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[2022] EWCA Crim 1548  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2022/01698/A3



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Friday 11<sup>th</sup> November 2022

**B e f o r e:**

**LADY JUSTICE CARR DBE**

**MRS JUSTICE MAY DBE**

**THE RECORDER OF THE ROYAL BOROUGH OF KENSINGTON & CHELSEA**  
**(His Honour Judge Edmunds KC)**  
**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

**- v -**

**R A T S H**

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**Mr C Harper** appeared on behalf of the Applicant

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**J U D G M E N T**

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**LADY JUSTICE CARR:**

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

**Introduction**

2. We have before us an application for leave to appeal against sentence, alongside an application for an extension of time of 60 days. The single judge, whilst considering the appeal to be arguable, declined to grant leave in the light of this delay and referred the matter as a whole to the full court.
3. The applicant is now 30 years old. He pleaded guilty to a number of sexual offences committed on his stepdaughter, "C". On 4<sup>th</sup> March 2022, in the Crown Court at Aylesbury, he was sentenced by Her Honour Judge Tulk ("the judge") to a standard determinate sentence of 12 years and four months' imprisonment, and to a special custodial sentence, pursuant to section 278 of the Sentencing Act 2020, comprising a custodial term of six years and an extended licence period of one year, to run consecutively. Thus, the total sentence imposed was one of 18 years and four months' imprisonment, together with the extended licence period.
4. In more detail, the sentences imposed were as follows, grouped into three separate categories: firstly, on counts 3 and 4 (assault of a child under 13 by penetration, contrary to section 6(1) of the Sexual Offences Act 2003), a seven year special custodial sentence, made up of a six year custodial term and a one year extended licence, those sentences to run concurrently with each other but consecutively to the sentence on count 10. The second category of offences, on counts 5, 6 and 14 (sexual activity with a child family member, contrary to section 25(1) of the Sexual Offences Act 2003), three years' imprisonment on each count, to run concurrently with each other, but again consecutively to the sentence on count 10. Finally, on counts 8 and 10 (rape, contrary to section 1(1) of the Sexual Offences Act 2003), seven years' imprisonment on count 8 (vaginal rape) and nine years' imprisonment on count 10 (oral rape), those sentences to run concurrently with each other and concurrently with the sentences on counts 11 and 12 (making indecent photographs or pseudo-photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978), two years' imprisonment on count 11, and five years' imprisonment on count 12. On count 13 (inciting a child family member to engage in sexual activity, contrary to section 26(1) of the Sexual Offences Act 2003, three years' imprisonment. On count 15 (causing a child to watch a sexual act, contrary to section 12(1) of the Sexual Offences Act 2003), two years' imprisonment. Finally, and separately, the applicant admitted failing to surrender, contrary to section 6 of the Bail Act 1976, for which a consecutive term of four months' imprisonment was imposed. A statutory surcharge order was imposed, alongside a restraining order and a Sexual Harm Prevention Order.

5. The basis of the application before us is that the judge was wrong to find on count 10 (the oral rape) that the applicant had transmitted a sexual disease to C, leading to a sentence that was manifestly excessive. The applicant has had the considerable benefit of representation by Mr Harper.

### **The Facts**

6. The applicant was in a relationship with C's mother and lived in the family home. He and C's mother had a son together. The applicant started to sexually abuse C in June 2018, when she was 12 years old, and the offending carried on until Christmas Day of the following year.
7. On New Year's Eve in 2019 C was staying with her grandmother, who found some messages on C's telephone between C and the applicant, one of which the grandmother showed to C's mother. The applicant had sent C a text on Christmas Day, reading: "Are you going to wank me off or give me a blow job tonight?" C replied: "Sure". The applicant then said: "Which?" C replied: "The first one".
8. C's mother asked C about the messages. C became upset. Her mother sent a screenshot of the messages to the applicant who replied, "What the fuck?" He denied the offences. He said that he had intended to send the messages to C's mother and that he must have sent them to C's telephone by mistake. C's mother knew immediately that this was simply not true.
9. The police attended and spoke to C on the same day. C said that the applicant had sent her text messages about doing sexual things, and that on Christmas Day, whilst her mother had been in bed feeling sick, he had entered her room and done sexual things to her. She said that it was not the first time this had happened. On Christmas Day she had "wanked him off". He had not ejaculated on that occasion. She said that she had received messages from him on Christmas Day and that night he had come into her room, lain on her bed and she had touched him. When asked why she had not told anyone about it, C said that she did want her stepfather to get into any trouble. She did not want anything bad to happen.
10. When asked what, if anything, had happened on other occasions, C described the applicant touching both the inside and outside of her vagina under her clothing. She said that she did not like it. She said that it had not happened too many times, but it had happened on her bed in her bedroom. It had then progressed from him touching her to her touching him a few times. When he wanted something to happen, he would say: "Can I get some?"
11. When interviewed again a few weeks later, C made further disclosures. There had been an occasion when she had been off school with a headache, alone in the house with the applicant. They had been on the sofa and C had masturbated him. He had removed his penis from his trousers, put her hand on it, and moved it up and down. He had then ejaculated on to her hand and she had wiped the ejaculate off on to a towel and had washed her hands because it was "gross". There had been an occasion when the applicant had asked her to sleep without her pyjamas on at night, but she had not agreed to do so and nothing had happened.
12. C said that there had been a few occasions when the applicant had put his penis inside her, but she had held herself tightly so it did not go all the way in. It had hurt a bit, but it was not "super painful", and she would cry a little bit. The applicant would be lying over her, holding his penis and moving it whilst it was inside her. He would tell her not

to hold herself so tightly so he could get it in. He would usually ejaculate on her, aiming at her stomach or vagina. She would tell him to wipe it off, which he would do with his blue towel or her pink towel. He would bring the towel into the room with him and leave it on the floor. This again happened in her own bed in her bedroom in her new house, but not in her old house.

13. She said that the applicant would sometimes ejaculate on to her bed sheet and she would then strip the bed and tell her mother that the sheets were dirty. On occasions the applicant would put his fingers inside her vagina, but she would pull them out. She said that at the old house he would lick her vagina. He would bribe her when she wanted something to eat, saying that she could have something to eat if she let him lick her "down there", so she let him. She said that he would lick her vagina and it would hurt when he put his tongue in too far. This happened at the old house when she was aged 12. It happened every time he went into her room, she said, at her old house.
14. From that it moved on to him ejaculating on her, her masturbating him, and then him putting his penis inside her at the new house. He had told her that she could go to a show with her mum if he licked her and ejaculated on to her. On one occasion he walked in when she was in the bath, and he touched and sucked her breast on that occasion.
15. After the sexual acts took place, she said that the applicant would message her to say that he was sorry, and she would always forgive him. She said that the applicant would send her detailed sexual cartoon images of people licking each other's vaginas, two of which she had deleted straight after. One message contained sexual depictions of characters from the Disney film "The Little Mermaid", which he had sent to her on Christmas Day. She also said that when the applicant got on to her bed and was touching her, or she was touching him, he would also be watching pornography on his telephone, which he would show to her, but she would close her eyes.
16. On one occasion she said that the applicant asked her whether she went to her grandmother's house to get away from him "doing stuff" to her. She thought that he had asked this because he knew that she did not like what he was doing to her. Although he did not tell her not to tell anyone, she knew not to say anything and did not want to get him into trouble or get into trouble herself.
17. In her final police interview C made the disclosures the subject of counts 8 and 10. The applicant on one occasion put his penis into her mouth and then put his penis into her vagina. She had said that she did not want it in her mouth and she had kept her lips shut, but he had managed to put his penis inside her mouth. She did not like it and pushed it out. He then put his penis into her vagina. This was at her new house when she was 13 years old. The doctor from the Sexual Offence Referral Centre had called her subsequently to say that she had had an infection in her mouth and she had then told her grandfather about this occasion.
18. During their investigations the police seized a number of items from the house, including C's onesie and her bedding. The applicant's semen was found on the onesie and on the duvet and bedding. C's laptop and smartcard were also examined. They contained indecent videos of a child. These appeared to be recordings of the applicant's sexual assaults of C. Three indecent videos, two of which were Category A, showed the applicant having vaginal intercourse with C who was saying "Stop"; and one showed oral sex, then penetrative vaginal sex again with C saying "Stop". One video was Category B, showing the applicant ejaculating over C on a bed whilst she was asleep.

19. As we have indicated, C was examined at a Sexual Assault Referral Centre. She was then informed that there had been a positive test for gonorrhoea in her mouth swab. Subsequently, it was explained to her that there may have been a cross-reaction in the laboratory test that may have given a false positive test result. A further full test 11 days later indicated that C was clear of infection by that stage.

### **The Sentencing Exercise**

20. The applicant failed to attend his plea and trial preparation hearing on 13<sup>th</sup> July 2021 and did not surrender until 6<sup>th</sup> January 2022. He then entered his guilty pleas. As the judge commented, his abscondment must have had a severe impact on both C and her mother, not least because of the consequences of delay for them.
21. The prosecution sentencing note, in the context of count 10, referred to a call by a doctor from the Sexual Assault Referral Centre to C's mother, saying that C had tested positive for gonorrhoea in her mouth. When opening the facts in court, prosecuting counsel again referred to this positive test, but with reference also to false positives and negatives. The judge questioned counsel for clarification. Prosecuting counsel maintained that on the face of the medical notes, which stated that the tests had been correct, it appeared to her that C had been infected with a sexually transmitted disease, which had then cleared up spontaneously. On the evidence, submitted prosecuting counsel, this transmission could only have been caused by the oral rape the subject of count 10.
22. Thus, when sentencing, the judge said this:

"... so far as the oral rape is concerned, there is evidence that that caused a sexually transmitted infection; it caused gonorrhoea. So, so far as the oral rape is concerned, it clearly was a category 2 harm."

She found the vaginal rape to be category 3 harm. Specifically, C was not to be treated as particularly vulnerable due to her personal circumstances.

### **Grounds of Appeal**

23. Mr Harper submits that the sentence on count 10 was excessive because there was insufficient evidence for the judge to find to the necessary criminal standard that the oral rape had caused C to contract a sexually transmitted infection. Without that finding, the offending on count 10 would have been placed by the judge in category 3A, rather than 2A, making a likely difference of two years to the overall length of the custodial sentence. The judge should have resolved the doubt as to C's positive test for gonorrhoea in the applicant's favour.
24. Given the judge's very careful structure in her sentencing approach, it is clear, submits Mr Harper, that she would not have imposed a sentence of the magnitude that she did, and the sentence was manifestly excessive.

### **Discussion**

25. In order to sentence the applicant on count 10 on the basis that the offending had caused C to be infected with a sexually transmitted disease, the judge had to be sure that this was the case. If there was only one possible interpretation of the situation, the judge had to sentence on that basis.; if there was more than one possible interpretation, however, the judge had to make up her own mind to the criminal standard as to the

factual basis upon which to impose sentence; if there was more than one possible interpretation, and the judge could not be sure of any of them, then she had to pass sentence on the basis of the interpretation most favourable to the applicant: see *R v Cole Jarvis* [2022] EWCA Crim 1251 at [44], endorsing the well-known dictum in *R v King* [2017] EWCA Crim 128, [2017] 4 WLR 95 at [31].

26. It is clear to us from a letter dated 30<sup>th</sup> January 2020 from a Dr Sheila Paul, Clinical Director of the Thames Valley Sexual Assault Service, that C was tested initially for oral gonorrhoea and returned a positive result. Equally, a full sexually transmitted infection screen was performed 11 days later, and C tested negative.
27. However, Dr Paul recorded that Dr Sherrard, a Sexual Health Consultant, had explained that in relation to the first positive test there could have been a cross-reaction with *Neisseria meningitidis*, leading to a false positive test. False positives could occur.
28. Three explanations were advanced for the apparent discrepancies, namely, that the first test was a false positive; that the second test was a false negative; or that both tests were correct and the infection had cleared spontaneously in the 11 days between tests. In her concluding comments, Dr Paul stated that the discrepancies in these tests meant that the initial finding of gonorrhoea was "less robust" than initially thought.
29. In these circumstances there was more than one possible interpretation of the relevant facts, and there was no proper basis on which the judge could be sure that the third explanation was the correct one. We are therefore satisfied that the judge should not have categorised the offending on count 10 as category 2A offending on the basis of the transmission of a sexually transmitted infection. Category 3A offending carries a starting point of seven years' custody, with a range of six to nine years.
30. However, this error does not determine the outcome of the appeal, since the question remains as to whether or not the sentence overall was manifestly excessive in all the circumstances.
31. The sentencing structure adopted by the judge was very fair to the applicant. She divided the sentences into three groups, as we have set out above, with a clear eye to totality. The judge passed concurrent sentences on the two rapes, with a term of nine years' custody, after 25% credit for the guilty plea on count 10, and also concurrent sentences with those two sentences on the further offences of making indecent photographs, inciting a child family member to engage in sexual activity, and causing a child to watch a sexual act.
32. The rapes, we note, fell only just within the adult rape guideline, since C was only 13 years of age. A category 3A rape in respect of a child has a starting point of ten years' custody. Further, there were here multiple features of category A culpability, with further aggravating factors, including that the applicant did not wear a condom, and the offences took place in C's bedroom.
33. The task for us is not an exercise in reconstruction. Standing back, we do not consider that an overall term of nine years' imprisonment for both rapes, taken together with the offending on counts 11 to 13 and 15 was manifestly excessive. A term of 12 years' imprisonment, before credit for the guilty plea, was outside the range for a single rape, based on category 3A offending. But, as we have emphasised, there were here two rapes, and other serious sexual offences carried out on a child. It is also not to be forgotten that, whilst there may have been ambiguity as to the outcome of the tests for sexually transmitted infection, there was no ambiguity about the fact that for a

significant period both C and her mother believed that she had been infected with a sexually transmitted disease as a result of the oral rape, and that there as an uncertain necessity for treatment. Even after the second test, that uncertainty remained.

34. Nor, in our judgment, can the term of nine years' imprisonment on this group of offences be said to have led to an ultimate sentence that was disproportionate to the applicant's offending overall.

### **Conclusion**

35. We consider the appeal to be arguable and the application for leave to appeal against sentence is granted, as is the necessary extension of time. The reasons for the delay are set out in a detailed solicitors' letter dated 31 May 2022. The appellant was not to blame, and his grounds of appeal stood a real prospect of success.
36. However, the substantive appeal is dismissed. The final sentence of 18 years and 4 months' imprisonment, together with an extended licence period of year, was not manifestly excessive or wrong in principle.

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