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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1646

No. 202202692 A3

Royal Courts of Justice

Monday, 22 November 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MURRAY
HIS HONOUR JUDGE KATZ KC
(Sitting as a Judge of the High Court)

REFERENCE BY THE HIS MAJESTY'S ATTORNEY GENERAL UNDER Section 36 Criminal Justice Act 1988

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V
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REPORTING RESTRICTIONS APPLY:
Sexual Offences Amendment Act 1992

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MR P RATCLIFFE appeared on behalf of the Crown.

MR E HETHERINGTON appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 The provisions of the Sexual Offences Amendment Act 1992 apply to these offences. Under those provisions no matter relating to any person against whom offences have been committed shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify those persons as victims of the offences. In order to prevent identification of the victims in this case we shall refer to the offender as AFB. This is necessary due to the familial relationships involved in the case. Were the offender to be named, this would serve to identify the victims.

2 On 10 June 2022 in the Crown Court at Bristol before His Honour Judge Lambert ("the Judge") and a jury AFB was convicted of one offence of indecent assault, contrary to section 14 of the Sexual Offences Act 1956 and nine offences of sexual assault of a child under 13, contrary to section 7 of the Sexual Offences Act 2003. He was acquitted of 10 other counts of similar offending. On 11 August the judge sentenced the offender to concurrent terms of two and a half years' imprisonment on each count. A sexual harm prevention order of indefinite duration restricting the offender's access to female children under 16 was made. His Majesty's Attorney General now applies for permission to refer the sentences imposed to this court pursuant to section 36 of the Criminal Justice Act 1988.

3 The offences of which the offender was convicted involved three young girls. Two of the girls were his nieces. The mother of the third girl was somebody with whom the offender had a relationship for a period of around two years.

4 The offender was born in 1978. He committed the offences when he was between the ages of 24 and 40. He is now 44. With one exception the relevant counts on the indictment were described as "specimen counts". They did not allege multiple incidents. It follows from the principles set down in C*anavan* [1998] 1 WLR 604 that the judge was required to sentence the offender for committing 10 specific offences of sexual assault, irrespective of any course of conduct alleged by the victims in evidence.

5 The first victim was his niece born in September 1995 ("SC"). He was convicted of two counts in relation to her. Count 1 concerned the period from September 2002 to April 2004. The offender would take SC out in his car. This occurred with SC's mother's knowledge and consent. On occasion SC herself asked to go out with the offender. On one such occasion when they were out in the car, the offender indecently assaulted SC by touching and stroking the inside of her legs. She was aged 7 to 8 at the time. Count 11 was the other count relating to SC. This referred to a specific occasion in November 2007 when she was aged 12. SC's mother had been admitted to hospital as an emergency. She was kept in hospital for several days. From time-to-time SC's father had to be at the hospital. On those occasions the offender came to SC's house in order to be in charge during those periods. It was when the father was at the hospital and SC was sitting on her bed that the offender put his hands under her top and felt her breasts. He told SC she would get into trouble if she told anyone what he had done.

6 The second victim ("HG") was the daughter of the woman with whom he was in a relationship between 2012 and 2014. HG was born in November 2001. Count 13 related to a sexual assault committed when HG was aged between 10 and 12. She was taken to see some ponies by the offender in his car. The offender put his hand on to HG's leg when she was in the car with him. Count 14 concerned an incident in the same period. The offender was giving HG a bath. He touched her on the thighs.

7 The third victim, ("SL"), was the offender's other niece. He was convicted of six offences of sexual assault in relation to her. There were three types of sexual assault, each of which was charged in two separate counts. SL was born in March 2008. In the case of each type of sexual assault one count related to an occasion between 2014 and 2017 when SL was aged 7 or 8, and the other count related to an incident between 2017 and 2019 when SL was aged 9 or 10. The offences occurred on occasions when SL visited her grandparents' home, namely the offender's parents. The offender lived with his parents.

8 Counts 15 and 16 involve the offender being with SL in his bedroom when they were playing computer games, SL having asked to go and play games. As she lay on his bed he kissed her.

9 Counts 17 and 18 occurred in the same context, namely in his bedroom playing computer games. Whilst SL was sitting on the bed playing a computer game, the offender would have her on his knee or between his legs. On the two occasions identified in the count he touched her vaginal area over her clothing. Counts 19 and 20 occurred when SL had gone out with the offender in his car. On those two occasions he touched her leg in the same way as he had touched HG's leg.

10 Each of the victims made a victim personal statement. SC said that the offender had taken away the innocence of her childhood. She blamed herself for not saying anything at the time because had she done so her sister would not have been abused. She now had children of her own of whom she was over-protective. HG said she found it hard to trust people. During the course of the criminal proceedings she had suffered significant anxiety. SL who was still only 14 said that she did not feel safe and would not go out alone. She had harmed herself because she had felt dirty where the offender had touched her. Her memories were triggered whenever someone was wearing the deodorant that the offender wore.

11 The account of the offences set out by the author of the pre-sentence report was based on the entirety of the indictment on which the offender was tried including the allegations of which he was acquitted. Moreover it assumed that the offender fell to be sentenced for committing sexual assaults of the same kind on multiple occasions. The offender gave an account to the author of the report which was substantially in line with the offending as proved by the jury's verdicts. He claimed, as he had told the jury, that the actions were not sexually motivated. The jury had rejected that assertion. Unsurprisingly, the author of the report was dismissive of the offender, saying that he had repeatedly created opportunities sexually to offend against his victims on numerous occasions over a sustained period of time. For reasons we have already explained, that was not the nature of the offending for which the offender fell to be sentenced.

12 The report set out the offender's personal circumstances. He had lived with his parents for most of his life. He continued to do so. He had worked as a dairy operative for around 16 years. He worked long shifts being paid £11 an hour. As a child he had attended a special needs school due to hearing and speech difficulties. They had resolved as a result of an operation. The offender had no convictions prior to 2022.

13 Due to some kind of technical failure there is no transcript available of the sentencing hearing. Fortunately the judge prepared a note to assist him when delivering his sentencing remarks. We understand that it differs in no material respect from the reasoning he set out when sentencing the offender. The first issue he addressed was whether the offending had been an abuse of trust on the part of the offender. This was of critical importance in determining the level of culpability within the Sexual Offences definitive guideline. He referred to the text of the guideline itself and to what was said in relation to that issue in

Forbes [2016] EWCA (Crim) 1388 at [17] and in the later case of *JD* [2017] EWCA (Crim) 2509.

14 Having considered the circumstances as a whole and the kind of person the offender was ("rather child like and somewhat immature"), the judge concluded that the offender had not been in *loco parentis* and had no status justifying a finding of abuse of trust. The judge went on to determine that the offender was not capable of the kind of manipulative behaviour properly described as "grooming". Thus, the offending did not fall into the category of high culpability within the guideline. The judge did say that there was an element of betrayal of the young people and of an abuse of position by an adult which served to aggravate the seriousness of the offending.

15 The judge noted that the prosecution had not pursued multiple incidents counts. He reduced the sentence to take account of the offender's special needs, his relative immaturity and his vulnerability within the prison estate. The judge said he would impose the same sentence in respect of each count in order to reflect the overall seriousness of all the offending. That was how he reflected the totality of the offending. So it was he imposed the sentences to which we have already referred.

16 To his sentencing remarks he appended a table indicating the harm and culpability assessment in relation to each count. Save for Count 11, harm in every case fell into Category 3. Count 2 was Category 2 harm. All of the offending fell into culpability B.

17 The Attorney General argues that the sentence was unduly lenient for three reasons. First, the judge erred when he concluded there was no abuse of trust within the meaning of that term in the guideline. The offender was trusted to take sole charge of children who were either his relatives or was the child of someone with whom he was in a relationship. That meant that the offender was in a parental or quasi-parental relationship with his victims. He had a degree of responsibility for them in each case. Therefore, it is said all of the offending should have been placed into the higher category of culpability.

18 Second, whilst it was open to the judge to impose concurrent sentences throughout to reflect all of the offending, the lead offence, which was Count 11 fell into Category 2A which had a starting point of 4 years' custody and a category range of 3 to 7 years' custody. There should have been upward adjustment from that starting point to take account of the location of the offending and the steps taken to prevent the victim from reporting the incident. There then had to be significant upwards adjustment to the overall sentence however that was achieved to take account of the following. Multiple offending against three different victims; the duration of the offending in respect of each victim; the overall duration of the offending; the youth of SC and SL, particularly when the offending began; and the harm caused to the victims.

19 The third way in which the judge fell into error was in reducing the sentence to allow for the offender's special needs. It is argued there was no proper evidence of this. Character references submitted on the offender's behalf, for instance, did not suggest any mental disorder or learning disability.

20 On behalf of the offender a respondent's notice was prepared by trial counsel, Mr Hetherington. It supported the reasoning of the judge. He has made brief oral submissions to us today, supporting that respondent's notice.

21 In order to conclude that a sentence is unduly lenient so as to require this court to intervene on the application of the Attorney General, we must be satisfied that the sentence fell

outside the range of sentences reasonably open to the sentencing judge. This court must always have proper regard to the advantage which any trial judge has, particularly where, as here, the offender has given evidence. In this case, the judge was exceptionally experienced in trying and sentencing cases of this type. We would have to be confident that a clear error had been made by the judge before we could properly interfere with the sentence.

22 The submissions of the Attorney General substantially are predicated on a conclusion that the judge was in error when he said there was no abuse of trust of the kind envisaged in the guideline. We do not agree with the submission that the judge did fall into error in that respect. The passage from *Forbes*, cited by the judge, is as follows:

> "Whilst we understand that in the colloquial sense the children's parents would have trusted a cousin, other relation or neighbour … to behave properly towards their young children, the phrase 'abuse of trust' as used in the Guideline connotes something more than that."

23 As the judge noted the guideline indicates that:

> "A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found."

24 The judge engaged in that exercise and concluded that, although there was an element of abuse of position by an adult, the facts did not fall within the meaning of abuse of trust within the guideline. This judge had conducted the trial. Unless it could be shown that he failed to take into account relevant matters, or considered irrelevant matters in reaching his conclusion, we cannot be in a position to substitute our view for that of the judge. That cannot be established here. The mere fact that a person has been put in charge of a child does not give rise to an abuse of trust. In our view, there is no basis for overturning the decision of the judge. In the reference, the Attorney General referred to *W* [2018] EWCA (Crim) 265 to support the submission. The court in that case was conducted a fact-specific exercise, just as the judge did in this case. *W* did not set out principles of any general application.

25 The second limb of the Attorney General's argument loses much of its force once all of the offending is to be placed into Category B in relation to culpability. The single Category 2B offence in relation to SC had a starting point of two years' custody with a category range of 1-4 years' custody. The Category 3B offences had a starting point of 26 weeks with a category range of up to a year's custody. If the judge had been required to sentence on the basis of repeated offending over a sustained period, we would accept that a significant uplift to the overall sentence would have been required. In our view, the submission made by the Attorney General assumes that this was the basis on which the judge ought to have sentenced, though we accept straightaway that Mr Ratcliffe in oral submissions acknowledged the nature of the indictment and the basis upon which sentence had to be imposed.

26 In our view the judge was right to identify the nature of the indictment to which we have already referred. He properly reflected in our view the aggravating factors in the overall sentence he imposed.

27 As to the submission that the judge should not have concluded that that offender had "special needs, relative immaturity and undoubted vulnerability" because the judge had no independent evidence of these matters, we consider that this ignores the fact that the judge had seen the offender give evidence. The judge specifically referred to the evidence of the

offender as part of his assessment of the case. Nothing in the pre-sentence report contradicted the judge's view. The fact that the character references did not make reference to the offender's limitations is of little consequence. The purpose of the references was to establish that the offender was a generous and hard-working man who helped relatives when they needed assistance. That was not inconsistent with him being immature and childlike. The fact that the was still living with his parents in his mid-40s and had been working in a relatively menial capacity for many years doubtless was relevant to the judge's assessment.

28 It follows that we are satisfied that the sentences imposed by the judge were not ones which fell outside the range reasonably open to him. Rather, we consider that this was a conspicuously careful sentencing exercise conducted by a judge with huge experience in this type of case. It led to a result that fell within the reasonable range of sentence for offending of which this offender was convicted. It follows that we refuse permission to refer the sentences as being unduly lenient.

CERTIFICATE

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This transcript has been approved by the Judge