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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202304499/A1

Neutral Citation Number:
[2024] EWCA Crim 196

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 16 February 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MURRAY
THE RECORDER OF PRESTON
HIS HONOUR JUDGE ALTHAM
(Sitting as a Judge of the CACD)

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

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V
ADX

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MISS C PATTISON appeared on behalf of the Attorney General
MR T JACOBS appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 a victim of the offence. In this instance the familial relationship between the offender and his victims is such that his victims would be readily identifiable were the offender himself to be identified by name. Therefore we will refer to him as "ADX" for the purposes of the judgment. We refer to his victims as C1 and C2.
2. On 22 May 2023 the offender pleaded guilty to the following offences. In relation to C1, one count of causing a child under the age of 13 to engage in sexual activity, two counts of sexual assault of a child under 13, two counts of sexual assault, one count of causing a child to engage in sexual activity and one count of engaging in sexual activity in the presence of a child. In relation to C2, the offender pleaded guilty to one count of rape, two counts of attempted rape, four counts of assault by penetration and four counts of sexual assault. The offending against C1 occurred between 2012 (when she was nine) and 2017 (by which time she was 13). The sexual abuse of C2 occurred between September 2021 (when she was 13) and October 2022 (when she was 14).
3. Sentence was imposed on 29 November 2023. The judge identified a lead offence for C1, namely the count of causing a child under the age of 13 to engage in sexual activity, and a lead offence in relation to C2, namely the count of rape. The course the judge took in sentencing was to impose a sentence of 11 years' imprisonment in respect of the count of rape and a concurrent sentence of 4 years' imprisonment in respect of the count of

causing a child under the age of 13 to engage in sexual activity, that sentence to run concurrently. The total sentence reflecting all of the offending was 11 years' imprisonment.

4. His Majesty's Attorney General applies to refer that total sentence as being unduly lenient pursuant to section 36 of the Criminal Justice Act 1988.
5. The offender at the relevant time lived with his wife and their three children, who included C1 and C2, in Leeds. C1 was born in October 2003. C2 was born in September 2008.
6. The sexual abuse of C1 generally occurred at night when C1's mother was working a night shift as a nurse. It only concluded when she disclosed what had been happening to her mother shortly before her 14th birthday. The abuse would either happen in the living room of the family home or in her bedroom.
7. C1's first recollection of sexual misconduct by the offender was him showing her his penis. This progressed over time to him undressing her and touching various parts of her body, caressing her breasts and touching her vagina. The touching of the vagina was both with his hand and later rubbing his penis on her vagina. He would also make her hold and masturbate his penis. On other occasions he would masturbate in her presence. He would sometimes ejaculate onto her stomach.
8. All of the offences charged in relation to C1, to which he pleaded guilty, were multiple incident counts. The lead offence of causing a child under the age of 13 to engage in sexual activity represented at least three occasions between the ages of nine and 12 of the offender making C1 masturbate his penis. There was a parallel count to reflect at least three occasions when that happened after C1's 13th birthday.
9. The two counts of sexual assault of a child under the age of 13 also were multiple

incident counts. They reflected the touching of the child's naked vagina, first with the offender's hand on at least three occasions; second with his penis on at least three occasions. Again that activity continued after C1's 13 birthday so there were counts of simple sexual assault to reflect that by now she was no longer a child under the age of 13 and multiple incident counts reflecting at least three occasions of each type of touching. Finally there was a multiple incident count dealing with the activity of him masturbating in her presence and ejaculating upon her. Because all of those counts were multiple incident counts, they reflected at least 21 different occasions of sexual abuse of differing types.

10. The offender was arrested in relation to those allegations at the beginning of October 2019 because C1 had told her school what was going on. The offender was arrested on the same day as the disclosures were made. C1 was interviewed by the police, as was the offender. He answered no comment to all questions asked of him. A decision was made at that stage to take no further action.
11. The sexual abuse of C2 began about three months after her 13th birthday, which was in September 2021. The abuse usually took place at the family home. Again it was when her mother was working nights, although there were occasions when it happened away from the home. The abuse usually happened in her bedroom on her bed, the offender shutting the door so that they would not be disturbed by C2's brother. As with C1, the offending progressed. At first the offender would touch C2's thigh and legs, progressing to touching her stomach and breasts. In order to carry out this touching he would undress her. C2 described occasions when the offender would be on top of her and kissing her on the mouth using his tongue. He then would kiss her neck and move downwards onto her breasts and stomach. He would also rub her body with lotion and suck her nipples.

12. In 2022 he progressed to penetrative sexual activity. This started with digital penetration and the licking and penetration of her vagina with his tongue. The first occasion was on a couch in the living room but more often it occurred in C2's bedroom behind a closed door. She described penetration with both fingers and tongue as being deep and more than momentary. On two occasions the offender tried to force his penis into C2's mouth but she moved her head so that he was unable to complete the act. Finally, on 6 October 2022 he vaginally raped C2 (by now aged just 14). This took her virginity. It occurred on C2's bed. The offender told her that he did not want her to be innocent any more. He wanted to know what it would be like for a future husband. Unsurprisingly the rape caused C2 pain. She cried as she was raped. Although the offender did not use a condom, he did not ejaculate.
13. The lead offence, as described in the case of C2, was that final offence of rape. The sexual assaults were represented by two counts reflecting touching of legs, stomach and breasts with one of those counts being a multiple incident count. The kissing and penetrating of the mouth with the offender's tongue was also a multi-incident count as was the count representing the kissing of the vagina. In total there were 26 separate incidents of sexual assault.
14. In relation to assault by penetration there were five incidents represented by the various counts of digital penetration and 10 incidents of penetration of the vagina with the tongue. The attempted rapes were charged as specific counts.
15. In December of 2022 C2 told a friend as to what was going on, the police were informed and C2 was interviewed by the police. The offender was arrested in January 2023. When he was interviewed he denied any inappropriate behaviour in respect of C2. At that point he was charged both with the offences against C1 and against C2.

16. He was sent to the Crown Court. There was no indication of plea at the point of sending. The case progressed reasonably quickly such that a ground rules hearing was set for 22 May 2023 which was two days before a scheduled section 28 hearing at which both C1 and C2 would be cross-examined. At the ground rules hearing on 22 May 2023, the offender was arraigned. He pleaded guilty to the counts as we have already outlined. Sentence had to be adjourned both because reports were not available and because an interpreter was required. That is why there was a delay until November 2023.
17. The offender was born in the Philippines. He has no relevant convictions. He is now a man in his fifties.
18. The judge when sentencing had a pre-sentence report. The report identified that the offender claimed that he did not understand why he behaved as he did. He had very little understanding of the impact of what he had done on his family. At that stage the report indicated there was a high risk of harm to children, specifically to children within the offender's care.
19. The judge had victim impact statements from both C1 and C2. In May 2023 C1 explained that she often had nightmares about what had happened to her and that she was scared of the future effects of the trauma. She was scared of forming relationships and of being vulnerable to people. She said: "I was brought up to love my dad but he ruined this and abused me." She explained she had moved away from the family home in 2022, being glad to escape it all. She said that she now felt the guilt of leaving her sister to be exposed to her father's depredations, something that would live with her forever. In respect of her longer term psychological state, she said she felt very low at times. She had become less ambitious and was starting to give up on the idea of a successful life. She felt tired, agitated and burnt out.

20. C2 also made a victim personal statement in which she explained that she no longer felt safe in her own home as a result of what had happened to her. She felt overwhelmed with emotions and often did not know how to deal with all of them at the same time. She said she sometimes felt helpless and had on one occasion self-harmed. She had bad dreams about her father and experienced flashbacks about what had happened. She said she felt insecure about her body because of what had happened, feeling that her body was ugly and worrying that no one would want to be with her physically when she grew up. She said: "My body is a constant reminder of him because he has touched it." She explained how problematic it had been that the offender had not pleaded guilty until very shortly before the section 28 hearing. She had been building herself up for that hearing. At the very last minute he had pleaded guilty. She felt it was completely unnecessary. As she put it: "Why leave it so long and put me through so much misery and distress?"

21. The judge in relatively brief sentencing remarks noted the number of offences and where they had happened. He said that the ages of the victims at the time added to their vulnerability. He described the abuse as repetitive, prolonged and with insufficient safeguards put in place to stop the abuse. The judge said:

"There will undoubtedly be long-term psychological and emotional distress caused to both of your daughters...."

He referred to the victim impact statements.

22. The judge towards the end of his sentencing remarks indicated that he would reduce the overall sentence for two reasons: the plea of guilty; to reflect the totality of the sentence he had to impose. He explained his approach of imposing sentences on what he described as the two lead offences, the ones to which we have referred. He concluded by

saying this:

"Dealing with your overall offending, in relation to the offences involving [C2], the appropriate sentence would have been one of 12 years' imprisonment. I am going to afford you 20 percent credit for your guilty plea and that will therefore reduce that to nine-and-a-half years' imprisonment and to reflect totality of the overall offending involving both victims, I reduce that further to one of seven years' imprisonment.

In relation to [C1], the starting point would have been one of eight years' imprisonment. Again, allowing you credit for plea, that would come down to six-and-a-half years' imprisonment. Allowing and reflecting totality, that comes down further to four years. So adding the seven and four together, the sentence will be 11 years' imprisonment on count 11 [that is the count of rape] with four years' imprisonment but to run concurrently on count 17 with no separate penalty in relation to the other offences, I have taken those into account in the overall sentence."

23. On behalf of His Majesty's Attorney General it is submitted that the overall sentence failed to reflect that gravity of offending, as we have described. No issue is taken with the approach adopted by the judge of identifying a lead offence in relation to each victim and setting a sentence in relation to that offence which encompassed all of the offending against that victim. The judge's error was twofold. First, the sentence in respect of the lead offence relating to C2 failed to reflect the entirety of the offending in relation to her. Second, the total sentence failed to reflect the overall offending against both victims. At one stage during the Reference process there was a suggestion that there had been too great a reduction for the pleas of guilty. Before us, the Attorney's fire is directed at the reduction for totality which, it is said, was too great. In any event the outcome was a total sentence which was unduly lenient.

24. Mr Jacobs, who appeared on behalf of the offender below and appears before us, submits that the reduction for the plea of guilty was appropriate, a point which is no longer in

issue before us. As to the overall sentence, the judge carefully weighed all of the relevant factors. There were matters which he was entitled to take into account and he had to give full weight to the issue of totality.

25. The correct formulation of what is an unduly lenient sentence remains that provided by the then Lord Chief Justice in Attorney General's Reference No 4 of 1989 [1990] 1 WLR 41:

"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."

It follows that for us to conclude that this sentence was unduly lenient we must find that it was not reasonably appropriate for this judge to restrict the overall sentence to 11 years' imprisonment. Put conversely, we must conclude that a much longer overall sentence was required to reflect the successive offending against two young children spread over, in total, some 10 years. We say immediately that we have no hesitation in reaching that conclusion. We give leave to refer the sentences imposed.

26. In respect of C1, each offence was charged as a multiple incident offence. In every case there was a gross abuse of trust. In relation to the lead offence it is certainly arguable that there was severe psychological harm in which event it was a Category 2 offence with a starting point of 8 years' custody. Even a Category 3 offence, which was how it was put in the court below, will have a starting point of 5 years' custody but with a range of 3 to 8 years' custody. Where there is repeated offending an adjustment upwards from the starting point will be required. That is the starting point for that specific offence. But there were many other offences in this case. The offences of sexual assault also involved a gross breach of trust. There was touching of naked genitalia. A single offence of

sexual assault when C1 was a child under the age of 13 required a starting point of 4 years' custody. Again an upwards adjustment due to the multiple offences was required.

27. Taking into account all of the offending, the overall sentence of 8 years' custody after trial in relation to C1, which was identified by the judge as appropriate, was very modest. The sentence in relation to C1 had to represent repeated sexual abuse of a child aged between nine and 13 over a period of 5 years by a man in whom she was entitled to put her trust.
28. C2 was older than C1 when the offending against her began and it lasted for just over a year. But the relative brevity of that offending was due only to the fact that his offending was reported and he was then arrested and kept in custody.
29. The lead offence was rape. The offender knew that he was taking his 14-year-old daughter's virginity. Given the vulnerability of C2, and the psychological harm which resulted from the rape, it is our judgment, whatever was said in the court below, that this offence fell into Category 2A with a starting point of 10 years. On at least 15 occasions the offender assaulted his daughter (then only 13) by penetration. By reference to the guideline for that offence, even a single offence falling into Category 3A, were that to be the correct categorisation, would have a starting point of 4 years. Given the number of incidents a very substantial upward adjustment from that figure was required. The upper end of the category range for a Category 3A offence is 6 years. To these offences had to be added repeated sexual assaults and two attempts by the offender orally to rape his daughter.
30. The judge concluded that the overall sentence after trial for the entire offending against C2 would have been 12 years. That was not a reasonable conclusion in view of the

number of incidents, the seriousness of the offending and the fact that the offender had been interviewed in relation to C1 by the time he began his abuse of C2. We are satisfied that had the judge been sentencing solely for the offending against C2 the appropriate sentence after trial would have been at least 17 years.

31. The judge applied a reduction of 20 per cent for the pleas of guilty. As we have indicated, there was initially a submission that this reduction was too much. Certainly some judges would have taken a stricter view of the level of reduction required for the pleas in the context of this case. However, we agree with the view now taken by the Attorney General that the reduction applied by this judge cannot be described as unreasonable. We are not going to depart from it in our overall assessment of the appropriate sentence. A reduction of 20 per cent would result in a sentence of 6 years 4 months in relation to C1 and 13 years 6 months in relation to C2.
32. We part company with the judge in relation to the issue of totality. The Sentencing Council issued a revised guideline in relation to totality on 1 July 2023 which the judge was required to apply. We shall assume that he had it in mind, although he did not at any point refer to the terms of that guideline. The issue of totality arose at two points in the sentencing exercise. First, in relation to each victim the judge was required to ensure that the sentence reflecting all of the offences was just and proportionate in relation to that offending. In our view the judge only just achieved that object in relation to the overall sentence imposed in relation to C1 i.e. before any reduction to take account of the sentence to be imposed in relation to C2. His conclusion in relation to the appropriate overall sentence in relation to C2 was wrong. It failed to reach a just and proportionate sentence reflecting the many very serious offences committed against her.
33. More important was the second point at which totality fell to be considered, namely in

assessing the appropriate sentence on the indictment as a whole. The judge reduced the sentence in relation to each victim by two-and-a-half years "to reflect totality of the overall offending involving both victims". The overriding principle of totality, as identified in the guideline, is that the overall sentence must "reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender and be just and proportionate." The guideline sets out the general approach to be adopted.

There are three relevant bullet points:

- "1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
2. Determine whether the case calls for concurrent or consecutive sentences. When sentencing three or more offences a combination of concurrent and consecutive sentences may be appropriate.
3. Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole."

34. Consecutive sentences will generally be appropriate where, as here, there are separate victims against whom quite separate offences are committed over different periods. The guideline concludes:

"Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate."

35. In this case the judge adopted the approach of imposing a lead sentence in relation to each victim. We do not criticise that approach in the context of this case. In terms of the court order it is recorded that he imposed consecutive sentences in relation to the different victims. That is not what he said in the course of his sentencing remarks. The

sentence imposed on any offender is the sentence announced in open court by the judge. Had he imposed consecutive sentence, that would have been the proper course to take given the facts and circumstances of this case.

36. Where the judge fell into error was in the extensive downward adjustment he made in relation to the overall sentence in relation to each victim. His sentence had to be just and proportionate in relation to each victim. It had to reflect all of the offending behaviour. The judge in order to do that had to make an assessment of the proper sentence in relation to each type of offending the offender committed. He failed to do so that. For instance, in the case of C2 he referred only to the sentence in relation to the offence of rape. He did not make any reference to the serious offences of assault by penetration. It may be that his failure to do that led him into the error which we have identified.
37. Given that the total sentence had to reflect all of the offending behaviour, we are satisfied that it required the judge to make only a modest adjustment to the lead sentence appropriate in relation to each victim. A simple addition of the two sentences we have concluded ought to have followed after allowing for a reduction of 20% from the sentences after trial for the pleas of guilty would lead to an overall sentence of 19 years 10 months. That assumes that the sentence in relation C2 (13 years 6 months) would run consecutively to the sentence in respect of C1 (6 years 4 months). Some adjustment to that overall sentence would be required to ensure that the total sentence is just and proportionate. The extent of the adjustment would only be modest. We emphasise that this was serious offending against two different young children of the family. It was successive, one child being abused after the other. The series of offences committed by the offender required a very substantial period of imprisonment.
38. Our judgment is that the overall sentence necessary to meet that requirement is 17 years 6

months' imprisonment. We shall achieve that by imposing on count 17 (the identified lead offence in respect of C1) a sentence of 5 years 6 months' imprisonment. In relation to count 11, the count of rape (the lead offence in relation to C2) we shall impose a sentence of 12 years' imprisonment to run consecutively. That gives a total sentence of 17 years 6 months' imprisonment.

39. For all of those reasons we find that the sentence imposed by the sentencing judge was unduly lenient. We quash his overall sentence of 11 years' imprisonment and substitute in the way we have set out an overall sentence of 17 years and six months' imprisonment.

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

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk