Neutral Citation Number: [2022] EWCA Crim 483

Case No: 202200530

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
His Honor Judge Newbery
T20217173

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 April 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE MAY
and
HIS HONOR JUDGE POTTER

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

JACHIN JOSHUA MASCALL **Respondent**

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Serena Gates appeared on behalf of **HM Solicitor General**
Marion Smullen appeared on behalf of the **Respondent**

Hearing date : 31 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30am on 11 April 2022.

Lord Justice William Davis:

Introduction

1. On 15 June 2021 in the Crown Court at Inner London the offender, Jachin Joshua Mascall, pleaded guilty to the three counts of rape of a child under 13 contrary to Section 5(1) of the Sexual Offences Act 2003. He had indicated those pleas at the point of sending from the magistrates' court. On 24 January 2022 in respect of each count the offender was sentenced concurrently to a community order of three years' duration. The requirements attached to the order were 200 hours unpaid work, rehabilitation activity requirement of 40 days and a programme requirement, namely 48 sessions of choices and changes programme. The Solicitor General seeks leave pursuant to Section 36 of the Criminal Justice Act 1988 to refer the sentence to this court as unduly lenient.

The facts

2. The victim of the offences was aged 12 years 10 months at the relevant time. We shall refer to her throughout as EM. She lived in south London. She was described by the judge as "a highly vulnerable child". Notwithstanding her age she had joined Tinder, a dating app which ostensibly has a minimum age requirement of 18. Although we know little about her other than the facts of this case, it is apparent that she was a child whose mother found her difficult to control.

3. The offender was born in January 2002. He was 19 and of good character at the time of the offences. His family home was near Dunstable in Bedfordshire. However, he had fallen out with his parents at some point early in 2021. He stopped living with them though he would return home to change his clothes and/or to shower. He slept at friend's houses or in a friend's car. The offender also used Tinder. It was via the app that he first encountered EM. At or around the beginning of March 2021 he and EM swapped telephone numbers.

4. On a day at the beginning of April 2021 EM travelled by train from London to Luton with a friend. At the station they met the offender and some other young men. This was the first time that EM and the offender had met in person. EM's friend said that she, the friend, was aged 12. EM told the offender that she, EM, was 20. Whether on that visit or subsequently she said that she had a car and that she had accommodation of her own. EM and her friend spent several hours in Luton with the offender and his friends. They were at the home of one of the other young men during that time. The visit ended with EM and her friend being taken back to the station by the offender.

5. In the early hours of 4 May 2021 the offender travelled from the Luton area to London. He met EM somewhere in south London. EM had left her grandmother's address on the evening of 3 May 2021. She had been staying with her grandmother because her mother (with whom she generally lived) was in the process of moving house. When her mother came to pick her up on the evening of 3 May and discovered that EM was not there, EM was reported as missing. The offender and EM spent the next 36 hours together. They travelled to various parts of London. They went by train to Bletchley and Milton Keynes. On one of the train journeys a ticket inspector asked EM her age and she gave a false date of birth. During the time the offender was

with EM he had vaginal sex with her in a car park at Westfield Stratford in east London. He ejaculated in the vicinity of her vagina. On two separate occasions at different railway stations EM performed oral sex on the offender. He ejaculated on each occasion. EM swallowed the ejaculate. At no point did the offender and EM go to any house or flat. They did not go in a car.

6. By 9.00 a.m. on 5 May 2021 the offender and EM were back in south London. They were seen by EM's mother who had been looking for her daughter. They ran into a nearby residential estate to get away from the mother. The offender held the back of EM's jacket as they ran. EM's mother followed them onto the estate. When EM walked between two cars and a little way apart from the offender, her mother was able to grab hold of her. When he saw this the offender shouted "are you mad, what the fuck man". EM's mother shouted "paedophile" and said that the police were coming. The offender ran away. According to the mother the offender lifted his jacket to show a knife in his waistband. In due course this was disputed by the offender. We mention this only for completeness. This feature could not and did not impinge on the eventual disposal of the case.

7. EM was taken by her mother to Brixton Police Station. When first interviewed EM did not say that any sexual activity had taken place. Once at home her mother saw that there was semen and blood on EM's underwear. As a result the police re-interviewed EM. The semen was found to be that of the offender.

8. The offender was arrested on 15 May 2021 in Birmingham. When interviewed by the police he immediately admitted that he had had vaginal sex and oral sex with EM. He said that she had led him to understand that she was 20. He stated that, in his own mind, he thought that she might be a bit younger but that at all times he believed that she was over 16.

The proceedings

9. The offender was charged with three offences of rape of a child under the age of 13. At his first appearance before the magistrates' court on 18 May 2021 he indicated that he would enter pleas of guilty. He was sent to the Crown Court sitting at Inner London. At the PTPH on 15 June 2021 he pleaded guilty to three counts of rape of a child under 13. At that hearing a draft written basis of plea was provided. It set out the facts as we have rehearsed them. It disputed the offender's alleged possession of a knife when he was seen by EM's mother. It stated that the offender at no time believed that EM was under 16. Whilst accepting that the offender had had vaginal and oral sex with EM, it said that the offender at no stage had forced EM to have sex.

10. On 26 August 2021 the Crown Prosecution Service responded in writing to the draft basis of plea. At that stage the prosecution did not accept that the sexual activity between the offender and EM was unforced. It was asserted that the activity had been against EM's wishes. There were further hearings on 31 August 2021 and 1 October 2021. At the October hearing the prosecution invited the court to list the case for sentence. The court ordered the parties to provide an agreed basis for sentence prior to the sentencing hearing. On 26 November 2021 the prosecution produced a document entitled "Factual Basis for Sentencing". In this document it was said that (a) CCTV footage had been recovered from more than one location in which EM and

the offender were together and which showed no distress on the part of EM and (b) the sexual activity between the offender and EM was unforced.

11. The case was listed for sentence on 7 December 2021. The pre-sentence report available at this hearing had been prepared on the basis that the sexual activity between EM and the offender had been non-consensual. Since this was no longer the basis of the prosecution case, sentence was adjourned to allow the preparation of a fresh pre-sentence report. Up to this point the offender had been remanded in custody. When sentence was adjourned, the offender was released on bail albeit with a condition of electronically monitored curfew. Sentence eventually was imposed on 24 January 2022 in the terms we already have rehearsed.

Material before the judge

12. The pre-sentence report prepared for the purpose of the final sentencing hearing is dated 19 January 2022. In the course of the report the author said as follows:

> "In my assessment Mr Mascall appears to be somewhat immature for his age. He says that the victim did not tell him the truth, however, it is also the case that he dd not actively question what the victim had told him about herself or the fact he had not seen any evidence to verify what she had said such as a car, a drivers licence, or her accommodation….
> It is difficult for professionals to entirely believe that the victim did not show some indications to Mr Mascall that might cause him to reasonably suspect that she was in fact younger than her stated age. He perhaps did not think she was 20 and he regrets not discussing this with her.
> Furthermore, if the subject of age did not come up during the course of a platonic friendship then it is reasonable to expect those engaging in sexual activity to at least take some steps to at least check a person's age or sexual history, in the absence of some other concrete evidence, other than via self-disclosure, particularly as it is well known that users of social media sometimes misrepresent personal details including age and that this is a relatively well-known and common practice on dating websites. The failure to use a condom could also be seen as evidence of lack of care for the health and wellbeing of others…..
> Mr Mascall's explanation of the offence does call into question his maturity and judgment. He could be as easily portrayed as irresponsible, opportunistic, and taking advantage of a vulnerable person as he could be portrayed as lacking in maturity and good judgement, acting impulsively and without thinking about the longer term consequences of his actions. Only time and regular reassessment would inform which portrayal is more accurate.
> My impression is that he lacks maturity having experienced a somewhat sheltered upbringing by well-meaning but strict parents. He appears to crave guidance and direction. However, this cannot entirely or adequately explain the apparent lack of insight and awareness demonstrated. …."

13. At an early stage of the proceedings the offender had been the subject of a psychiatric assessment. The report of Dr Kretzschmar is dated 29 July 2021. She had details of the prosecution allegations which at that point included the proposition that the sexual activity had been non-consensual. However, she described such extraneous material as "assumed facts" and said that she only had personal knowledge of what had emerged from her examination of the offender. She reported what he had said to her.

Her assessment inter alia was that he "did not acknowledge that he had any part in responsibility for the offence" and that he "appeared to consider himself in the position as a victim". She found "a lack of remorse or feelings of guilt with regards to the victim".

14. The judge was provided with seven letters from members of the offender's family, from friends and neighbours, from a teacher and from a local minister of religion. Each referred to the offender as well-mannered and fundamentally decent. His mother spoke of him as being responsible and mature. A neighbour described him as independent and responsible. All regarded the behaviour which led him to be before the court as being out of character. The offender himself wrote a letter to the judge. This was written when the position of the prosecution in relation to his basis of plea had yet to be determined. The letter showed limited insight into the offences. In particular, it gave no regard to the position of EM. We bear in mind that the letter was written in the context of the case as it then was being put by the prosecution.

15. Both EM and her mother made victim personal statements. EM's statement was brief. The prosecution eventually proceeded on the basis that much of what EM said when interviewed by the police was unreliable. In those circumstances we do not give that statement any significant weight. That does not apply to EM's mother whose statement is dated 20 January 2022. She said that, due to the perceived risk to EM in staying in London, the family had moved away. This has taken the family away from the grandmother and other family members. EM herself now wakes in the night with terrors and her mother has to lie in bed with her to comfort her. EM's mother continues to suffer anxiety attacks following the events of last May.

The sentence

16. The sentencing judge had had conduct of the case throughout. She was fully aware of the way in which the attitude of the prosecution had changed over the course of the proceedings. The judge began by identifying the material with which she had been provided and the basis upon which she was to sentence in terms of the offender's knowledge of EM's age. As we already have said, she described EM as "a highly vulnerable child". She acknowledged the harm caused by the offending as revealed in EM's mother's victim personal statement. In describing the factual background the judge found that no grooming of EM had occurred and there was an absence of exploitation. She described the offender as "a young man who is relatively ordinary, immature and possibly rather naïve". She noted his good character.

17. The judge then turned to consider the application of the Sentencing Council Definitive Guideline in relation to rape of a child under 13. In particular she had regard to the explanatory passage which appears at the beginning of that guideline. This reads as follows:

> "This guideline is designed to deal with the majority of offending behaviour which deserves a significant custodial sentence; the starting points and ranges reflect the fact that such offending merits such an approach. There may also be **exceptional** *(emphasis as in the published guideline)* cases, where a lengthy community order with a requirement to participate in a sex offender treatment programme may be the best way of changing the offender's behaviour and of protecting the public by preventing any repetition of the offence. This guideline

> may not be appropriate where the sentencer is satisfied that on the available evidence, and in the absence of exploitation, a young or particularly immature defendant genuinely believed, on reasonable grounds, that the victim was aged 16 or over and that they were engaging in lawful sexual activity."

The judge said that the guideline only applied to a defendant who was aged 18 or over so the term "young" had to be interpreted in that context. On that basis the offender was young. She also found that he was immature. Thus, the judge determined that it was not in the interests of justice to sentence within the guideline.

18. The judge said that this was an exceptional case. She was not assisted by the authorities to which she had been referred, each case being fact specific. She considered that factors which might otherwise have aggravated the offence – lack of a condom, ejaculation, sexual activity in public places at night – were lacking in the potency they would have had if the case had fallen within the guideline. She said that apparent lack of remorse was more to do with immaturity than anything else. Having observed that the offender had served the equivalent of a sentence of 14 months by reference to his time on remand and that he was entitled to full credit for his pleas of guilty, the judge concluded that the appropriate sentence was a community order. So it was that she imposed the community order in the terms set out at the beginning of this judgment.

Submissions

19. On behalf of the Solicitor General it is submitted that, were the guideline to apply, Category 2 harm would be established by the sustained nature of the offending and by the degradation involved in the offending occurring at night in public places. No culpability A factors were present. As a Category 2B case the starting point in the guideline is 10 years with a category range of 8 to 13 years. Were the case to fall into Category 3B, the starting point would be 8 years with a range of 6 to 11 years. In terms of aggravating factors it is argued that ejaculation, no use of condom and lack of remorse apply. It is accepted that the offender's reasonable belief that EM was aged at least 16 and his previous good character amounted to mitigating factors.

20. However, the Solicitor General does not submit that the judge erred in departing from the guideline. It is accepted that the offender genuinely believed on reasonable grounds that EM was aged at least 16. Although the introductory passage to the guideline states that the guideline "**may** not be appropriate" in those circumstances, here it is said that the offender's belief did render the guideline inappropriate. Rather, it is argued that the guidance given in *Attorney General's Reference Nos 74 and 83 of 2007* [2008] 1 Cr App R (S) 110 would indicate that a custodial sentence of at least 4 years ought to be imposed in a case such as this. In this instance, the judge double counted the effect of the offender's reasonable belief. It was used to remove the case from the ambit of the guideline. It was used again to justify exceptional circumstances justifying a non-custodial sentence. Moreover, the judge failed to give proper weight to the aggravating factors. Their potency remained even if the normal starting point in the guideline was not being adopted. It is submitted that, contrary to the finding of the judge, there was an element of exploitation in the offending given the period of time during which EM was in the offender's company and the power relationship as between the offender and EM. Finally, it is argued that insufficient

weight was given to the impact of the offences as revealed in the victim personal statement of EM's mother.

21. On behalf of the offender it is argued that the judge's finding in relation to exploitation was correct. At an earlier stage of the sentencing process the prosecution conceded the lack of exploitation. That concession was appropriate given the circumstances in which the offender and EM were together. In broader terms it is submitted that the judge properly concluded that this was an exceptional case which justified a non-custodial sentence. The judge was entitled to pay particular regard to the offender's lack of maturity and to the fact that he had spent some time in custody awaiting his sentence. The provisions of Section 36 of the 1988 Act are there to correct gross errors by a sentencing judge. No such error had been made here.

Discussion

22. We are not aware of any previous decision of this court in which the Sentencing Council Definitive Guideline in relation to rape of child under 13 has been considered in the context of an offender who reasonably believes that the child is aged 16 or over. *Attorney General's Reference Nos 74 and 83* to which we have been referred was concerned with the Sentencing Guidelines Council Definitive Guideline. A more recent consideration of sentencing practice in relation to the offence where the offender reasonably believes that the victim is over 16 is to be found in *Attorney General's Reference Nos 11 and 12 of 2012* [2012] EWCA Crim 1119. This decision did not form part of the written submissions on behalf of the Solicitor General. It was not put before the sentencing judge. However, it is concerned with general principle rather than Sentencing Council Definitive Guideline. That only came into force on 1 April 2014.

23. The first point that emerges from this more recent consideration of the offence of rape of a child under 13 is what properly is to be gleaned from *Attorney General's Reference Nos 74 and 83.* The Solicitor General argues that the case indicates that a starting point of 4 years' custody is appropriate in circumstances such as these. In *Attorney General's Reference Nos 11 and 12* at [32] the court said:

> "The court in (the earlier case) was not suggesting at paragraph 14 that, merely because the victim gave "ostensible consent" and the offender reasonably believed that victim was aged 16 or over, the starting point and sentencing ranges for section 9 offences would apply to convictions under section 5 of the Act; still less was the court suggesting that the guideline for section 9 offences should apply when the offender reasonably believed the victim to be aged 13-15 years. The Vice President was pointing out only that the guideline for section 9 offences gave an indication that, in the case of a young adult who reasonably believed the victim was aged 16 or over, where the sexual activity was consensual, the minimum starting point would be 4 years. It remained necessary carefully to consider all the circumstances, including the nature of the encounter with the victim and the respective ages of the offender and the victim."

The court went on to observe that, in the two cases considered in *Attorney General's Reference Nos 74 and 83*, the minimum starting point before discount for plea was set at 6 years' custody.

24. Within the general observations made by the court in *Attorney General's Reference Nos 11 and 12* we note the following at [34]:

> "There is a strong element of deterrence in sentencing for sexual offences committed against young children, whether they are sexually experienced and 'willing' or not. They are, by reason of their young age, vulnerable to exploitation and require protection, sometimes from themselves. It can be assumed that, whatever the circumstances, there is likely to be considerable long-term harm caused by such offences."

The court also approved the proposition that there was a distinction to be drawn between offending which might be regarded as being within the context of a relationship and offending which is opportunistic. The latter will be more serious.

25. The context of those decisions was paragraphs 2.12 and 2.16 to 2.18 of Sentencing Guidelines Council Definitive Guideline:

> "2.12 In keeping with the principles of protection established in the SOA 2003, the Council has determined that:
> • Higher starting points in cases involving victims under 13 should normally apply, but there may be exceptions;
> • Particular care will need to be taken when applying the starting points in certain cases, such as those involving young offenders or offenders whose judgment is impaired by a mental disorder; and
> • Proximity in age between a young victim and an offender is also a relevant consideration….
>
> 2.16 All the non-consensual offences involve a high level of culpability on the part of the offender, since that person will have acted either deliberately without the victim's consent or without giving due consideration whether the victim was able to, or did in fact give consent.
>
> 2.17 Notwithstanding paragraph 2.11 above, there will be cases involving victims under 13 years of age where there was, in fact, consent where, in law, it cannot be given. In such circumstances, presence of consent may be material in relation to sentence, particularly in relation to a young offender where there is close proximity in age between the victim and offender or where the mental capacity or maturity of the offender is impaired.
>
> 2.18 Where there was reasonable belief on the part of a young offender that the victim was 16 this can be taken into consideration as a mitigating factor."

We have already quoted the equivalent part of the Sentencing Council Definitive Guideline.

We must consider whether the guideline as it now stands requires a different approach to that taken in the earlier decisions to which we have referred.

26. We are satisfied that it does not. In *Attorney General's Reference Nos 74 and 83* the court quoting with approval from paragraphs 6 to 10 of the judgment in *Corran* [2005] 2 Cr App R (S) 73 said at [7]:

> "Although absence of consent is not an ingredient of the offence, presence of consent is, in our judgment, material in relation to sentence, particularly in relation to young defendants. The age of the defendant, of itself and when compared with the age of the victim, is also an important factor. A very short period of custody is likely to suffice for a teenager where the other party consents. In exceptional cases….a non-custodial sentence may be appropriate for a young defendant."

The court went on to say at [15] that, given the added emphasis on the protection of the young in the relevant provisions of the Sexual Offences Act 2003, the sentence to which reference was made in *Corran* was only likely to apply to an offender over the age of 18 in very special circumstances. These observations are reflected in the wording of the Sentencing Council Definitive Guideline. There will be exceptional cases. Even where the case is not exceptional, the guideline may not apply where there is genuine belief that the victim was aged 16 or over.

27. EM was about 2 months short of her 13th birthday when the offences were committed. We do not consider that this can affect the position to any significant degree. This court discussed the potential relevance of what the position might have been had the victim been in 13 in *Attorney General's Reference No 142 of 2015* [2016] 1 Cr App R (S) 68 at [29]:

> "…we think it can be potentially misleading to have over much regard to what the position might have been had only the victim been 13. The short point is that she was not 13. She was 12 and a half; she was a young child. Further, the whole point of this particular provision is to protect young children from themselves. To emphasise, as the recorder did, that here there was no force, here there was no manipulation, here there was no coercion, misses that point. The consent given is " consent ", to be put in italics; a child aged 12 cannot lawfully consent. Of course it is relevant that no force or coercion as such was used. But the underlying point remains that children such as this victim need to be protected from themselves."

Although this was said in the context of a case where the offender knew that the victim was under 13, it is of general application. The requirement to protect children under 13 from themselves is just as important when the child allows the offender to believe that she is over 16.

28. With all of that in mind how is the offending in this case to be categorised? We consider that the following features are important:

(i) EM was a highly vulnerable child. She may have passed herself off as a 20 year old but that does not detract from her vulnerability. The strong element of deterrence is of significance in this case.

(ii) The victim personal statement of EM's mother was a proper foundation for a finding that the harm caused by the offender was substantial. We acknowledge that EM must have been a troubled child before her encounter with the offender. Equally, there is no reason not to take the mother's statement at face value.

(iii) The relationship between the offender and EM can only be categorised as opportunistic. The offender came to London to meet EM. They did not go to her home wherever that might have been. Rather, they travelled around

London and went to the Milton Keynes area and engaged in sexual activity in car parks and railway stations. They were together for at least 36 hours. He was 19 and she was 12.

(iv) Though the offender was and is not a mature adult, he was not markedly immature for his years. His immaturity was referred to in equivocal terms within the reports. He was not described as immature in the statements made by those who know him; rather the reverse. The observations in *Clarke and others* [2018] EWCA Crim 185 at [5] remain of some relevance to the offender. Equally, he is not someone of particular immaturity on the available evidence.

(v) There were aggravating factors relating to the offending which the judge identified: ejaculation; no use of a condom; location of the offending. These factors were significant. They did not lose their potency even if the case did not fall to be sentenced within the guideline category range. Any sentence had to reflect the fact that EM was raped on three separate occasions.

(vi) The judge found that the offender's belief in relation to EM's age was reasonable. That was inevitable given the view taken by the prosecution. However, it remained the position that the offender spent a substantial period with EM. He did not question the fact that they did not go to her flat. According to him she said that her uncles were using it. He took this unlikely account at face value. There was no sign of the car to which she supposedly had access. There can be an element of risk taking when committing offences of this kind. That applied here.

29. Taking all of those matters into account, we are quite satisfied that this is not an exceptional case of the kind referred to in the Sentencing Council Definitive Guideline. Whether the judge truly approached the case in that fashion is open to question. She did use the expression "exceptional case". But it seems to us that in reality she took the view that the case fell outside the guideline and that, because the offender already had served the equivalent of 14 months' custody, the right course was to impose a non-custodial sentence. The six factors which we have set out above alone mean that the case was very far from exceptional within the meaning of that term in the guideline. We do not accept the submission on this issue made on behalf of the offender.

30. The Solicitor General does not resile from the position adopted by the prosecution in the court below in relation to the offender's belief as to EM's age. He accepts that in consequence the guideline is not "appropriate". We are bound to deal with his application on that basis. We first must ask whether the conclusion that the guideline is not "appropriate" requires the sentencing judge to abandon it altogether and to approach the sentencing exercise from first principles. Alternatively, is the correct approach to consider the categories of harm and culpability and then the aggravating and mitigating factors as they appear in the guideline in order to reach an assessment of the overall seriousness of the case but not to use the starting points and category ranges other than as reference points of relative seriousness? This was not an issue in relation to the Sentencing Guidelines Council Guideline because the scheme of the guideline was different. We find that the second approach is how the sentencing exercise should be approached. The categories of harm can be just as relevant to the case where an offender believed that the victim was over 16 as to the case where there was no such reasonable belief. There may be cases in which higher culpability factors

will be present notwithstanding a reasonable belief that the victim was over 16. In many cases – of which this is one – there will be no higher culpability factors **and** culpability will be substantially reduced by the offender's reasonable belief

31. We accept the submission that there were harm factors which, by reference to the guideline, would have placed the offence within Category 2. These matters were not and are not affected by the offender's genuine and reasonably held belief. Assessment of culpability in a case such as the present is not straightforward. Not only were there no higher culpability factors but also culpability was reduced by the offender's belief in relation to EM's age. It would be wrong to say that in some way the offender's culpability was within B of the guideline. That would fail to give proper weight to the offender's belief. A careful assessment of the effect of the offender's belief is necessary. We consider that the following matters are important:

    (i) The offender was with EM for many hours. At no point did he actively question her about what she had said in relation to having a flat or the car to which she supposedly had access.
    (ii) Even for someone of the offender's age and level of maturity and even where the subject of age did not come up, it would be reasonable to expect some steps to be taken to check the person's age or sexual history. No such steps were taken. This consideration is not to undermine the proposition that the offender held a genuine belief which was held on reasonable grounds. He had been told by EM that she was 20 when they first met and she said nothing to contradict that at any point. Equally, the circumstances of a genuine belief will vary. The offender's position was very different from (say) an immature 18 year old who meets an apparently mature 12 year old (who lies about her age) at a party during which they have consensual sexual intercourse with the entire incident occupying no more than an hour or two. The culpability of that person will be far removed from that of the offender.
    (iii) The offender at no point used a condom. Whatever his belief as to EM's age that showed a lack of care for EM's health and wellbeing.
    (iv) The sexual activity took place at night in locations such as a public car park.

    Taken in the round the offender's culpability lay in his willingness to accept without more what EM told him, his failure to reflect sufficiently or at all as to what they were doing and where they were doing it, his failure to re-evaluate the position as time went on and his lack of any care for EM when he was engaging in sexual activity with her when he knew very little about her true circumstances.

32. We must address the issue of exploitation. It was considered by the judge. As we already have noted, she concluded that there was no evidence of exploitation in the circumstances of the relationship between the offender and EM. In the context of sexual offending of this type exploitation involves the using of the victim for the offender's sexual advantage. It implies an imbalance of power between the offender and his victim. What existed here was a culpable lack of responsibility on the part of the offender rather than exploitation in the strict sense. He was 19 whereas EM was 12. He was the person as between the two of them who ought to have exercised responsibility.

33. The Solicitor General invited us to depart from the judge's view in relation to lack of remorse. He argued that it was an aggravating factor and that it could not be ascribed

simply to the offender's lack of maturity. In our view lack of remorse is more accurately categorised as the absence of a mitigating factor. In any event, whilst the offender at various points in the course of the proceedings appeared to be more concerned with his own position than that of EM, we take into account that he was and is a young man who has been confronted with the consequences of what he did.

34. The Solicitor General makes his application on the basis that there is a starting point of 4 years' custody in a case such as this. He relies on *Attorney General's Reference Nos 74 and 83 of 2007* for that proposition. We are concerned with a different guideline to that considered in 2008. However, we agree that the judgment in the earlier Reference is a useful guide. It demonstrates that, other than in an exceptional case, a significant custodial sentence will be appropriate. The length of any such sentence will vary depending on the circumstances. It is not possible to provide any more detailed guidance since facts in these cases will vary greatly. Thus, in the particular circumstances of the offenders with which the earlier Reference was concerned the proper sentence before credit for plea was said to be six years. But close comparison between the facts in those cases and this offender's case is not appropriate.

Conclusion

35. Taking account of the factors we set out at paragraphs 28 and 32 above, we conclude that, before credit for plea, the appropriate sentence in this case was 60 months' detention in a young offender institution. This custodial term reflects the harm caused by the offender, his culpability as we have outlined above, the aggravating factor of ejaculation and the personal mitigation available to the offender. The principal mitigation is his good character. The age of the offender is in part the reason why the guideline is not appropriate. It is not to be counted twice.

36. Account must be taken of the conditions in which the offender will serve his custodial term. The factors referred to in *Manning* [2020] EWCA Crim 592 at [41] apply in his case. The sentence in this case is not so long as to render irrelevant the impact of Covid-19 on prison conditions. Moreover, the offender's time on remand was when lock-down conditions applied. He is a young man with no previous experience of custody. The term of 60 months will be reduced to 54 months to allow for these matters.

37. The offender is entitled to full credit for his pleas. That leads to a custodial term of 36 months. Although the offender had served a not insignificant period of custody whilst he was awaiting sentence, it was very much less than the term which we conclude was correct on the facts of this case. It is not sufficient to justify the conclusion that further custody can be avoided.

38. This was a very difficult sentencing exercise. The judge took great care in her consideration of the case which extended over two lengthy hearings. She took the very proper step of obtaining a second pre-sentence report when it was clear that the first report had been prepared on what amounted to a false basis. She gave full weight to the harm caused to EM. However, we have come to the conclusion that the sentence the judge imposed gave insufficient weight to the nature of the offender's culpability and the aggravating features involved in his conduct towards EM. The outcome was a sentence which fell outside the range reasonably open to a judge. We

reach that view taking full account of the circumstances of the case and of the requirement to protect children under the age of 13. In our judgment the sentence was unduly lenient.

39. We grant leave to the Solicitor General to refer the sentences imposed. We quash the sentence of a community order. We substitute in its place concurrent terms of 36 months' detention in a young offender institution. Because the offender was convicted of offences listed in Schedule 13 of the Sentencing Act 2020, we are obliged pursuant to Section 265 of the 2020 Act to impose a special sentence for an offender of particular concern. Therefore, the total term we substitute for the sentence imposed in the Crown Court is a sentence for an offender of particular concern of 48 months, namely 36 months' custodial term and a further period of 1 year for which the offender will subject to a licence.

40. The offender will serve at least one half of the custodial term. At that point he will be entitled to apply for parole. He will only be released if the Parole Board consider that it is safe to do so. Whenever he is released, he will remain on licence for the balance of the custodial term then remaining and for a further period of 1 year thereafter.

41. Credit will be given for the period served on remand prior to the offender's release on bail. That will follow automatically. He also will be credited with one half of the days he spent on electronically monitored curfew prior to his sentence. The parties must notify the Criminal Appeal Office prior to the handing down of this judgment of the relevant figure so that the order of the court specifies the correct number of days.

42. The offender must surrender to Luton Police Station at 4 p.m. on the day on which this judgment is handed down.