



Case No: 202303774 A4

Neutral Citation Number: [2024] EWCA Crim 753

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MANCHESTER
HIS HONOUR JUDGE LAWTON
CASE NO. T20207440

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2024

Before:

LORD JUSTICE LEWIS

MR JUSTICE GOSS

and

HHJ MORELAND

(sitting as a judge of the Court of Appeal (Criminal Division))

Between:

ES

- and -

THE CROWN

Appellant

Respondent

Emma Fenn for the Appellant
Jonathan Savage for the Crown

Hearing date: 10 May 2024

APPROVED JUDGMENT SUBJECT TO EDITORIAL CORRECTIONS

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 that offence. This prohibition applies unless waived or lifted in accordance with section 3 of that Act.

LORD JUSTICE LEWIS handed down the following judgment of the Court:

INTRODUCTION

1. This appeal concerns an issue in relation to the effect of section 11(3) of the Criminal Appeal Act 1968 ("the Act"). That subsection requires this Court, on an appeal against sentence, to exercise its powers when substituting a sentence for that imposed by the court below to ensure that "taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below". The issue arises in the context of quashing two special custodial sentences and substituting determinate sentences where the provisions governing early release differ as between the two types of sentence.

THE BACKGROUND

2. The background is as follows. On 16 November 2021, in the Crown Court at Minshull Street, Manchester, the appellant was sentenced following conviction for two offences. One was an offence of rape contrary to section 1 of the Sexual Offences Act 2003. The victim was the appellant's step-granddaughter who had been placed with the appellant and his wife under a guardianship order. The appellant raped her, at home, when she was 15 years old. As the sentencing judge noted, that offence involved a gross breach of trust and had caused immediate harm to the victim and was likely to cause incalculable harm for the rest of her life. The second offence was an offence of assault by penetration contrary to section 2 of the Sexual Offences Act 2003. That offence occurred the day after the rape when the appellant digitally penetrated the 15 year old victim's vagina.
3. The appellant was sentenced for the first offence to a special custodial sentence of 11 years pursuant to section 278 of the Sentencing Act 2020 ("the 2020 Act") comprising a custodial element of 10 years and an additional licence period of 1 year. He was sentenced for the second offence to a special custodial sentence of 3 years comprising a custodial element of 2 years and an additional licence period of 1 year, that sentence to be served consecutively.
4. The appellant sought to appeal solely against the imposition of a special custodial sentence, and the two separate periods of 1 year's additional licence, on the ground that the relevant statutory provisions did not require the imposition of such sentences

for the offences he had committed. The matter was not noticed by the sentencing judge or counsel at the sentencing hearing. It only came to light when the probation service noticed that an error might have been made in the appellant's sentence. The appellant therefore applied for an extension of time for appealing and for permission to appeal against sentence. The matter was referred to the full court by the registrar and an oral hearing was held on 10 May 2024. We heard full argument and, as a new issue was raised at the hearing as to the operation of section 11(3) and the effect of differing early release provisions, we invited written submissions from Ms Fenn for the appellant and Mr Savage for the respondent. They did so and we are grateful for their oral and written submissions. We grant an extension of time for appealing. We grant leave to appeal against sentence.

THE LEGAL FRAMEWORK

5. It is necessary to set out the legal framework giving rise to the issue that arises on this appeal. Section 278 of the 2020 Act deals with certain offenders of particular concern. The section applies where a court imposes a sentence of imprisonment for an offence listed in Schedule 13 to the 2020 Act provided other conditions are satisfied. The section provides, in effect, that the sentence must include an additional 1 year period when the offender is to be subject to licence. The appellant was convicted of offences under section 1 and 2 of the Sexual Offences Act 2003. However, those are not offences listed in schedule 13. The listed offences include offences under section 5 and 6 of the Sexual Offences Act 2003, namely rape of a child under 13 years of age and assault by penetration of a child under 13 years of age. The victim in the present case, however, was not under 13 years of age and the appellant was not convicted of such offences.
6. In those circumstances, section 278 did not apply and did not require the imposition of a special custodial sentence. All parties agree that this is the position and that special custodial sentences were improperly imposed in the present case. The appropriate course of action is to substitute determinate sentences for the two counts. It is accepted that a sentence of 10 years' imprisonment for count 1, and 2 years' imprisonment on count 2, to be served consecutively would be appropriate subject to any argument in relation to section 11(3) of the Act. That provides that:

“(3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—

(a) quash any sentence or order which is the subject of the appeal; and

(b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;

but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below”.

7. The issue that arises on this appeal concerns the application of section 11(3) given the different provisions governing early release applicable to special custodial sentences as compared with determinate sentences. At the time that the appellant was sentenced, section 244A of the Criminal Justice Act 2003 (“the 2003 Act”) provided that a person subject to a special custodial sentence would be referred to the Parole Board once he had served $\frac{1}{2}$ of the custodial element of the sentence and the offender would be released on licence if the Parole Board directed release. By contrast, if a determinate sentence were to be imposed on the appellant, section 244ZA of the 2023 Act now provides that the appellant will be automatically released subject to licence once he has served $\frac{2}{3}$ of the sentence where a sentence of 7 years’ imprisonment or more is imposed in respect of an offence listed in Part 1 or 2 of Schedule 15 to the 2003 Act. Those offences include offences of rape contrary to section 1, and assault by penetration contrary to section 2, of the Sexual Offences Act 2003. Where a sentence of less than 7 years is imposed for such offence, then section 244 of the 2003 Act provides for the offender to be released after serving $\frac{1}{2}$ of the sentence. See *R v AB* [2021] EWCA Crim 692, [2022] 1 Cr. App. Rep. (S.) 13 for the operation of section 244ZA.

SUBMISSIONS

8. Ms Fenn for the appellant submitted that the Court must, when substituting a sentence on an appeal against sentence, adopt a multi-factorial approach taking account of all the features of the case to ensure that the sentence is not more severe as a whole. That includes having regard to the effect of differing early release provisions in the case of special custodial sentences and determinate sentences.
9. Ms Fenn submitted that the position for the appellant is that, under the special custodial sentences imposed on him, he would have been eligible for release on licence if so directed by the Parole Board after serving 6 years, that is after he had served $\frac{1}{2}$ of the total custodial element of 12 years for the 2 offences (i.e. the custodial elements of 10 years for count 1 and 2 years for count 2). By contrast, if determinate sentences of 10 years and 2 years were imposed for counts 1 and 2 respectively, he would not be eligible for release on licence after 6 years where the Parole Board so directs but would be automatically released on licence after $\frac{2}{3}$ of a determinate sentence of 10 years’ imprisonment, in respect of count 1, and $\frac{1}{2}$ of a consecutive determinate sentence of 2 years’ imprisonment for count 2. That would mean that he would be automatically released after serving 7 years and 8 months. That is, the appellant might serve longer in prison than he would have served under the special custodial sentences. Ms Fenn submitted that to substitute determinate sentences of equivalent length to the custodial element of the special custodial sentences would therefore violate section 11(3) of the Act.
10. Ms Fenn submitted that the only way to ensure that the appellant was not more severely dealt with on appeal was to impose determinate sentences that had the effect of ensuring automatic release on licence after 6 years, that is, release at a time equivalent to when the appellant would have been eligible for release if the Parole Board had so directed. Ms Fenn submitted that the decision in *R v KPR* [2018] EWCA Crim 2537, [2019] 1 Cr. App. R. (S) 36, *R v A* [2020] EWCA Crim 948, and *R v AB* [2021] EWCA Crim 692 represented a shift in focus towards consideration of the date upon which a person becomes eligible for release rather than the release date. Ms Fenn also invited us to consider that the appellant was someone for whom it was more likely

that release on licence would be directed by the Parole Board than others given the appellant's age, previous good character and behaviour in prison.

11. Mr Savage for the respondent accepted that a determinate sentence replacing the special custodial sentence should take account of the seriousness of the offence, the relevant Sentencing Council Guidelines, the severity of the sentence that had been unlawfully passed and the requirement that the appellant was not to be dealt with more severely than when sentenced by the lower court. In relation to the early release provisions, Mr Savage submitted that the case law demonstrated that when a special custodial sentence was substituted for a determinate sentence (the converse to the situation in the present appeal), the fact that the offender was only eligible for release if the Parole Board so directed and he might serve less time in prison than he would serve under a determinate sentence (where the offender would be automatically released on licence at a fixed point) did not involve a violation of section 11(3). The Court had not regarded the possibility of serving longer in prison as a result of a refusal of the Parole Board to direct release as meaning that the imposition of a special custodial sentence resulted in the offender being dealt with more severely. Similarly, he submitted that, in the present case, substituting a custodial sentence of the same or equivalent length to the custodial element of a special custodial sentence would not infringe section 11(3).

Discussion and Conclusion

12. As a matter of general principle, the provisions governing early release from custody are not relevant when deciding upon the length of a determinate sentence: see *R v Patel* [2021] EWCA Crim 231, [2021] 2 Cr. App. Rep. (S.) 383, *R v Round* [2009] EWCA Crim 2667, [2029] 2 Cr. App. R. (S.) 292 and *R v Burinskas* [2014] EWCA Crim 334, [2014] 2 Cr. App. R. (S.) 45. There are exceptions to that general position, one of which is when this Court quashes the sentence of the lower court and substitutes a different sentence where the provisions of section 11(3) of the Act apply. Another exception arises where a person is convicted at a retrial where the court may not pass a sentence of greater severity than that passed on the original conviction: see paragraph 2(1) of Schedule 2 to the Act (and see *R v KPR* [2018] EWCA Crim 2537. [2019] 1 Cr. App. R. (S.) 36 especially at paragraphs 42 to 44).
13. The situation governing cases where a special custodial sentence or an extended sentence was quashed on appeal and a determinate sentence imposed was considered by this Court in *R v Thompson (Christopher)* [2018] EWCA Crim 639, [2018] 1 WLR 4429. As the Court observed at paragraph 10, section 11(3) requires that "taking the case as a whole, the appellant is not more severely dealt with". That involves considering the potential impact of a sentence on an offender. At paragraph 23, the Court said this:

"The limit of its power is that the court must be satisfied that, taking the case as a whole, the appellant is not being dealt with more severely on appeal. That requires a detailed consideration of the impact of the sentence to be substituted which must involve considerations of entitlement to automatic release, parole eligibility and licence. If a custodial sentence is reduced, the addition of non-custodial orders (such as disqualification from driving or sexual offences prevention orders) may be

added but, in every case, save where the substituted sentence is “ameliorative and remedial”, that sentence must be tested for its severity (or potential punitive effect) compared to the original sentence.”

14. In cases involving the quashing of a special custodial sentence and substituting a determinate sentence, the date on which release becomes unconditional “will be of particular importance” (paragraph 41 of the judgment in *Thompson*).
15. In the present case, the appellant was sentenced to a special custodial sentence for count 1 of 11 years, comprising a custodial element of 10 years and an additional licence period of 1 year on count 1. On count 2, he was sentenced to a special custodial sentence of 3 years, comprising a custodial element of 2 years and a 1 year additional licence period, to be served consecutively. The total custodial element was therefore 12 years and there was an additional 2 years of licence. He would have been eligible to apply for release on licence (if the Parole Board so directed) after serving $\frac{1}{2}$ of the total custodial element, i.e. after 6 years, and he would have been on licence for a further 8 years (and subject to recall to prison during that period if he breached the terms of his licence). The Parole Board might, of course, decline to direct release. In those circumstances, the appellant could spend up to 12 years in custody (the total custodial element of the sentences) and would then be released on licence for 2 years (the additional licence period).
16. By contrast, if determinate sentences of 10 years’ imprisonment for count 1, and 2 years’ imprisonment for count 2 were imposed, the appellant would be released automatically having served 7 years and 8 months in prison ($\frac{2}{3}$ of the 10 year sentence, and $\frac{1}{2}$ of the 2 year sentence). He would be on licence for a period of 4 years and 4 months (and subject to recall during that time to recall to prison for breach of the licence).
17. Taking account of the case as a whole, we do not consider that determinate sentences equivalent to the custodial element of the special custodial sentences would result in the appellant being dealt with more severely. When considering the imposition of a determinate sentence, the date on which release becomes unconditional is of particular importance. Here, the appellant will, under the current statutory provisions, be released after 7 years and 8 months in custody (with 4 years and 4 months on licence). If he were subject to a special custodial sentence, the appellant would only be released unconditionally after serving 12 years in prison (and would still be subject to the 2 years additional licence period). There is a possibility that he *might* spend 6 years in custody (and 8 years on licence during which he would be subject to recall to prison on breach of the licence) if the Parole Board had directed that he be released. Taking account of the case as a whole, we do not consider that determinate sentences of 10 years’ and 2 years’ imprisonment do result in dealing with the appellant more severely than he was dealt with below. That assessment is not affected by the possibility that he is eligible to apply for parole and *might*, depending on the outcome, spend 6 years in prison and 8 years on licence.
18. We have considered the cases relied upon by Ms Fenn. Those cases involved the converse of the situation here (and in *Thompson*). They concerned cases where a determinate sentence had been imposed (where there was automatic release on licence after spending $\frac{2}{3}$ or $\frac{1}{2}$ of the sentence) but where a special custodial sentence should

have been imposed. The imposition of a special custodial sentence, even with a similar custodial element to the determinate sentence, would not provide for automatic release at a particular stage in the sentence but would mean only that the offender would be eligible to apply for release on licence after serving $\frac{1}{2}$ of the custodial elements. In *KPR*, which concerned sentencing following a retrial, the Court considered the imposition of a special custodial sentence of 11 years (with a custodial element of 10 years and an additional licence period of 1 year) and a determinate sentence of 4 years' imprisonment to be served consecutively in place of determinate sentences totalling 17 years' imprisonment. The change resulted in a situation where the offender would be eligible for release on licence (if the Parole Board directed release) after 7 years, although he might be detained for 12 years (i.e. the entire 10 year custodial element of the special custodial sentence and $\frac{1}{2}$ of the 4 year determinate sentence). Under the original determinate sentences, the appellant would have been the subject of automatic release after 8 and $\frac{1}{2}$ years (that is, having served $\frac{1}{2}$ of the determinate sentences of 17 years). The Court did not consider that the risk that the offender might serve an additional 3 and $\frac{1}{2}$ years in custody (when he might also be released after 7 years) meant that the offender was subject to a more severe sentence.

19. We note that, in *R v A*, the Court was faced with a similar situation, i.e. the substitution of a special custodial sentence for a determinate sentence. It is correct that at paragraph 25 the Court referred to *KPR* reflecting a change in emphasis from *Thompson* which placed great importance on the date when release became unconditional. The Court recognised, however, that the difference was understandable as the approach reflected what was described as a multifactorial assessment in which a significant number of disparate considerations had to be borne in mind including entitlement to automatic release on licence, eligibility to apply for release on licence and the length of the licence period.
20. We do not consider that those observations support the submission of Ms Fenn that a determinate sentence must be fixed which will allow automatic release at the time that a person subject to a special custodial sentence would be eligible for release on licence if the Parole Board so directs. Nor, in considering the comparative gravity of the sentences, do we consider it necessary or appropriate to try to predict whether or not it would be likely (or more likely than in other cases) that the Parole Board would direct that the appellant be released on licence.

CONCLUSION AND DISPOSAL

21. We quash the special custodial sentences imposed on count 1 and count 2. We substitute a sentence of 10 years' imprisonment on count one, rape contrary to section 1 of the Sexual Offences Act 2003. We substitute a sentence of 2 years' imprisonment on count 2, assault by penetration contrary to section 2 of the Sexual Offences Act 2003, to be served consecutively to the sentence on count 1. That will result in a total sentence of imprisonment for both offences of 12 years.

