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IN THE COUGH OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Wednesday 28th March 2018

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE GREEN

and

HIS HONOUR JUDGE PATRICK FIELD QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v -

PETER PHILIP DE WHAGHON BURR

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Ltd trading as DTI

165 Fleet Street, London EC4A 2DY

Telephone 020-7404 1400

(Official Shorthand Writers to the Court)

Mr P Jarvis appeared on behalf of the Attorney General

Mr J Segan (Solicitor Advocate) appeared on behalf of the Offender

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J U D G M E N T

(As Approved by the Court)

Wednesday 28th March 2018

LORD JUSTICE DAVIS:

1. This is an application brought on behalf of Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court sentences on the ground that they are unduly lenient. We grant leave.

2. The offender is Peter Burr. He is now 73 years old, having been born on 21st October 1944.

3. At his plea and trial preparation hearing in the Crown Court at Lewes held on 11th October 2017, the offender was arraigned on an indictment containing thirteen counts. He pleaded guilty to nine of those

counts. Those pleas were acceptable to the Crown. The remaining counts were ordered to lie on the file on the usual terms.

4. The counts on the indictment to which the offender pleaded guilty were counts 2, 3, 4, 5, 7, 9, 11, 12 and 13. All charged indecent assault on a male, contrary to section 15(1) of the Sexual Offences Act 1956. The maximum available sentence for each count of such offending under that particular statute was ten years' imprisonment.

5. Counts 2, 3 and 4 related to a victim whom we shall call "AB". Count 5 related to a victim whom we shall call "CD". Counts 7, 9 and 11 related to a victim whom we shall call "EF". Counts 12 and 13 related to a victim whom we shall call "GH". Of those counts, some of them were charged as a course of conduct; others were charged only as individual counts. The total sentence imposed by Her Honour Judge Henson QC on 5th January 2018 was a total term of 48 months' imprisonment. That was broken down in this way: five months' imprisonment on counts 2 and 12; seven months' imprisonment on count 5; nine months' imprisonment on counts 3 and 4; eleven months' imprisonment on count 7; 22 months' imprisonment on count 13; and 48 months' imprisonment on counts 9 and 11. All of the sentences were ordered to run concurrently. Thus it was that the total overall sentence was one of 48 months' imprisonment. It may be noted that of the counts charged, counts 3, 7, 9 and 11 had been the ones charged as course of conduct offending.

6. The background facts, in summary, are these. Between 1969 and 1975, the offender had been a house tutor and physics teacher at Christ's Hospital School, near Horsham, which was an all-boys boarding school. At that time the offender was a young teacher in his twenties. He held the position of a house master, which meant that, amongst other things, he supervised dormitories and shower blocks. During his time at the school, he indecently assaulted four boys who were aged between 11 and 14.

7. The first former pupil to come forward was AB. He had initially made contact with the police in 2000, but no action was taken at that time. However, following a particular programme on BBC Radio London, broadcast in December 2016, he made further contact with relevant persons and in due course the police were advised. AB himself contacted the police on 18th February 2017. He described a harsh regime at the school in those days, and also physical bullying from other pupils. He also said that the atmosphere was that individuals such as himself should be grateful for being at the school and that nothing was to be said that might "rock the boat". It may be noted that in the case of these particular victims they variously were either at the school without the payment of fees or had a parent or parents who had died and so perhaps it could be said should have particular reason for gratitude (at least that is the way it was presented).

8. AB said that, when he was housemaster, the offender would often walk around the dormitory giving sexualised talks to the young pupils. It was said that he would watch the boys when they were changing for their baths, and that he would also spend a lot of time watching the boys shower and change after games. AB said that the offender was very tactile with some of the boys. It was so frequent that it was regarded as part of everyday life at the school. AB said that there were numerous occasions when he would be changing or using his towel to dry himself when the offender would walk up to him and place his hands on his bot- tom (over his pants or towel). The first time this happened constituted what became count 2 on the indictment; but it happened regularly, which constituted the course of conduct count comprising count 3.

9. There was a swimming pool at the school. AB recalled the offender taking him swimming on a few occasions when he was around 11 or 12 years old. AB could recall being deliberately grabbed by the offender on the crotch and bottom, over his swimming trunks, with an open hand on his genital area. This was to constitute count 4 on the indictment.

10. Subsequently, there was a particular incident in consequence of which AB felt that the offender became hostile towards him and contact diminished.

11. CD joined the school in September 1968. His father had died in the preceding year. He was 11 years old when he started at the school. He boarded for the first three years in the offender's house. He described how he and a few other boys were often invited into the offender's study. He said that the offender would give one of the boys money to buy biscuits from the tuck shop which they then ate.

12. CD said that on some occasion between September 1969 and July 1971 he was in the study with the offender. They were "messing and fooling around". At one stage, CD knelt astride the offender. He was wearing breeches (the uniform the boys then wore). The offender put his hand behind him, slipped his fingers down the back of his breeches and into his boxer shorts and touched his bottom underneath his underwear. This, CD said, was quite deliberate; it was to constitute count 5 on the indictment. CD never told anyone what the offender had done. Indeed, CD frankly stated that he remained on good terms with the offender during his remaining time at the school and indeed had subsequent contact with him. He described the offender generally as a very kind and generous man. He gave examples of the offender taking boys on canal boats and things like that.

13. EF started as a boarder at the school, aged 11, in 1969. He had brothers at the school. He recalled the offender as a housemaster at his boarding house. The offender had also been his physics teacher at one stage. EF remembered the offender's study in the boarding house. He, like other boys, was sometimes invited into that study. It was considered to be a privilege to be able to go there. Indeed, watching television was one of the attractions, as well as the tea, biscuits and cakes on offer. EF said that the visits to the study started as social visits, but that soon changed. He said that in his first three years at the school, when he was aged 11, 12 and 13, the offender began to touch him. There would be a few boys in the study. The offender would put his arms around EF, put his hand up the back of his school shirt and start to rub his bare back for a prolonged period of time. This happened on a number of occasions and was to constitute count 7 on the indictment.

14. However, as time progressed, the offender became more physically intimate in his touching of EF. EF said that the offender would end up by working his hands around to the front of his body. He would then put his hand down the front of his breeches, into his underwear and then put his hand directly onto his penis. This had happened on more than one occasion. No one had ever touched EF like that in his life before. He said that he tried to prevent the offender from doing this. He also said that he never said anything to anyone else. Other boys would be there when this took place, but no one ever mentioned it. He said that that sort of thing happened on more than two occasions but he could not say how often. That became count 9 on the indictment.

15. As time went on, EF was invited into the study on his own. He was aged around 13 or 14 and in his last year of being in the offender's boarding house. He would visit the offender on his own. EF's perception was, looking back, that he had, in effect, been groomed. The offender would sit him on a single seat in front of the television and would stand behind him. He would then put his arms around EF, open his flies, take out his penis and masturbate him. This happened on a number of occasions. On one occasion he (EF) ejaculated. This offending was reflected in count 11 on the indictment.

16. The offender remained in some contact with EF after EF left the school. EF himself had felt too awkward to discuss with anyone what had happened to him.

17. Finally, GH was a pupil at the school between 1969 and 1976. He, too, was a full boarder in that boarding house for his first three years at the school. He noted that a number of boys were regularly invited into the offender's study, although initially he was not one of that group. Latterly, he was invited. That was considered a treat because of the chocolate biscuits on offer. He said that, when in the study, he was told to sit on the sofa. The offender would then put his hand under his school shirt, touch the front of his clothing and then move his hand down towards the area of his stomach. That was reflected in count 12 on the indictment.

18. There was one occasion when GH was handed a note by another boy to go to the offender's study, which he did. On that occasion the offender undid his breeches, put his hand into his breeches and, through the hole in his underwear, touched his penis and rubbed it. GH then left the room. Indeed, he cried because he was frightened that he (GH) might be punished. He did not tell anyone about what had happened at the school. When he was notified that various matters had come to light at the school at that time, this brought back memories and he then contacted the police to report it.

19. On 6th April 2017, the offender was interviewed by the police about the allegations made by AB and CD. In a prepared statement he said that he did not remember any child named [AB] and he declined to comment to all other questions. When subsequently interviewed in May 2017 about the allegations made by EF and GH, he declined to comment to all questions put.

20. The offender has no previous convictions or cautions of any kind whatsoever. More than that, there were a number of positive character references put in on his behalf. He had gone on to a different school in 1975, where he had remained for many years. In due course, the headmaster of that school wrote a complimentary letter about the offender. It concluded: "From my viewpoint, he was a first-class schoolmaster". Furthermore, since he retired and went to live in the West Country he has been engaged in a number of good works and has been actively helpful in community matters.

21. A detailed pre-sentence report was obtained. In the course of speaking to the probation officer, the offender stated that his offending had been "a stupid, naive way of trying to curry favour with people". He referred to his own background at school and his naivety with regard to sexual matters generally. He said that he "hung his head in shame" when thinking about what he had done to his victims. He acknowledged that what he had done was "appalling" and he acknowledged the likely effects on his victims. He stated to the probation officer that he was "deeply, deeply sorry". He accepted that at that time he had been sexually attracted to children. He attributed this, in part, to his own immaturity, shyness and lack of confidence.

22. Moving victim personal statements were made by each of the victims. CD frankly said that what had happened to him had had no long-term impact upon him. So far as the others were concerned, however, the position was very different. One, for example, said that the abuse had left "a hole in my heart". One in his personal statement said that the offender had "ruined my childhood and stolen my innocence".

23. There was a full discussion before the sentencing judge. When she came to pass sentence, she dealt with the matter with evident care and thoroughness. She had regard, in a way to which we will come, to the relevant authorities and guidelines. So far as the current guidelines are concerned, she said that she had sought to apply them "in a measured and reflective manner". The judge noted that the boys targeted had, for the most part, been particularly vulnerable because they had obtained a place at the school because of the death of a parent or by reason of a low income, which were factors explaining their reluctance to speak out. The judge said that what was involved was a gross abuse of trust. Indeed, it was. She further said that there was a large power differential between the offender (the teacher) and the victims (the pupils). Again, indeed there was. She noted that the offending had taken place over a number of years and that the children should have been safe and secure, but they were not.

24. In dealing with the offences charged as a course of conduct (counts 3, 7, 9 and 11), it was common ground before the judge that the offending there had taken place on at least three occasions. She proceeded accordingly.

25. As to credit for the guilty pleas, the judge did not specify precisely what credit she gave, but said:

"You will be given the credit due for the pleas entered at that stage [that is to say, the plea and trial preparation hearing] ..." The judge stated that there was a serious and repeated nature to the offending. She then proceeded to impose the sentences we have described, all to run concurrently with each other.

26. As we have said, the maximum available sentence under the 1956 Act was one of ten years' imprisonment for each individual count. Nevertheless, under the principles set out in Appendix B to the definitive guideline on sexual offences issued by the Sentencing Council, and as further explained in the decision of a constitution of this court in *R v Forbes* [2016] 2 Cr App R(S) 44, the judge was, as she fully appreciated, re- quired to take account of the position under the corresponding provisions of the Sexual Offences Act 2003. It was common ground that the offences variously either corresponded to sexual activity with a child, contrary to section 9 of the 2003 Act, or (as to counts 4, 7 and 9) sexual assault of a child under the age of 13, contrary to section 7 of the 2003 Act. In all cases, culpability clearly was to be categorised as A by reason of the abuse of position of trust and by reason of the disparity in ages between the offender and the victims.

27. Further, for the purposes of categorisation under that guideline, for counts 9, 11 and 13, the appropriate categorisation was category 2 by reason of touching of naked genitals, which, for example, for count 9 would connote a starting point under that guideline of four years' imprisonment for a single offence, with a range of three to seven years; and for counts 11 and 13 a starting point of three years' imprisonment, with a range of two to six years. For the other counts it was accepted that the appropriate categorisation was category 3. That, overall, indicated a starting point under the guidelines of twelve months and six months' imprisonment, respectively, with appropriate ranges accordingly. This guideline, of course, is against a context of a statutory maximum under the 2003 legislation of fourteen years' imprisonment.

28. Moreover, there were aggravating factors over and above the matters relevant to categorisation: in particular, over and above the grooming, there was the fact that what occurred sometimes took place in the presence of other young pupils.

29. Overall, because of the acceptance of the minimum number of offences that had occurred in the course of conduct offences, it is accepted that at least seventeen offences were involved in total: five against AB, one against CD, nine against EF, and two against GH.

30. The judge, understandably, was much pressed with the available personal mitigation, which we have already summarised.

31. So far as credit for the guilty pleas is concerned, the judge's remarks might seem to suggest that she had accorded credit of 25 per cent because the guilty pleas were entered at the plea and trial preparation hearing. However, Mr Segan has explained to us that, in fact, the offender had indicated at the magistrates' court his intention to plead guilty and that there would not be a trial. He simply was waiting for the resolution of various issues about the charges before that was formally to be done. Mr Segan has told us that a form was signed at the magistrates' court indicating an intention to plead guilty.

32. As so often in cases of this type, this was a very difficult sentencing exercise. However, despite the evident care taken by the sentencing judge, our conclusion is that, taken overall, this sentence was unduly lenient. The judge chose to make all sentences concurrent. She was not disentitled from doing that, even though there were separate victims and even though it might perhaps have been more orthodox to have included at least some consecutive elements to the sentencing. But if that course were to be taken, as the judge did, it remained essential that the lead sentence reflected the overall criminality relating to all four victims.

33. With respect, a total sentence of four years' imprisonment, with credit for the guilty pleas, did not achieve that. As Mr Jarvis on behalf of the Solicitor General pointed out, count 9 alone, under the modern guideline, would connote a starting point of four years' imprisonment, with a range of three to seven years' imprisonment, after trial, for one offence. Here, as he pointed out, not only did that count alone involve a number of offences, but there then were also all the other counts on the indictment and a number of other victims involved. As we have said, there was a totality of 17 incidents involving four victims, reflected in the nine counts on the indictment to which the offender had pleaded guilty. Thus, Mr Jarvis' short point, which we accept, is that the sentence imposed by the judge simply did not adequately reflect the totality of the offending committed by the offender.

34. Mr Segan has eloquently pressed the powerful personal mitigation available to the offender. He has also said, and rightly said, that it is always open to a judge in an appropriate case to show mercy. But even giving all due weight to the powerful mitigation available, our conclusion is that this sentence was unduly lenient.

35. We of course bear in mind that the maximum available sentence at the time was ten years' imprisonment, and not fourteen years' imprisonment as would now be the case. So far as credit for the guilty plea is concerned, we think it appropriate in the circumstances that the offender should receive credit only a little short of the full one-third credit available: that is so say, credit in the region of 30 per cent in view of what we have been told.

36. Our view is that, had there been a trial, the least appropriate sentence ought to have been in the region of ten years' imprisonment. From that the appropriate credit for the guilty plea should then be deducted.

37. In the result, we propose to adjust the sentences imposed by the judge in the following way. All the sentences which she set will stand. However, the sentence of 22 months' imprisonment on count 13 will run consecutively to the concurrent sentences of 48 months' imprisonment on counts 9 and 11. The concurrent sentences of nine months' imprisonment on counts 3 and 4 will continue to run concurrently with each other, but will run consecutively to the sentence on count 13. All other sentences will remain concurrent. The overall result, we apprehend, is that this sentence then becomes a total sentence of 79 months' imprisonment, which this court considers to be the least sentence appropriate in this case.

38. We accordingly allow the appeal to that extent.
