IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300463/A2
[2023] EWCA Crim 597

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 23 March 2023

Before:

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

MR JUSTICE KERR

HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

REFERENCE BY HM ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REX

v

IAN FEATHERSTONE

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 J EVANS KC appeared on behalf of the Attorney General.
MS L COTON appeared on behalf of the Offender.

J U D G M E N T

(Approved)

1. THE VICE-PRESIDENT: This offender, Ian Featherstone, pleaded guilty to two charges of sexual activity with a child by a person in a position of trust, contrary to section 16 of the Sexual Offences Act 2003. On 16 January 2023, in the Crown Court at Derby, he was sentenced by HHJ Smith KC to 12 months' imprisonment, suspended for 2 years, with a number of requirements. His Majesty's Solicitor General believes that 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 sentencing may be reviewed.
2. The victim of the offences (to whom we shall refer to as "C") is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.
3. The offences were committed between March and October 2021, beginning when the offender was aged 42 and C was aged 16. The offender was a teacher. C was then his pupil for one subject. He had previously been her form tutor and she would regularly speak to him at school. Although the offender denied being aware of this, C has been diagnosed with high functioning autism and is, for that reason, somewhat vulnerable.
4. In March 2021 the offender and C began to exchange messages, using a particular social media platform because the offender did not want his wife to find out about their communications. The offender kissed C when she was waiting to be collected after school. Their messages became sexualised. He sent her pictures of his penis and encouraged her to send him nude pictures of herself. He told her not to save any contact details for him in her mobile phone.
5. The offender and C began to engage in sexual activity. The offender pleaded guilty to at

least two offences of sexual activity involving his digital penetration of C's vagina, beginning when she was 16; and two offences involving his having vaginal sexual intercourse with her, during which he ejaculated, when she was 17. No condom or other form of contraceptive was used, but the offender told C that he had had a vasectomy. The offences involving digital penetration took place in the school, the sexual intercourse elsewhere.

6. In January 2022 C disclosed what had happened and the offender was arrested. He made "no comment" when interviewed under caution but pleaded guilty to the charges to which we have referred at a plea and trial preparation hearing in late November 2022.
7. The offender had no previous convictions. At the sentencing hearing, the judge was assisted by a pre-sentence report and a number of testimonials from persons who knew the offender well and spoke highly of him. The judge also had a letter in which the offender expressed his remorse; acknowledged the catastrophic effects of his behaviour on C, her family, his own family and others; and indicated that he had sought guidance from the Lucy Faithfull Foundation.
8. Very regrettably, the judge did not have a victim personal statement written by C three days before the hearing. We do not know how it came about that the prosecution failed to put that statement before the court. Neither counsel appearing at sentencing was aware of it.
9. The author of the pre-sentence report assessed the offender as meeting the criteria for a sex offender programme, and expressed the view that he had shown only limited victim empathy. The report noted that the offender's marriage had broken down and that he had experienced depression, for which he was prescribed medication, following that breakdown and his arrest. The offender was assessed as presenting a low risk of general

reoffending though a high risk of harm to children. He was allowed to see his own children only under the supervision of his parents. The report proposed a 24-month community sentence with a number of requirements.

10. The judge in his sentencing remarks said that the offender had no previous convictions and was of good character. He had excelled as a teacher, was highly regarded by former students and had done charity work. The judge noted that, by his own account, the offender had given in to the temptation of the attention he had received from C and had groomed her into a relatively short-lived relationship. There could be no excuse for the offender's conduct, but the judge accepted that he was remorseful, not only for himself but also for his victim. The judge observed that he had no victim personal statement from C, but he regarded her autism as an aggravating feature albeit "an incremental one rather than a significant one".
11. The judge considered the Sentencing Council's relevant definitive guideline. Each of the offences fell into category 1A, with a starting point of 18 months' custody and a range from 1 to 2 years. He took a starting point of 18 months, which he increased to 2 years because there was more than one occasion and there were two different forms of sexual activity. He then took account of what he regarded as substantial personal mitigation: the offender had lost his job, his marriage was over, his contact with his children was restricted and he had brought shame upon himself. The judge noted that the testimonials all spoke very highly of the offender. He reflected these mitigating factors by reducing his provisional sentence to 16 months' imprisonment. He then gave 25 per cent credit for the guilty pleas.
12. The judge stated that the offences plainly passed the custody threshold, in particular because of the disparity in age and the breach of trust. He then turned to what he

identified as "the big question" of whether the sentence could be suspended. He considered all the factors relevant to that question which are listed in the Sentencing Council's Imposition guideline, and focused on whether appropriate punishment could only be achieved by immediate custody. In that regard, the judge said that a number of factors tipped the scales in favour of suspension: prison would be particularly difficult for the offender because of a diabetic condition; it was appropriate to take into account the impact of the current very high prison population; and, most importantly, the release provisions applicable to a 12-month sentence would mean that there would be no meaningful assistance of the sort mentioned in the pre-sentence report. The judge concluded that a suspended sentence with appropriate requirements, including a significant punitive element, would be for the benefit of everybody, including the public.

13. The judge therefore imposed, on each count concurrently, sentences of 12 months' imprisonment suspended for 24 months, together with a curfew from 7.00 pm to 5.00 am each night for 6 months, 200 hours' unpaid work, a requirement of attendance on a 45-day sex offender programme and a 55-day rehabilitation activity requirement. It should be noted that the punitive measures included in that list of requirements went significantly beyond what had been suggested by the author of the pre-sentence report.

14. On behalf of the Solicitor General, Mr Evans KC submits that the total sentence was unduly lenient and failed adequately to reflect the seriousness of the offending as a whole. He submits that the judge gave insufficient weight to the extent and duration of the offending and the aggravating factors, namely the use of grooming behaviour; the soliciting of sexual images; C's degree of vulnerability because of her autism; the substantial age disparity; and the element of planning in using particular forms of communication and arranging to meet outside school. Mr Evans readily and fairly

acknowledges that some of those factors had already been taken into account by the judge in his decision as to the categorisation of the offence, but he submits that it is the cumulative effect of their all being present which was particularly important. Mr Evans further submits that the judge gave too much weight to the mitigating factors. His overall submission is that the term of imprisonment should have been longer and should not have been suspended.

15. Mr Evans also raised a point based on the contents of the victim personal statement by C, which is now available. We do not think it would be appropriate for us to take that into account, or indeed to take into account in the offender's favour a supplementary report which has been provided by the Probation Service, because the role of this court is to review the sentence passed by the judge on the evidence and information which was before him. We accept that the offender may consider himself fortunate, because the contents of the victim personal statement might well have led the judge to impose a somewhat longer custodial sentence, though not, we think, to alter his decision as to suspending the sentence. However, it was no fault of the offender's that the statement was not made available to the judge.

16. Ms Coton, representing the offender in this court as she did below, resists this application. She points out that the judge, having selected a starting point in accordance with the guideline, did then increase it to reflect the commission of more than one offence and the aggravating factors. In addition, she submits that the judge added a significant punitive element of the suspended sentence order by the group of requirements which he imposed. Ms Coton submits that there was substantial mitigation and that the judge did not give undue weight to it. She reminds us of two familiar statements of principle. First, as Lord Lane CJ said in Attorney-General's Reference No 4 of 1989 [1990] 1 WLR

41, a sentence will only be unduly lenient if "it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate." Secondly, as was said by Hughes LJ (as he then was) in Attorney-General's Reference No 60 of 2012 (R v Edwards) [2012] EWCA Crim 2746:

> "The procedure for referring cases under section 36 of the Criminal Justice Act 1988 is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result."

17. We are grateful to both counsel, each of whom has made all relevant points on each side and each of whom has assisted the court.
18. The offender committed serious offences in gross breach of trust and with the aggravating features identified by Mr Evans. A custodial sentence was plainly unavoidable. On the other hand, we agree with Ms Coton that there was substantial personal mitigation. The judge was therefore faced with a difficult sentencing process.
19. In our judgment, his approach was impeccable. He correctly considered and applied the offence-specific guideline, correctly took in to account the substantial personal mitigation, and reached a custodial term which was within the range properly open to him. He then considered each of the factors identified in the Imposition guideline as militating in favour of, or against suspension of the sentence. He rightly focused on the key question of whether appropriate punishment for the offending could only be achieved by immediate custody. He explained, very clearly, his reason for answering that question in the negative. He then imposed conditions which, as he said, added a significant punitive element, thereby reflecting the seriousness of the offending.
20. We have concluded that the judge's decision in this difficult case was one which was

properly open to him. He reached it, as we have said, by an impeccable process, each stage of which he clearly explained. He plainly had well in mind the serious features of the offending and the harm to C which was shown by the information available to him; but he also, rightly, recognised that there was substantial mitigation. He correctly followed the Imposition guideline, and he was entitled to conclude that the sentence could be suspended.

21. We can well understand why the Solicitor General wished to refer this case to this court, and we think it appropriate to grant leave to refer. For the reasons which we have given, however, we conclude that the sentence was not unduly lenient, and we therefore refuse the application.

22. The effect of our decision, from the offender's point of view, is that his sentence remains exactly as it was imposed by the judge.

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

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