Neutral Citation Number: [2017] EWCA Crim 43
No: 201604251 A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 26th January 2017

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(LADY JUSTICE HALLETT DBE)

MR JUSTICE STUART-SMITH

MS JUSTICE RUSSELL DBE

R E G I N A

v

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(Official Shorthand Writers to the Court)

Mr R S Sandford appeared on behalf of the **Appellant**

Mr P Jarvis appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

THE VICE PRESIDENT:

Introduction

1. Despite what was hoped to be the clear guidance of the specially constituted court in *R v Forbes [2016] EWCA Crim 1388; [2017] 1 WLR 53*, we have been asked yet again to consider the proper approach to sentencing an adult for sexual offences committed as a teenager. With very little notice, we invited the Crown to be represented. We are indebted to the Crown and to Mr Paul Jarvis whom they instructed to appear before us this morning. He has been of very considerable assistance.

2. The 51-year-old appellant was convicted on 18 August 2016 of sexual offences on two female relations when he was aged between 14 and 17 and they were considerably younger. Given the seriousness of his offending and the impact upon his victims, Mr Sandford accepted that, at first sight, the total sentence of 30 months' imprisonment imposed by the trial judge, Mr Recorder Gateshill, was merciful. The question posed for this court is whether the judge had the power to impose it.

3. We should emphasise that reporting restrictions apply, albeit we hope not to say anything that could lead to the identification of the victims.

Facts

4. Both counts on the indictment were specific. The prosecution's case was that on two separate occasions the appellant indecently assaulted two different complainants. It was impossible to prove the exact date of the offences so as to establish precisely the age of the offender or the age of his victims.

5. The appellant was born on 17 March 1965. The period set out in count 1 (the indecent assault on C1) was from 1 January 1980 to 1 January 1982 when the appellant would have been aged between 14 years and 10 months to 16 years and 10 months. He made C1, then aged approximately six, perform oral sex upon him under a blanket. The period set out in count 2 (indecent assault on C2) was 26 April 1979 to 26 April 1981 when the appellant would have been aged 14 years and 1 month to 16 years and 1 month. He digitally penetrated C2, then aged nine or ten, when they were together in a tent in the garden. When interviewed about the offences, he denied them. By the time he appeared in the Crown Court he had 45 convictions spanning from 1978 to 2011. They included

two offences of indecent assault on a female under the age of 14 in 1980, for which he received a supervision order.

Sentencing remarks

6. The trial judge, Mr Recorder Gateshill, observed that this was one of the worst cases of indecent assault that could be imagined. The appellant violated two very young girls and the impact upon them had been long-standing and serious. It had left them with psychological damage that had persisted throughout their lives. Significant substantial problems they had experienced over the years had been attributable to the appellant's behaviour years ago. The appellant had evaded justice for many years.

7. The Recorder, who did not have the benefit of the judgment in *Forbes*, determined that, had the appellant committed these acts in the recent past, as an adult, he would be sentenced to a period of at least 10 years' imprisonment based on the various guidelines now in place. The appellant's offence against C2 would now be categorised as an offence of rape for which the maximum is life imprisonment. The maximum sentence that could be imposed for offences of indecent assault at the time of his offending was 5 years' imprisonment. The appellant's offences were so serious, the Recorder felt justified in taking the maximum sentence of 5 years as a starting point, but decided he must make a significant adjustment to that figure to reflect the fact that teenagers should not be sentenced as heavily as adults. He was unable to determine the exact age of the appellant at the time of the offences. He decided to sentence on the basis he was at the younger end of the scale of 14 to 17. He reduced the sentence by 50 per cent to reflect the appellant's youth and ordered the sentences to run concurrently.

Ground of Appeal

8. The appellant has leave of the single judge to argue essentially one point: that the Recorder’s powers were constrained by the statutory maximum penalty available at the time of the offence for an offender aged 14. It was common ground that the maximum powers of the juvenile court for a 14-year-old would have been 3 months' detention for a single offence with a maximum of 6 months for consecutive terms. A 14 year old offender committed to the Crown Court for sentence, would have faced a maximum of 6 months for a single offence and a maximum of 12 months for consecutive terms.

9. Reliance was placed on *Forbes* in support of the proposition that sentencing the appellant as an adult to a longer sentence than would have been available to the court had he been

sentenced as a 14 year old offends Article 7 of the European Convention on Human Rights.

Conclusions

10. In *R v Bowker [2007] EWCA Crim 1608* the court held that the fact that a defendant who committed an offence two days short of his 18th birthday was sentenced as an 18-year-old (for whom there was a higher maximum penalty) did not involve a breach Article 7. The court observed:

    "It seems to us that the provisions of Article 7.1 are clearly directed to the mischief of retroactive or retrospective changes in the law. In the present case, there was no change in the law. The penalties for violent disorder remained the same. All that changed was the penal regime to which the appellant would be exposed as a result of the normal operation of existing law to his age at the time of conviction. For those reasons, we do not consider that the court is constrained in any way by the provisions of Article 7 in situations such as the present."

11. Similarly, *in R v H [2011] EWCA Crim 2753; [2012] 1 WLR 1416* the court held that, provided a sentence imposed upon an offender did not exceed the maximum sentence applicable to the offence at the time the offence was committed, then Article 7 would not be contravened.

12. Without expressing any dissent from the principles set out in *H* and *Bowker*, the court in *Forbes* distinguished both cases, stating it made a difference to the operation of Article 7 where no custodial sentence of any kind could have been imposed upon an offender at the time he committed the offence, given his age. In those circumstances it would be contrary to Article 7 and ordinary common law fairness to impose a custodial sentence upon him now (see paragraph 120).

13. The court in *Forbes* stressed the limited nature of this exception. Article 7 is not offended where a custodial sentence was always available for an offender, even if the type of custodial sentence may be different (see paragraph 119). The court stressed that this departure from the *H* principle should not "operate as encouragement or licence to courts to indulge in a similar exercise in any other situation" (see paragraph 121).

14. Following *Forbes*, the position is, therefore, as follows:

(a) The general principle is that the relevant maximum penalty is the maximum penalty available for the *offence* at the date of the commission of the offence.

(b) There is an exception to the general principle where the *offender* could *not* have received any form of custodial sentence at the time he committed the offence.

(c) The exception is no licence for any broader inquiry. If custody was available at the time of the offending for the offender, the age of an offender at the time of the commission of the offence is relevant solely to the assessment of culpability. The only constraint in those circumstances on the powers of the sentencing court is the statutory maximum for the offence. The court should not analyse the nature of the custody available for a young offender at the time, the maximum length of that custody, the court's powers to commit for sentence as a grave crime or the principles governing sentencing of young offenders, in so far as they go beyond the importance of assessing culpability and maturity.

15. On the facts of this case, therefore, reliance on *Forbes* is misplaced. If the appellant had been sentenced for these offences as a 14-year-old, the sentencing court would have had available to it at least one custodial option. The fact that a form of custodial sentence could have been imposed on him, irrespective of its maximum length or nature, is sufficient to satisfy the requirements of Article 7 and the principles of common law fairness. There has been no retroactive or retrospective change in the law; it is simply that the penal regime has changed because his age has changed.

16. It is not suggested by Mr Sandford that the sentence, if lawful, was excessive and for good reason. These were serious offences committed by a teenage boy on much younger children, with devastating consequences for them. The appeal must be dismissed.