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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 453

No. 202300517 A1

Royal Courts of Justice

Tuesday, 4 April 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE COCKERILL
MR JUSTICE JOHNSON

A REFERENCE BY HIS MAJESTY'S SOLICITOR GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

REX
V
THOMAS TIMPSON

REPORTING RESTRICTIONS APPLY:
Sexual Offences Amendment Act 1992

Transcript prepared from digital audio by
Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MR HOLT appeared on behalf of the HM Solicitor General.

MR G PURCELL appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared without access to documentation)

LORD JUSTICE WILLIAM DAVIS:

1 The provisions of the Sexual Offences Amendment Act 1992 apply to the offences with which we are concerned. Under these 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 a victim of that offence. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction.

2 On 20 January 2023 in the Crown Court at Nottingham, Thomas Timpson was convicted of six offences of sexual activity with a child contrary to section 9 of the Sexual Offences Act 2003: one offence of sexual communication with a child, contrary to section 15(a) of the Sexual Offences Act 2003, and one offence of causing or inciting a child to engage in sexual activity, contrary to section 10 of the Sexual Offences Act 2003

3 On the same day he was sentenced as follows: Counts 1 and 2, sexual activity with a child, two years' imprisonment; Count 3, sexual activity with a child, three years' imprisonment; Counts 4, 5 and 6, sexual activity with a child – the counts being multiple incident counts – three years' imprisonment; Count 7, sexual communication with a child, no separate penalty; Count 9, causing or inciting a child to engage in sexual activity, two years' imprisonment. All those sentences were ordered to run concurrently, the total sentence was three years' imprisonment. Ancillary orders were made with which we are not concerned.

4 His Majesty's Solicitor General now applies to refer the sentence to this court pursuant to section 36 of the Criminal Justice Act 1988. He argues that the sentence was unduly lenient.

The Factual Background.

5 The offender is 36. He was born in September 1986. In 2018 he had a partner who worked at a riding stable. At that time the female victim, to whom we shall refer as "LB", began to work at weekends at the stable. She was then coming up to her 14th birthday. Her date of birth was 2 April 2004. LB and the offender's partner became friends. As a result of that friendship the offender got to know LB. He had a horse at the stable, LB would exercise his horse.

6 During the course of 2019 the offender spent more and more time with LB. He was a regular visitor to her home address. Although he had a partner he began a sexual relationship with LB's mother. LB knew nothing of this. Notwithstanding the sexual relationship the offender was having with LB's mother, he also engaged in sexual grooming of LB. For instance, in August 2019 he took her shopping and bought her a set of lingerie. She was aged 15½ at the time. On 1 September 2019 LB went to a festival with the offender and his partner. Whilst they were at the festival the offender kissed LB for the first time. The relationship between the offender and LB soon went further.

7 Later in September 2019, when LB was with the offender, ostensibly helping him to prepare a motor cross course, they first had sexual intercourse. Following that, the offender and LB, until about April 2020, engaged in sexual activity on numerous occasions and at various locations. The activity included both vaginal and oral sex by reference to the multiple incident counts, the indictment represented nine occasions on which vaginal intercourse took place, and three incidents of oral sex involving the penetration of LB's mouth with the

offender's penis. It also reflected three incidents of the penetration of LB's vagina with the offender's tongue.

8 The grooming of LB by the offender continued over this period. He bought her clothing. He paid for beauty treatments. He deposited cash into her bank account. They socialised in public houses where the offender bought alcohol for LB. The offender sent messages to LB, including pictures of his penis. He asked her to send him naked pictures of her. In April 2020, LB's mother told LB that she had been having a sexual relationship with the offender. This caused serious friction between LB and her mother. At that stage the mother was unaware of LB's relationship with the offender.

9 On 2 May 2020 she found a note in LB's bedroom which said: "Love you millions. Can't wait to spend the rest of my life with you." She also found a letter in LB's handwriting clearly intended to be sent to the offender. It concluded with the words: ". . . can't wait for more sex. I'm so addicted to you." When LB was confronted by her mother she said: "I know we cannot be together but I love him." The relationship between mother and daughter broke down completely at this point. LB went to stay with her grandparents. She was advised by her father to contact the police. She did so but when the police first spoke to her she denied any sexual contact with the offender. However, she had resiled from this position by 12 May 2020. On that day she telephoned her mother and admitted she had been having sex with the offender over a period of some months.

10 She was interviewed by the police in ABE interviews in May and June 2020, at which point she gave a full account of her relationship with the offender. She explained that she had been groomed by the offender with the result that she had become infatuated with him. The offender was arrested on 13 May 2020. When interviewed he said that he had done nothing wrong and that he was innocent. Other than that, he made no comment to all questions.

11 The offender was charged on 8 November 2020. His first appearance in the Magistrates' Court was on 14 January 2021, when he was sent for trial at the Crown Court. Two trial dates were fixed and then vacated, one in September 2021 and one in June 2022. The September trial date was vacated because there was a lack of Judges. The June trial date was vacated because of the lack of a courtroom. The offender's defence at trial, in January 2023, was that he had had sexual intercourse with LB on one occasion in 2020 by which time she was 16. Other than that, he had not had any kind of relationship with her. LB had been flirtatious with him but he had not responded. His case was that LB's account was malicious fabrication.

Material Before the Judge.

12 LB made a lengthy victim personal statement in which the dominant theme was fear of encountering the offender again. She said that she was scared to be on her own. She had difficulty sleeping because she would dream that he was looking through the window at her at which she would wake up frightened. She suffered flashbacks of what had happened between her and the offender. She was nervous and anxious at all times. She was constantly on edge. She had had some therapy sessions and was due to have more because she could not cope with the anxiety. Her family were contemplating moving away from the area so that the offender would not know where she lived.

13 The offender had two convictions for which he had been fined. Neither conviction was of any relevance to sentence in this case. Two character references in relation to the offender were provided to the judge, one from a previous manager of the stable, and one from a local farmer. Both spoke highly of the offender's work ethic, and his helpful attitude.

The Sentence.

14 In the course of mitigation Mr Purcell, who represented the offender at the trial and who has appeared on his behalf before us, made two submissions to which we need to refer. First, he argued that LB's age and her ostensible consent reduced the seriousness of the offences considerably. He relied on the fact that the offence of sexual activity with a child under 16 will cover all ages from 13 to 15. LB was towards the upper end of that range. Second, he said that there had been delay which was no fault of the defendant.

15 In sentencing the judge said that initially there had been a friendship between LB and the offender via their interest in horses. That friendship had been corrupted by the offender and he had taken advantage of her sexually. LB was infatuated with the offender. He took advantage of the infatuation of an immature teenager. A fully penetrative sexual relationship had developed with sexual activity occurring on multiple occasions as indicated by the jury's verdict on the multiple incident counts.

16 The judge considered the Sentencing Council Guideline in relation to the most serious offences of sexual activity with a child, namely the penetrative sexual activity reflected in Counts 3 to 6. In relation to those offences harm was in Category 1. The judge found that there were high culpability factors, namely grooming behaviour and a significant disparity in age. A Category 1A offence had a starting point of five years' custody, with a category range of four to ten years. The judge observed that the offending was repeated over a period of five or six months and said that: "The starting point, in a sense, is inadequate to reflect the scale and duration" of the offending. However, the judge went on to say that the age of LB reduced the seriousness of the offending. In consequence he concluded that the appropriate starting point, allowing also for the offender's good character, was four years' custody. He then applied a reduction of 25 per cent to take account of delay. He said that there had been an unreasonable period between the first complaint in May 2020, and the trial in January 2023. He concluded that the delay: "had impacted upon the offender's Article 8 rights" under the Convention. By that route the judge arrived at the total sentence of three years' imprisonment.

The Submissions Before Us.

17 The Solicitor General accepts the structuring of the sentence by the judge, whereby he imposed what he considered to be the appropriate overall sentence on each of the counts of sexual activity with a child was unexceptionable. His submission is that the judge fell into error in two respects. First, the starting point of four years' custody before the reduction for delay was overly favourable to the offender. If an adjustment for the age of LB was appropriate, this had to be balanced against the raised culpability factors and the repeated offending. Rather than moving down the category range the starting point should have been higher than five years' custody. Second, it is said that whilst there was a significant delay a reduction of 25 per cent was excessive. It failed to take into account the continuing impact of offending on LB.

18 On behalf of the offender, Mr Purcell repeated the submissions he made to the judge in the Crown Court. He argues that the judge was entitled to take the approach he did. He invites us to give proper weight to the fact that the judge who imposed the sentence was the judge who had heard the trial. In oral submissions, he made the particular point in relation to the grooming of LB by the offender. He argued that the grooming in this case was not as bad as online grooming and could not be described as predatory behaviour.

Discussion.

19 We remind ourselves of what was said by Lord Lane LCJ in *Attorney General's Reference* (No 4 of 1989) 1991 WLR 41, when section 36 of the 1980 Act was in its infancy:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the Judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must, of course, be had to reported cases, and in particular to the guidance given by this court from time to time in so-called guideline cases. However, it must always be remembered that sentencing is an art rather than a science, that the trial Judge is particularly well placed to assess the weight to be given to various competing considerations, and that leniency in itself is not advice."

Those principles hold good today, save, of course, a sentence now must be considered by reference to the relevant Sentencing Council Guidelines. In short, we have to ask whether the term of imprisonment imposed by this judge fell outside the range reasonably open to him.

20 Notwithstanding the fact that the sentencing judge was the trial judge, a factor to which considerable weight always must be attached, we are satisfied that the sentence in this case was unduly lenient. First, the judge implicitly acknowledged that the starting point of five years' custody was insufficient to reflect the repeated offending over months. He was right to do so. The guideline is intended to reflect a single offence, yet that factor was effectively ignored. There should have been an uplift from the starting point of five years' custody to reflect the multiple offences. As we have said, the Solicitor General does not criticise the way the judge structured the sentence. Nor do we. But when concurrent sentences are passed in relation to more than one offence the principles set out in the Sentencing Council Totality Guideline must be observed:

> "Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences."

The starting point of four years' custody, which was the basis upon which the sentence was calculated, wholly failed to represent that overall criminality.

21 Moreover, the proposition that, in the circumstances of this case, the age of LB was a factor which served to reduce the starting point at the bottom of the category range was misconceived. As the judge found, LB was an immature teenager. The offence under section 9 of the 2003 Act is intended to protect girls like her from predatory sexual offenders. If she had been 13 or 14 when the sexual relationship began, that might well have been a basis to move the sentencing up the category range. In the particular circumstances of this case, LB's age provided no basis for moving the starting point to the bottom of the category range. The harm and culpability factors placed the offences squarely into Category A in the guideline, the multiple offending required a movement up the category range from the starting point. No other conclusion was reasonable on the facts of the case. The least uplift appropriate in the circumstances would have been 12 months i.e. a sentence of 6 years' custody.

22 Secondly, the judge erred by reducing the sentence by 12 months (or 25 per cent) due to the delay. It was wrong to say, as Mr Purcell submitted to the judge, that the delay was no fault of the defendant. In February 2021 he appeared at the Crown Court, he was arraigned. Had he pleaded guilty he would have been sentenced shortly thereafter. Of course, he was entitled to have his trial and he was not to be penalised for that. Equally, he was not entitled to a benefit by reason of him contesting the case. As Mr Holt, on behalf of the Solicitor General, pointed out in the course of the hearing, suppose the offender had pleaded guilty at

the PTPH. He would have had a reduction of his sentence for his plea of guilty of 25 per cent. In this case, the offender contested the case, yet his sentence was reduced as if he had pleaded guilty at a relatively early stage. It cannot be said that the delay before his trial was nothing to do with him. A trial was only necessary because he contested the case. In those circumstances, we consider that the delay would have to be wholly out of the ordinary for any reduction at all to be applied.

23 The situation here was wholly different to the situation which is all too common in criminal proceedings. Offences are committed, they are reported promptly to the police who investigate them with reasonable expedition. The investigation concludes with evidence available to justify charging of the offender. Then, many months, sometimes years, pass before the offender is charged. That type of delay often will result in some reduction in the eventual sentence, particularly in cases where the offender pleads guilty. We observe that the reduction would be most unlikely to be as great as 25 per cent, particularly where the offences were serious, but some reduction would follow. In this case, the offences were reported to the police in May 2020, the offender was charged in November 2020, he made his first appearance in the Crown Court in January 2021. That chronology does not reveal any significant delay, rather it is the progress to be reasonably expected in a case of this kind.

24 The judge referred to Article 6. Article 6 provides a criminal defendant with a right to a trial within a reasonable time. There are two aspects to this right which are of relevance to this case. First, the conduct of the defendant is relevant to the reasonableness of any delay. Second, where the courts are faced with some unusual or exceptional circumstances, which create a significant backlog, the backlog leading to delays, there will be no interference at all with the defendant's Article 6 rights, so long as the courts take remedial action insofar as they can.

25 We have already dealt with the conduct of the defendant. As to the backlog, there was undoubtedly a significant backlog in Crown Courts generally in 2021 and 2022. Up to June of 2022 it was predominantly due to the effects of the pandemic. During 2020 and the first half of 2021, the ability of any Crown Court to try cases was dramatically reduced. When the position improved after the middle of 2021, the courts were faced with a backlog of cases dating back to the beginning of the lockdown in March 2020. The Judiciary and HMCTS engaged in a recovery programme in which priority had to be given to older cases, cases involving offenders in custody and young offenders. The problem was exacerbated by the fact that those who might have sat as fee paid judges to deal with the backlog were unable to do so because they were committed to cases coming on for trial as part of the recovery programme. In addition, the number of courtrooms in many crown courts was reduced due to precautions required as a result of the pandemic.

26 The history of the proceedings in this case was plainly unfortunate. However, it was the consequence of extraordinary circumstances in respect of which the courts took such remedial action as they could. With great respect to the judge, it was not helpful to refer to Article 6 without any consideration of domestic or ECHR authority. It is clear to us that there was no actionable interference with the offender's Article 6 rights. Given the overall circumstances, the delay in trying the offender was not unreasonable. There was no proper basis for any reduction in the offender's sentence by reason of delay.

Conclusion.

27 We give leave to refer the sentence imposed on the offender on 20 January 2023. We are satisfied that the overall sentence was unduly lenient. We shall quash the concurrent sentences of three years' imprisonment imposed on Counts 3 to 6 on the indictment. We

substitute in their place concurrent sentences of six years' imprisonment on each of those counts. The other sentences will remain unaltered. It follows that the total sentence now will be six years' imprisonment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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