IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE: 2021 00664 A3
NCN:[2021] EWCA Crim 839

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 27 May 2021

LORD JUSTICE HOLROYDE

MR JUSTICE HENSHAW

RECORDER OF REDBRIDGE
HIS HONOUR JUDGE ZEIDMAN QC
(sitting as a Judge of the Court of Appeal, Criminal Division)

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

REGINA
v
DAVID WILSON

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MR PAUL JARVIS appeared on behalf of the ATTORNEY-GENERAL
MR MICHAEL CLARE appeared on behalf of the OFFENDER

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J U D G M E N T

1. LORD JUSTICE HOLROYDE: David Wilson ("the offender") committed sexual offences against many young victims. They are all entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify them as the victims of these offences. We shall refer to them only by the use of letters of the alphabet.
2. The total sentence imposed on the offender was an extended determinate sentence under section 226A of the Criminal Justice Act 2003 of 33 years, comprising a custodial term of 25 years and an extension period of 8 years. Her Majesty's Attorney General considers that total sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
3. The offences were committed over a period of 4 years, between May 2016 and April 2020. The offender was arrested during that period, questioned, and released on bail. He nonetheless continued to commit further similar offences over the following months.
4. The offender was aged 32 at the start of this offending and is now 37. He had a number of comparatively minor previous convictions. None of them was for a sexual offence, but it is relevant to note two features: first, that his antecedents showed repeated failure to comply with orders of the courts; and secondly, that for some of the period of this offending he was subject to a community order or suspended sentence order.
5. It is also relevant to note that in 2015 he had been investigated for offences similar to those which we are about to describe but had not been prosecuted because of a lack of evidence.
6. The present offences were charged in an indictment containing 96 counts, many of which were multiple-incident counts. In all, there were hundreds of offences which involved 52 victims, all of whom were boys aged under 16. The offender posed on social media as a young girl, using 14 false social media accounts and seven different aliases to contact his victims. Some of his victims were known to him because he coached at a football club.
7. The offender, in the guise of a girl, persuaded his victims to send images of their genitals or of the genitals of other children. He encouraged them by sending images of sexual activity and by leading them to believe that they might be able to meet their supposedly female correspondent for sexual activity. Having gained possession of their images, he then threatened and blackmailed them into further activity, such as filming themselves masturbating or masturbating a sibling or friend. If any boy refused to do what was required, he was threatened with the disclosure to his friends of the images which he had provided up to that point. Thus the victims were driven to provide more images. Some of the victims blocked the offender, but he then contacted them using another of his aliases and accounts and so was able to resume and continue his abuse.
8. The offender took care to avoid detection. He used an unregistered pay-as-you-go mobile and always paid in cash when he topped it up.
9. The three most serious offences were of causing or inciting a child under 13 to engage in sexual activity involving penetration, contrary to section 8(1) and (2) of the Sexual Offences Act 2003. The maximum penalty for such an offence is life imprisonment. In addition, there were 24 offences of causing or inciting a child to engage in sexual activity, contrary to section 10 of the Sexual Offences Act 2003; 52 of causing or inciting a child under 13 to engage in sexual activity, contrary to section 8; ten of causing a child to watch a sexual act, contrary to section 12; four of arranging or facilitating the sexual exploitation of a child, contrary to section 50; and three of blackmail, contrary to section 21 of the Theft Act 1968.
10. The three most serious offences to which we have referred reflected at least eight occasions when the offender caused boys to engage in penetrative sexual activity with others. Count 8 (which became the lead offence) was a multiple-incident count which related to offending involving K, aged 11, and his brother J, aged 13. K was persuaded to send naked images of himself and his friends and family. Unbeknown to K, the offender -- using a different alias -- had also been grooming J. The offender required K and J to send him a video of them

masturbating one another and performing oral sex on each other to ejaculation. The offender then required a photograph of the penis of their younger brother aged 4. When further demands were made, K refused to comply. The offender threatened to show K's friends the video of K sucking J's penis. J was eventually arrested on suspicion of sexually abusing K but was not charged when it emerged that the offender had been grooming both boys.

11. Counts 13 and 16 related to offending against E, aged 12, who was required to record a video of himself and his friend masturbating each other. The boys were then told that they must record themselves engaging in oral sex. When they refused, the offender said he would send the first video to their friends. They therefore did what was required.
12. Other offences included the offender requiring a number of boys, aged 11 to 13, to send photographs of the penises of their younger brothers, aged between 4 and 9. One of those victims, aged 12, was required in addition to touch his brother's penis with a view to sending pictures of it erect. The same demand was made of another victim, aged 13. Another 13-year-old was required also to take images of himself masturbating in the presence of, and watched by, his 7-year-old brother, inserting a pencil into his anus and masturbating his brother while he was asleep.
13. We have said enough to indicate the extent and seriousness of the offending. We do not think it necessary to dwell further on the details.
14. Needless to say, the victims were greatly distressed. They begged and implored the offender not to disclose the photographs as he threatened to do. The offender was callously indifferent to such pleas. A number of his victims told him that they were going to commit suicide, but they were ignored. One sent a photograph showing him holding a blade to his wrist, with the words, "I'm killing myself". The offender replied, "Bye".
15. As we have said, the offender was arrested after he had committed a substantial number of the offences, but he denied any involvement, was bailed, and then continued to offend until eventually arrested in April 2020. At that stage, he was only charged with three offences. He denied them. He appeared before a magistrates' court on 30 April 2020, gave no indication as to his pleas and was sent to the Crown Court for trial. At a PTPH on 18 June 2020 he pleaded not guilty to the three charges, and the case was placed in a warned list for trial in September. On 25 August 2020 he appeared before a magistrates' court charged with a further 94 offences. He indicated not guilty pleas and was sent to the Crown Court. A better case management form completed for that hearing stated the following as being the real issues in the case:

> "Provenance of the phone is in dispute. Defence question whether in the absence of further information how it is known that the persons allegedly involved are in fact who they say they are."

16. As we understand it, the phone referred to is one which the offender had used to contact his victims. It had been found by the police in his home.
17. All the charges were later combined into one indictment. After a number of adjournments the offender was arraigned on 23 November 2020 and pleaded guilty to all 96 counts.
18. He was sentenced on 10 February 2021 by His Honour Judge Overbury in the Crown Court at Ipswich.
19. The judge was assisted by a pre-sentence report. It referred to sexual abuse which the offender said he had suffered as a child and to matters which may have caused the offender to have been suffering from emotional problems at the time of these offences. The author of the report assessed the offender as posing a very high risk of serious harm to children: he was obviously sexually attracted to boys, appeared to have gained pleasure both from the sexual imagery which he received and from his tormenting of his victims, had at times behaved aggressively towards them, had no protective factors in place and was unable to control his impulses.
20. The judge was also provided with a number of victim personal statements, some written by

victims and some by the parents of victims. Each member of this court has also read these statements. They set out very clearly the extent of the suffering which the offender has caused and which, we observe, it was inevitable he would cause by his offending. Victims described how their confidence had suffered as a result of the abuse. Some, as we have noted, felt suicidal and had to undergo counselling. Their personalities changed; they became more aggressive and less trusting of others. The parents reported their feelings of guilt when they were told how their children had been abused, often in their own homes. Some of the boys exhibited notably more sexualised behaviour after the abuse, and many became aggressive both at school and at home. A number of children had to be removed from their family homes for their own protection and one was living in a children's home at the date of the sentencing hearing. Some of the boys self-harmed. Others struggled to concentrate at school and their results suffered. The parents blame the offender for taking away their children's innocence.

21. Mr Clare, then as now appearing for the offender, advanced before the judge realistic and focused submissions in mitigation. He referred to the guilty pleas, the offender's acceptance of full responsibility and wish to accept whatever appropriate help he could receive in prison, and the fact that he had no previous conviction for any sexual offence.
22. The judge clearly considered the circumstances of the offending with great care. At the start of his sentencing remarks he summarised the offending as "a lengthy and premeditated campaign of sadistic and manipulative abuse of some very young boys using social media". He observed that any decent person would be astonished at the level of depravity involved. He made plain that he was sentencing only for the 96 offences, but in considering the issue of dangerousness he took into account -- as he was entitled to do -- information indicating that probably thousands of children had been involved. He referred to the Sentencing Council's relevant sentencing guidelines and to case law which he had considered*: R v Watkins* [2015] 1 Cr App R (S) 6; *R v DJ* [2015] 2 Cr App R (S) 16; *R v Leighton* [2017] EWCA (Crim) 2057; and *R v Falder* [2018] EWCA (Crim) 2154. He indicated that he would allow full credit for the offender's guilty pleas. He also indicated that he would attach the total sentence to one count (count 8), with shorter concurrent sentences on other counts.
23. The judge then summarised the circumstances of the offences. He noted the young ages of the victims and the fact that some were required to engage in penetrative sexual activity. He carefully categorised the offences by reference to the guidelines and noted the aggravating features which applied to them all: a significant degree of planning, grooming behaviour, the use of threats, and the sharing of sexual images both still and moving. He concluded that the total notional determinate sentence would be one of 37 years 10 months' imprisonment after a trial.
24. The judge turned to the issue of dangerousness. He concluded that the offender is extremely dangerous: a serial paedophile with a perverted and sadistic sexual interest in young boys. He then considered, as he was required to do, whether the seriousness of the offence justified a life sentence on one or more of counts 8, 13 and 16. He concluded:

> "I'm not satisfied that even the extreme nature of this case justifies such a sentence, but particularly so because I am satisfied that the necessary level of public protection can be achieved by passing an extended sentence under section 226A of the Criminal Justice Act 2003."

25. The judge went on to say that the abhorrent nature of the crimes merited an extremely long sentence for the protection of the public. Taking into account the limited mitigation and the credit for the guilty pleas, the sentence on count 8 was an extended determinate sentence with a custodial term of 25 years and an extended licence period of 8 years. Shorter determinate sentences were imposed, concurrently, for each of the other offences. It is unnecessary, for present, purposes to set out the details of those sentences.

26. On behalf of the Solicitor General, Mr Jarvis submits that the total sentence was unduly lenient. He advances three arguments in particular.
27. First, Mr Jarvis submits that the judge should have imposed a life sentence. He points to the number of victims and the scale, persistence, and profound impact of the offending. He refers to *Attorney-General's Reference (No 27 of 2013) (Burinskas*) [2014] EWCA Crim 334; [2014] 2 Cr App R (S) 45. He submits that there was no reliable estimate before the judge as to the length of time for which the offender would remain a danger. He notes the opinion of the author of the pre-sentence report that "without massive improvement across a large number of problem areas" the offender would be likely to cause significant harm in the future. Although the offender had told the author that he was motivated to address his behaviour whilst in prison, she regarded him as underestimating the risk of further offending. Mr Jarvis submits that even if the offender was required to serve the custodial term in full, he would be aged 61 when released and the judge could have no confidence that he would no longer be a danger to children. In those circumstances, he submits, only a life sentence could be justified.
28. Mr Clare, in response, submits that although the offences were very serious, they did not involve any physical contact between the offender and his victims, or even in any attempt by the offender to meet any of his victims. He observes that it will rarely be possible to have an entirely reliable estimate of how long an offender will remain dangerous, but submits that it would be inappropriate to impose a life sentence in this case only for that reason. He emphasises that a discretionary life sentence is a sentence of last resort. He points out that only three of the 96 offences carried life imprisonment, the maximum sentence in each of the other cases being at most 14 years' imprisonment. He also notes that the other cases considered by the judge, which could fairly be regarded as more serious than this, had not involved the imposition of any life sentence.
29. Mr Jarvis submits, secondly, that an overall sentence of 37 years 6 months -- the notional term which the judge must have reached before giving credit for the guilty pleas -- was significantly too short. He recognises that the judge faced a difficult task in determining the appropriate total sentence. He acknowledges that the total custodial term of 37 years 6 months "does not appear to be out of step with" the notional determinate terms in the cases which were considered by the judge. But, he submits, those cases all preceded the decision of this court in *R v McCann, Sinaga and Shah* [2020] EWCA Crim 1676; [2021] 4 WLR 3. He does not suggest that the present case reaches the exceptional level of seriousness with which the court was there concerned because the present offending did not involve the commission of any rape. He submits, however, that the principle which can be drawn from the decisions in relation to the offenders *McCann* and *Sinaga* is that where the facts of a case are truly exceptional and can properly be described as falling within the category of the most serious cases involving a campaign of rape, then a notional determinate sentence after trial of 60 years' imprisonment is merited. In his written submissions he went on to submit that the offending in the present case "comes close to" the type of offences considered in the cases of *McCann* and *Sinaga* and that the judge should therefore have taken a notional determinate sentence after trial of significantly more than 37 years 6 months. In his helpful oral submissions this morning, Mr Jarvis acknowledged that he was in truth arguing that the effect of the decisions in *McCann* and *Sinaga* was to justify a general increase in the level of sentencing for truly exceptional cases. He submitted today that the present case is truly exceptional albeit not a truly exceptional case of rape.
30. Mr Clare in response submits that apart from the case of *Falder*, the other cases which were drawn to the attention of the judge were contact cases involving features such as campaigns of rape and violence. The notional determinate sentence in the present case was, he submits, very high even when compared to the notional determinate sentences in *McCann* and *Sinaga* for the campaigns of rape in those two cases. He invites comparison with the sentencing in *Falder*, which he submits was a worse case than the present. He opposes the suggestion that the decisions relating to *McCann* and *Sinaga* set any new benchmark for

sentencing in cases of multiple sexual offences.

31. Mr Jarvis's third argument is that the judge was overly generous in allowing full credit of one-third for the guilty pleas in this case. He submits that in the light of the decision of this court in *Hodgin* [2020] 4 WLR 147 the judge should not have given full credit for guilty pleas which had not been indicated at the magistrates' court.
32. Mr Clare accepts that the offender may have been fortunate to receive full credit. He has, however, explained to us the considerable practical difficulties attendant upon taking instructions and giving advice in a case involving so many different offences during the Covid pandemic. He submits that when those considerations are taken into account the judge was entitled to grant full credit.
33. We are very grateful to both counsel for their written submissions and for their helpful oral submissions today.
34. We consider first the issue of a life sentence. The provisions of the Criminal Justice Act 2003 apply to this case, albeit that they have now been replaced by the Sentencing Act 2020. By section 225 of the 2003 Act, where an offender is dangerous (as this offender is) and is liable to life imprisonment (as he was on counts 8, 13 and 16), if the court "considers the seriousness of ... the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life", then the court must impose that sentence. In *Burinskas* [10] the Lord Chief Justice noted that where section 225applies, a judge has no discretion: a life sentence must be imposed. He went on to consider the interpretation of section 225 in the light of legislation which had ended the former sentence of imprisonment for public protection, saying at [24] that, save where required by section 224A of the 2003 Act, "a life sentence remains a sentence of last resort".
35. As to the test to be applied, the Lord Chief Justice at [22] said this:

> "... the question in s.225(2)(b) as to whether the seriousness of the offence (or of the offence and one or more offences associated with it) is such as to justify a life sentence requires consideration of:--
>
> The seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of s.143(1). This is always a matter for the judgment of the court.
>
> The defendant's previous convictions (in accordance with s.143(2)).
>
> The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.
>
> The available alternative sentences."

36. It is apparent that Judge Overbury had that test in mind, and applied it in reaching his decision that the available alternative of an extended determinate sentence would provide sufficient protection for the public and that a life sentence was not justified. He had found the offender to be extremely dangerous -- a finding which has not been challenged -- and he was of course dealing with very serious offending which had caused great harm to many victims and their families. On the other hand, he had to take into account that an extended determinate sentence would result in the offender spending many years in prison and a long period on licence, remaining subject to licence into his 70s. He had observed at an early stage of the hearing that he expected the licence conditions would include all the provisions which might be included in a Sexual Harm Prevention Order and he would recommend that they did. In addition to being supervised during that licence period, the offender would be subject to further controls because of the notification requirements and the barring provisions. All those considerations were highly relevant in deciding whether the sentence

of last resort was justified.

37. In those circumstances, and notwithstanding the seriousness of the offending and the assessment of the offender as extremely dangerous, the judge was, in our view, entitled to conclude that a life sentence was not justified. We are therefore unable to accept Mr Jarvis's first submission.
38. As to the second submission, we agree with Mr Jarvis that the total custodial term, before credit was given for the guilty pleas was broadly in line with the other cases which the judge considered. We also agree with Mr Clare that the offenders in the cases of *Watkins*, *DJ* and *Leighton* had all committed numerous rapes. The offender in *Falder* had not personally raped any of his victims, but had encouraged another man to rape a 2-year-old child. Like this offender, he had been given full credit for guilty pleas. In his case, the custodial term of an extended determinate sentence was reduced on appeal to 25 years. We do not think it would be helpful to consider those cases in greater detail for two reasons: first, because the facts and circumstances of each case inevitably differ; and secondly because, as we have said, the Solicitor General does not argue that the present sentence was unduly lenient by comparison with those cases. We would add the observation that nothing in the judge's sentencing remarks suggests to us that he felt in any way constrained by the level of sentencing in those cases.
39. We accordingly turn to the submission that a higher level of sentencing is now appropriate because of the decision of this court in relation to the offenders *McCann* and *Sinaga*.
40. The offender *McCann* was convicted of seven offences of kidnap, ten of false imprisonment, seven of rape, one of rape of a child under 13, three of assault by penetration and other offences. He was sentenced to life imprisonment with a minimum term of 30 years.
41. The offender *Sinaga* was convicted, after a series of trials, of a total of 136 offences of rape and a number of other sexual offences. He too was sentenced to life imprisonment with a minimum term of 30 years.
42. In each of those cases, the Attorney-General argued that the sentences should have been whole life orders, because of the exceptional seriousness of the offending. The court did not agree, but held that each of the cases came within the category of the most serious cases involving a campaign of rape to have been tried in England and Wales. The circumstances of each of those two cases were "truly exceptional", and neither offender had shown any remorse. Although the cases were unconnected, each merited a minimum term based on a notional determinate sentence of 60 years.
43. Thus the court in those two cases was dealing with the level of sentencing for truly exceptional offending. The decisions as to the appropriate notional determinate sentences were explicitly based on the facts and circumstances of the individual cases. We respectfully agree with those decisions on their facts. However, we see nothing in the judgment to suggest that the court intended to set a benchmark for cases falling below the truly exceptional, or to initiate a general increase in the levels of sentencing for offenders convicted of multiple sexual offences. Mr Jarvis was not able to identify to us any passage which could be relied on to that effect.
44. Mr Jarvis invited our attention also to the recent decision in *R v JRM* [2021] EWCA Crim 524. In that case too, the offending was correctly categorised as exceptional: the offender had committed about 150 rapes and numerous other penetrative sexual offences. This court again concluded that the appropriate notional determinate sentence was 60 years; but in doing so, Macur LJ [42] made clear that it was inappropriate to attempt a comparison with the factors present in *McCann* and *Sinaga* because they were completely different. Again, we see nothing in the judgment to suggest that it was intended to set any sort of a benchmark for cases falling somewhat below the level of exceptional seriousness illustrated by those cases.
45. We are therefore unable to accept the submission that the decisions relating to *McCann*, *Sinaga* and *JRM* mandate in this case a level of sentencing other than that which would

previously have been considered appropriate. Although very serious, the offending in this case was not of the exceptional level found in those three cases. It follows that the basis of the submission, that the length of the custodial term here should be increased substantially, fails. The length of the total custodial term in the present case, before reduction for guilty pleas, was not unduly lenient.

46. We see greater merit in Mr Jarvis's third point. In *Hodgin*, where the offence charged was indictable-only, the court reviewed earlier decisions and concluded at [37] that:

> "... in order to receive full credit of one-third pursuant to the guideline, where at the magistrates' court it is not procedurally possible for a defendant to *enter* a guilty plea, there must be an *unequivocal indication* of the defendant's intention to plead guilty. An indication only that he is *likely* to plead guilty is not enough."

47. In the recent case of *R v Plaku* [2021] EWCA Crim 568, the court endorsed that principle. It referred to the Sentencing Council's definitive guideline on Reduction in Sentence for a Guilty Plea, emphasising that it focuses on the time when a guilty plea is indicated, not when it is entered. It noted the clear distinction drawn between the reduction in sentence available at the first stage of proceedings and the reduction available at any later stage. The court went on to refer to the exception F1, but stated that both the proper application of the guideline and fairness to those who did indicate their guilt at the first stage of proceedings demanded observance of the distinction between "cases in which it is necessary to receive advice and/or have sight of evidence in order to determine whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal".
48. In the present case, we readily accept from Mr Clare that there were difficulties in arranging and holding detailed conferences. However, the offender did not indicate his intention to plead guilty to any of the offences at the first stage of the proceedings. On the contrary, in relation to the first three charges he pleaded not guilty when the case was before the Crown Court and the case thereafter moved towards a trial date. When multiple further charges were laid, the offender indicated not guilty pleas. We accept that the number of victims may have made it difficult for him to remember immediately the details of each of the individual offences; but the wording of the charges makes clear what conduct is alleged and he needed neither legal advice nor sight of all the evidence to know that he had committed many sexual offences of the kind charged. He could have indicated guilty pleas or he could have indicated that he would plead guilty to many sexual offences against young boys but needed a little time to consider the details of each charge. He did no such thing. His challenge to the provenance of the incriminating mobile phone found in his home meant that the prosecution had to continue to prepare for a contested case and the victims had to assume that they may be required to give evidence. The key benefits of an early guilty plea, to which the guideline refers, were therefore not available in this case.
49. In those circumstances, we accept Mr Jarvis's submission that the judge fell into error in allowing full credit. Mr Clare had suggested that the offender should have credit of between one-third and one-quarter, but -- as the court made clear in *Plaku* [27] -- there will be very few occasions when such a reduction is appropriate. We are satisfied that this is not one of them. With respect to the judge, who in every other respect conducted a very difficult sentencing process with great skill, the offender could not properly have been allowed more than one-quarter credit.
50. We are satisfied that in that respect the sentence was unduly lenient. Reducing the custodial term of 37 years 6 months by one-quarter rather than by one-third, and rounding down slightly in the offender's favour, has the effect of increasing the custodial element of the extended determinate sentence imposed on count 8 from 25 years to 28 years. Given that

the sentence on that count reflects the seriousness of the offending as a whole, we think it sufficient to increase the sentence on that count without making arithmetical reductions to each of the concurrent determinate sentences.

51. For those reasons we grant leave to refer. We quash the extended determinate sentence of 33 years imposed in respect of count 8 and substitute for it an extended determinate sentence of 36 years, comprising a custodial term of 28 years and an extension period of 8 years. In all other respects the sentencing remains as before. The effect of our decision is that the offender must serve at least two-thirds of the custodial term of 28 years. His case may then be referred to the Parole Board, but he will only be released before the end of the 28-year term if the Parole Board decides it is safe to do so. When released, he will be on licence for any remaining part of the 28-year term and for a further 8 years.

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