IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00210/B4

On appeal from Nottingham Crown Court
(His Honour Judge Coupland)
[2024] EWCA Crim 1200

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 31st July 2024

B e f o r e:

LADY JUSTICE WHIPPLE DBE

MR JUSTICE GOOSE

THE RECORDER OF WOLVERHAMPTON
(His Honour Judge Michael Chambers KC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

DAVID LEVESCONTE

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Miss L Jones appeared on behalf of the Appellant

Mr B Aina KC appeared on behalf of the Crown

J U D G M E N T

Wednesday 31st July 2024

LADY JUSTICE WHIPPLE:

1. 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 the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

The Background

2. The appellant's date of birth is 7 May 1969. On 4 November 2022, following a trial in the Crown Court at Nottingham before His Honour Judge Coupland and a jury, the appellant was convicted of two counts of indecent assault (counts 1 and 2), one count of attempted rape (count 5), and two counts of rape (counts 7 and 9). He was acquitted of various other counts on the indictment.

3. On 22 December 2022, he was sentenced by the trial judge to a total of 14 years' imprisonment. That sentence comprised a term of eight years on count 5 (attempted rape of C1), nine months on each of counts 1 and 2 (indecent assault of C1) and four years on count 7 (rape of C1), those sentences to be concurrent. He was sentenced to a consecutive term of six years on count 9 (rape of C2). He was made subject to the usual notification requirements and to be included in the relevant list by the Disclosure and Barring Service, in relation to which no issue now arises.

4. A co-accused, MB, was convicted of count 10 (indecent assault). He was sentenced to nine months' imprisonment. He is not involved in this appeal.

5. The appellant now appeals against his sentence with the leave of the single judge

The Facts

6. There were two complainants, C1 and C2. They alleged that they were sexually abused as children when aged between 11 and 13 years by the appellant, who was C1's cousin, and the co-accused MB, who was C1's brother.

7. C1 made a complaint to police officers on 20 October 2019 by way of a 999 call. She was then spoken to by the police on 25 October 2019 when she disclosed that she had been raped and sexually abused in the 1980s when she was a child.

8. Counts 1, 2, 5 and 7 on the indictment related to C1. C1 said that she would wake up in the night to find the appellant, fully dressed, crouched by the side of her bed with his hands under the sheets touching her vagina. She would be dressed in a nightie, without knickers. This was counts 1 and 2 (indecent assault). At the time of count 1, C1 was 10 to 11 years old and the appellant was 14 to 15 years old. At the time of count 2, C1 was 11 to 12 years old and the appellant was 16 or 17 years old. On one occasion, the appellant took C1 to the outside toilet at night and sat on the toilet seat. He was naked and she was wearing only a nightie. He proceeded to make her sit on his erect penis and attempted to penetrate her vagina, but, due to her age, she was too small. She could feel his penis pressing against the lips of her vagina. She said he might have penetrated her but "not much". She told him not to do it. This was count 5, attempted rape. C1 was then 10 to 11 years old and on the judge's findings the appellant was 16 or 17. On another occasion, whilst walking down a road close to her home, the appellant approached her, put his arm around her and walked her around the corner. She did not want to go with him. He took her into the allotments where he put her on the floor, got on top of her and put his erect penis inside her vagina. It happened very quickly. She was telling him "No" and that it was wrong. This was count 7, rape. The judge

found that the appellant was 16 or 17 when this occurred.

9. C1 told her best friend, C2. C2 later told C1 that the appellant had had sex with her as well, when C2 was about 13 years old.

10. With the information received from C1, the police located C2 and spoke to her on 26 January 2020. She recalled an incident in a park close to C1's home address. It was summertime. It was light but starting to become dark. She was on her back, going in and out of consciousness and feeling as though she was under the influence of something. Her trousers had been pulled down and her knickers were around her ankles. MB was touching her pubic area and she was pushing him away. The appellant then got on top of her, pushed her and proceeded to put his penis into her vagina. She felt a pain inside her vagina. She recalled trying to push him away. This was count 9, rape. C2 was 12 years old at the time; the appellant as aged 17, on the judge's findings.

The Sentence

11. These offences had occurred in the 1980s and by the time of sentence the appellant was 53 years old. The judge set out the background facts and turned to the individual counts on which the appellant had been convicted. He considered them by reference to the Sexual Offences Guideline.

12. The judge said that counts 1 and 2 would nowadays be charged as sexual assault of a child under 13 years, which carried a maximum sentence of 14 years' imprisonment. Both offences fell within category 2B. They were aggravated by the difference in age between the appellant and C1, the location of the offences, and the fact that they reflected repeat offence.

13. The judge said that count 5 would now be charged as attempted rape of a child under 13,

with a maximum sentence of life imprisonment. The offence fell within category 3A. There was an element of grooming, but the sentence would reflect the fact that the offence was an attempt, albeit close to the full offence.

14. The judge treated count 7 as a rape, but not a rape of a child under 13 because, as he said, the jury had not been sure that the appellant had had sexual intercourse with C1 when she was under 13, which was said to have pre-dated this incident. This was a reference to the jury's acquittal of the appellant on count 6 on the indictment (sexual intercourse with a girl under 13). The judge said this offence fell within category 3A of the relevant guideline.

15. The judge said that count 9 would now be charged as a rape of a child under 13 years. The offence fell within category 2A of that guideline. C2 was particularly vulnerable due to her personal circumstances at the time, and the offence was committed not just by the appellant but with another person, namely MB.

16. The judge reminded himself that he was to have regard to the appellant's age at the time of offending and the sentence that would have been imposed at the time. He identified a number of aggravating features and the available mitigation. He noted that the appellant had been out of trouble for a long period of time. He had had a difficult family situation at the time of the offending, including experiencing domestic abuse. He had now been in a stable relationship for the last 30 years and had three children. The offences were committed when he was under the age of 18 years.

17. The judge said that the appellant's character and the delay had minimal impact on sentence. The appellant had been able to enjoy the benefit of life since these offences in ways that the complainants had not been able to. The delay was largely because the appellant would not admit what he had done. He had shown no remorse either during his trial or in the

course of the sentencing exercise.

18. The judge said that he would pass an aggregate sentence on count 5, which would include count 7 and counts 1 and 2, so as to reflect the offending against C1; and a consecutive sentence on count 9, which was the offence against C2. He said that both lead sentences would be reduced to reflect totality and to make sure that the overall sentence was not too long. The sentences would then be reduced by one-third to reflect the appellant's age at the time of the offending and the fact that both he and MB were children at the time. But the judge was not prepared to reduce the sentence further, given the number of offences and the fact that both of them knew that what they were doing was seriously wrong.

19. On count 5, which incorporated counts 1,2 and 7, the judge said that the starting point for an adult would have been 12 years' imprisonment, but he reduced that to eight years to reflect age. He imposed nine months' imprisonment on each of counts 1 and 2, and four years' imprisonment on count 7, those sentences to be served concurrently with the lead sentence on count 5.

20. On count 9, the judge said that the starting point would have been 13 years' imprisonment for an adult, if it had stood alone. He reduced that to nine years for totality. He then reduced it further to six years, to reflect the appellant's age at the time of the offending. That sentence was ordered to run consecutively to the sentence on count 5.

21. Thus, the total sentence was 14 years' imprisonment.

The Grounds of Appeal

22. The appellant's original grounds of appeal, which are undated, assert that the sentence of 14 years' imprisonment was manifestly excessive. The following specific points are

advanced:

(1) A term of eight years' imprisonment was imposed on count 5 but there was no reduction in sentence to reflect the fact that the offence was an attempt.

(2) The reduction of one-third to account for the appellant's age at the time of committing the offences was too low.

(3) There should have been a further reduction to recognise the appellant's unstable upbringing.

(4) There should have been a further reduction to recognise the period of time since the offending, where the appellant had not committed any other offences, sexual or otherwise.

(5) Although there were two complainants, the imposition of consecutive terms failed to take into account the totality of offending and was manifestly excessive.

23. The Criminal Appeal Office wrote to counsel for the appellant, Miss Lucy Jones, on 30 March 2023, posing two questions. The first of those has fallen away and it is unnecessary for us to refer to it. The second raised a query in relation to count 5. It said, so far as relevant:

> "Depending on when this offence was committed, the maximum sentence for an adult would either be seven years' imprisonment or life imprisonment. The offence was committed between 21 February 1984 and 20 February 1986. According to the table provided, the maximum sentence was

> increased to life imprisonment on 16 September 1985. Was there ever a finding as to when the offence was committed as this would evidently impact on the maximum sentence? It is noted that in the sentencing remarks the judge comments "you were about 17"[1] … Furthermore… the maximum is noted as being a detention centre order of up to four months if the [appellant] was 14 or detention of up to 12 months in a [young offender institution] if 15 or over and therefore the same query is raised as to whether any finding was made as to when this offence occurred and the age of the [appellant]."

24. In response, Miss Jones filed amended grounds of appeal. She took no issue with the sentence imposed on counts 1 and 2. However, she maintained that the appellant had been 15 to 16 years old at the time of the commission of the offence charged in count 5, at which point, as the Criminal Appeal Office had pointed out, the maximum sentence which could have been imposed on the appellant was a term of detention in a young offender institution not exceeding 12 months. The judge was in error in taking count 5 as the lead offence, she submitted. He should have taken count 7 as the lead offence, given that detention for that offence was not the subject of any time limit, even for a person under the age of 18. Miss Jones argued that the judge had been correct to impose a period of four years' imprisonment for count 7 and that, although it was open to the judge to uplift that sentence to reflect the other offending, the total sentence for the offending against C1 would have been much less than the eight years' imprisonment finally imposed, if count 7 had been taken as the lead offence. She submitted that the appeal should be allowed on that basis.

25. The Crown filed an amended Respondent's Notice on 11 April 2023 responding to these latest developments. They argued that the judge was entitled to impose the sentences that he did, which fell within the permissible range.

26. The single judge granted leave on 12 June 2023 and invited a closer focus on issues of

[1] Elsewhere stated in the judge's sentencing remarks as "16 or 17".

totality, passage of time and age.

27. On 16 June 2024, Miss Jones filed a skeleton argument in which she made a number of points, some of which had been before the single judge, but others of which were new points. She argued:

> (a) The maximum available sentence for count 5, on the basis that the offending did or might have occurred before 16 September 1985, was seven years' imprisonment. The sentence on count 5 exceeded the statutory maximum and for that reason was wrong in principle.
>
> (b) The appellant would have been aged 15 or 16 years at the time of the offending. The maximum to which he could have been sentenced on count 5 would have been 12 months' detention in a young offender institution, so that eight years on count 5 was manifestly excessive.
>
> (c) The judge failed to reflect the passage of time since these offences were committed. During the 40 or so intervening years, the appellant had received only one caution for harassment in 2009. He had no record for sexual offending and had established a family life. This was a strong mitigating factor which should have led to a further reduction in sentence.
>
> (d) Count 7 was wrongly placed in category 3A. Under the guideline, it should have been placed in category 3B.
>
> (e) Count 7 should have been the lead offence, and the other offences should have been treated as aggravation of that lead offence.

(f) There should have been a separate discount or reduction to reflect the difficult nature of the appellant's childhood, separate from the one-third reduction to reflect his age at the time of commission of the offences. He had an unstable upbringing, disrupted accommodation and a lack of familial presence or support.

(g) As a matter of totality, four years' imprisonment was simply too long for an offender who was a child at the time.

28. The Crown had not responded to Miss Jones' skeleton argument when the case came before the court on 18 June 2024. The appeal was adjourned on that date. The court gave directions that the Crown were to prepare a skeleton argument and were to be present at the adjourned hearing. We are very grateful for the skeleton argument dated 19 July 2024, which has been filed by Mr Benjamin Aina KC, who represented the Crown below and who responded to the court's directions.

29. Mr Aina has helpfully reviewed the position for counts 5, 7 and 9. He has provided some case law and guidance in support of what the sentences would have been if the appellant had been sentenced at around the time that the offences were committed, as well as the up to date guidelines for each offence. Mr Aina accepts that the judge failed to make sufficient allowance for totality.

30. Miss Jones has responded in a document dated 30 July 2024, for which we are also grateful.

31. A great deal of ink has been spilt on paper in the course of this appeal, and a number of

points now require determination.

Discussion: Approach

32. The judge was assisted by detailed sentencing notes from each party and a table setting out the maximum for each charged offence. With the benefit of those documents, the judge circulated his own note on approach to sentence, which document was agreed by all parties before the judge proceeded to sentence. This was a thorough and sensible way of approaching what was a complex sentencing exercise. The judge is to be commended for his approach. The reasons we shall give for varying his sentence, to which we shall shortly come, are not in any way a criticism of his approach to sentence at the time.

33. The judge was well aware of the sexual offences – historical definitive guideline. He reminded himself that it was necessary in cases where the offender had crossed a significant age threshold between the date of the commission of the offence and the date of conviction also to have regard to the guideline on sentencing children and young offenders, in particular in relation to cases, as here, where the maximum sentence on the date of conviction was greater than that available on the date the offence was committed: see paragraphs 1 to 3 of that guideline. He was aware of the approach in *R v Limon* [2022] EWCA Crim 39, in particular at [34], which we note has now been clarified in the subsequent case of *R v Ahmed* [2023] EWCA Crim 281: see [21] to [22].

34. We turn to the sentence as imposed. It is not necessary for us to dwell on counts 1 and 2. There is no challenge to the sentences imposed on those counts, which were appropriate.

35. So far as the sentence on count 5 is concerned, there are two problems. The first is that the judge made no finding about precisely when the offence charged in count 5 occurred. The judge found that count 5 occurred when the appellant was “about 17” or "16 or 17" (both

things are stated in his sentencing remarks). The appellant's date of birth is 7 May 1969. That means that the offending in count 5 occurred on or after 7 May 1985. But it could have occurred before 16 September 1985, on which date the statutory maximum for the offence of attempted rape increased from seven years' imprisonment to life imprisonment. The indictment period spanned the legislative change. The judge did not make any clear finding about when this offence occurred (ie whether before or after the legislative change) and we have a concern that the sentence on count 5 of eight years exceeded, or might exceed, the statutory maximum at the time of the offending.

36. The second and related difficulty is that the maximum permissible custodial sentence for attempted rape by a person of the appellant's age (namely 16 or 17) was limited to up to 12 months' detention in a young offender institution, because, at least before 16 September 1985, the statutory maximum was less than 14 years. Even accepting that it might have been open to the court to go up from that point when sentencing an adult who had offended as a child (see [32(v)] of *Ahmed*), it is difficult to see how an increase to eight years could be justified; certainly, if that was the judge's approach, it needed to be carefully explained. In our judgment, given these difficulties, the sentence of eight years' imprisonment on count 5 cannot stand and must be quashed.

37. We agree that the lead sentence should have been imposed on count 7. That carried a maximum of life imprisonment and was not subject to any limit on the term for which a young person could be detained or imprisoned. Miss Jones seeks to persuade us that the sentence of four years' imprisonment imposed by the judge on count 7 was the correct sentence. That submission requires close analysis, because that sentence was not imposed as the lead sentence and was not intended to reflect the other offending under counts 1, 2 and 5.

38. Our starting point in considering the appropriate sentence on count 7 is to establish what

the likely sentence for that offence would have been if the appellant had been sentenced at the time. Count 7 occurred, on the judge's findings, when the appellant was 16 or 17 years of age – i.e. after 7 May 1985. Following the approach in *Ahmed*, we have explored the likely sentence at the time with Mr Aina's help. He draws our attention to *R v Billam* 82 Cr App R 347, which was decided on 21 February 1986. That suggested a starting point for an adult of five years' imprisonment, and listed various aggravating features which might elevate the sentence, including, so far as might be thought pertinent to this appeal, planning, whether the rape was repeated, a victim who was very young, and whether the effect on the victim was of special seriousness. Mr Aina has also helpfully researched sentences imposed on young persons for rape in the 1970s and through to the mid 1980s. Those cases all turned on their own facts, and we have not in the end found them to be particularly helpful in resolving this appeal.

39. We have had regard to the rape guideline. At the time of sentence it was common ground that count 7 fell under category 3A of that guideline, which would have led to a starting point of seven years' imprisonment in a range of six to nine years. However, Miss Jones has submitted to us that count 7 properly falls within category 3B of that guideline, with a starting point of five years' imprisonment in a range of four to seven years.

40. The judge had put the offence into category 3A on the basis that there was grooming. Miss Jones submits that this is an aggravating factor to be taken into account, but not a feature listed in the guideline as an indicator for category 3A. In short, Mr Aina agrees with that submission. He agrees that grooming is not a factor listed in the rape guideline. It is, of course, a factor listed in the guideline for rape of a person under the age of 13, but that guideline is not applicable to count 7.

41. Accordingly, if we were to apply the rape guideline, this would be category 3B offending

with a start point of five years' imprisonment in a range of four to seven years.

42. Mr Aina submits, and Miss Jones accepts, that there must be an increase in the sentence to reflect not only the significant aggravating factors – some grooming, some deliberate isolation of the victim, and at least some planning – but also the very serious effect that this offending had on the victim. Bearing in mind the evidence that was before the judge and that we also have considered, that factor cannot on any view be underestimated.

43. An increase is also required to reflect the other offending, namely the offending on counts 1, 2 and 5.

44. We arrive at a notional sentence at this stage, counting the various aggravating features, of something in the region of seven years, taking account of both the contemporary and the historic position. We would reduce that by one year, to reflect some aspects of personal mitigation (which the judge did not consider to be particularly strong – and notwithstanding Ms Jones' able submissions, we are with the judge on that) and totality. That gives a sentence of six years' imprisonment.

45. Miss Jones does not now dispute the reduction of one-third to reflect the appellant's youth. On the judge's findings, the appellant was 16 or 17 at the time of offending and not 15 or 16 as Ms Jones suggested. That brings the sentence down to four years' imprisonment.

46. Thus, for reasons which have required a little explanation, we are in agreement with Miss Jones that the sentence imposed by the judge on count 7 was the correct sentence.

47. The sentences on counts 1 and 2 remain unchanged, nine months' imprisonment on each, to be served concurrently. The sentence we impose on count 5 is one of ten months'

imprisonment to be served now concurrently with the lead sentence on count 7. The sentence of ten months' imprisonment on count 5 reflects the fact that count 5 was an attempt, albeit that it was very nearly the full offence; we sentence on the basis that it was subject to a limit of 12 months' detention in a young offender institution at the time, giving the appellant the benefit of the doubt on that point.

48. In summary, that means that the appellant will serve a term of four years' imprisonment to reflect all of his offending against C1.

49. We turn to count 9. We do not disturb the consecutive term of six years' imprisonment on count 9. This reflects the rape of C2. We note that that sentence already comprises a substantial discount for totality and youth. It is not challenged by Miss Jones.

Conclusion

50. The appeal is therefore allowed. The sentence on count 5 is quashed. We substitute on count 5 a sentence of ten months' imprisonment. That sentence will be served concurrently to the sentence on count 7, which remains undisturbed at four years' imprisonment. Likewise, the sentences on counts 1 and 2 are to be served concurrently and remain undisturbed at nine months' imprisonment. We do not disturb the sentence on count 9, which is to be served consecutively to the sentence on count 7, that is a sentence of six years' imprisonment. The total sentence is one of ten years' imprisonment.

51. May we thank counsel for their attention to this case, for their helpful submissions and for the extensive work that has gone into this appeal.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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