IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN: [2020] EWCA Crim 1244

CASE NO 202002162/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 15 September 2020

LORD JUSTICE DAVIS
MR JUSTICE LAVENDER
MR JUSTICE PEPPERAL

REFERENCE BY THE ATTORNEY GENERAL
UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

REGINA
V
RAHAF AL ALI

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Mr P Ratliff appeared on behalf of the Attorney General

Miss S Mahmood appeared on behalf of the Offender

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J U D G M E N T

1. LORD JUSTICE DAVIS: The Solicitor General in this case seeks to refer the matter on the ground that the sentence imposed in the Crown Court was unduly lenient.
2. The circumstances are these. The offender was a woman who was born in Syria on 20 July 1997. She is now 23 years old. She faced an indictment which in its ultimately drafted form contained two counts of cruelty to a person under the age of 16 years, contrary to section 1(1) of the Children and Young Persons Act 1933. Count 1 particularised the offence as between 1 January 2015 and 1 April 2017, she wilfully neglected her child, J, in a manner likely to cause J unnecessary suffering or injury to health by deliberately failing to attend to his medical and health needs and to engage consistently with healthcare professionals in meeting those needs. Count 2 related to a period as particularised between 1 April 2017 and 14 November 2017. In this respect it was alleged that she had wilfully neglected J in a manner likely to cause J unnecessary suffering or injury to health by deliberately failing to seek medical attention which she knew was required by J.
3. On 26 June 2020, a relatively short time before the re-fixed date for the trial, the offender pleaded guilty to both counts. Subsequently, on 23 July 2020 she was sentenced by His Honour Judge Mukherjee in the Crown Court at Birmingham to a total of two years' imprisonment, suspended for two years, concurrent on both counts. Conditions were attached to the suspended sentence order, including a rehabilitation activity requirement, undertaking to complete a particular program and to comply with all reasonable requirements of probation and social services and other authorities.
4. The background facts are these. As indicated, the victim was the offender's son, J who was born on 19 August 2014. The offender herself had been 17 years old when she gave birth to J.
5. J was born prematurely and spent several months in hospital being discharged from hospital in November 2014. He lived with both parents until the father left the family home, after which the offender retained custody of J with the father visiting on occasions.
6. J had significant developmental deficits and required constant and consistent involvement with medical professionals. By October 2017 it was noted that he could hardly walk, could speak only a few single words in Arabic and still required feeding.
7. So far as count 1 is concerned, in February 2015 the offender failed to take J to his neonatal follow-up clinic appointment. Thereafter there were visits by the police following concerns expressed by a neighbour who had heard J crying a lot and matters such as that. On each occasion that the police visited the offender they saw no evidence of injury and did not see any reason to intervene. There were no concerns expressed when there was a health visitor visit in April 2015.
8. In May 2015 there was an instance where the offender failed to take J to a baby clinic appointment and thereafter there were various failures to attend baby clinic appointments. In July 2015 a health visitor observed J who seemed to be alert and awake. On 14 July 2015, J was taken to the emergency department at the hospital with a fractured humerus. The offender was to explain that he had suffered this injury whilst in his cot. There were further instances of failure to attend appointments. On 4th December 2015, J was then taken to the emergency department at the hospital with a fracture to his right

elbow. No explanation for the injury was given by the offender. No concerns were thereafter noted at subsequent visits. There were, however, occasions where there continued to be irregular contact for the purposes of appointments.

9. So far as count 2 is concerned, which related to the period 1 April 2017 to 14 November 2017, on 26 April 2017 the offender presented J at the local hospital with a swelling to the back of his head. She was to say that he had fallen two weeks earlier. In the course of the investigation, scans indicated, as was assessed by an expert, that there had been a fractured skull suffered in April 2017 which had not been spotted at the time.
10. On 13 July J was discharged from the register at the hearing clinic after his parents failed to contact the clinic to arrange his attendance. There then were further instances of failure to attend appointments. In September 2017 the offender again presented J at the emergency department of the hospital explaining that he had been pushed off his tricycle by his cousin. There was an x-ray of his left humerus showing some irregularity. A subsequent examination conducted on 20 November 2017 found that as of 10 September 2017 there had been an acute separation injury of the left humerus.
11. Again there were failures to attend various appointment. Then on 4 November 2017 J suffered injuries to his face and eye. On 4 November 2017 the offender had been staying with J at the home of the offender's sister-in-law and the sister-in-law had been awoken by hearing sounds of J screaming and further matters such as that. Texts were sent by the offender, amongst other things, saying: "He's unbearable, awake and don't let me sleep". Later in the morning of 4 November 2017, the sister-in-law saw that J had an injury to his eye. The offender refused to take J to see a doctor, saying that he had had such bruises previously. The offender sought no medical treatment for the injuries.
12. Following a further failure to take J to appointments, on 14 November 2017 a 999 call was made requesting urgent assistance as J was unconscious and having a seizure. Paramedics attended and it was established that his condition was extremely serious. He was taken to a hospital where a CT scan showed a comminuted skull fracture which was healing, suggesting an older injury. There was a serious blood clot over J's brain containing acute and chronic components. He was taken to theatre for emergency surgery and those features were identified to indicate a new trauma.
13. The offender was questioned about what had happened and she gave her account. When asked whether J could have hurt his head at any time in the previous few months, the offender said that she had not noticed anything unusual. An expert subsequently considered all images taken and scans from 14 November 2017 onwards and dated the fracture to the right parietal bone and haematoma to within 10 days of the CT scan - that is to say between 4 and 14 November. The offender was arrested on 14 November and interviewed on the following two days. Following her interviews she sent her sister-in-law text messages telling her to expect an interview and telling her what to say about the cause of J's injuries. What the offender told her sister-in-law to say was not true. The offender was interviewed again in April 2018 and gave an account which was not true. She also stated that she did not seek medical attention for J in relation to those injuries because she had been warned that he would be taken away from her if further incidents occurred.
14. The investigation later recovered the text messages between the offender and the sister-in-law which had revealed a plain attempt to get the sister-in-law to lie to the police and, further, a plan to mislead her social worker by claiming that she was going to

London, in order to avoid a home visit.

15. The offender had no previous convictions or cautions recorded against her. A short form pre-sentence report was prepared. That noted the extremely troubled background of the offender, she having had a traumatic childhood involving fleeing war-torn countries. Further, there is a pronounced language barrier in this country, she having a very poor grasp of English. Concerns were expressed as to the impact on her mental health of her background and indeed as to her ability to look after a young child on her own. It was recorded that her age and immaturity and inexperience as a mother would have greatly contributed to her offending behaviour. She was assessed as posing a medium risk of harm to J, albeit it was suggested that the risk could effectively be managed in the community. A non-custodial disposal was recommended.
16. There were also before the judge reports from a senior practitioner social worker. That indicated what had happened with regard to J in the context of family proceedings. What had eventuated in those proceedings was, it has to be said, most unusual in its outcome. In the course of those proceedings the family court had found on the balance of probabilities that the offender had herself inflicted the various physical injuries to J. Notwithstanding those findings in the family court proceedings, the family court nevertheless had concluded that it was in the best interests of J that he should remain in the care of both the offender and also of the father who had by now returned to assist with J, who by this stage was very, very significantly disabled. Thus the position was that notwithstanding that the offender had inflicted these injuries on J, as found in the family court, the best interests of J required, as the family court found, that he should not be placed into care but be with his mother and also his father.
17. At the request of the judge in the Crown Court a further report was put in to explain what the impact on J might be if the mother were to be separated from J by being sent to prison. Unfortunately that further report did not really spell out the consequences for J, apart from noting the obvious fact that he would be on that scenario separated from his mother. However, it is right to record that since November 2017 there have been no further incidents of any concern; and clearly it has been assessed that the mother can properly look after J and indeed that J should have his mother with him throughout. There are, for example, indications that J is able to recognise his mother and has formed a bond with her which cannot be replicated in any other form of relationship.
18. So far as aggravating and mitigating factors are concerned, the background facts really set out the position. The position is that she had failed to respond to interventions and warnings about her behaviour, she had attempted to hide the injuries to J from the authorities and indeed there had been an attempt to mislead the authorities. In terms of mitigating factors, she had no previous convictions, as we have said, she had demonstrated remorse, she had following arrest cooperated with agencies and of course she was the primary carer for J. Not least, she had lacked maturity.
19. In terms of the guideline, it was common ground that this was Category 1 in terms of harm. So far as culpability is concerned, for Category 1A the starting point is six years' custody with a range of four to eight years' custody. For Category 1B the starting point is three years' custody, with a range of two to six years' custody. There was no doubt that there were elements here of high culpability; but equally there was an element here of lesser culpability in that her responsibility, as the judge found, had been substantially reduced by reason of her lack of maturity.

20. In passing sentence, the judge made clear that he did not for the purposes of the criminal proceedings hold the offender accountable for causing the various injuries. That is a point to be stressed; indeed the indictment had never so asserted. The fact that the family court subsequently, applying the civil standard, has found otherwise is of no relevance for this purpose. The judge was right to stress that point.
21. The judge found that the offender had made deliberate decisions to deprive J of the attention he needed but those decisions were made by her when she was much younger, a very inexperienced parent and "no doubt naive and scared". The judge accepted part of her motivation was because she feared that J would be taken from her. The judge noted, however, that the indictment covered a period of nearly three years with multiple incidents of offending. The judge then went on to say this:

    i. "I do not think you could cope. I think that you were overwhelmed. This was not what you expected parenthood to be like. You did not have the right tools to deal with complex and trying circumstances..."

22. The judge found as a fact that a responsibility had been substantially reduced by lack of maturity and poor mental health. The judge then said this in terms of categorisation:

    i. "As far as harm is concerned, it is accepted on your behalf that this offending falls within Category 1 because of the serious developmental harm caused to [J]. So, as my starting point, I place this case within the top end of Category 1B, namely five and a half years' imprisonment."

23. The judge then went on to take into account the fact that when the offending started she had been 17 years of age and then said this:

    i. "In those circumstances, I am obliged to reduce that starting point and I do so by one-third, which reduces the sentence to 44 months."

24. The judge then referred to the mitigation. He gave 20 per cent credit for the relatively late pleas. That brought the sentence overall down to 25½ months and the judge decided that on the exceptional facts of the case it was appropriate to impose a two-year sentence which he could properly suspend.
25. On behalf of the Solicitor General, Mr Ratliff in his excellent submissions has submitted that this was an unduly lenient sentence. Mr Ratliff does not really quarrel with the judge selecting a starting point, as the judge put it, of five-and-a-half years: although Mr Ratliff did query whether this case should properly have been categorised as Category 1A rather than Category 1B as the judge sought to categorise it. Mr Ratliff drew attention to the aggravating factors, albeit he acknowledged that there were also significant mitigating factors. Mr Ratliff rightly acknowledged the potential importance of Step 5 in the guideline relating to parental responsibility of sole or primary carers. But he pointed out that this could not be said, on any view, to be a lower culpability case or a one-off incident. He submits overall that judge simply was not entitled to impose a sentence of

two years, enabling him thereby to suspend it. He also queries the judge's choice of a 20 per cent discount for the plea, Mr Ratliff observing that the plea was tendered only a few days before the re-fixed date of the trial. Mr Ratliff further complains that the judge was quite wrong to afford a one-third discount by reason of the age of the offender. The point was that she was an adult at the time she pleaded guilty and was sentenced, and indeed had been an adult at the time of the great majority of the offending. Thus it was a wrong application of the relevant guideline relating to children and young people to afford so significant a discount on the grounds of age. Indeed, he further complains that that in effect was double-counting: just because the judge had placed this in Category 1B because of his finding that her actions had been significantly motivated by reason of her lack of maturity. Overall, Mr Ratliff submitted a sentence of immediate custody was unavoidable on a proper application of the guideline to the facts and the sentence could not properly have been brought down to as low as two years' imprisonment.

26. On behalf of the respondent, Ms Mahmood submits that there was no proper basis for this court to interfere. If this was a lenient sentence then, she says, the circumstances were eminently such as to justify mercy and to justify leniency. She said that there can be no criticism of the judge's categorisation of this matter; and even if the credit for the late plea was generous, it was open to him in circumstances where much investigation had to be undertaken, where applications for disclosure had previously been made and where the indictment was only finalised relatively late on in the proceedings. Ms Mahmood accepted that the judge was not entitled to apply the guideline relating to children and young people in the way that he did in according a further one-third discount on the ground of age. But nevertheless, and overall, she said that this was properly categorised as an exceptional case and properly was the subject of a suspended sentence. She particularly emphasised the most unusual outcome in the family court proceedings; and she submitted that it would in effect be lamentable if this court should reverse now the status quo which has been established and when the family court has found that the best interests of J are served by being with his mother and also his father. Indeed, there may be concerns that if the mother were to go to prison the father on his own thereafter may not be able to cope and J might then have to be taken into care, which is precisely what the family court had been trying to avoid. She also stressed that since November 2017 no further concerns of any kind have been raised or noted.
27. The judge had throughout emphasised that this was an exceptional case and a very difficult case. Indeed it was. We do think that valid criticism can be made of the judge's methodology in reaching the sentence which he did reach, in particular in according the one-third discount on the grounds of age when that factor had already featured in his choice of starting point in the first place. Moreover, the discount for the plea was undoubtedly very generous, albeit perhaps permissibly within the range of the judge's discretion. We also of course bear in mind the focus of the family court in cases of this kind is not the same as the focus of the criminal court. The criminal court has to bring into play principles of retribution, principles of deterrence, principles of reformation; whereas the focus of the family courts of course is quite different.
28. But all that said, we must also bear in mind the sheer exceptionality of this case and we must also bear in mind the lapse of time that for, whatever reason, has occurred. The position is that J clearly needs his mother with him. That is the finding of the family court. It would be most unfortunate now, after all this time, if J were to be separated

from his mother, particularly having regard to the extreme position as to J's health.

29. We think overall that, whilst one can certainly criticise aspects of the judge's methodology, he was justified exceptionally in imposing a sentence of two years' imprisonment and then suspending it. He explained his reasons for doing that and we think those reasons overall were open to him. This undoubtedly was a very lenient approach and undoubtedly this was a very lenient sentence. But it does not seem to us to be a sentence with which this court should interfere. We consider, as we have indicated, that the status quo should now be maintained.
30. Accordingly, whilst we will grant leave in this case because there are features of the judge's reasoning which do not stand up to real scrutiny and just because this is an exceptional case, nevertheless we dismiss this Reference.

31. **Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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