WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1094

CASE NO 202200413/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 12 July 2022

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE HOLROYDE)

MR JUSTICE SPENCER

MRS JUSTICE HILL DBE

REGINA
V
"GJ"

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR M ROWCLIFFE appeared on behalf of the Appellant.

J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge.
2. The provisions of the Sexual Offences (Amendment) Act 1992 apply in this case. There must be no reporting of the case which is likely to lead to the identification of the victim. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. In view of the family relationship between the appellant and the victim, we shall also anonymise the appellant in this judgment.
3. On 15 October 2021 in the Crown Court at Northampton the appellant, who is now 47 years old, pleaded guilty to a total of 15 serious sexual offences committed against his niece (whom we shall refer to as "XY"). There were six offences of assault on a child under 13 by penetration, contrary to section 6(1) of the Sexual Offences Act 2003. Those were the most serious allegations. There were nine offences of sexual assault of a child under 13, contrary to section 7(1) of the Act. There was also a single offence of causing or inciting a child under 13 to engage in sexual activity, contrary to section 8(1) of the Act. The case was adjourned for reports.
4. On 19 January 2022 the appellant was sentenced by HHJ Herbert QC. The judge took as the lead offence count 5, which was a multiple incident count of assault of a child under 13 by penetration. On that count he imposed an extended sentence of 12 years' imprisonment, comprising a custodial term of 10 years and an extension period of 2 years. On count 14, assault of a child under 13 by penetration, there was a concurrent sentence of 9 years. On each of three further counts alleging the same offence (counts 2, 9 and 11) there were concurrent sentences of 7 years' imprisonment. For each of the offences of sexual assault of a child under 13 (counts 1, 3, 4, 6, 7, 8, 13, 15 and 16) there were concurrent sentences of 4 years' imprisonment. On count 12, causing or inciting a child under 13 to engage in sexual activity, there was a concurrent sentence of 30 months. Appropriate ancillary orders were made.
5. The grounds of appeal, in short, are that the judge wrongly categorised the offences in a number of respects, failed to take sufficiently into account the appellant's learning disability and was wrong to find that the appellant was a dangerous offender for whom an extended sentence was necessary.

<u>The facts</u>

6. The victim of the offences was the appellant's niece and also his goddaughter. The offending began in 2007 when she was 7 years old and continued until 2014 when she was 12. When the offending began the appellant would have been around 35 years old. The offences began at XY's home address. Later on they took place at her grandmother's house which is where the appellant was living. Counts 1 and 2 were offences of sexual assault and assault by penetration, when the appellant was baby-sitting for XY, his 7-year-old niece at her house. He was also baby-sitting for her younger brother. It is to be inferred that despite his learning difficulties he was regarded by the family as sufficiently capable and responsible to be looking after two young children.
7. On this first occasion the appellant followed XY into her bedroom having told her "this can be our little secret" and touched her face, breasts and vagina over her clothing. It progressed to kissing her on the mouth. He then removed her trousers and underwear

leaving her naked from the waist down. He told her to be quiet, he kissed her on the lips and then kissed her over her clothing down to her lower body. All that activity was count 1 (sexual assault). He then licked her vagina and inserted his tongue into her vagina. That was count 2 (assault by penetration). This incident lasted for about 20 minutes. On that first occasion the appellant told XY not to say anything to anybody about what had happened. She did as she was told.

8. About a week later, again in her bedroom, he kissed her lips, cheeks and neck and touched her over her clothing. He got his mouth down as far as her trousers but then stopped, probably because her younger brother was shouting. That was count 3 (sexual assault). Thereafter the appellant penetrated her vagina with his tongue, at her own house, and did so on five to 10 occasions (counts 4 and 5). There was an occasion when in the kitchen at her home the appellant kissed her lips, cheek and neck and touched her breasts and vagina over her clothing (count 6). There was another time when he kissed her lips, cheek and neck and touched her down her body but stopped when XY's mother returned home (count 7). All the offences that we have dealt with so far took place at XY's own home.
9. When XY was a little older, aged 9 or thereabouts, she started to stay at her grandmother's house regularly for sleepovers. She enjoyed spending time at her grandmother's house because they had a good relationship. On these occasions she would sleep in her aunt's bedroom. That house was also where the appellant still lived with his parents.
10. On one occasion as XY was lying on the bed watching television the appellant came into the room and told her to be quiet. He undid her jeans and removed them completely, and her underwear. He then penetrated her vagina with his tongue (count 9). He also kissed her lips and cheeks and kissed and grabbed her breasts (count 8, sexual assault). There was another occasion at her grandmother's house when she was aged 10, when she was staying in her aunt's bedroom. The appellant came into the room and sat on the bed with her. He moved her around, pulling her bottom around to face him so that she was face down with her legs hanging off the bed. He had already removed her trousers and underwear. He touched her breasts over her clothing, then inserted his finger into her anus (count 11). This episode came to an end, she believes, because her grandmother shouted for them to come downstairs for tea. This penetration of her anus caused her immediate pain. She had to ask her grandmother for some cream to ease the discomfort. On another occasion XY was in the appellant's bedroom where he was playing on his games console. His penis was exposed and he was touching it. He grabbed her hand and tried to place it on his penis. She pulled away. That was count 12, (causing or inciting a child under 13 to engage in sexual activity).
11. There were other times at the grandmother's house when the appellant kissed and touched her breasts over her clothing. On one of these occasions she was there for her grandfather's birthday (count 13). On another occasion she and her cousins where playing hide and seek when the appellant pushed her down onto the bed and touched her over her clothing (count 15). There were at least three further occasions during this period when he penetrated her vagina with his tongue (count 14).
12. The final offence (count 16) was committed when she was 12 years old. It took place in a bedroom at the appellant's home. Adopting the judge's description of this incident, the appellant made her straddle him over clothing while he touched her chest. She could

feel he was sexually aroused. Initially she was fully clothed but he pushed up her top and her bra and was touching her breasts. It was at this stage that her younger brother walked into bedroom and she and the brother, it seems, were both equally shocked. Her brother tried to persuade her to tell her mother but she did not want to, for fear that she would not be believed; after all she had been told throughout by the appellant to keep quiet and to keep it a secret. Her brother was very angry from that day forward but respected her wishes and did not disclose what he had seen.

13. It was not until 2020, some 8 years later, that XY plucked up the courage to report to the police the abuse she had suffered at the appellant's hands when she was a child. She gave a series of very full and detailed ABE interviews.
14. The appellant was arrested on 31 May 2020. When interviewed he gave a prepared statement. He said that he suffered with learning difficulties and his mother did everything for him. He denied assaulting his niece in any way. He said the allegations were completely untrue. However, in due course he pleaded guilty to all the offences we have outlined. We should say that when he was seen by the probation officer for the purposes of the pre-sentence report, he appeared to be resiling from his admissions of guilt and his guilty pleas. The judge queried this at the sentencing hearing and was assured that the appellant did accept full responsibility for all the offences. That is confirmed in the recent prison report that we have been shown.
15. There was a victim personal statement, which XY read aloud at the sentencing hearing. She was by then 21 years of age. She said that the abuse she had suffered had caused ongoing and repetitive nightmares in which she was reminded of what the appellant had done to her. She was constantly reminded of what she was put through at such a young age. She suffered with anxiety. She had severe panic attacks where she could not breathe properly. She had short-term memory problems, sometimes being unable to remember things that had happened only minutes earlier. She had trust issues especially with men. She would sometimes flinch when a man touched her or embraced her. Overall the experience of this abuse had affected her mental health, her general well-being and her sense of security. She did not feel safe unless she was at home with her boyfriend or with her parents and brothers. She hoped things would improve because she could not carry on living like this. She had undergone counselling to help her to cope and get through it and she expected to need further counselling and support. One of the consequences of reporting the abuse had been that her grandmother and grandfather (that is the appellant's parents) and his other sisters had turned their backs on her, apparently somehow blaming her.
16. The appellant had no previous convictions.

<u>The reports</u>

17. There was a psychiatric report which had been commissioned principally to establish that the appellant was fit to plead. The report gives a diagnosis of mild learning disability, IQ 50-70. The appellant attended a school for children with learning difficulties and then went on to college but did not achieve any qualifications. He has never had paid employment but he had work experience as a driver's mate for a lumber company in his younger days and he had worked more recently in a charity shop sorting donations. He is able to use a Smart phone; he can use it for Internet banking. He is keen on computer games. He lives with his parents. They took over control of his money but that was

only to provide him with extra support because he had developed a serious alcohol problem. He is fully independent in terms of personal care. He is reliant on his parents to support him with his finances and shopping but is otherwise independent although he does struggle with some tasks, for example, he cannot read a map or use a SatNav.

18. Based on the diagnosis of mild learning disability, the psychiatrist's assessment of the appellant in interview (which was conducted remotely) and based on the appellant's educational history and on his daily living skills, the assessment in the report was that he functions at a level of someone around 12 to 13 years of age. We take that from its context to be a reference essentially to his intellectual functioning having regard to what he is able to do in the descriptions we have given.
19. We note that in the report at paragraph 3.21 the psychiatrist says in terms that he asked the appellant whether when the incidents happened in 2008 to 2013, he knew that what he was doing amounted to a sexual offence. The answer was yes. He remained consistent in that response when the question was asked in different ways. We have no doubt that the psychiatrist asked the question in different ways to ensure that the answer he was being given was reliable.
20. There was a pre-sentence report which expressed the view that the offences did not appear to be the result of poor thinking but rather a calculated cycle of sexual offending which involved persuading himself that it was acceptable behaviour, targeting a victim, grooming and creating opportunities, committing the offences and then avoiding detection. The report noted that although the appellant's immediate family are supportive of him, there are concerns of possible collusion within the family to protect him. He still has contact with another sister's two daughters (aged 9 and 11) but his sister has been assessed by Children's Services as protective and able to supervise any contact. The appellant denied experiencing any form of sexual arousal when he was seen by the probation officer, which she thought improbable given the circumstances of the offences.
21. The assessment in the report was that the appellant presented a high risk of serious harm to children, specifically female children, known to him through family, over whom he has some authority, where he can secure lone contact, probably in a domestic setting. The risk in the community is likely to occur if and when he has manoeuvred himself into a position of authority and trust within a family environment. The report expressed the view that he would not only groom the victim to gain their silence and compliance, possibly via a combination of threats and covert control, but would also groom those adults who may act as protectors of the children and supervisors of his behaviour. It was reasonable to conclude, the report said, that he holds established distorted attitudes in relation to entitlement and consent.

<u>The judge's sentencing remarks</u>

22. In passing sentence the judge said the offences amounted to a serious breach of the trust placed in the appellant to look after his niece when effectively he was baby-sitting for her. The judge was satisfied that the appellant groomed XY over a long period for the sexual conduct that took place.
23. It appeared that the appellant had little understanding of the harm that he had caused her. His offending has had a profound effect upon XY. It has had, and will continue to have, a severe impact on her life, the full extent of which is not possible to determine at this

stage. The judge was satisfied that the appellant posed a significant risk of serious harm to young girls from the commission of further offences of this type. That assessment, the judge said, was based on the evidence in the case and was confirmed in the pre-sentence report.

24. The judge explained that he would treat count 5 as the lead offence as it was a multiple incident count of assault by penetration and therefore the most serious offence. He made it clear that he was sentencing the appellant for a lengthy course of conduct and that the sentence on count 5 would reflect the appellant's overall conduct towards his niece.
25. Turning to the Sentencing Council guideline for a section 6 offence, the judge said that it was category 2 harm because XY was only 7 years old at the time and was therefore "particularly vulnerable due to her extreme youth". He was also satisfied that the effect upon her of the offending had been "severe", by which we take it to mean that the judge was satisfied that another category 2 factor was present, namely "severe psychological harm". He said that if he had concluded that she was not extremely young, he would nevertheless have been satisfied that the combination of these two factors made it a category 2 harm case. The judge assessed culpability as level A because of the breach of trust involved. The starting point under the guideline was therefore 11 years, with a range of 7 to 15 years for a single offence.
26. There were multiple offences of the same kind involving penetration of the vagina and on one occasion the anus, which meant that the sentence on count 5 had to be increased significantly. The judge noted that the appellant had no previous convictions. He took into account his disability and the content of the psychiatric report. He acknowledged that the appellant had a low IQ and intellectual functioning which went in his favour. The judge continued:

> "That said, I have concluded from the evidence that despite your level of intellectual functioning you were fully aware of how wrong your conduct was at all times."

27. The judge expressly took into account the impact of the pandemic on prisoners serving sentences. The judge also assessed the section 7 offences of sexual assault of a child under 13, as falling into category 2A of the relevant guideline with a starting point of 4 years and a range of 3 to 7 years. He said that had those offences stood alone, they would together have merited a sentence of 6 years' imprisonment after trial.
28. Taking all these factors into account, the judge concluded that 15 years on count 5 was the appropriate total sentence, before credit for plea, to reflect all the offending in all the offences. He said that if the appellant's intellectual level had been different, the sentence would have been higher and outside the range of 7 to 15 years. Giving full credit of one-third for the appellant's guilty pleas, the custodial term imposed was 10 years. The judge said that a determinate sentence of that length would not fully address the risk that the appellant represented. It was therefore necessary to impose an extended sentence to protect the public in the future. There would be an extended sentence of 10 years with an extended licence period of 2 years.

<u>The submissions on appeal</u>

29. On behalf of the appellant, Mr Rowcliffe challenges a number of aspects of the judge's

approach and his application of the guidelines. We are grateful for his written and oral submissions advanced most attractively and ably.

30. In relation to the most serious offences of assault by penetration, Mr Rowcliffe submits that the judge was wrong to conclude that there was category 2 harm, and wrong for two reasons. First, he submits that this was not a case of "severe psychological harm". He relies on the well-known proposition, confirmed in this Court, that because the guidelines themselves assume a degree of psychological harm from serious offences such as these, there has to be "significantly more" in order to meet the threshold of *severe* psychological harm. Second, he submits that the judge was wrong to say that at the age of 7 the victim of the offences was a child "particularly vulnerable due to extreme youth". He relies on authority from this Court which suggests that the guideline envisages a child much younger than 7 years of age. We shall return to this point. It is therefore submitted that this was a category 3 case, not category 2. In relation to culpability, Mr Rowcliffe submits that this was not a case of "abuse of trust" within the meaning of the guideline, nor was there "grooming behaviour" used against the victim.
31. As to abuse of trust, Mr Rowcliffe relies in particular on another well-known passage from the decision of this Court in R v Forbes [2016] EWCA Crim 1388; [2016] 2 Cr App R(S) 44 at[17]:

> "Whilst we understand that in the colloquial sense the children's parents would have trusted a cousin, or other relation or a neighbour... to behave properly towards their young children, the phrase 'abuse of trust', as used in the guideline, connotes something rather more than that. The mere fact of association or the fact that one sibling is older than another does not necessarily amount to breach of trust in this context."

32. Mr Rowcliffe accepts that when the appellant committed some of the offences while baby-sitting for XY, there may have been an abuse of trust. But that only applied to the early counts and has to be viewed against the appellant's learning disability. The difficulty with that submission is that it was the earlier counts which are the most serious, including count 5 on which the lead sentence was imposed.
33. Mr Rowcliffe also challenges the judge's finding that there had been grooming behaviour. There may be force in that point but, as we pointed out in the course of submissions, it was not an essential part of the judge's reasoning and he did not specifically identify it as a culpability factor. He identified only abuse of trust as the relevant culpability A factor.
34. In the light of all these points, Mr Rowcliffe submits that this was not a category 2A offence and, more properly, it was a 3A or 3B offence with a starting point of 6 years or perhaps even only 4 years.
35. In relation to the offences of sexual assault of a child under 13, similar submissions are made in writing in the grounds of appeal. It is said that the judge was wrong to place those offences in category 2A and that this would have affected the judge's overall sentence for the lead offence (count 5). Indeed, in summarising the import of his submissions Mr Rowcliffe contended that, to the extent that the judge erred in his categorisation of any of the offences, that would have had an effect upon the assessment of the overall sentence rendering it potentially manifestly excessive.

36. Mr Rowcliffe next submits that the judge failed to give sufficient weight to the appellant's learning disability. The appellant, he says, functioned at the level of a child aged 12 to 13. Although this did not mean that he had to be sentenced as if he were a child of that age, it is submitted that a very substantial reduction should have been allowed for this aspect of the mitigation, and although it was referred to by the judge, it is impossible to say to what extent he took it into account.
37. Finally Mr Rowcliffe submits that the judge was wrong to find that the appellant was "dangerous" for the purpose of imposing an extended sentence. The appellant had not offended in the intervening 8 years; he had offended only against a single victim and only when he had the opportunity to do so. It is submitted that no similar opportunity was ever likely to arise again so there could not be a significant risk, as opposed to a mere possibility, of further offending of this kind.

Discussion and conclusion

38. We have considered all these submissions carefully. Taken individually there is merit in some of the points that are made. However, it is crucial to bear in mind that the real issue for us is whether a custodial term of 15 years, before credit for plea, was manifestly excessive to reflect all the appellant's offending. We are unable to accept that proposition.
39. We deal first with categorisation of the most serious offences, assault by penetration of a child under 13. We think the judge was undoubtedly correct to place count 5, the lead offence, in category 2. The judge identified two separate harm factors. He was entitled to conclude on the evidence that XY had suffered "severe psychological harm". As this Court has made clear, it is for the judge alone to make that assessment. There need not be expert evidence: see R v Chall [2019] EWCA Crim 865; [2019] 2 Cr App R(S) 44. Here, the content of the victim personal statement made it clear that this young woman had suffered and continues to suffer from seriously debilitating psychological trauma. It was well beyond the degree of psychological harm which might be expected to result, for example, from a single episode of such abuse as a young child. This abuse lasted for 6 years and has had a particularly profound affect upon her. The judge saw and heard her and was well placed to make that assessment. That category 2 harm factor was properly found by the judge and was sufficient in itself to make this a case of category 2 harm.
40. We see force in the submission that this was not a case of "extreme youth". We also raised with counsel, in the course of argument, the extended definition of this factor for category 2, which reads: "child is particularly vulnerable due to extreme youth and/or personal circumstances".
41. We can see an argument that the "personal circumstances" in which the offences were committed, irrespective of her precise age, might have made that an alternative route to category 2 harm. However, care would have to be taken to ensure that it did not overlap with any culpability factor, and in particular abuse of trust.
42. We note that this was the approach of this Court in R v KC [2020] EWCA Crim 1632; [2020] 1 Cr App R 41. We mention this because Mr Rowcliffe relied on this case as authority for the proposition that a child of 7 was not young enough to qualify as "extreme youth" for the purpose of the guideline. The Court in that case was reluctant to express a firm conclusion but inclined to that view, as do we. However, the Court went on in that case to conclude without hesitation that the victim in the case was "particularly

vulnerable due to personal circumstances" although it cautioned against the risk of double counting. As we say, it is unnecessary for us to reach a decision upon whether this case in the alternative could be categorised as harm within category 2 because that factor alone was established. Severe psychological harm was sufficient.

43. As to culpability, at least in relation to the offences committed when he was baby-sitting, we think the appellant was undoubtedly in a position of trust, or more accurately in the words of the guideline, there was to that extent "an abuse of trust". It was not simply a case of a child visiting a relative or friend who abused her. The appellant had been placed in a position of responsibility towards the child, as he must have realised. He grossly abused that trust. We can see an argument that this culpability factor features more generally in assessing the seriousness of the offending but, as already explained, we are satisfied that the category 2 harm factor of severe psychological harm is sufficient in itself. There is therefore no question of double counting.
44. We think that the judge's overall assessment that the appropriate sentence on count 5 alone would have been 10 years before credit for plea was fully justified. The uplift to 15 years properly reflected the number of offences of assault by penetration and also the large number of section 7 offences of sexual assault of a child under 13.
45. We turn to the relevance of the appellant's mild learning disability. We are satisfied that the judge paid due weight to this. Under the sexual offences guideline for these offences, lack of maturity is a mitigating factor where it affects the responsibility of the offender. Likewise, learning disability is a mitigating factor particularly where linked to the commission of the offence.
46. The judge was also referred to and had clearly in mind the more recent Sentencing Council guideline "Overarching Principles: Sentencing Offenders with Mental Disorders". At paragraph 15 of that guideline the focus is on culpability, including the following:

> "At the time of the offence did the offender's impairment or disorder impair their ability:
>
> - to exercise appropriate judgement
> - to make rational choices
> - to understand the nature and consequences of their actions?
>
> At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?"

47. We have considered carefully what the answers would be to those questions. They certainly would not be resoundingly answered in the affirmative. We think quite the opposite. We think the judge's analysis in his sentencing remarks, albeit briefly expressed, was fully justified. As the psychiatric report confirmed, the appellant was aware at the time of what he was doing and that it was wrong and was a sexual offence. As the judge put it:

> "... you were fully aware of how wrong your conduct was at all times."

48. It was unnecessary for the judge to spell out in terms of years, or as a percentage, what credit he was allowing for this mitigating factor. It is sufficient that he alluded to it and took it into account overall, as we are quite sure he did.
49. Finally, we turn to the question of dangerousness. There was ample material in the pre-sentence report and in the facts of these offences to entitle the judge to reach the conclusion he did. This Court should only interfere if the judge's conclusion was one that was not reasonably open to him. That is very far from being the case. The family dynamics in this case are complex, with concern expressed in the pre-sentence report about the possibility of collusion by family members trying to protect the appellant. We think the judge was not only fully entitled but undoubtedly correct to take the view that he did.
50. It follows that despite Mr Rowcliffe's attractive and tenacious submissions, we are quite satisfied that this sentence was neither manifestly excessive nor in any way wrong in principle. The appeal must therefore be dismissed.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk