IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1280

No. 202201091 A4

Royal Courts of Justice

Thursday, 30 June 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE CUTTS
HER HONOUR JUDGE DEBORAH TAYLOR, RECORDER OF WESTMINSTER

IN THE MATTER OF A REFERENCE BY HER MAJESTY'S SOLICITOR GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

AQY **Respondent**

REPORTING RESTRICTIONS APPLY:
Sexual Offences (Amendment) Act 1992

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MR P NORSWORTHY appeared on behalf of the HM Solicitor General

MR J POLNAY appeared on behalf of the Respondent

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J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences with which we are concerned. No matter relating to the person against whom the offences were committed shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as victims of the offences. Given the relationship between the offender and the person to whom the 1992 Act gives protection, we shall refer to the offender throughout as "AQY". Where he to be further identified, this would be likely to lead to the identification of his victim.

Introduction

2 On 17 December 2021 in the Crown Court at Truro, before Mr Recorder Levene and a jury, AQY was convicted of two counts of indecency with a child contrary to s.1(1) of the Indecency with Children Act 1960 (Counts 1 and 2); two counts of indecent assault on a woman contrary to s.14(1) of the Sexual Offences Act 1956 (Counts 3 and 4) and three counts of rape contrary to s.1(1) of the Sexual Offences Act 1956 (Counts 5 to 7).

3 On 11 March 2022 he was sentenced as follows:

- Counts 1 and 2 – six months' imprisonment on each count.
- Counts 3 and 4 – two years' imprisonment on each count.
- Counts 5 to 7 – four years and six months' imprisonment on each count.

4 All of the sentences were ordered to run concurrently, making a total sentence of four years and six months' imprisonment.

5 Her Majesty's Solicitor General seeks leave, pursuant to s.36 of the Criminal Justice Act 1998, to refer this sentence to the court as unduly lenient.

The Facts

6 Between 1979 and 1982 AQY lived with his family near Redruth in Cornwall. At that time, he was aged between 14 and 17. He had a female cousin ("AB") who lived nearby. She was aged between five and eight during this period. She would play regularly at her grandparents' house, which was next door to her own home. AQY was a regular visitor at that address. Over a period of about nine months, AQY sexually attacked AB in a variety of ways. The precise period over which the offending occurred was not identified. AB did not complain about what had happened until she was an adult and in her early 40s. She was able to correlate the offending to the time when her father left the family home on New Year's Eve 1981. That was because she was upset by what AQY was doing to her. Members of her family were aware that she was upset and they thought that this was as a result of her father leaving. On that analysis, AB was aged around seven when she was subjected to the sexual attacks. AQY was aged either 16 or 17. He was born in December 1964.

7 Counts 1 and 2 related to occasions on which AQY exposed his erect penis, put AB's hand onto his penis and made her masturbate him. The first time that this occurred they were in a shed at the grandparent's house. AB did not properly understand what she was doing. AQY told her not to tell anyone as it was their secret. There were other occasions on which AQY got AB to masturbate him. In evidence AB said that it happened often and that she could not remember each one. Count 1 was said to relate specifically to the first incident in the shed. Count 2 referred to "an occasion other than in Count 1" and was said to be

"another specimen occasion". However, this was not a multiple incident count, so the indictment reflected two instances of masturbation.

8 Counts 3 and 4 concerned instances of AQY forcing AB to take his penis into her mouth. The offending now would be charged as rape of a child under the age of 13. The first occasion on which this occurred AB was in the toilet at her grandparent's house. AQY made her kneel in front of him, though she remembers not kneeling properly and fully because she was much smaller than him. AQY put his penis into her mouth. He explained he wanted to push his penis into her mouth. He threatened to kill AB if she did not allow him to do so. He blocked the door to the toilet so that she could not leave. He had oral sex with her, pulling her hair in order to do so. He ejaculated into her mouth. The incident lasted for a couple of minutes. This form of sexual assault occurred on other occasions, both in the toilet and in the bathroom. Count 3 related to the first occasion. Count 4 referred to "an occasion other than Count 3". It was said to be "another specimen occasion". But, as before, this was not a multiple incident count.

9 The offending then progressed to vaginal rape of AB by AQY. The first time that this happened AB was in the bathroom at the grandparents' house. AQY came into the bathroom behind her. He pulled down her trousers and underwear. He made her stand on the toilet seat, he undid his trousers and he raped her vaginally. AB told him to stop because it was hurting her. AQY ignored her and ejaculated inside her. He then pulled up his trousers and told AB that he would kill her if she told anyone. AB did not know what had happened, but she felt disgusting. She did not know to whom to talk about what AQY had done. There was an occasion on which AQY raped AB when the two of them were in a shed, the nature of the rape being similar to the first occasion. AB said she was raped vaginally on a number of other occasions. Count 5 related to the rape in the bathroom. Count 6 was said to refer to the rape in the shed, though it was pleaded simply as being on "an occasion other than Count 5." Count 7 concerned "at least two occasions other than in Counts 5 and 6". This count was described as "two specimen occasions", but the number of incidents was specified, as we have described.

10 The offending did not continue after AB's eighth birthday. She left Cornwall as soon as she had finish her schooling. She joined the army from school and subsequently became a firefighter in Yorkshire. She visited her mother and other family who remained on Cornwall only at holiday times. It was on a visit home at Christmas in 2019 that she revealed to her mother what had occurred. The police conducted an ABE interview with AB in February 2020. AQY was interviewed by the police first in March 2020 and again in June 2020. He denied any sexual activity with AB.

The material before the judge

11 AB made a victim personal statement, in the course of which she said this:

> "When I was a young child, I remember being very happy. I liked being at home and playing outside as I was energetic. After the assaults, I remember turning in on myself. I became quite shy. I had a lot of nightmares and I would wet the bed. I was so unhappy that I would hide in my wardrobe where my mum would find me. This is where I felt safe. After this happened, I felt like I had all this anger in me that I needed to get out. The minute I was old enough to move away, I did. I only came home at holiday time. This has affected my whole family relationship as I never wanted to come back and bump into him. I was around 22 years old when I had my first proper relationship, but we split up because of the sexual issues that I couldn't get over. This still affects my

> relationship today. In the past two years since reporting, I have felt really stressed at times and guilty at others. I felt like although I was a child, I must have done something wrong as I carry a lot of guilt. I believe this has really ripped the family apart and some days wonder if I shouldn't have spoken out as it would have been my burden to bear and not my family suffering. I will never forget what BM has done to me, but I intend to get counselling when I get home."

12 The pre-sentence report provided no insight into AQY's offending. He continued to deny any sexual assault on AB. At the time of the report (which was prepared in March 2022) AQY had been married for some 16 years with two children aged 15 and 10. His wife had two grown up children from a previous relationship. They lived in Redruth. AQY had worked until about 2011 when he had stopped work due to health problems.

13 AQY's general practitioner provided an overview of those medical problems in a letter dated 5 January 2022. In 2011 AQY suffered an intracranial abscess and acute endocarditis and had undergone aortic valve surgery. From 2005 onwards, he had suffered with recurrent depression. He suffered from epilepsy and impaired cognition. There was psychological evidence concerning his cognitive abilities. AQY took various medications to keep his conditions under control. He recently had had chronic leg pain, thought to be associated with previous clotting incidents. The general practitioner said that, having been asked to comment on how the medical problems would affect AQY in prison, he had no experience of prison medicine, but that he would need ongoing monitoring of his medication to keep his condition stable.

14 Nine character references were provided by relatives and friends of AQY. They described him as a caring and kind man whom they trusted. Some spoke of his positive relationship with children.

The Sentence

15 The judge described the offending as an escalating course of sexual violence, culminating in four offences of rape. He said that those offences were by far the most serious offences. He noted the aggravating factors of ejaculation and threats made to AB. In relation to the harm to AB, he said that it was clear that she had suffered lifelong from what AQY had done to her. She was still distressed about what had happened, though she had been learning to cope over the years.

16 The judge had been referred to the Sentencing Council definitive guideline in relation to the offence of rape of a child under 13 contrary to s.5 of the Sexual Offences Act 2003, i.e. the current equivalent of the offences of rape of which AQY had been convicted. It had been suggested to him that the offence fell into Category 3B, with a starting point of eight years' custody. The judge said that AQY's offending fell higher on the scale than "the ordinary starting point", because of the matters to which he had already referred and the overall offending reflected on the indictment.

17 The judge concluded that, had AQY been an adult at the time of the offending, the sentence after trial would have been eight years' imprisonment. He reduced that figure to five years because of the age AQY was at the time. He then said that the figure would be increased by a year to allow for the aggravating factors. Finally, the judge took account of mitigating factors. He said that AQY's good character over his adult life was a neutral point. The judge considered that the most important issue was AQY's health. He said that AQY's physical problems would cause significant difficulties. Due to that factor, the judge reduced

the sentence to four and a half years' imprisonment, which he imposed on the counts of rape. As we have set out above, shorter concurrent sentences were imposed on the other counts.

Discussion

18 On behalf of the Solicitor General, it is submitted that the judge did not err when he adopted the categorisation of the offences in Counts 5 to 7 as being in Category 3B of the relevant guideline. The guideline in relation to rape of a child under 13 also should have been adopted in respect of Counts 3 and 4. The starting point for a single offence is eight years' custody, the category range being six to 11 years. Where the judge fell into error was in failing to reflect the repeated offending in the sentence identified as appropriate before any allowance for mitigating factors. The judge also failed to reflect the aggravating factors in the appropriate adult sentence. Eight years' custody might have been appropriate for a single offence with no significant aggravating factors present. It was "by some margin" too little for repeated offending with the features which were present in BM's case. Because of this error, this eventual sentence was unduly lenient.

19 Mr Norsworthy represented AQY at his trial. He appeared before us and made submissions on the reference. He argued that the sentence was a proper reflection of two factors. First, the indictment period began when AQY was only 14. It was possible that AQY had been only 14 throughout the offending, in which even a very substantial discount for age would have been appropriate. Although the judge did not make a finding to this effect, it was a conclusion open to us on the evidence. Second, the mitigating effect of AQY's ill-health was very substantial. The judge was justified in making the reduction he did in relation to that factor. Thus, he argued the sentence was not unduly lenient.

20 The correct formulation of what amounts to an unduly lenient sentence is still that provided by the then Lord Chief Justice in Attorney-General's Reference No 4 of 1989 [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all of the relevant factors, could reasonably consider appropriate."

21 By reference to that formulation, we consider that the sentence imposed in this case was unduly lenient. We respect the fact that the sentencing judge had heard a trial and that he gave careful consideration to the case. Were the sentence imposed to be dependent on the judge's assessment of the evidence in the case, it would be very difficult for us to interfere with his conclusions. That is not the position here. We have the evidence of AB as it was presented to the jury via the ABE interview. We have the documentary materials relating to sentence. We consider that the judge fell into error in relation to more than one point of sentencing principle. It is incumbent upon us to correct those errors.

22 Though the judge did not set out his reasoning explicitly, it is apparent that he took the offences of rape as the lead offences on which he would impose a sentence which reflected the totality of the offending. That was a permissible approach. As the Sentencing Council totality guideline makes clear, repeated sexual offences against the same individual may be met with consecutive sentences. But it is often equally appropriate to impose concurrent sentences reflecting the overall criminality. In that event, the sentences should be aggravated by the repeated offending. In this case, the judge took as his starting point for an adult convicted of the offences a term of eight years' imprisonment. That did not give any allowance for the fact that AQY had committed the six offences of rape of a child under 13 over a period of approximately nine months. Had the judge taken proper account of the

fact that there were repeated offences, the starting point in relation to the offences of rape would have been significantly higher than eight years.

23 We note that the judge categorised the offences of rape as Category 3B offences at the invitation of the prosecution and the defence. The Solicitor General does not argue that he was wrong to adopt that categorisation. We are not convinced that this approach was or is correct. The factors which place a case into Category 2 harm include, "child is particularly vulnerable due to extreme youth and/or personal circumstances". In our view, AB satisfied the description of "extreme youth" during the currency of the offending. Her position vis-a-vis AQY rendered her particularly vulnerable. Although he was not in a position of trust in the sense required by the guideline as explained in *Forbes* [2016] EWCA Crim 1388, their relationship was relevant to AB's vulnerability. Even if the case properly was placed into Category 3B, AB's age and vulnerability required the judge to place the case towards the top of the category range just for a single offence: see *R v O* [2019] 1 Crim App R (S) 28 at para.32.

24 Having reached his view of what he took to be the appropriate sentence before allowance for mitigation, the judge applied a reduction of 25 per cent to take account of the mitigating effect of AQY's ill-health. He did not refer to any authority or general principles when he did so. This meant that he failed to apply the guidance in *Bernard* [1997] 1 Cr App R (S) 135, which set out four principles, of which two are relevant in this case:

> "(iii) A serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate.
> (iv) An offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

25 This guidance has been endorsed repeatedly in this court, in particular at some length in *S* [2018] 1 WLR 5344. Two points are of relevance to this case. First, there must be evidence that the medical condition in question will cause serious problems for the offender in prison. Second, reducing a sentence below that which would otherwise be appropriate due to ill-health will be an exceptional course. We have set out the only evidence available to the judge. This gave no basis at all on which to reduce the appropriate sentence. The general practitioner simply said that AQY's condition and medication would have to be monitored in prison. The judge had no reason to think that the prison medical service would be unable to fulfil this requirement. Nor do we. There was nothing exceptional about the medical position of AQY. It follows that it was wrong in principle to apply a significant reduction to the appropriate sentence to take account of ill-health.

26 The judge applied a reduction of five eighths to take account of the age of AQY at the time he committed the offences. We do not consider that he erred in doing so. There has been considerable debate in recent authority as to the way in which a sentencing judge should deal with an adult who committed offences some time ago when he or she was under 18. In *Forbes* para.20 to 22 it was stated that youth was relevant to culpability in that a young person might be immature. It was the immaturity which reduced culpability. It was said that the Youth Guideline (as it then was) was not relevant other than in terms of assessing maturity. The Sentencing Council guideline on sentencing children and young people postdates *Forbes*. In *Limon* [2022] EWCA Crim 39, application of the principles in that guideline to someone in AQY's position was approved. However we approach it, we cannot criticise a substantial reduction in sentence to take account of the fact that AQY was around 16 at the time of the offences. Almost by definition, he was lacking maturity. For the

reasons we have given, we do not accept the proposition that the judge should have assumed that AQY was 14 at the time so as to require a more substantial discount. In our view, the evidence did not support any such assumption.

Conclusion

27 Had these offences been committed by an adult, the very least sentence that would have been appropriate would have been 13 years' imprisonment. That would have been a proper reflection of six occasions on which a child aged around seven had been raped either orally or vaginally. We emphasise that the sentence could only be imposed in relation to six occasions. The references on the face of the indictment to "specimen occasion" did not create multiple incident counts permitting the judge to go beyond the specific incidents. Quite correctly, he did not do so. But the sentence identified by the judge was, in our view, barely half the appropriate length of sentence.

28 The term we have identified takes account of the aggravating factors. It gives such weight as can be given to the good character of AQY, as evidenced by his behaviour over the last 40 years and by those who provided character references. These were very serious offences. Good character can be given no significant weight in determining the appropriate sentence.

29 Applying the reduction of five eighths, as the judge did, gives a sentence slightly in excess of eight years' imprisonment. It must follow that the sentence of four and a half years' imprisonment was unduly lenient.

30 We quash the sentences of four and a half years' imprisonment on Counts 5, 6 and 7 and we substitute sentences of eight years' imprisonment on those counts. Those sentences will run concurrently to each other and to the other sentences imposed.

31 In the course of the hearing, there was debate between Mr Polnay, who appeared for the Solicitor General, and the court in relation to the sentences imposed on Counts 3 and 4, namely sentences of two years' imprisonment. We discussed with Mr Polnay whether the principles set out in *Limon*, a case to which we have already referred, in relation to the maximum sentence available between 1979 and 1982 to someone of the offender's age would in fact have been 12 months, in which event, as a matter of practice and principle, if not law, the sentences on Counts 3 and 4 should not stand. Mr Polnay frankly admitted that this was not an issue that he had the opportunity to investigate in detail. There is a lack of clarity in this case. The sentences of two years' imprisonment were not unlawful. It follows therefore that given the lack of clarity and given the overall result of this case, we take no further action in relation to those counts. They merely indicate the difficulties that face any judge sentencing for very old sexual offences.

32 The sentences of eight years' imprisonment constitute the effective sentences in this case.

33 The offender will serve two thirds of those sentences before he will be eligible for release.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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