Neutral Citation Number: [2018] EWCA Crim 639

Case No: 2017 01043 A1; 2017 04031 A1;
2017 02072 A2; 2017 00188 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURTS AT TEESIDE, CANTERBURY, NORWICH & LINCOLN
Judges Crowson, O'Mahony, Bate & Heath
(1) T20157517, 0476, 0942, T20167115
(2) T20167207 (3) T20157245 (4) T2015 0325

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE TREACY
MRS JUSTICE CARR D.B.E.
MRS JUSTICE YIP D.B.E
and
SIR PETER OPENSHAW
(sitting as an additional judge of the Court of Appeal)

- -

Between :

CHRISTOPHER JOHN THOMPSON	**Appellant**
- and -	
THE QUEEN	**Respondent**
And Between:	
TAJSHAM CUMMINGS	**Appellant**
- and -	
THE QUEEN	**Respondent**
And Between:	
OSCAR FITZGERALD	**Appellant**
- and -	
THE QUEEN	**Respondent**
RICHARD FORD	**Appellant**
- and -	
THE QUEEN	**Respondent**

Brendan Carville for **Christopher John Thompson**
Siobhan Molloy for Tajsharn Cummings
Robert Banks for Oscar Fitzgerald
Sam Robinson and **Isabel Wilson** for Richard Ford
Jonathan Polnay for the Crown in each case

Hearing dates : 8 March 2018

Approved Judgment

Sir Brian Leveson P :

1. These four otherwise unconnected appeals have been listed together as each potentially raises an issue in relation to the effect of s. 11(3) of the Criminal Appeal Act 1968 ("the 1968 Act") which requires this court, on an appeal against sentence, to exercise its powers such that "taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below". Articulating the issue with reference to the specific sentences that may give rise to the issue, it is about the extent to which this court can substitute what is a standard determinate sentence with (i) a special custodial sentence for offenders of particular concern under s. 236A of the Criminal Justice Act 2003 ("the 2003 Act"); (ii) an extended sentence under s. 226A or B of the 2003 Act; or (iii) a hospital order with restriction or hybrid order under s. 37 and 41 or 45A of the Mental Health Act 1983.

2. A further issue of principle arises in respect of the proper interpretation of s. 226A(8) of the 2003 Act which provides that the extension period of an extended sentence must not exceed 5 years in the case of a specified violent offence and 8 years in the case of a specified sexual offence. In short, the question is whether if (as will be comparatively rare), the court imposes consecutive extended sentences, the 5 or 8 years' extension is the maximum permitted for the total sentence or whether it is possible to order extension periods also to run consecutively.

The Legal Framework

3. In order to understand the background to this challenge it is necessary to identify the statutory consequences of different custodial sentences open to the court. Thus, subject to the offender not having been awarded 'added days' for breach of prison or institution rules, if sentenced to a term of imprisonment, detention in a young offender institution or to detention pursuant to the provisions of s. 91 of the Powers of Criminal Courts (Sentencing) Act (i.e. a standard determinate sentence), he will automatically be released on licence at the half way point of the sentence: see s. 244 of the 2003 Act. Breach of the terms of the licence (which may be by the commission of a further offence or by failure to comply with a specific condition in the licence e.g. of residence) may lead to the Secretary of State revoking the licence and recalling the offender to custody to serve part or the remainder of the unexpired sentence (s. 254 of the 2003 Act). What is critical, however, is that release at the half way point is not subject to the exercise of any discretion on the part of the authorities.

4. This right is to be contrasted with the different (and conditional) rights to release that are engaged in the event that an offender is sentenced to a special custodial sentence for offenders of particular concern or an extended sentence under s. 236A and s. 226A or B of the 2003 Act respectively. Subject, again, to 'added days' for disciplinary breaches, following the imposition of such a sentence, the offender will be released at the half way point (in the case of a special custodial sentence for offenders of particular concern) or at two thirds (in the case of an extended sentence) in each case subject to the Parole Board being satisfied that his detention is not necessary for the protection of the public. If the Board is not so satisfied, the case will be reviewed two years thereafter; ultimately, however, if not released on parole, the offender will only be entitled to be released unconditionally having served the entire custodial term. Breach of the terms of the licence can lead to recall (as for standard determinate sentences).

5. The position in relation to orders under the Mental Health Act 1983 is different. If an offender, subject to a hybrid order pursuant to s. 45A in conjunction with a determinate or extended sentence, has been returned to prison as treatment is no longer required, eligibility for release is the same as if the sentence imposed had been the determinate or extended sentence alone. If the offender remains in hospital, the limitation direction (or restriction order) expires on the date that the offender would have been released on licence (i.e. directed by the parole board in the case of an extended or indeterminate sentence) but he will remain in hospital until considered well enough to be discharged following the normal application of the relevant principles governing the discharge of patients detained under the Act.

6. Although the release provisions from differing sentences are highly significant for the offender, it is important to underline the limited role that they have in the sentencing process. Thus, in relation to an extended sentence passed pursuant to s. 226A or B of the 2003 Act, the appropriate custodial term is specified as that term that would have been imposed in compliance with s. 153(2) which provides that:

> "....the custodial sentence must be for the shortest time (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence...."

7. This requirement to identify the custodial part of any extended sentence is underlined by s. 126(4) of the Coroners and Justice Act 2009 which (in the context of the duty to follow relevant sentencing guidelines) defines the notional determinate term as:

> "... the determinate sentence that would have been passed in the case if the need to protect the public and the potential danger of the offender had not required the court to impose a life sentence.... or, as the case may be, an extended sentence of imprisonment or detention."

It is also worth noting that the phrase 'appropriate custodial term' for a special custodial sentence passed on an offender of particular concern pursuant to s. 236A is defined in the same way as "the term that, in the opinion of the court, ensures that the sentence is appropriate". In our judgment, this does not require the court to approach the assessment of the length of the custodial term other than as the shortest time that is commensurate with the seriousness of the offence: the difference in language, therefore, has no material effect on the approach of the court.

8. This conclusion is not merely to be derived from the legislation. It is equally clear from a consideration of the authorities which have been careful to identify the general principle in terms. These are summarised in *R (Stott) v Secretary of State for Justice* [2017] EWHC 214 (Admin) (at [1]) in these terms:

> "It is well recognised that "the general principle that early release, licence and their various ramifications should be left out of account on sentencing is ... a matter of principle of some importance": see *R v Round* [2009] 2 Cr App R (S) 292; [2009] EWCA Crim 2667 at [44] per Hughes LJ, reaffirmed in *R v Burinskas* [2014] 1 WLR 4209; [2014] EWCA Crim 334 at [38]-[39]. One exception relates to the identification of the

> minimum term when passing any indeterminate sentence (when the normal period of one half of the appropriate determinate term to reflect the need for punishment and deterrence can be varied for good reason: see *R v Szczerba* [2002] 2 Cr App R (S) 387; [2002] EWCA Crim 440 per Rose LJ at [32]-[33] and the example of *R v Hayward* [2000] 2 Cr App R (S) 418). Another is those cases which were at the margin of different automatic release provisions when the court could adjust an otherwise unobjectionable sentence to avoid the disproportionality of moving the offender into long term prisoner status: see *R v Cozens* [1996] 2 Cr App R (S) 321 and *R v Harrison* [1998] 2 Cr App R (S) 174."

9. This approach cannot be considered surprising. When passing sentence, although the effect of a sentence cannot retrospectively be increased, the judge has no way of knowing precisely how the executive may (in the future) adjust the approach to parole (to the benefit of an offender) or alter release provisions whether by reference to concepts such as home detention curfew or executive release. Thus, the general principle is to ignore it save in certain defined circumstances.

10. When the Court of Appeal has to consider a sentence, however, s. 11(3) of the 1968 Act requires that "taking the case as a whole, the appellant is not more severely dealt". The potential impact of a sentence on the offender cannot therefore be ignored. Thus, in *Thompson* (1978) 66 Cr. App. R. 130, the court considered that a sentence of 15 months' imprisonment, suspended for two years (together with a fine and a forfeiture order) was wrong in principle and that an immediate custodial sentence of 9 months should have been imposed. It was recognised, however, that such a sentence would contravene s. 11(3) of the 1968 Act (wrongly referred to in the report as s. 4(3) of the 1968 Act, although possibly a reference to s. 4(2) of the Criminal Appeal Act 1966).

11. That case was considered in in *Mah-Wing* (1983) 5 Cr App R (S) 347 by Griffiths LJ (as he then was) in these terms:

> "The effect of that subsection in relation to a suspended sentence was considered by this court in *Thompson* (1977) 66 Cr. App. R. 130. ... In that case the court held that they had no power to order an immediate imprisonment when the court below had ordered that the imprisonment should be suspended, the reason being that any ordinary person would consider themselves more severely dealt with on appeal if they were sent into prison albeit for a short period than if they were given the opportunity of a suspended sentence."

12. This test has also been articulated as that of 'right-thinking members of the public' but we note, in passing, that in *Howells* [1999] 1 Cr App R (S) 335, Lord Bingham CJ observed that the court would attribute its views to such 'right thinking members of the public' and went on (at 337):

> "In the end, the sentencing court is bound to give effect to its own subjective judgment of what justice requires on the peculiar facts of the case before it."

13. Decisions, however, are case specific and no general rule can be identified. Thus, in *Waters* [2008] EWCA Crim 2538, an immediate term of 9 months was imposed in place of a suspended sentence. Although on the face of it such a sentence was more severe, as the appellants had already served the equivalent of that sentence on remand, the court had little difficulty in concluding that "no ordinary person would consider that the appellants are now being dealt with more severely than in the court below": whether that decision would now stand in the light of the introduction of post sentence supervision and automatic credit for time spent on remand is a separate issue and only underlines the need for care when considering whether a proposed sentence is more severe than that imposed in the Crown Court.

14. Other examples include *Ardani* (1983) 77 Cr App R 302 (where the court reduced a custodial term but considered it permissible, in those circumstances, to add what was a mandatory disqualification order) and *Needham and other cases* [2016] EWCA Crim 455, [2016] 2 Cr. App. R. (S.) 26 (in which, in order to comply with s. 35A and s. 35B of the Road Traffic Offenders Act 1988, it was made clear that the court can increase disqualification when reducing a custodial sentence e.g. at [143]). Similarly, unlawful sentences have been adjusted without offending s. 11(3). Thus, unlawful consecutive disqualifications have been adjusted to permit concurrent disqualification (*Sandwell* (1985) 80 Cr. App. R. 78); an unlawful confiscation order was replaced with a compensation order (*Meader* [2011] EWCA Crim 2108). On the other hand, in *Aldridge* [2012] EWCA Crim 1456, a sexual offences prevention order imposed for less than the minimum term had to be quashed because to increase the term to the minimum would have breached s. 11(3).

15. Furthermore, whether a sentence is 'more severe' is not only determined by the period for which an offender might be affected by it; it is the punitive element of the sentence that has to be considered. Thus, in *Bennett* (1968) 52 Cr App R 514, the court (Widgery and Fenton Atkinson LJJ and Roskill J) concluded that a sentence of a hospital order with an indefinite restriction was not more severe than a sentence of 3 years' imprisonment. This was on the basis that the sentence (per Widgery LJ) was "a remedial order designed to treat and cure, even though in certain events the hospital order may involve the detention of the appellant for a longer period of time". That decision was followed in *Searles* [2012] EWCA Crim 2685, [2014] MHLR 47 when Treacy LJ put the matter in this way (at [17]):

> "It is plain, particularly ... in the light of the case of *Bennett* 52 Cr App R 514, that making a remedial order of the sort we intend cannot be regarded as more severe than a sentence of imprisonment or custody, notwithstanding the fact that this appellant will, within a matter of a week of two, be reaching the end of the term of custody imposed in the court below. The effect of the order which we make today will extend beyond the end date of that custodial term, but its purpose is ameliorative and remedial and not punitive and therefore does not fall foul of the restriction in s. 11(3)."

16. Turning to the position of an extended sentence pursuant to s. 226A or B or a custodial sentence for an offender of particular concern passed pursuant to s. 236A of the 2003 Act (even if mandatory), there is no doubt that s. 11(3) will bite to limit the powers of this court. In *Reynolds* [2007] EWCA Crim 538, [2007] 2 Cr App R (S) 87, [2008] 1 WLR 1075, this court rejected the submission that s. 11(3) of the 1968

Act applied only to a discretionary as opposed to a mandatory sentence and explained the basis of the statutory provision in these terms (at [22]):

> "[T]he only power that the court has to interfere with the sentence is the power contained in section 11(3) (subject to the two exceptions to which we have already referred) and that section requires us to apply the cap. Further, it seems to us that the justification for the application of the cap to appeals against sentence generally is equally applicable to appeals against sentence involving consideration of the mandatory sentence provisions of any statute. The 1968 Act was preceded by the Criminal Appeal Act 1966 . This repealed the power given by the Criminal Appeal Act 1907 , its predecessor, to this court to increase sentences. The major justification for this change was that it was considered that the power to increase sentences was a significant deterrent to defendants who wished to challenge their sentence. As we have said, in the present context many appeals are essentially based upon the argument that the judge was wrong to conclude that the defendant met the criteria of dangerousness. If the consequence of seeking to persuade the court of that, is to risk an increase in sentence from an extended sentence, say, to an indeterminate sentence, the very mischief which the 1968 Act was intended to avoid would be reintroduced by a side wind in this category of case."

17. That is not to say that the court cannot take its own view as to the severity of the sentence then being considered when compared with the original sentence imposed: indeed, in our judgment, it is bound to do so and, to that extent, the authorities based on *Round* do not provide the appropriate approach. In *Fruen* [2016] EWCA Crim 561, [2016] 2 Cr App R (S) 30, the court was concerned with s. 236A of the 2003 Act and special custodial sentences for offenders of particular concern. When such sentence was mandatory and should have been imposed, the court rejected as falling foul of s. 11(3) of the 1968 Act the option of interpreting an ordinary determinate sentence as being the expression of an appropriate custodial term with a further licence of one year. Leaving aside the fact that a s. 236A sentence did not have the automatic release provisions, the further period of licence involved the exposure of the offender to the risk of recall for a further year. Treacy LJ went on (at [30]):

> "A further option would be to treat the determinate sentence imposed (six years in [Fruen's]'s case) as representing a s.236A offence comprising a five-year custodial term and the one year further licence period. This seems to us to be an inappropriate solution where, (as we do in [Fruen's]'s case), the court holds that the custodial term imposed was appropriate. It would thereafter be wrong to re-engineer what the court has concluded was an appropriate custodial term so as to bring the case within the ambit of s.236A . The situation might well be different if this court concluded that the custodial term imposed was too long and reduced it by a period of at least a year. This would enable the court properly to substitute the reduced custodial term and to add to it the further one year period of licence which should have been imposed in the first place, without infringing s.11(3) . In cases where that situation does

not apply, we consider that the court should follow the course taken in *R v Reynolds* [2007] 2 Cr App R (S) 87 (p.553) at [24] by not interfering with the Crown Court's sentence."

18. Whether the reduction of only one year in the custodial term would be sufficient to ensure that a breach of s. 11(3) is avoided requires a detailed consideration of severity in the context of the overall sentence but the suggestion then identified was taken up in two further cases both of which cited *Fruen*. Thus, in *PM* [2016] EWCA 1895, a determinate sentence totalling 14 years' imprisonment was replaced with a special custodial sentence under s. 236A totalling 10 years' imprisonment with a further licence for one year. The effect of the alteration of sentence was that, subject to the absence of adverse disciplinary findings, in place of an entitlement to release after 7 years with 7 years on licence, the appellant would be eligible for parole after 5 years but, if found to be a risk to the public, would only be entitled to be released after 10 years with licence provisions for the balance of the sentence (up to 11 years). Thus, although not performing the calculation in its judgment, the court must have considered that the possibility of release after 5 years with a licence only up to the end of the eleventh year balanced the risk (of failure before the Parole Board) of his having to serve 3 years more than the date on which he would otherwise have been entitled to be released albeit then subject to licence for a further 7 years. In the opinion of the court, again unexpressed, taking the case as a whole, the appellant was not being dealt with on appeal more severely than he was by the Crown Court.

19. In *Julian S* [2016] EWCA Crim 1607, again, a total determinate term of 14 years' imprisonment was imposed when the offender was of particular concern so that, at the very least, a sentence pursuant to s. 236A should have been imposed. In the event, the court replaced the sentence and imposed a sentence under s. 236A sentence comprising a 6 year custodial term with a further year on licence and a consecutive determinate term of 6 years. Thus, instead of automatic release after 7 years with 7 years licence, he was entitled to be considered for parole after 6 years and, if he failed to obtain parole, could be detained for up to 9 years with a licence coming to the end 12 years after sentence. In this case, the court specifically had regard to s. 11(3) and so, taken as a whole, did not consider that the offender was dealt with more severely.

20. More recently, *Bradbury* [2015] EWCA Crim 1176 [2015] 2 Cr App R (S) 72 considered the case of a consultant paediatric haematologist who was sentenced to a total determinate term of 22 years' imprisonment imposed for a series of child sexual offences. On appeal, without any explicit reference in the judgment to s. 11(3) or *Fruen*, the sentence was restructured to impose an extended sentence expressed to be of 16 years with a further 6 years' licence. In fact, s. 226A requires any extended sentence to be expressed as comprising a custodial term and extended licence (see *Watkins* [2014] EWCA Crim 1677, [2015] 1 Cr App R (S) 6). Thus, it represented an extended sentence of 22 years comprising a custodial term of 16 years and an extended licence of a further 6 years. The comparative effect is that, based on the original sentence, the offender would have had to serve 11 years in prison with a licence of 11 years; as a result of sentence following appeal, he would have to serve a minimum of 10 years' 8 months in prison, thereafter being eligible for release subject to the Parole Board concluding that he is not a risk to the public: if not so satisfied, he could be detained for the full 16 years. In any event, he will remain on licence until the end of 22 years after sentence.

21. Further, two sentences of 12 months imprisonment which were ordered to run consecutively to the 21 years for other offences could not constitute part of an extended sentence (because, absent previous conviction for an offence listed in Schedule 15B of the 2003 Act, an extended sentence may only be passed where a custodial term of at least 4 years is imposed). If that sentence is corrected, the 12 month term could only take place as a determinate consecutive term. Assuming that to be the case, the sentence remains as an extended sentence of 21 years (comprising a custodial element of 15 years and 6 years on licence with one year's imprisonment to be served consecutively). Thus, parole would fall to be considered after 10 years 6 months.

22. On any showing, it is difficult to see how it could be suggested that, taking the case as a whole, the offender in that case was not being dealt with more severely by the Court of Appeal. For the possible release on parole 6 months earlier than he would have been entitled to automatic release (at 11 years in a determinate sentence of 22 years), he is at potential risk of a further 5 years in custody (at the end of the custodial term of 16 years) without any change to the terminal date of the licence. In our judgment, that decision does not sit with s. 11(3) of the 1968 Act and should not be followed. In relation to this analysis, we acknowledge the assistance we have received from the commentary by Lyndon Harris in (2015) Crim LR 1005.

23. Bringing the authorities together, we recognise that, on appeal, it is open to this court to restructure a sentence particularly where, as has occurred in a number of the cases discussed, the sentence passed has been unlawful having failed to comply with mandatory sentencing provisions. *Fruen*, however, is not authority for the proposition that if a custodial term is reduced by at least a year, a sentence under s. 236A of the 2003 Act will necessarily satisfy the requirements of s. 11(3) of the 1968 Act. The limit of its power is that the court must be satisfied that, taking the case as a whole, the appellant is not being dealt with more severely on appeal. That requires a detailed consideration of the impact of the sentence to be substituted which must involve considerations of entitlement to automatic release, parole eligibility and licence. If a custodial sentence is reduced, the addition of non-custodial orders (such as disqualification from driving or sexual offences prevention orders) may be added but, in every case, save where the substituted sentence is "ameliorative and remedial", that sentence must be tested for its severity (or potential punitive effect) compared to the original sentence.

The Length of an Extension Period

24. Section 226A(8) of the 2003 Act provides that the extension component of an extended sentence must not exceed 5 years in the case of a specified violent offence and 8 years in the case of a specified sexual offence. The question has been raised whether this provision specifies the maximum of any possible extension or only does so for single offence. Putting the issue another way, it is whether it is possible to have consecutive extended sentences thereby increasing the potential licence period beyond the specified maxima.

25. This issue was considered in *Pinnell* [2010] EWCA Crim 2848, [2011] 2 Cr App R (S) 30. Having reviewed the authorities, Hughes LJ was clear ([at 48]):

> "There is no objection to imposing an extended sentence consecutive to another sentence, or to imposing consecutive extended sentences, although we suggest that it should be done only where there is a particular reason for doing so. The extension periods in the case of consecutive extended sentences will themselves be consecutive. In a case of consecutive extended sentences, each offence for which such a sentence is imposed must itself be a specified offence."

26. In *B* [2015] 2 Cr App R (S) 78 this court varied a sentence so that consecutive extended sentences had a total extended licence period of 10 years. It has been argued that the statutory limit on the length of the extension period would have been unnecessary because the greatest maximum sentence for offences which were specified but not serious within the legislation is 7 years' imprisonment so that with the requirement of a 12 month custodial term, the maximum extension periods could only have been 4 years for an offence of violence and 6 years for a sexual offence. That conclusion, it is said, is underlined by the absence of any express statutory provision permitting consecutive licence periods in excess of the statutory maximum for a single offence.

27. In our judgment, the concern that s. 227(4) and 228(4) of the 2003 Act would have been entirely unnecessary unless applied to consecutive sentences is misconceived. First, in respect of a specified offence of violence carrying a maximum sentence of 7 years' imprisonment, but for s. 227(4)(a), it would be possible to impose an extended licence of 6 years. Secondly, in respect of offenders under the age of 18 who are convicted of a serious and specified offence (that is to say with a maximum sentence of life imprisonment), it is open to the court to impose a sentence under s. 228 (as opposed to a sentence of detention for public protection) if such a sentence would adequately protect the public. Therefore, but for s. 228(4), it would be possible to impose an extended licence of any length. The remaining anomaly (in relation to an extended sentence for a sexual offence for an adult under s. 227(4)(b) is insufficient to justify the conclusion that the legislation intended to impose a maximum extension period applicable to consecutive sentences. Finally, similar provisions limiting the extension period were also present in extended sentences available under s. 58(4) of the Crime and Disorder Act 1998 available to for all violent or sexual offences: the wording of ss. 227 and 228 merely mirrored the earlier legislation.

28. Reverting to *Fruen,* the court considered the analogous argument in relation to s. 236A to the effect that where the offender had to serve the custodial term in full, a period of licence was limited to 1 year. Treacy LJ made it clear (at [23]):

> "Although these arguments have attractions, there appear to be two problems. Firstly, it is well-established in the case of section 226A extended sentences that the sentence passed is a single indivisible sentence comprising a custodial term and an extension period. It is not possible for one element of that sentence (the custodial term) to run consecutively whilst the other element (licence period) runs concurrently. The sentence is indivisible and all of it must be imposed concurrently or consecutively. This principle is by now well understood in extended sentence cases. We note that the language of section

> 236A(2) is almost identical to that used in 226A(5) so that the same analysis must apply. Moreover, the language of section 236A(2) is mandatory ("must be"). A section 236A sentence must comprise the aggregate of the appropriate custodial term and a further one-year period of licence. The counter-argument raised by reference to subsection (5) would seem to infringe the principle that the sentence passed is comprised of two indivisible elements."

29. In our judgment, it is open to the court, in an appropriate (albeit exceptional) case to impose consecutive extended sentences where the total extended licence was in excess of the maximum licence period for a single offence. That option should not, of course, be deployed to create what could be considered as the equivalent of life licence or one that is otherwise oppressive in nature.

R v Thompson

30. On 3 February 2017, in the Crown Court at Teeside, Christopher John Thompson, then aged 26, appeared before His Honour Judge Crowson to be sentenced for multiple sexual offences on four separate indictments to which he had pleaded guilty at various earlier hearings. It was conceded on his behalf (and the judge found) that Thompson was dangerous but the judge decided not to pass an extended sentence on the basis that a number of the offences attracted the provisions of s. 236A of the 2003 Act and would therefore be dealt with by way of a special custodial sentence for certain offenders of particular concern.

31. The offences to which s. 236A apply are set out in Schedule 18A to the 2003 Act and, unfortunately, the judge wrongly imposed sentences under s. 236A for offences which did not fall within that schedule. Although counsel corrected him in relation to two offences, neither counsel recognised the other erroneous sentences. In the event, the total sentence imposed was 27 years' 8 months' imprisonment with a 3 year extended licence under s. 236A of the Criminal Justice Act 2003. The complex makeup of the total sentence (as expressed by the judge) is set out in Appendix 1 to this judgment.

32. Thompson now appeals against sentence with leave of the single judge, contending that, in its totality, it was manifestly excessive. In granting leave, it was noted that this court would need to consider correcting the unlawful s. 236A sentences.

33. In order to understand the gravity of the offending, the facts must be set out in a little detail. The first indictment concerned offences committed in 2013 involving a boy of 12 years of age. Thompson (then aged 22 or 23 and a serving soldier) contacted the boy through an online social network. He sent the boy a picture of himself naked with his army helmet covering his genitalia, then progressed to sending images in which he was masturbating. He persistently asked the boy to meet him and proposed having sex, but the boy refused. He got the boy to send a picture of his naked penis. Thompson sent further indecent images and videos, showing him masturbating to ejaculation and performing oral sex on another male. Although the boy had initially given his age as 14, messages between the two showed that Thompson knew his true age. When arrested, Thompson admitted sending the messages and the images; he accepted he had wanted to meet the child. He also admitted that he was sexually attracted to children and said that he needed help but had not been able to find any.

He was bailed pending further investigations but, when indicted, pleaded guilty at the first opportunity.

34. The second indictment concerned offences committed in 2015 while Thompson was on bail. They involving a different boy aged 11 at the time who was playing in a park while truanting from school. Thompson noticed the boy looking for discarded cigarette ends. He approached the boy and asked how old he was receiving the answer that he was 12. Thompson then bought cigarettes for the boy and arranged to meet him at a garage, selecting that location as it did not have CCTV. Once inside the garage, he told the boy he was good looking. He then exposed his penis and began masturbating. He asked the boy to expose his penis and to let him suck it. Thompson ejaculated before the boy made an excuse to leave and reported the incident.

35. The third indictment concerned indecent images found on Thompson's mobile phone when he was arrested in 2015, including photographs and videos of a boy aged 10 to 12 being orally raped by an adult male, another boy aged 13 to 15 masturbating to ejaculation and a third boy aged 3 to 5 with his genitals exposed.

36. The final indictment concerned offences revealed when further investigations were carried out on Thompson's mobile phone. One of his contacts was a boy aged 15 when Thompson met him in 2015 (again, while on bail). They had met via a dating website for gay men. Initially, the boy had claimed to be older but later revealed his true age. They engaged in sexual activity which included Thompson penetrating the boy's mouth and anus with his penis.

37. The investigations also revealed contact between Thompson and a man who had been convicted of raping his four-year-old nephew. Thompson had deliberately made contact with the man in the context of seeking to commit sexual offences against children. He requested images of the man's nephews and was offered the opportunity to rape one of them for payment. He was told that the children were usually drugged and asleep while being abused. Thompson asked if it would be possible to keep the boy awake and whether the uncle would mind if the boy screamed. As it was, he could not afford to travel to where the boy lived but the boy's uncle filmed himself raping him and sent it to Thompson for his enjoyment.

38. The judge faced a difficult sentencing exercise involving multiple offences, a number of victims, and a period stretching from 2013 to 2015. Although Thompson was a man of no previous convictions, the later offences were committed while he was on bail for the earlier ones. He pleaded guilty to all matters but at different times (thereby attracting different credit). No issue arises as to that credit nor as to the judge's assessment of the appropriate category by reference to the sentencing guidelines for each of the individual offences. The judge was plainly right to describe the offences as a "catalogue of appalling crimes" which merited a long total sentence. Aside from the lawfulness of the s. 236A sentences, the only ground of appeal maintained by Thompson is that, having regard to totality, the final sentence was manifestly excessive.

39. Contrary to the judge's understanding, as Mr Polnay for the Crown concedes, none of the offences fell within Schedule 18A. Therefore, the sentences which he purported to impose under s. 236A cannot stand and must be quashed. Even had the judge been correct that many (or any) of the offences could be dealt with under s. 236A of the

2003 Act, he adopted an approach that was wrong in principle. That section provides that the sentence is only available for persons over 18 years of age, convicted of offences listed in Schedule 18A in respect of whom the court does not pass an indeterminate sentence or an extended sentence.

40. It follows from s. 236A(1)(c) that the court must first consider whether to pass a life sentence or an extended sentence and, only if it decides not to, move on to pass the sentence required under s. 236A(2). Here, the judge had decided that he was not required to pass a life sentence. Having decided (not least because of the concession to that effect) that the appellant was dangerous and required licence provisions, he ought to have passed an extended sentence under s. 226A of the 2003 Act. We are aware that in *AG's Reference (No 27 of 2013), R v Burinskas and other cases* [2014] EWCA Crim 334, [2014] 2 Cr App R (S) 45, the court required further consideration to be given to a determinate sentence when considering an extended sentence but the approach in that case must now be considered in the light of subsequent passage of s. 236A of the 2003 Act which, in certain circumstances, mandates a special custodial sentence which carries with it an automatic licence. In any event, we have no doubt that an extended sentence was the appropriate sentence in this case.

41. Had this court decided to maintain the overall length of the sentence, it would have been necessary to restructure it so as to quash all the sentences imposed under s. 236A and to impose extended sentences under s. 226A instead. In doing so, we would have had to ensure that the new sentence did not offend section 11(3) of the 1968 Act. That would have involved consideration of the different release provisions for extended sentences and sentences under s. 236A. We have set out the impact of the different automatic release provisions (and parole eligibility dates) in [3]-[4] above and underline that the date on which release becomes unconditional will be of particular importance when assessing comparative severity.

42. In the event, standing back and looking at totality, we have concluded that, very serious as these offences undoubtedly were, the total sentence was manifestly excessive. As a result, the correct approach for this court is to consider the appropriate sentence leaving out of consideration the provisions for early release and licence in accordance with the general principle that a sentencing court will not have regard to the actual period the offender is likely to spend in custody (see [8] above). Having done that, as we have explained, it is then necessary to compare the practical effect of the new sentence with the sentence originally imposed to ensure that it does not fall foul of s. 11(3).

43. Performing this exercise, considering the offending as a whole, including the pleas of guilty and the mitigation advanced, we consider that the appropriate total sentence in this case is an extended sentence of 21½ years made up of a custodial element of 17 years and an extended licence period of 4½ years, consecutive to 2 years' imprisonment (reflecting the offences for which an extended sentence was not available), making a total sentence of 23 years 6 months' imprisonment.

44. The effect of this sentence is that Thompson will become eligible to apply for parole when he has served two-thirds of the custodial element of the extended sentence plus half of the determinate term (i.e. after 12 years 4 months) and entitled to release when he has served the whole of the custodial term of the extended sentence plus half the determinate term (after 18 years). Under the sentence imposed in the Crown Court,

he would have become eligible for release after serving half of 27 years 8 months (13 years 9 months) and would have been entitled to release after serving 24 years 1 month (the whole of 20 years 6 months and half of the determinate sentence of 7 years 2 months). Accordingly, imposing the sentence we consider appropriate does not result in Thompson being treated more severely.

45. In a case such as this involving more than one victim and guilty pleas entered at different stages, a judge at first instance may wish to consider consecutive sentences to mark the separate offending on separate victims. As we have said, consecutive extended sentences may be imposed in appropriate cases and the individual circumstances and trauma caused to each victim must not be minimised. Bearing in mind the complexities of this case, however, together with the need to cross-check the sentence to ensure it does not offend s. 11(3) or the statutory maxima for offences, we adjusted the extended sentences so as to reflect the totality of the offending in respect of those offences attracting concurrent extended sentences, identifying those which will run consecutively in relation to different indictments. The extended sentences will also be consecutive to the determinate sentence of imprisonment for those offences that do not qualify for an extended sentence. We therefore allow the appeal to that extent and substitute the sentences shown in Appendix 2 to this judgment below for those imposed in the Crown Court.

R v Cummings

46. Following a trial in the Crown Court at Canterbury before Judge O'Mahony and a jury, Tajsham Cummings was convicted of causing grievous bodily harm intent, contrary to s. 18 of the Offences against the Person Act 1861. On 12 April 2017, he was sentenced to 12 years' detention pursuant to s. 91 of the Powers of the Criminal Courts Act 2000. The judge ordered that no separate penalty should be imposed in relation to other offences to which he had previously pleaded guilty (possessing controlled drugs of Class A and B respectively, with intent to supply).

47. When passing sentence, the judge expressly found that Cummings was dangerous, but he wrongly believed that since the offender was below the age of 18, he had no power to pass an extended sentence. It is unfortunate that counsel did not draw his attention to s. 226B of the 2003 Act 2003, which specifically gave him the power to do so. Notwithstanding what might have been considered his good fortune in that regard, Cummings now appeals against that sentence, with the leave of the single judge.

48. We can summarise the facts quite shortly. The victim of the assault was a young woman; she was a drug abuser, who bought her supplies from the Cummings. The judge, who had heard the trial, described her as being frail and vulnerable. As a result of his dealing drugs to her, she owed him money but was unable to pay. As a consequence, on 16 August 2016, he sought her out. As she returned home, from taking her dog for a walk, Cummings was waiting for her. He demanded his money whereupon she explained that she had no money. Because of his obvious aggression, her dog became alarmed and started to bark. Cummings then threatened to kill the dog if she didn't shut it up but she remembered nothing more until she was being placed into the ambulance.

49. What happened in the meantime could be pieced together from other fragments of evidence. The victim had, in fact, called her mother on her mobile telephone. Her

mother therefore heard part of what was going on and when her daughter ceased to respond, she sensibly called the police. In addition, there was an independent witness, who saw Cummings grab his victim by the hair and drag her about. He slapped her in the face. When she stood up, he kicked away her feet, grabbed hold of her and struck her forcibly in the face, kicking her really hard in the ribs. He then kicked her hard to the face, causing her to lose consciousness. The result was that she sustained a fractured jaw, which required plating and lost half a dozen teeth: her personal victim statement explains her continuing terror.

50. Cummings was arrested and found to be in possession of 68 wraps of cocaine, which were plainly part of his stock in trade as an active drug dealer, a conclusion confirmed by an analysis of the traffic passing on his mobile phone.

51. Although only 17 years of age, Cummings had a significant previous conviction, in 2014, for attempting to inflict grievous bodily harm with intent when he had sprayed ammonia into a woman's face. He had other convictions for assaulting a constable, for public order offences and for several drugs related offences. The pre-sentence report indicated he had a total lack of remorse towards the victim and was quite unable or unwilling to recognise the seriousness of what he had done. The writer considered that he presented a high risk of serious harm to others.

52. The judge found that Cummings was an active and significant Class A drug dealer, who had sold drugs to the victim; when she was unable to pay, he went round to her house to enforce the debt, using considerable violence. The judge concluded that this was intended to demonstrate his authority and to teach her a lesson, and so deter others from not paying their debts. He found these to be aggravating factors, to add to the seriousness of her injuries. Applying the guidelines, he assessed this to be a Category 1 offence, with a starting point of 12 years and a range of 9 to 16 years. He considered the previous conviction to be a seriously aggravating factor. He did not pass a separate penalty for the drugs offences, taking the view that the s. 18 offence sprang from his drug dealing; we observe in passing that Cummings was fortunate that the judge took that view.

53. Having heard the trial, Judge O'Mahony was well placed to assess the criminality and the risk presented. He concluded that Cummings had no moral compass whatsoever, giving the impression that he thought that drug abusers who did not pay their dealers 'had it coming to them'. It was in those circumstances that the judge did not hesitate in finding him dangerous, such that, if the power was available to him, he would have passed an extended sentence.

54. As to the determinate sentence, he said that if he was an adult, the sentence would have been 15 years' imprisonment but, taking into account Cummings' youth, he reduced the sentence to 12 years' detention, under s. 91 of the Powers of the Criminal Courts Act 2000 which it is now suggested was manifestly excessive. It is sufficient for us to say that we do not agree; there were a host of aggravating factors, all of which were properly identified by the judge. It was a merciless and sustained attack upon a vulnerable young woman, deliberately intended to terrify her and others to pay up for the drugs he had supplied to her; he inflicted serious injuries upon her, which also affected her mother who had heard the attack over the phone. Furthermore, he had a highly relevant previous conviction. In our judgment, all these factors fully justified a sentence of 12 years' detention.

55. The only error in the sentence passed was not to impose an extended sentence, as the judge could, and indeed should, have done. However, for reasons which we have already articulated, we cannot now extend the sentence, for to do so would be to pass a more severe sentence, which would fall foul of s. 11(3) of the Criminal Appeal Act. This appeal is dismissed.

R v Fitzgerald

56. On 4 December 2015 in the Crown Court at Norwich, Oscar Eugene Fitzgerald, then aged 26, pleaded guilty to 3 counts of rape of a child under 13 contrary to s. 5(1) of the Sexual Offences Act 2003. On 5 February 2016, he was sentenced by Judge Bate to a term of 8 years' imprisonment on each count, the sentences to run concurrently. He omitted to impose what were mandatory special custodial sentences pursuant to s. 236A of the 2003 Act.

57. On a date which is unclear from the papers, the Prison Service raised a concern about the sentence and the error was identified. On 5 April 2016, Judge Bate then purported to correct the error under s. 155 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act") and imposed a special custodial sentence for offenders of particular concern under s. 236A of the 2003 Act comprising a custodial term of 8 years with a further licence period of 1 year. Fitzgerald now appeals against that sentence by leave of the single judge.

58. The facts can be shortly summarized. The victim on each count was a girl aged 12. They made contact through a social media site and very quickly arranged to meet. In the late afternoon of 12 September 2015, Fitzgerald collected her in his car and drove her back to his house. At around 8.40 pm the girl's mother called the police to report her daughter as missing. When the girl returned, she told the police that she had met a man who had raped her. She had trusted him sufficiently to get into his car. Once at his home Fitzgerald told her to go upstairs into his bedroom where he began to undress her. He said he wanted to have sex with her. She said that she wanted to go home. He put on a condom on his penis, lay on top of her and raped her anally, vaginally and then orally, ejaculating in her mouth. They got dressed and he threw the condom away. They professed love for each other. He drove her home and told her not to tell anyone what had happened so that they could meet up again.

59. Fitzgerald had appeared before the courts on one previous occasion when he was absolutely discharged. In the pre-sentence report, he admitted that he had committed the offences in order to gain sexual gratification and indicated that, at the time, he was feeling lonely and isolated. He recognized that the offending would have a significant impact on the victim (which, from the victim impact statement it is clear that it had). He was assessed as falling into the high risk category to children and staff and a potential harm to himself given past suicidal thinking.

60. There are two substantive grounds of appeal. The first is that the purported variation of sentence was unlawful having been made outside the slip rule time limits in circumstances when it was not listed so that all parties could attend. Further the variation was not made in open court and Fitzgerald was denied his right to be present. The second ground of appeal is that the sentence (even before variation) was manifestly excessive.

61. The first ground of appeal is clearly well founded. Section 155 of the 2000 Act provides:

> "(1) Subject to the following provisions of this section, a sentence imposed, or other order made by the Crown Court when dealing with an offender may be varied or rescinded by the Crown Court within the period of 56 days beginning with the day on which the sentence or other order was imposed or made....
>
> (4) A sentence or other order shall not be varied or rescinded under this section except by the court constituted as it was when the sentence or other order was made....."

62. Unfortunately, the variation was outside the statutory 56 day period and the court was *functus officio*. Furthermore, the exercise of the time-limited power to vary a sentence is a substantive judicial function, not to be carried out administratively or without full regard to the requirements of s. 155 and 28.4 of the Criminal Procedure Rules ("Crim PR"). We would emphasise the importance of proper compliance with s. 155 and Crim PR 28.4. CrimPR 28.4 provides that the court may exercise its power on application by a party or on its own initiative or at a hearing in public or in private or without a hearing. However, a party who wants the court to exercise its power must apply in writing as soon as reasonably practicable after the sentence under review. Further, CrimPR 28.4(4) states:

> "(a) The court must not exercise its power in the defendant's absence unless-
>
> (i) The court makes a variation which is proposed by the defendant, or
>
> (ii) the effect of which is that the defendant is no more severely dealt with under the sentence as varied than before; or
>
> (b) The defendant has had an opportunity to make representations at a hearing (whether or not the defendant in fact attends)."

63. It does not appear in this case that due regard was paid either to s. 155 of the 2000 Act or to the requirements of the Rules. In the circumstances, the purported sentences passed pursuant to s. 236A of the 2003 Act are quashed as having been invalidly passed; the original determinate sentences, though unlawful, remain valid and effective. For the avoidance of doubt, it must be underlined that these sentences are not a nullity (see *Reynolds* [2007] 2 Cr App R (S) 87 at [23] and *Cain* [1985] 1 AC 46 at p. 55).

64. The second submission by Mr Robert Banks for Fitzgerald was that the overall sentence of 8 years' imprisonment was manifestly excessive. He contended that the judge was wrong to place the offending in category 2A of the Sentencing Council Sexual Offences Definitive Guideline. It was suggested that the incident was not

"sustained" because it did not last a long time. He suggested that there were no high culpability factors present. The ejaculation should not be considered an aggravating factor since the sexual activity was not unwanted.

65. We unhesitatingly reject these submissions. Their flavour revived outmoded values and myths about sexual offending that we believed had long been put to rest. The incident was clearly sustained, involving as it did three separate rapes. There was grooming behaviour. Ejaculation was certainly an aggravating factor. There can be no sensible suggestion of a 12 year old girl "wanting" the sexual activity. Her victim impact statement makes her confused state of mind at the time very clear, describing feeling alone, isolated, worried nervous and scared, alongside the profound and humiliating effect of these events on her. In any event, even if this were category 2B or 3A offending, the starting point would be 10 years' custody for a single rape. The judge fairly took into account the mitigation available to the appellant.

66. We have no doubt that the starting point adopted by the judge of 12 years before giving credit for guilty plea to reach an overall sentence of 8 years' imprisonment for three serious sexual offences was justified and having regard to the mandatory provisions of s. 236A of the 2003 Act, of less severity than that which would otherwise have been imposed. It was not manifestly excessive. As a result, the provisions of s. 236A cannot be accommodated in a manner that would not offend s. 11(3) of the 1968 Act for to do so would be to treat Fitzgerald more severely.

67. In these circumstances, the sentence which the judge purported to impose on 5 April 2016 is quashed and the determinate sentences of 8 years' imprisonment originally passed stand. Because these were the only operative sentences, the appeal is dismissed.

R v Ford

68. On 12 December 2016, in the Crown Court at Lincoln, following his earlier pleas of guilty to ten counts of making threats to kill, contrary to s. 16 of the Offences against the Person Act 1861, Richard Ford was sentenced by Judge Heath on counts 1 to 5 inclusive to 9 years imprisonment, on each count the sentences to run consecutively. He passed sentences of 9 years imprisonment on counts 6 to 10 as well, but ordered those sentences to be concurrent with those passed on counts 1 to 5. The total sentence, therefore, amounted to a determinate sentence of fully 45 years. He now appeals against sentence with the leave of the single judge.

69. That total sentence was, as the judge observed, highly unusual: so was the case. The facts were as follows. Whilst serving a prison sentence at HMP Nottingham, Ford took to writing a series of threatening letters. Thus, on 17 January 2016, he passed a letter to male prison officer, writing that he wanted to kill a fellow prisoner and then have penetrative sex with his body (count 1). He also wrote in the same letter wanted to commit various sexual offences upon the officer and indeed upon other prisoners and other prison officers.

70. Less than a week later, on 23 January, he spoke to the same prison officer through the door of his cell saying he would slit his throat if he ever got out of prison (count 2). The prison officer was concerned because he knew Ford to be unpredictable and was fearful that he might be stabbed should Ford have the opportunity. A further few days

later, on 28 January, Ford handed a letter to another prison officer stating that he was going to kill two prison staff or the governor and that he wanted to have sex with their bodies and get the keys off them and that when he got out of prison he wanted to kill his former male partner, and to kill a particular prison officer, whom he named. He added that he was going to kill someone that week. The latter was accompanied by crude drawings depicting some of the scenes he threatened (counts 3 and 4).

71. Three weeks later, on 16 February Ford handed a letter to yet another prison officer, containing similar threats to kill and to have sex with a named person and to kill members of the staff and the governors at HMP Nottingham. He was then going to escape and to kill his probation officer, with whom incidentally he had, until that time, formed a good working relationship. These incidents founded counts 5 and 6.

72. A month later, on 18 March Ford wrote another letter, which he handed in; he wrote that he did not want to live any longer; he threatened to kill the governor and to commit a sexual offence upon another named person (count 7). Thereafter, ten days later, on 28 March he wrote yet another letter threatening to kill two further named prison officers and a named District Judge. He also made various threats to commit sexual offences against them, against others and against unidentified children. Again, he crudely depicted some of the scenes (counts 8, 9 and 10).

73. Not everyone took these threats seriously, not least because Ford was in custody and had little chance of committing most of the offences he imagined. But the threat could not be dismissed since everyone knew of his unpredictability and it is a matter of real public concern that attacks by prisoners upon prison staff, particularly by those who are mentally unstable, are a serious problem.

74. Furthermore, the staff also knew about his previous convictions which included two offences (in 2011 and 2013) of possessing a knife in a public place and a further offence in 2014 of possession of a bladed article when he telephoned the police saying that he had a knife and was going to kill someone and then kill himself: this led to the term of 2½ years' imprisonment which he was serving when these threats were issued.

75. At the time of the offences, Ford was aged 38. He had pronounced learning difficulty and a borderline personality disorder, with traits of antisocial personality disorder. He had repeatedly self-harmed, both in and out of custody. He experienced what the psychiatrists called overwhelming sadistic urges and fantasies of killing men and adolescent boys and then sexually interfering with their dead bodies. He was himself fearful of being released from prison because he did not feel that he could prevent himself from acting out his sadistic urges. All those who had examined him concluded that he posed a grave and immediate danger to the public, and indeed to prison staff: for the foreseeable future he was likely to continue to do so. He was plainly dangerous within the meaning of the Criminal Justice Act 2003.

76. However, despite his many problems, Ford does not meet the criteria for mental illness or learning disability which would justify his reception into a mental hospital. That much was confirmed after an earlier constitution of this court ordered a further medical report and adjourned the hearing of the appeal to await it. In the circumstances, a disposal under the Mental Health Act 1983 is not available.

77. Judge Heath faced a difficult sentencing problem. The maximum sentence for making threats to kill is 10 years' imprisonment, so a life sentence, which otherwise could protect the public, was not available to him. Having identified the high risk that Ford presented, he started therefore with the maximum sentence of 10 years on each of the first five counts, which he reduced by one year to 9 years, to make allowance for his late pleas; he then ordered these sentences to run consecutively, making 45 years in all.

78. Reverting to the sentence, it must be one of the longest determinate sentences ever passed by an English court; neither is it less so following the direction of the Secretary of State that Ford be transferred to a medium secure mental hospital, where he is receiving appropriate care for his many conditions. It has been imposed on a man who never actually assaulted or attempted to assault anyone; indeed, committing these offences, he never left his prison cell. Plainly, such an overall sentence is entirely disproportionate to the offences which he has committed and cannot be upheld, but the protection of the public against the obvious risk that Ford presents must be at the forefront of any consideration of the case.

79. In our judgment, the maximum sentence of 10 years' imprisonment is not sufficient to meet the seriousness of his offending. Furthermore, neither is it sufficient to protect the public against the serious risk that Ford presents that a licence as part of an extended sentence, can amount to no more than 5 years (see s. 226A(8) of the 2003 Act). This case, therefore, does provide the exceptional circumstances which justify the imposition of consecutive extended sentences, and, in the circumstances, we propose to do so. Accordingly, the existing sentences are quashed and we substitute extended sentences under s. 226 of the 2003 Act. On counts 1-5 inclusive there will be an extended sentence of 10 years, with a custodial element of 6 years and an extended licence of 4 years; those sentences will be concurrent. On counts 6-10 inclusive there will also be an extended sentence of 10 years, with a custodial element of 6 years and an extended licence of 4 years also to run concurrently with each other, but consecutive to the sentences on counts 1-5.

80. The overall result is that Ford will be subject to an extended sentence of 20 years comprising a custodial term of 12 years and 8 years' licence. Thus, after he has served 8 years, being two thirds of the total 12 year custodial term, his case must be referred to the Parole Board for consideration of his release. Whether he is then released will depend on the assessment of risk of the public that he then poses. If not granted parole, he is at risk of being required to serve the full 12 year term. At whatever point he is released, he will remain on licence until 20 years from the date of sentence has expired.

81. We conclude by confirming that this substituted sentence does not offend s. 11(3) of the 1968 Act. Although the sentence originally passed was a determinate term, he would not have been entitled to be released until he had served one half of the 45 year sentence, that is to say 22½ years. In the circumstances, the appeal is allowed to that extent.

Conclusion

82. The complexity of sentencing legislation is such that errors such as those that have been made in these cases are inevitably becoming more frequent as judges and

advocates struggle with (and take time to resolve) the multiplicity of disposals and the statutory requirements for each. It is to be hoped that the Sentencing Code proposed by the Law Commission will be adopted by the government and so permit all the relevant legislation to be found in one place, avoiding the correction of costly mistakes and thereby aiding the proper administration of justice.

83. In the meantime, it is necessary to remind all advocates (and, in particular, the Crown Prosecution Service and those who prosecute on its behalf) that their obligation, in the public interest, is to ensure that the judge is correctly informed of the powers of the court and timeously reminded of any failure to comply with the many legislative requirements in place. In the event of error, s. 155 of the 2000 Act exists to correct, within 56 days, any that slip through without incurring the expense of an appeal or reference by the Attorney General pursuant to s. 35-36 of the Criminal Justice Act 1988. Having said that, another trap must be avoided: the time limit within which the Unduly Lenient Sentence Scheme must be initiated (28 days) means that a reference to the Attorney General may be necessary while, at the same time, an application under the slip rule is pursued. Needless to say, in the event of an application under the slip rule, compliance with 28.4 of the Criminal Procedure Rules is also essential.

Appendix 1

R v Thompson: Crown Court Sentences (with corrections)

Indictment T2015 7517 (Credit for guilty pleas of one-third)

1	Attempting to arrange a child sex offence	s236A 20 months' custodial term + 1 year extension	
2	Inciting a child to engage in sexual activity	s236A 4 years' custodial term + 1 year extension	Concurrent
3	Inciting a child to engage in sexual activity	s236A 20 months' custodial term + 1 year extension	Concurrent
4	Causing a child to watch a sexual act	16 months' imprisonment	Concurrent
6	Making indecent photographs	8 months' imprisonment	Consecutive
7	Distributing indecent photographs	2 years' imprisonment	Concurrent to 6, but consecutive to 1,2,3, 4
	Total	*s. 236A 4 year custodial term + 1 year extension consecutive to 2 years' imprisonment*	

Indictment T2015 0476 (Credit for guilty pleas of 10%)

1	Engaging in sexual activity in the presence of a child	32 months' imprisonment	
2	Inciting a child to engage in sexual activity	s236A 4½ year custodial term + 1 year extension	Concurrent
	Total	*s. 236A 4½ year custodial term + 1 year extension*	

Indictment T2015 0942 (Credit for guilty pleas of one-third)

1	Making indecent photographs	8 months' imprisonment	Concurrent
	Total	*8 months' imprisonment concurrent*	

Indictment T2016 7115 (Credit for guilty pleas of 20%)

1	Attempting to arrange a child sex offence	s236A 12 year custodial term + 1 year extension	
6	Sexual activity with a child	5 years 2 months imprisonment	Consecutive
8	Sexual activity with a child	5 years 2 months imprisonment	Concurrent to 6, but consecutive to 1
	Total	*s. 236A 12 year custodial term + 1 year extension with 5 year 2 months imprisonment consecutive*	

Total

Indictment T2015 7517	s236A 4 year custodial term + 1 year extension consecutive to 2 years' imprisonment	

Indictment T2015 0476	s236A 4½ year custodial term + 1 year extension	Consecutive
Indictment T2015 0942	8 months' imprisonment	Concurrent
Indictment T2016 7115	s236A 12 year custodial term + 1 year extension with 5 year 2 months imprisonment consecutive	Consecutive
Total	*s. 236A 20 year 6 month custodial term + 3 year extension plus 7 years 2 months' imprisonment consecutive Total 27 years 8 months with 3 year extended licence period*	

Appendix 2

R v Thompson: Court of Appeal Sentences

Indictment T2015 7517

1	Attempting to arrange a child sex offence	Extended sentence 38 months comprising 20 months custodial term + 18 months extension	
2	Inciting a child to engage in sexual activity	Extended sentence 5½ years comprising custodial term of 4 years + 18 months extension	Concurrent
3	Inciting a child to engage in sexual activity	Extended sentence 38 months comprising 20 months custodial term + 18 months extension	Concurrent
4	Causing a child to watch a sexual act	16 months' imprisonment	Concurrent
6	Making indecent photographs	8 months' imprisonment	Consecutive
7	Distributing indecent photographs	2 years' imprisonment	Concurrent to 6, but consecutive to 1,2,3, 4
	Total	*Extended sentence of 5½ years comprising a custodial term of 4 years + 1½ years extension consecutive to 2 years' imprisonment*	

Indictment T2015 0476

1	Engaging in sexual activity in the presence of a child	Extended sentence 50 months comprising 32 months' custodial term + 18 months extension	
2	Inciting a child to engage in sexual activity	Extended sentence 6 years comprising custodial term of 4½ years + 1½ years extension	Concurrent
	Total	*Extended sentence of 6 years comprising custodial term of 4½ years + 1½ years extension consecutive to sentence on Indictment T2015 7517*	

Indictment T2015 0942

1	Making indecent photographs	8 months' imprisonment	Concurrent

Indictment T2016 7115 (Credit for guilty pleas 20%)

1	Attempting to arrange a child sex offence	Extended sentence 10 years comprising 8½ years' custodial term + 1½ year extension	
6	Sexual activity with a child	Extended sentence 6 years 2 months comprising custodial term of 5 years' 2 months' + 1 year extension	Concurrent
8	Sexual activity with a child	Extended sentence 6 years 2 months comprising custodial term of 5 years' 2 months' + 1 year extension	Concurrent
	Total	*Extended sentence 10 years comprising 8½ years custodial term + 1½ years extension consecutive to indictments T2015 7517 and T2015 0476*	

Totals

Indictment T2015 7517	Extended sentence of 5½ years comprising a custodial term of 4 years + 1½ years extension consecutive to 2 years' imprisonment	
Indictment T2015 0476	Extended sentence of 6 years comprising custodial term of 4½ years + 1½ years extension consecutive to sentence on Indictment T2015 7517	Consecutive to sentence on T2015 7517
Indictment T2015 0942	8 months' imprisonment	Concurrent
Indictment T2016 7115	Extended sentence 10 years comprising 8½ years custodial term + 1½ years extension	Consecutive to total sentences imposed on T2015 7517 and T2015 0476
Total	*Extended sentence of 21½ years comprising custodial term of 17 years + 4½ years extension, consecutive to 2 years' imprisonment*	