Neutral Citation Number: [2017] EWCA Crim 393

Case No: 2017/00254/A1 &
2017/00824/A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
His Honour Judge Bond (Clarke)
AND ON APPEAL FROM CROWN COURT AT LEEDS
His Honour Judge Evans (Cooper)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2017

Before :

LADY JUSTICE HALLETT
Vice President of the Court of Appeal (Criminal Division)
LADY JUSTICE RAFFERTY
LORD JUSTICE TREACY
Mr JUSTICE SWEENEY
Mr JUSTICE GOSS

- -

Between :

	R	**Respondent**
	- and -	
	RALPH CLARKE	**Appellant**
	And Between	
	R	**Respondent**
	- and -	
	PETER COOPER	**Appellant**

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Mr Kevin Hegarty QC for Clarke
Mr Patrick Mason for Cooper

Ms Miranda Moore QC for the Respondent.

Hearing dates: 2nd March 2017

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Judgment Approved

The Court:

Introduction

1. These two cases have been referred to the full court by the Registrar. Each raises the issue of the appropriate allowance to be made for extreme old age in the sentencing process. We grant leave in each case.

2. The appellants were at the time of sentence aged 101 and 96 respectively. Both were sentenced for sexual offences committed some time ago when they were younger and fitter and when there was no question of their culpability being reduced by any matter relating to their mental health or age. In each case the appellant is relatively fit for a man of his chronological age. Each was, until sentence, leading an independent life. Neither of them has any major health issue; such health problems as each suffered from were simply a product of their old age.

3. The original grounds of appeal in Clarke's case urged that a sentence of immediate custody was wrong in principle, and that it was not in the public interest to impose such a penalty. Mr Hegarty QC who has now been instructed on Clarke's behalf did not advance the case on that basis. He made somewhat different submissions which were adopted and augmented by Mr Mason on behalf of Cooper.

Submissions

4. Mr Hegarty's first submission was that s.142 (1) of the Criminal Justice Act 2003, which sets out the purposes of sentencing to which a court should have regard, should be read subject to the provisions of s.244 and s.244A of the Act, which govern the point in time at which there is a duty to release prisoners sentenced to determinate terms or sentences under s.236A of the Act. Those two provisions envisage release of the prisoner, or arrangements for his release being set in train, after serving one half of the custodial term imposed by the court.

5. Mr Hegarty's argument therefore was that the sentence passed on an offender should be one where it can be reasonably expected that the offender will serve the requisite custodial period, as defined in s.244 and s.244A. Where the court is dealing with an offender of very advanced years, he submitted that the sentence should be tailored by giving greater consideration to the age of the offender, so that the court can pass a sentence that can reasonably be expected to be one where the offender will be able to serve the requisite custodial period, defined by those two sections as half of the appropriate custodial term for the offence or offences.

6. S.153 (2) requires a court to impose a custodial sentence for the shortest term commensurate with the seriousness of the offence or offences before the court. If it cannot reasonably be expected that an offender will be able to serve the requisite custodial term, in effect what the court is doing is passing something akin to a whole life sentence, when the offender has not been sentenced in that way. Accordingly, the advanced age of an offender should carry considerable weight in seeking to arrive at a sentence which it can reasonably be expected that the offender will serve.

7. Mr Hegarty confined his submissions to determinate sentences and those under s.236A. He expressly excluded life sentences and those passed upon dangerous offenders.

8. Initially Mr Hegarty suggested that 80 to 85 should be regarded as constituting an advanced age upon which his submissions should bite. In exchanges with the court his position became modified and rather more targeted on the position of a person of the age of his client. He also accepted that the court had to balance the seriousness of the offending in a particular case against the age of the offender, and at one point acknowledged that the gravity of the offending might sweep away considerations based on age. Nonetheless, he urged this court to take a new approach to very old offenders which would take into account a reasonable expectation that the offender could complete the requisite custodial term.

9. To illustrate his point, he referred us to estimates relating to the old from the Office for National Statistics. The latest version shows that there were over half a million people aged 90 or over living in the UK in 2015. For every 100 men aged 90 and over, there were 240 women. The number of centenarians living in the UK has risen by 65% over the last decade to 14,570 in 2015. Of those centenarians, 850 were estimated to be aged 105 or more, double the number in 2005. Accordingly, roughly 6% of centenarians are estimated to be 105 or older. Clearly life expectancy in the UK continues to increase, as does the number of centenarians. Although the majority of the very old are women, the number of men reaching the oldest ages is increasing as male life expectancy improves. On this basis Mr Hegarty argued that given a significant diminution in the number of centenarians as their age approaches 105 years and beyond, there cannot be a reasonable expectation that Mr Clarke will serve the requisite custodial term in his case.

10. As a separate submission Mr Hegarty argued that the approach to sentencing such offenders should be modified so as not to condemn a person such as his lay client to the expectation of a death in prison. This could be achieved by taking into account the exceptional age of an offender, so as to give greater weight to old age than had been indicated in *R v Millberry & Others [2003] 2 Cr App R (S) 31.*

11. Mr Mason for Cooper adopted those submissions and emphasised the vulnerability of extreme old age, inviting the court to treat old people as if they were terminally ill. He suggested that they should be treated as a special class of offender, and compared them to those under 18 and mentally disordered offenders, each of whom is subject to special consideration in sentencing.

Discussion

12. This court is conscious that there has been a rise in the older prison population, and nobody sitting in our courts could be unaware of the increased numbers of prosecutions for historic sexual offending which will frequently bring aged offenders before the courts. Figures provided show that the prison population made up of offenders aged 50 or over has increased proportionately more than any other age group in recent years. There are about 4,400 prisoners aged 60 or over at present. Ministry of Justice figures show that as at 31 December 2016, there were 219 offenders in prison aged between 80 and 89, 14 aged between 90 and 99, and one aged 100 or more, giving a total of 234. The overwhelming majority of those aged between 80 and 89 are sex offenders and virtually all of those aged 90 or over are sex offenders.

13. At [17] of *Millberry* Lord Woolf CJ said:

> "A different factor that could cause the court to take a more lenient view than it would otherwise is the consequences which result from the age of the offender. In those cases the experience is that the offender may be only a danger to members of the family with whom he has a relationship. So this is a dimension that can be taken into account if there is a reduced risk of re-offending. In addition, the court is always entitled to show a limited degree of mercy to an offender who is of advanced years, because [of] the impact that a sentence of imprisonment can have on an offender of that age."

14. Whilst the observations as to offending within the family are probably now no longer apposite in the light of experience, a better understanding of how and when the sexual offences are committed, and the advent of provisions for dealing with dangerous offenders, the guidance as to "a limited degree of mercy" to be shown has been regularly applied by courts since *Millberry*. We were provided with a large number of decisions to consider and it is unnecessary to recite them all here.

15. In *Attorney General's References No 37 and others of 2003 [2004] 1 Cr App R (S) 84*, Kay LJ at [11] in speaking of sentencing aged offenders, albeit not at the extremes arising in these cases, spoke of the difficulty of the task for sentencers. He said:

> "It would lead to a clear sense of injustice if there was not a consistency of approach to sentencing in such cases and specific guidance was given in *Millberry* as to this factor…"

At [12] he said:

> "It is important to emphasise the word 'limited' used by the Lord Chief Justice in the last sentence [of [17] of *Millberry*], and sentencers should be careful not to make too great an allowance in this regard thereby shrinking from what is their duty, however unpleasant it may be to perform."

16. In *Attorney General's Reference No 38 of 2013 [Stuart Hall] (2014) 1 Cr App R (S) 61* Lord Judge CJ, in dealing with an 83 year old offender, noted at [73] that his age and level of infirmity were relevant to the sentencing decision, but needed to be approached with a degree of caution. He went on observe that the offender had got away with his offending for decades, and that the impact on the victims had been life long.

17. In *R v Forbes [2016] 2 Cr App R (S) 44*, Lord Thomas CJ at [80] and [81] stated that in the case of an 80 year old man a sentence of 20 years meant that he would most probably spend the rest of his life in prison. That merited the most anxious scrutiny by the court. However, the sentence was upheld. The court observed that, after sustained and systematic gross abuse of vulnerable young children in the offender's care, he had left the school and his victims behind him and enjoyed many years of productive life. His victims had not been so lucky.

18. There are examples of cases where the court has moderated the sentences in recognition of the fact the offender was approaching the end of his life, while seeking to balance that factor against the need to punish him for his past offending: see R v *Burnett [2016] EWCA Crim. 1941*. In R v *Heron [2009] 2 Cr App R (S) 53*, the court stated that regard must be had to the risk that owing to age and ill health an offender might become ill or die in prison, but there was no clarity as to the level of discount which should be granted. Those observations were made in the context of an elderly person involved as cover for a drug importation and *Millberry* does not appear to have been cited to the court. The court however rejected a submission that the age of 80 was in any sense a cut-off although it would be a factor.

19. Sentencing guidelines frequently refer to age as a mitigating factor. In the Sentencing Council's guideline for sexual offences the factor is shown as "Age and/or lack of maturity where it affects the responsibility of the offender". That, of course will cover the case of young offenders, but the reference to age in the case of an older person is a reference to chronological age as a mitigating factor, irrespective of whether it affects the responsibility of the offender. As s.143 of the Criminal Justice Act shows, the primary drivers of sentencing will be harm caused or intended to be caused and the offender's culpability in committing the offence. In each of the two cases before the court both culpability and harm were high. Clarke's case was considerably more serious than that of Cooper, given the repeated penetrative abuse of three young children over a long period of time, with a severely blighting effect upon their lives. In each case the offender was able to carry on with his own life for a significant period, whilst the victims suffered the on-going consequences of his actions.

20. In the case of Clarke, as frequently happens in cases of this sort, the vulnerable young victims' contemporaneous complaints were rejected in the face of the offender's denials. Matters often do not reach the stage of complaint because of threats or bribes made by offenders. By these means offenders often avoid investigation and prosecution for many years, thus denying their victims justice and helping to perpetuate the harmful effects of their actions. It seems to us therefore that the matter cannot wholly be viewed in these cases from the standpoint of the offender, who has either by his inaction or by positive steps avoided justice and been enabled to enjoy life into old age.

21. By the time very old offenders of this sort fall to be sentenced, the question of rehabilitation is unlikely to be significant. Nor is the question of dangerousness. The court's focus will be on finding the appropriate sentence for the offending, where harm done and culpability of the offender are the primary considerations subject to balance for mitigation including guilty plea. It is clear that old age is a material mitigating consideration. Frequently it will be combined with considerations of ill health. The focus of the court will be on the extent to which a custodial sentence will be more onerous, compared to a younger, fitter offender. Old age and extreme old age are both relevant aspects of that consideration even in the absence of specific health considerations.

22. It will be important for a court, if such considerations are to be raised, to have reports which enable the court to engage with and consider such issues. Sentencing must be done on a case by case basis and the court will require evidence and information specific to the particular offender. We reject submissions made to us that the court could approach the matter on a more general basis by looking at statistical material and making

general assumptions as to life prospects by reference, for example, to where an offender lived, and to the sort of life he or she had led in the past. In the same vein, we see no warrant for treating the aged as akin to terminally ill individuals. That again would be to approach the matter by reference to the general rather than to the specific. Mr Mason's submission that old age should be treated as a special category akin to offenders under 18 or those with mental disorders founders on the fact that they are treated differently because their culpability is reduced.

23. No submission was made to us that the prison estate was incapable of making adequate provision for these offenders or very elderly offenders in general. The relatively recent rise in numbers of older offenders has led a degree of expertise being acquired by the prison service in this respect, and courts should proceed on the basis that appropriate provision can be made at the time of sentence. It will be necessary for an offender to provide firm evidence to the contrary if the court is to be invited to proceed on a different basis.

24. We were not attracted by Mr Hegarty's submissions based on s.142, s.246 and s.246A. That approach would involve the court ignoring the well-established principle that the court should not calculate sentence by reference to early release possibilities: see *R v Round and Dunn [2010] 2 Cr App R (S) 45*. In any event it seems to us that there is no need for the appellants to go down this route. The issue raised can be perfectly well approached by considering whether the guidance given in *Millberry* should be changed in the case of very old offenders. We note that in *R v H [2012] 2 Cr App R (S) 21* Lord Judge CJ at [33] cited with approval *Millbery* at [17]. In turn, *R v H* was adopted by the Sentencing Council in its sexual offences guideline (effective in April 2014) as the basis for annex B which governs the approach to sentencing historic sexual offences.

25. We are not persuaded that there should be any change in the position. Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors as was recognised in *Forbes*, we consider that the approach of taking then into account in a limited way is the correct one.

26. Whilst such a conclusion leaves open the possibility that an offender such as Clarke may die in prison, we draw attention to s.248 of the Criminal Justice Act 2003 which grants the Secretary of State power at any time to release a prisoner on compassionate grounds. It is clear from the section that there must exist exceptional circumstances justifying the release. The matter is dealt with in more detail at Chapter 12 of Prison Service Order 6000. Chapter 12.4 shows that early release may be considered where a prisoner is suffering from a terminal illness and death is likely to occur soon. Again, early release may also be considered where a prisoner becomes bedridden or severely incapacitated, or if further imprisonment would endanger the prisoner's life or reduce his or her life expectancy. Appendix A sets out the criteria to be applied to cases of compassionate release.

27. We have also had regard to this court's approach to sentence in cases involving ill health. We have considered *R v Bernard [1997] 1 Cr. App R (S) 135, R v Qazi [2011] 2 Cr. App R (S) 8,* and *R v Hall [2013] 2 Cr. App R (S) 68*. It is clear that the approach of this court in ill health cases has been similar to that which we have adopted above in relation to old age. That is not surprising since similar considerations arise and since, often, ill health and old age are inter-twined. Two relatively recent examples of the approach are to be found in *R v W [2012] EWCA Crim. 355* and *Attorney General's Reference No 14 of 2015 [2015] EWCA Crim. 949*.

Clarke

28. Ralph Clarke was convicted at Birmingham Crown Court in December 2016 of a large number of sexual offences committed against three of his close relations between 1974 and about 1981, when he would have been aged between 59 and about 65. He has no other convictions recorded against him.

29. These matters did not come to light until 2015. It is clear that at the time of offending the applicant had threatened each of the children so that they would not report matters. When one girl complained to her mother in 1979, she and her sister were denounced as liars. The applicant began to abuse the children after their parents had split up in 1974. They and their mother moved in to live with him and his wife. He was a big man who was given to violence. The family had to abide by his rules and do what he said. He threatened all three children as already described and physically assaulted the boy M. All the children were afraid of him. The abuse took place in the applicant's house, his work shed, and in the cab of a lorry which he took on trips as an HGV driver.

30. After about 18 months, the children moved to their own home with their mother, but the offending continued there as well as at the appellant's home. The appellant was careful to ensure that none of the children saw what was happening to their siblings. This was systematic and continual sexual abuse over a period of about 6 years. It was very regular, penetrative, and involved a gross abuse of trust. It was accompanied both by bribes and by threats not to report the abuse. As the victim personal statements showed, all three children were badly affected in their later lives by what had happened. The two girls were assessed by the trial judge as having suffered severe psychological harm, and it is clear that the boy was traumatised as well. One of the girls had taken an overdose when she was only 13 and the other one had required counselling during her life. The impact upon their inter-family relationships had been significant.

The offences

31. The appellant was convicted on 16 December 2016 of the offences in counts 1 to 21. Those counts involved the two girls. Counts 1 to 14 involved J, counts 15 to 21 involved Z. During the course of the trial, and after J and Z had given evidence, the applicant changed his plea to guilty on counts 23-31 which involved the boy M. The applicant said that J and Z were liars, and claimed that M had consented to sexual activity with him. He showed no remorse whatsoever and had no idea of the impact of his conduct upon the children.

32. Sentencing took place on 19 December 2016, with a slip rule hearing held two days later to amend and pass certain sentences under s.236A of the Criminal Justice Act 2003. We will return later to s.236A. The sentences as finally passed are set out in the following table:

Count	Offence	Pleaded guilty or convicted	Sentence	Consecutive or Concurrent	Maximum
1, 4	Indecent assault, contrary to s14(1) Sexual Offences Act 1956	Convicted	2 years' imprisonment	Concurrent	5 years' imprisonment
2	Indecent assault, contrary to s14(1) Sexual Offences Act 1956	Convicted	A sentence under s. 236A CJA 2003 of 5 years, comprising a custodial term of 4 years and a further 1 year period of licence.		5 years' imprisonment
3, 7, 9, 16, 18, 21	Indecent assault, contrary to s14(1) Sexual Offences Act 1956	Convicted	A sentence under s. 236A CJA 2003 of 5 years, comprising a custodial term of 4 years and a further 1 year period of licence.	Concurrent	5 years' imprisonment
5, 6, 8, 10, 11, 13, 14, 17, 19, 26, 29	Indecency with a child, contrary to s1(1) Indecency with Children Act 1960	Convicted	18 months' imprisonment	Concurrent	2 years' imprisonment
12	Indecent assault, contrary to s14(1) Sexual Offences Act 1956	Convicted	18 months' imprisonment	Concurrent	5 years' imprisonment if complainant under 13, otherwise 2 years' imprisonment
15	Indecent assault, contrary to s14(1) Sexual Offences Act 1956	Convicted	A sentence under s. 236A CJA 2003 of 5 years, comprising a custodial term of 4 years and a further 1 year period of licence.	Consecutive	5 years' imprisonment
20	Indecent assault, contrary to s14(1) Sexual Offences Act 1956	Convicted	4 years' imprisonment	Concurrent	5 years' imprisonment

23, 27, 28,	Indecent assault on a male person, contrary to s15(1) Sexual Offences Act 1956	Pleaded guilty	4 years' imprisonment	Concurrent	10 years' imprisonment
24, 30	Indecent assault on a male person, contrary to s15(1) Sexual Offences Act 1956	Pleaded guilty	5 years' imprisonment	Concurrent	10 years' imprisonment
25	Attempting to commit buggery, contrary to Common Law	Pleaded guilty	5 years' imprisonment	Consecutive	Life imprisonment
31	Attempting to commit buggery, contrary to Common Law	Pleaded guilty	5 years' imprisonment	Concurrent	Life imprisonment

33. The judge therefore passed consecutive sentences under s.236A in respect of each girl comprising a total custodial term of 8 years and a further licence period of 2 years, with 5 years imprisonment to run consecutively for count 25 relating to the boy M.

34. Thus the overall effect of the sentence was an aggregate term of 13 years custody with further periods of licence aggregating to 2 years. The applicant would be eligible for release after serving 6½ years, although for the s.236A offences his release would depend upon the Parole Board, and in theory might not take place until the full custodial term imposed for those offences had been served.

35. As already stated, this applicant is extremely old at 101. Nonetheless he had been able to participate in a three week Crown Court trial with the assistance of an intermediary. The judge referred to his "obvious frailty" in passing sentence. The applicant had deficits in his eyesight, hearing and mobility, and suffered from type 2 diabetes. On the other hand, he had been living independently, in a warden-assisted flat. He had come to court each day on his own on public transport. There is a recent prison report which does not suggest that the applicant cannot cope in prison, or that prison authorities cannot cope with him. It is well known that the prison service is by now experienced in making appropriate provision for geriatric prisoners, and, as previously stated, we received no submissions to the contrary. The author of the prison report commented that the applicant surprised the induction staff at the prison as he quickly integrated with other prisoners, and he had stated that he treated prison as a new experience. The applicant had refused a social care assessment, stating that he required no help, although he has since agreed to engage. The applicant is relatively sprightly for his age. Such problems as he suffers from are manifestations of the aging process.

The offences in detail

36. We next outline the offending in more detail. Counts 1 to 14 involved a girl, J. She was 8 or 9 when the abuse began. The appellant began to touch her indecently in the mornings, getting her to masturbate him in his bed. There was also digital penetration of her vagina. This conduct became a daily event and progressed so that she was performing oral sex on him. On one occasion she also had to sit astride the appellant's

penis simulating sex, at which point a penis or fingers went inside her, hurting her. Digital penetration of her vagina took place at bath time, when watching television, and when the appellant took J out with him in his lorry. On such occasions she had to touch his penis and lick and kiss it, or put it in her mouth. These various forms of abuse also took place, often on a daily basis, in the appellant's garden shed.

37. As time went on, J noticed that he was taking her younger sister Z into the shed, but the appellant thwarted J's attempt to protect her sister by insisting that he went in there with Z alone. The same types of abuse continued after J's mother moved to her own accommodation about 18 months after it had started. Initially J did not realise that what was happening was wrong, but as she got older she did. She had told the appellant that she wanted it to stop. He gave her money and sweets to bribe her. He also told her that she should not tell anyone. He said that she and her siblings would end up in care and no one else would have her. Eventually when J was about 13 she refused to give him oral sex in the woodshed and he stopped sexually abusing her. The abuse had been of about 5 years duration, between 1974 and 1980, when J was aged between 8 and 13 years.

38. Counts 15 to 21 concern Z. The abuse took place between about 1974 and 1981, when Z was aged between 4 and 6, and continued until she was 11 or 12. The abuse started at the appellant's home and followed a very similar pattern to the abuse of J. It covered digital penetration, masturbation to ejaculation and oral sex. It took place at the appellant's home, in his garden shed, and in the cab of his lorry. The abuse stopped when Z was 11 or 12 after she had pushed him away when he entered the bathroom intent on abusing her.

39. At one point in 1979, J told her mother what was happening to her and Z. The appellant accepted that he might accidentally have touched J on one occasion, but denied anything more. He and his late wife, who appears to have turned a blind eye to what was going on, said that the girls were liars and their word was accepted. J and Z thereafter felt that no one would believe them, and so did not make a complaint until 2015.

40. Counts 23 to 31 relate to M, the appellant's grandson. The abuse took place between 1975 and 1977, when M was aged 12 to 14. M would be taken on long distance lorry journeys. They would sleep in the cab overnight and, the applicant would touch M's penis and get him to touch his penis. He would perform oral sex on M and M had to do the same to him. He would also masturbate M and get M to penetrate his anus with M's penis. On one occasion he penetrated M's anus with his finger, and then attempted to commit buggery (count 25). There were also episodes of abuse in the shed, and at the appellant's home.

41. M was disgusted by what was taking place, but because the appellant was an aggressive and violent man, he felt he had no choice. M had been physically assaulted by the appellant. He did not disclose what had happened through shame, and because of threats that his mother and sisters would be forced to leave their home.

42. When the appellant was arrested he denied abusing the two girls and maintained that stance to the bitter end, referring to them as "born liars". He made limited admissions in interview as to his abuse of M.

Sentencing Remarks

43. In passing sentence the judge clearly had in mind annex B of the Sentencing Council's definitive guideline for sexual offences, dealing with historic offending. He also had regard to *R v Forbes*. He analysed the various offences by reference to the guidelines, and recognised that he was limited by sentencing maxima available at the time of the offences.

44. As to the passage of time, he said that the appellant had done nothing over the past 40 years to atone for his crimes. He referred to the threats made, and the denial of the 1979 complaint which ensured that the victims remained silent. That had enabled the applicant to live his life without being punished for his dreadful acts. Only minimal discount would be given for a very late guilty plea to the offences against M. The judge correctly referred to the impact upon the victims, the significant degree of planning, the grooming behaviour involved and the gross abuse of trust. He recognised the appellant's age, and that for him the effect of a custodial sentence would be enormous. In reality a lengthy sentence would not make any real difference as to whether he would be released. Notwithstanding that the appellant had lived for nearly 40 years in the community without being punished, the judge said that he was certainly of the view that his sentence should be discounted because of his age and infirmity. It is clear that had the appellant been a younger man the judge would have imposed a significantly longer sentence.

Conclusion

45. We have already set out the arguments put forward by Mr Hegarty QC and our conclusions upon them. There remains the residual submission that in the circumstances of this case, the sentence imposed was manifestly excessive. An analysis of the offending with its repeated penetrative abuse of three young children would lead to findings of high harm and high culpability in application of the guidelines. There is no mitigation in the passage of time since the offending, given that this offender brazened out the position when complaint was made. There is no mitigation for guilty plea in the case of the two girls, and virtually none in the light of very late pleas regarding the boy. In reality the only matters which can be relied on in mitigation relate to this appellant's old age and the decline in his faculties.

46. In passing sentence the judge made it clear that he took account of those matters and that he had made a significant reduction for them. Without conducting a precise count by count analysis, it was common ground at the hearing before us that for a younger man, a sentence of 20 years or more would have been appropriate. It is worth noting at this point, that this appellant whom the jury was sure was guilty of these offences chose to plead not guilty and to display a defiant attitude, thereby depriving himself of potential mitigation for early guilty plea and remorse. Had he entered an early guilty plea, he would have had the benefit of reductions from the 13 year custodial term which the judge imposed. The effect of that would have been a sentence of about 8 years which was precisely the level of sentence which Mr Hegarty was urging upon the court as representing appropriate recognition of his client's extreme old age. It follows from this analysis that time in custody beyond half of an 8 year term arises because a guilty man sought to continue to avoid the consequences of his offending. It seems to us anomalous and contrary to principle that we should simply ignore this aspect of the matter as we

were urged. It would have the effect of ignoring settled sentencing practice designed to recognise the benefits for victims, witnesses and the wider court process accruing from guilty pleas. It would provide a perverse incentive for aged offenders wrongly to deny their guilt in the knowledge that there was little or nothing to be lost by contesting the case.

47. Having regard to the circumstances of this offending and what we know about this offender's age and condition, we are not persuaded that the sentence passed was manifestly excessive. For these reasons this appeal fails on the grounds relating to old age.

Section 236A

48. In this case there was a failure properly to apply the provisions of s.236A of the Criminal Justice Act 2003 and the decision of this court in *R v Fruen* [2016] EWCA Crim. 561. Where a person over 18 at the time of the offence is convicted and not sentenced to life imprisonment or an extended sentence, he is liable to a sentence under s.236A if (inter alia) he is convicted of an "abolished offence". Such offences include offences which in modern times will be charged as rape of a child under 13 or assault of a child under 13 by penetration, or attempts to commit those offences. Section 236A requires the addition of a further year's period of licence to the sentence.

49. In Clarke's case, although the judge realised his error in failing to pass any s.236A sentence initially, he failed to put the matter in order at the slip rule hearing. In relation to counts 4, 6, 11 and 20 the judge should have passed a sentence under s.236A since his sentencing remarks showed that he made findings sufficient to constitute an abolished offence.

50. A question has also arisen in relation to the offences at counts 24, 25, 30 and 31 which relate to the young male victim M. Again, the judge did not pass a s.236A sentence. We consider in this instance that he was correct not to do so. The particulars given referred to M as having been aged either 12 to 14 or 12 to 13, and the judge after consideration was unable to make a finding that the offending had necessarily occurred when M was under the age of 13. Accordingly, the judge was correct not to impose a s.236A sentence for these counts.

51. The judge therefore imposed a determinate sentence on count 25 to run consecutively to the s.236A sentences imposed in relation to the counts in relation to the two female victims. In so doing, the judge failed to follow the practice identified in *R v Francis and Lawrence [2014] EWCA Crim. 631* at [50-57]. The determinate sentence at count 25 should have been imposed first, with the s.236A offences in relation to the two female victims running consecutively.

52. These are purely technical corrections which will have no impact whatsoever upon the appellant's sentence. However, in order to correct the position we quash the sentences on counts 4, 6, 11 and 20 and replace each of them with a sentence under s.236A. On counts 4 and 20 we impose a sentence of 5 years, comprising a custodial term of 4 years and a further 1 year period of licence. On counts 6 and 11 we impose a 2 year sentence

comprising 1 year's custody and 1 year's licence. We further order that the s.236A sentences on counts 2 and 15 in relation to each female victim run consecutively to one another as the judge ordered, but also consecutively to the 5 year determinate term imposed on count 25 in relation to the victim M. To that technical extent only this appeal is allowed.

Cooper

53. Cooper pleaded guilty at the Taunton Crown Court on 20 February 2017 to five offences of indecent assault contrary to section 14 (1) of the SOA 1956 (counts 2,3,5,8 and 9) and one offence of indecency with a child contrary to section 1 of the Indecency With Children Act 1960 (count 7). His Honour Judge Evans sentenced him to 4 years under section 236A of the CJA 2003 comprising a custodial term of 3 years and an extended licence of 1 year on count 2, concurrent terms of 24 months on the four other counts of indecent assault and 9 months concurrent on count

The offences

54. Between 1985 and 1992, when the applicant was in his mid to late sixties and the complainant ("C") aged between 6 and 12, the complainant was a regular visitor to the applicant's home. He was a close relation by marriage and in a position of very considerable trust towards her. The applicant abused that trust over a number of years by sexually assaulting her on a regular basis. According to C, the indecent assaults included touching her vagina, stimulating her clitoris and inserting his fingers into her vagina. It became part of her bath time and bedtime routines that the applicant stroked her thigh and her tummy, caressed her and tried to arouse her before putting his fingers inside her. On other occasions, members of the family were in the same room. He assaulted her in the sitting room, obscuring what he was doing from others by the use of a cushion. He behaved indecently with her, when naked in his bed, by inciting her to touch his penis, in the presence of her sister.

55. In December 2014, the complainant confronted him and he admitted abusing her. Subsequently he sent letters to the complainant, her sister and their mother in which he apologised for his behaviour describing it as wicked, horrible and inexcusable. He claimed that he had been feeling guilty for a long time.

56. The assaults were reported to the police and the applicant was arrested on 8 June 2015. He gave a no comment interview but indicated that he intended to plead guilty at the magistrates' court. He proposed a basis of plea at the Crown Court in which he accepted:

(i) touching C's naked genitalia on three to four occasions when she was in bed at two addresses;
(ii) touching C's naked genitalia when she was sitting on his lap;
(iii) getting C to touch his naked penis when she was in bed with him;

57. He did not, at first, appear to accept penetration. By the time of the sentencing hearing, he was prepared to admit that the abuse occurred on a regular basis over a number of years (far more than six times) and included a degree of penetration. Although he did not accept penetration of the vagina as C had alleged, he admitted that his touching would have had the effect of penetrating the labia within the meaning of section 79 (9) of the

Sexual Offences Act 2003.

58. The impact upon C has been severe. In a witness statement she explains that the abuse is always with her. Her childhood was shattered. She has suffered from stress and anxiety, a loss of confidence and has resorted to self-harming. She cannot trust other people, particularly men and including her own father. Her relationship with her sister has been destroyed. She found the applicant's failure to acknowledge his abuse when interviewed by police and his decision to wait until the magistrates' court to do so publicly particularly difficult. Although not in her witness statement, C informed the officer in the case that she did not wish to see the applicant receive an immediate custodial sentence. Family members confirm the impact upon them has also been significant, albeit some remain supportive of the applicant.

59. The author of a medical report found that the applicant was alert and has no cognitive impairment. He has suffered from colon and skin cancer in the past and must urinate on an hourly basis. He has hearing loss for which he wears hearing aids. He spent the first two weeks in custody in a specialist unit at HMP Exeter where he settled in well. He was in a single room and received a high level of support from prison officers, nursing staff and orderlies. However, because his physical condition does not justify that level of care, he is to be moved to HMP Dartmoor where the same specialist facilities are not available.

Sentencing Remarks

60. The judge sentenced on the basis that the offences began when C was only six and included digitally penetrating her vagina and her genitals, touching her between her legs, and inciting her to touch the applicant's penis when her sister was present. The maximum sentences available were 10 years' imprisonment for indecent assault and 2 years' imprisonment for indecency with a child. Having been urged by the Crown to identify an offence under section 6 of the Sexual Offences Act (assault of a child under 13 by penetration) as the modern equivalent, the judge was persuaded that the more appropriate modern equivalent, on these facts, was section 7 (sexual assault of a child under 13) but "with a degree of penetration involved". He acknowledged the lower maximum for the offence of indecent assault and that reference to the current guideline should be measured. He categorised the offence as 2A and took a starting point of 4 years. He increased that figure to 6 ½ years to reflect the aggravating features, made a reduction of approximately 2 years to reflect the powerful personal mitigation and made a further one third reduction to reflect the guilty plea.

Grounds of Appeal

61. There were initially two grounds of appeal against sentence.

(i) The sentences imposed were manifestly excessive and/or wrong in principle in all the circumstances.

(ii) The additional period of licence imposed pursuant to section 236A was unlawful.

In his oral submissions Mr Mason abandoned the second ground.

62. Mr Mason attacked the sentence as excessive on two bases. First, the judge reached too high a figure before giving credit for mitigation and second, the judge gave insufficient

weight to the mitigation and in particular to the applicant's advanced age.

63. He sought to persuade us that section 7 of the SOA 2003 should be taken as the modern equivalent offence, despite admissions as to penetration, because the maximum penalty for a section 6 offence is far higher than the maximum penalty available for indecent assault, namely life imprisonment as opposed to 10 years. Furthermore, when applying the guideline, the judge was obliged to factor in the higher maximum penalty for section 7 offences of 14 years. Mr Mason argued for a lower starting point than 4 years and a smaller upward adjustment to reflect the aggravating factors.

64. Mitigating factors were said to include the applicant's remorse, his extreme age, his natural frailty and vulnerability, his exemplary character over many years of serving his community as a general medical practitioner, and the wishes of the complainant. Giving those factors the additional weight suggested, one might arrive at a figure below 4 years before giving one-third credit for the guilty plea. This would lead to a sentence at or close to a level that could be suspended. Mr Mason described a suspended sentence as a "just outcome".

Conclusion

65. We reject the criticisms of the sentencing judge. His approach to the sentencing exercise was correct. He took as the modern equivalent offence the lesser offence under section 7 of the SOA but acknowledged the higher maximum penalty. He identified the correct category of offence (2A) the starting point (4 years) and the range (3-7 years). He adjusted the sentence upwards to reflect the relevant aggravating factors, downwards to reflect mitigating factors, and he gave credit for plea. If there is any criticism to be made of him in this process, it would be that he was over generous to the applicant in his assessment of the gravity of the offending in the light of the number of offences.

66. The guideline is directed at one offence. This was a 'campaign' of abuse over many years with devastating consequences for the victim. In the light of the number of offences and aggravating factors, including the presence of others (on one occasion another child), the age of the complainant when the abuse started, and a degree of penetration in each assault, even a measured reference to the guideline would produce a figure in the region of 8 years. The mitigating factors of age and personal mitigation would not result in a downward adjustment below four-and-a-half years. With credit for the guilty pleas, the result is the same (or might have been higher): namely 3 years. A custodial term of 3 years for offences of this seriousness cannot in any way be described as excessive, even for a man of 96.

67. Finally we must resolve the 236A issue in Cooper's case. Where an historical offence such as indecent assault does not plead the fact of penetration in the particulars, "there must either have been an admission of penetration by the defendant to the court or a finding by the judge that penetration has taken place in order for the offence to come within the ambit of sections 5 or 6 of the SOA 2003". (see para 10 of *Fruen* supra). In this case, there was both an admission and a finding that penetration had taken place. All the other requirements of section 236A were met. The judge's selection of an offence under section 7 of the SOA 2003 (which does not necessarily involve penetration) as the more appropriate offence for the purposes of the Sexual Offences guideline is not

relevant for the purposes of section 236A.

68. Thus, an order should have been made under section 236A in respect of all five counts of indecent assault. The judge's sentencing remarks suggest an order under section 236A was made on one count only (count 2). We have no power to extend the licence period as required under section 236A where it would entail our imposing a more severe sentence. We do, however, have the power to follow the requirements of section 236A where it would have no impact upon the sentence served or the licence period to which the applicant will be subject. Accordingly, we shall make the necessary amendment to the concurrent sentences imposed on counts 3,5,8 and 9.