Neutral Citation Number: [2020] EWCA Crim 881

Case No: 201904630 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SHEFFIELD CROWN COURT
Her Honour Judge Sarah Wright
T20187254, T20190296, T20180702

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2020

Before :

LORD JUSTICE BEAN
MRS JUSTICE MCGOWAN
and
MR JUSTICE MURRAY

- -

Between :

REGINA	**Appellant**
- and -	
DYLAN JOHN LAMB	**Respondent**

- -
- -

Gordon Stables (instructed by **The Registrar**) for the **Respondent**

Hearing date : 23/04/2020

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Approved Judgment

Mrs Justice McGowan :

Introduction

1. This case concerns the application of the principle of *measured reference* as it affects the imposition of sentences for historic sexual offences against children by reference to contemporary sentencing practice. *R v H (J) [2011] EWCA Crim 2753.*

2. Reporting restrictions apply in this case and nothing must be published that would lead to the identification of the complainants throughout their lifetimes.

Background

3. The appellant is 72 years of age. He was convicted after trial, of 21 counts of sexual abuse against five young boys in his care as a sports coach between 1977 and 1999. On 4 December 2019 in the Crown Court sitting in Sheffield, Her Honour Judge Sarah Wright sentenced him to a total term of 30 years imprisonment.

1	Indecent Assault on male s.15(1) Sexual Offences Act 1956 (D *aged under 16*)	3 years	consecutive	10 years maximum
2	Indecency with a child, s. 1(1) Indecency with Children Act 1960 (L *aged 13*)	9 months	concurrent	2 years maximum
3	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (L *aged 13*)	2 years	concurrent	10 years maximum
4	Indecency with a child, s. 1(1) Indecency with Children Act 1960 (L *aged 13*)	1 year	concurrent	2 years maximum

5	Indecency with a child, s.1(1) Indecency with Children Act 1960 (L *aged 13*)	2 years	concurrent	2 years maximum
6	Indecency with a child, s.1(1) Indecency with Children Act 1960 (L *aged 14*)	2 years	concurrent	2 years maximum
7	Indecent Assault on male s.15(1) Sexual Offences Act 1956 (L *aged 13*)	6 years	concurrent	10 years maximum
8	Indecency with a child, s.1(1) Indecency with Children Act 1960 (L *aged 13*)	6 years	concurrent	2 years maximum
9	Indecent Assault on male s.15(1) Sexual Offences Act 1956 (L *aged 14*)	6 years	concurrent	10 years maximum
10	Buggery, s.12 Sexual Offences Act 1956 (L *aged 13*)	8 years	consecutive	Life
11	Buggery, s.12 Sexual Offences Act 1956 *(L aged 14)*	8 years	consecutive	Life
12	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (L *aged 14*)	5 years	concurrent	10 years maximum
13	Buggery, s.12 Sexual Offences Act 1956	8 years	concurrent	Life

	(L *aged 15*)			

14	Indecent Assault on male s.15(1) Sexual Offences Act 1956 (L *aged 15*)	5 years	concurrent	10 years maximum
15	Buggery, s. 12 Sexual Offences Act 1956 (L *aged 16)*	5 years	consecutive	10 years maximum
16	Buggery, s. 12 Sexual Offences Act 1956 (L *aged 17)*	5 years	concurrent	10 years maximum
17	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (L *aged 17*)	2 years	concurrent	10 years maximum
18	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (P *aged 14 or 15*)	3 years	concurrent	10 years maximum
19	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (A *aged under 15)*	5 years	consecutive	10 years maximum
20	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (M *aged 15*)	1 year	consecutive	10 years maximum
21	Indecent Assault on male s. 15(1) Sexual Offences Act 1956 (M *aged 15*)	3 years	concurrent	10 years maximum

4. As is obvious from the table above the sentence on count 8 of 6 years, at a time when the statutory maximum was 2 years is unlawful. In fact, as it was ordered to run concurrently, it has no effect on the total but must be corrected.

Facts of the Offences

5. The appellant was a coach at football clubs and a hockey club during the 1970's, 80's and 90's. He moved from one club to another in the general area of North Lincolnshire and South Yorkshire. He took advantage of his position as a coach to carry out acts of sexual abuse against the boys in his care. The five complainants played football or hockey for different clubs and were involved in team sports at their schools or local club at various times between the years 1977 and 1999 which was when the offending took place. The complainants ranged in age from 11 to 17.

6. In South Yorkshire where he was a football coach he went by the surname of Hawthorne and in North Lincolnshire he was a hockey coach who went by the surname of Lamb.

7. The abuse took various forms, represented in the counts on the indictment. The appellant would masturbate in front of them, he would touch them sexually, he would masturbate the boys and he performed oral sex on one of them. L, the complainant in counts 2 to 17, was raped anally on a number of occasions and had a candle put into his anus by the appellant

8. All his victims lived with the effects of what he had done to them for many years. Some confided in friends but felt unable to go to the authorities. In late 2016 one of them did decide to speak out; P, the complainant in Count 18. He was 45 years old when he went to the NSPCC to speak about the abuse that he had suffered. The NSPCC referred the matter to the police and so in his mid-40s P explained to the police what happened to him in 1982/83 when he was 11 years old at the hands of his

then football coach. He described how he had met the appellant through Dearne Valley FC who had their home ground in Brampton near Doncaster, South Yorkshire.

9. **Count 18** reflects the offending against P. On a Sunday in 1982 or 1983 the appellant invited P and a friend on a bike ride. They all returned to the appellant's home. There he pulled P onto the sofa and, forcing his hand into P's underpants, he touched P's penis.

10. The next person to come forward was L. He was 53 when he spoke to the police in February 2017. He told the police that the appellant had regularly abused him from about 1977 to 1982/83 when he was between the ages of 13 years old and 17 years old. He had seen national media coverage regarding abuse of young boys in football clubs and realising he was not alone he decided to speak out about events that had occurred over 30 years ago. He spoke of abuse at the hands of his football coach, at the time the appellant was working at a school. That abuse saw him being groomed into having regular sexual contact with Mr Hawthorne, as he knew him. The abuse began with touching but over time developed into anal rape. The appellant and L stayed in contact over many years, the abuse in his case lasted much longer and was more severe. The following is a summary of the counts on the indictment in which L was the victim.

Count 2, the appellant masturbated in L's presence.
Count 3 the appellant masturbated L.
Count 4 the appellant made L touch the appellant's penis over clothing.
Count 5 the appellant made L masturbate him.
Count 6 the appellant made L masturbate the appellant.
Count 7 the appellant sucking L's penis
Count 8 the appellant put his penis in L's mouth
Count 9 the appellant inserted a candle into L's anus
Count 10 buggery when L was 13.

Counts 2 to 10 occurred when L was around 13 years old

Count 11 buggery when L was 14.
Count 12 the appellant sucked L's penis when he was 14.
Count 13 buggery when L was 15 years old.
Count 14 the appellant sucked L's penis when he was 15.
Count 15 involved buggery when L was 16.
Count 16 was buggery when L was 17.
Count 17 the appellant sucked L's penis when he was 17.

11. **Count 19** reflects the offending against A. He was the third person to speak to the police in August 2017. He is younger than P and L and in his case the abuse took place later, in about 1994 when the appellant was a hockey coach. He was the juniors' coach at a hockey club near Scunthorpe, in North Lincolnshire where he continued to offend. The appellant organised other events apart from hockey training and games. One event was a camping evening. Other boys spent the night under canvass but A who was 14 or 15 years old was told he could stay in the appellant's home. A bed was made for him by pushing two chairs together and he was happy with the arrangement

thinking it was a privilege. A was woken up by the appellant sucking his penis. He told him to stop and the appellant asked him "why" saying "You're enjoying it".

12. **Count 1** reflects the offending against D. He was the next of the victims to contact the police. The offending against him occurred in the 1970s when the appellant was a football coach back in South Yorkshire but at a different club from the one that P and L attended. D went to the police in August 2017 when he was 53 years old. When he was about 12 years old he played football at a local club in South Yorkshire. The appellant, then known by the name Hawthorne, was the coach. He also used to organise other activities, including walking. On a walk, as they sat down to rest, the appellant showed pornographic pictures to D and then masturbated him.

13. **Counts 20 and 21 reflects the offending against M.** M was the last of these complainants to come forward. He spoke to the police in May 2018, when he was 33. He told what happened to him when he was 14 years old boy. He played hockey in 1998/9. He had heard that A had come forward and felt that it was time that he spoke to the authorities. He told the police that he had been sexually abused in a hotel room by the appellant who had first touched his nipples and then his penis under his clothing and had encouraged him to kiss another boy who was also present.

14. His offending began in South Yorkshire in around 1976 and continued until 1999 in North Lincolnshire. During that time span the appellant moved from club to club. He had used different names over that time span.

15. There was a gap in his offending as in November 1983 he was sentenced to two years for two counts of indecency, one count of indecent assault on a male under 14, intercourse with a girl under 16 and buggery of a male under 16 and five offences were taken into consideration.

Sentencing Exercise

16. In passing sentence, the learned Judge rightly observed that these offences were an exploitation of the appellant's position as a sports coach. He had targeted his victims and planned his conduct so as to be alone with them. He relied upon the fact that they were unlikely to report his behaviour and he continued on the basis that he was safe from detection, even though some other offending had come to light. He had not been deterred by conviction and a prison sentence for similar offending during the indictment period. He disguised his identity by changing his name and married without telling his wife of his previous convictions.

17. The Judge rightly commended the victims for their bravery in speaking up. She outlined the terrible and traumatic effect the abuse had on these men. It was correctly described as devastating. She found that each had suffered psychological harm and had lived with the consequences of the offending since their adolescence.

18. In the careful and considered sentencing remarks, at page 2G-3B, the learned Judge set out her approach to the dealing with such a lengthy passage of time between offending and sentence.

"The offences for which I must pass sentence today took place many years ago at a time when the sentencing climate was less severe than it now is. There is clear

guidance as to how I should approach this task. It is set out in annex B to the Sexual Offences Definitive Guideline. I must sentence you in accordance with the sentencing regime applicable today, not at the date of the offence, but I am limited to the maximum sentences available at the time of the offences. I must assess the seriousness of the offence and must be guided as to that by the current guideline, which offers assistance to me in the assessment of harm and culpability as well as giving broad ranges into which sentences should appropriately fall. I must consider the relevance of the passage of time carefully and decide whether that is an aggravating, mitigating or neutral factor. But it seems to me that there has been delay in bringing you to justice because, as a result of your behaviour towards them, your victims felt unable to speak up out of fear, some out of a sense of shame and some out of a fear of not being believed or a fear of being blamed themselves for what was happening to them. Where it is necessary to do so, I must consider how the offences you committed would be characterised under modern legislation and modern guidelines."

This was a model approach and correctly summarises the guidance given by the sentencing Council in dealing with cases of historic abuse. The issue in the appeal is whether she failed adequately to make measured reference to definitive sentencing guidelines now in effect, relevant to the established facts of each historic offence.

19. She found that the number, nature and gravity of these offences, the serious breach of trust and the psychological harm caused to each victim gravely aggravated the position. She also found there to be "very significant planning". The previous convictions for like offences was obviously a statutory aggravating feature. She considered the appellant's age as a relevant factor. The combination of the many aggravating features would have entitled her to go outside the normal range for an individual offence but she made it clear that she would apply the principle of totality to avoid a sentence that would otherwise be "out of all proportion". Therefore, she adjusted the length of individual terms and ordered that some of those terms should run concurrently to reach the total of 30 years which she imposed.

Grounds of Appeal

20. In his extremely helpful written and oral submissions Mr Stables argues that the total sentence imposed was manifestly excessive. He submits that there was a failure to make "measured reference" to the current guidelines, as a consequence of which some individual terms were manifestly excessive and insufficient adjustment was made to satisfy the principle of totality. He argues that the effect of the failure to achieve the proper measured reference meant that some of the individual sentences did not adequately reflect the relationship of the nature of offending to the historic maximum sentence.

21. He cites the sentence on count 5 as the one of the most stark examples of his proposition. The statutory maximum at the time of the offending was 2 years imprisonment. The contemporary statutory maximum is 14 years. The Judge imposed the maximum sentence available at the date of offending without adjustment to reflect the fact that within the range of offending the conduct was not at the very highest level. Similarly, on count 4, the contemporary equivalent would be an offence under s.10 of the Sexual Offences Act 2003, causing a child to engage in sexual activity. That is the contemporary equivalent offence and has a statutory maximum of 14 years. Mr Stables argues that this incident in which the appellant made the victim

touch his, the appellant's, penis over clothing, would be a Category 3A offence on the modern guideline. It would have a starting point of 6 months. On this count the Judge imposed a term of 1 year when the statutory maximum at the time was 2 years.

22. He argues that the starting point should be lower than a contemporary starting point if the maximum sentence is lower, and in some instances much lower. The construction of the final sentence by the addition of terms that failed adequately to meet the need for calibration between the old regime and the new lead to a total term that, without further adjustment to accord with the principle of totality, was manifestly excessive.

Discussion and Conclusion

23. The difficult problems in the sentencing of, often, elderly offenders for offences committed many decades ago have come before this court in many cases but definitive guidance was provided in the case of *R v Forbes and others [2016] EWCA Crim 1388*, Lord Thomas of Cwmgiedd CJ set out the correct approach

"The basic principles

4. *As is clear from paragraphs 1 and 2 of annex B, reiterating what was said in R v H:*

i) The offender must be sentenced in accordance with the regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing and to current sentencing practice. ……

ii) The sentence that can be passed on the offender is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum has been reduced, when the lower maximum will be applicable.

5. *Although these principles are clear and, as we shall explain, clear guidance was given in annex B, various issues have arisen in relation to their application.*

Regard to the guidelines for the equivalent offence

6. *Paragraph 3 of the annex B provides:*

"The court should ***have regard to*** *any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003."*

7. *This reflected [47] of H where Lord Judge CJ said:*

"(a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and ***by measured reference to*** *any definitive sentencing guidelines relevant to the situation revealed by the established facts.*

(b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. …."(emphasis added)

8. *……*

> 9. *The phrase "have regard to" (which was intended to have the same meaning as "by measured reference to") was intended to make it clear that the judge should not simply apply the relevant guideline applicable at the date of sentence, subject to any lower statutory maximum sentence applicable at the date the offence was committed, but use the guideline in a measured and reflective manner to arrive at the appropriate sentence."*

23. The term "measured reference" is not intended to prescribe a mathematical exercise, but rather to cause the court to reflect the previous maximum sentence as part of the composition of the sentence based on current guidelines. It must achieve a proper calibration and thereby some reduction to reflect the statutory maximum available at the date of offending.

24. Applying the approach set out in *Forbes* to the current case we find that, despite the conspicuous care with which the learned Judge approached this difficult sentencing exercise, there was a failure to apply measured reference between the current guidelines and the statutory maximum terms in force at the time.

25. This court is required to look at the total sentence and assess whether the ground that it is excessive has been established. Applying the principle in *Forbes* and making measured reference to relevant contemporary sentencing guidelines in light of the statutory maxima at the relevant time, we conclude that the total term of 30 years is excessive and that a total of 25 years would have been appropriate. This does not, in any way, under-estimate the appalling nature of the sexual abuse in this case nor the devastating effect it has had on the victims and their families.

26. Therefore, adjusting the total to achieve a proportionate sentence without a total and unnecessary reconstruction we order that the five year term on count 15 should run concurrently to the other sentences, thereby reducing the total term to 25 years imprisonment.

27. The sentence imposed on count 8 is unlawful, the Judge imposed a term of six years for an offence that carried a two year maximum at the time. That sentence will be reduced to a term of one year. That was a serious offence and a term of half the statutory maximum was richly deserved. As it had been ordered to run concurrently, that has no practical effect on the total term.

28. To that extent this appeal is allowed.