valuable assistance as to the correct approach to assessment. We would summarise relevant considerations for the sentencing judge in a case such as the present as follows:

(1) Careful analysis of the circumstances of a section 5 offence is always required and a *Newton* hearing may be necessary when the claim is made that the victim was consenting in fact and/or that the offender believed the victim to be significantly older than her chronological age. The prosecutor bears a burden of responsibility to ensure that factual concessions to a basis of plea or mitigation of the offence are made only when justified and that, if made, the precise import of the concession is understood by the offender and the court (see further paragraph (3) below);

(2) There is a strong element of deterrence in sentencing for sexual offences committed against young children, whether they are sexually experienced and 'willing' or not. They are, by reason of their young age, vulnerable to exploitation and require protection, sometimes from themselves. It can be assumed that, whatever the circumstances, there is likely to be considerable long-term harm caused by such offences;

(3) Exploitative sexual behaviour towards a child under 13 without consideration for the vulnerability of that child may be just as serious as submission obtained by the use of force or the threat of force. "Ostensible consent" and "willingness" are terms which, in the context of offences against the young in particular, are susceptible to misunderstanding and, even if accurately used, are liable to obscure

the true nature of the encounter between the offender and the victim (see *Fenn and Foster* at para. 11);

(4) The culpability of the offender is measured in part by his own understanding of the harm he was causing or was likely to cause. The guideline does not, however, recognise as a mitigating factor a belief by the offender that the victim was aged 13-15 years. There is a good reason for this. Such an offender knew that the victim was not in law consenting. Nevertheless, the younger the victim, the more serious is the harm likely to result and the greater is likely to be the culpability of the offender. We repeat the advice of the court in *Corran* at para. 8 that the respective ages of the offender and the victim is an important factor in the assessment of seriousness;

(5) The starting point for consideration of the appropriate sentence for a section 5 offence is the table at page 25 of the guideline, and not the table at page 53 which applies to offences contrary to section 9. If the judge decides to sentence outside the guideline range that decision should be justified and explained.

35. We turn to consider the personal circumstances of the present offenders. Channer had previous convictions for possession of drugs and possession of an offensive weapon. He had been recalled to court on several occasions for breaches of court orders but had not served a custodial sentence. The author of the pre-sentence report made the following assessment of risk:

> "While there is no evidence which would suggest that Roshane Channer actively sought an opportunity to sexually abuse an 11 year victim, it is clear that in spite of his experiences as a consequence, there is little or nothing that he considers is necessary to alter in his conduct to prevent this from occurring again in the future. His assertion that the blame lies with the victim's parents allows him to distance himself from his responsibility for his actions and he does not appear to recognise the seriousness of his current position."

The author concluded that there was a likelihood of further similar offending.

36. Monteiro has previous convictions for assault, a public order offence, possession of an offensive weapon, burglary, attempted robbery and possession of drugs. He had previously served periods of up to 5 months detention in a young offender institution. The author of the pre-sentence report made the following assessment of risk:

> "On this occasion Mr Monteiro was involved in the exploitation of a female child for self-gratification supported by his belief that he was not causing harm as she was not resistant. His willingness to join in and failure to question his action is extremely worrying and risky… He has continued to act with self-interest with blatant disregard for the likely impact of his behaviour upon victims, society and ultimately himself."

The author concluded that Mr Monteiro represented a high risk of harm to the public and vulnerable young females.

37. We have received recent reports upon the offenders from their custodial institutions. They are not yet settling and both are presenting disciplinary problems.

38. We turn, finally, to consider whether the sentences imposed upon these offenders were unduly lenient. In our judgment, as the Attorney General recognised, the learned judge set about the task of identifying the proper factual basis for sentence in an exemplary fashion. He identified accurately those mitigating features of the offences which were *capable* of permitting him to depart from the guideline range and the aggravating features against which they should be balanced. It seems to us that the Attorney General's submissions go primarily to the final assessment of seriousness and the application of the guideline. For the reasons we have given, we respectfully disagree with the judge's conclusion (see paragraph 15 above) that level 2 of the guideline at page 25 was not intended to apply to offences such as the present. We can do no better than to resort to the sentencing judge's own description of these offences and to emphasise the following facts:

    (1) These offenders could not have thought that the complainant was older than 14 years of age. It follows that no significant mitigation was available to them on the basis of a mistaken belief in the girl's age. They knew that the girl was incapable of consenting in law to the activity in which they required her to engage;

    (2) They did not care how old she was. They did not make any enquiry of the girl. The circumstances were such that they must have realised that she was a child and, therefore, vulnerable;

    (3) There was a substantial disparity between their ages and the complainant's actual age; there was a significant disparity between their ages and the complainant's age as they might reasonably have believed it to be. We use these descriptions in order to emphasise the gulf in maturity between an 11 or 14 year old victim and the 20 year old offenders. Nonetheless these offenders were still young men;

    (4) The only mitigating feature available to the offenders was the complainant's willingness to engage in sexual activity. As explained in *Fenn and Foster*, however, such "willingness" is of little value in mitigation where the offence amounts to the exploitation of a young child. The circumstances here were that two adults jointly took advantage of a child in degrading circumstances;

    (5) The group nature of the activity (which should not be double-counted) and the recording of the event constituted serious aggravating features of an already exploitative offence;

    (6) The harm done by the offenders will be long-lasting, perhaps permanent.

39. The primary sentencing objective in these circumstances was punishment and deterrence. The aggravating factors identified by the judge serve only to identify the nature of the evil against which the Act and the sentencing guideline seek to achieve the protection of children. In our judgment, the starting point for these offences of rape should not have fallen below 11 years custody and may have been somewhat higher. We are conscious that this must result in a substantial increase in sentence even after giving full credit for guilty pleas. We agree with the judge that there is no

reason to distinguish between these offenders. In each case we quash the sentences imposed and substitute sentences of 7 years detention in a young offender institution. The days ordered will continue to count.