IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/03381/A2

[2024] EWCA Crim 199

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 14th February 2024

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE TURNER

MR JUSTICE BRYAN

R E X

- v -

ALAN LUDAR-SMITH

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Mr P Farr appeared on behalf of the Appellant

APPROVED J U D G M E N T

Wednesday 14th February 2024

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Bryan to give the judgment of the court.

MR JUSTICE BRYAN:

1. 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 the victim of the offences. This judgment has been anonymised accordingly.

2. On 15th June 2023, in the Crown Court at Cambridge before His Honour Judge Bishop, the appellant (then aged 49) pleaded guilty on re-arraignment to 3 offences of sexual assault of a child under 13. On 1st September 2023, in the Crown Court at Cambridge, he was sentenced by His Honour Judge Enright to 1 year's imprisonment on each of the 3 counts. The sentences were ordered to run consecutively to each other, making a total sentence of 3 years' imprisonment.

3. The appellant appeals against sentence with the leave of the single judge on the ground that the overall sentence passed was manifestly excessive.

4. We turn to the facts of the offending. The complainant was born in January 2005 and was aged between 9 and 11 during the time of the offending. Her stepfather was a friend of the appellant. At that time the appellant was a trusted friend of the complainant's family and would regularly visit their home. Whilst he was there, on three occasions, he took the opportunity to sexually assault the complainant.

5. Matters were brought to the attention of the police in May 2021, after the complainant had disclosed the offending to her mother. The complainant was interviewed by the police in July 2021 and gave a fuller account of what had taken place.

6. The complainant said that in 2014, when she was aged between 9 and 10, the appellant visited her address. She was left alone with him in the living room while her mother was putting the bins out and her father was out of the room. The appellant sat on the sofa next to the complainant, in the space that her mother had left. He sat very close to her and started touching her, saying that he was tickling her and that it was a game. The complainant did not think it was tickling as it was not her armpits and she said it was not funny. The appellant said that they were playing the tickle game, but the complainant described it as being "grabby" and on areas where she did not think she should be tickled and it was not ticklish. She said that it felt weird and wrong. The appellant was touching her on her chest area and her vagina. She tried to push his hands off but he would just put them back to those areas and continue. She could feel his fingernails digging into her, and it hurt. The appellant stopped when he heard someone coming up the stairs to the flat and he then moved. The touching was over her clothing. This was the subject matter of count 1.

7. The second incident occurred when the complainant was again at the flat, when her mother was at work, and the appellant visited. The appellant put the complainant on his lap with her facing away from him. He bounced her up and down, like playing a horse game. The complainant could feel that his penis was semi erect. The appellant positioned her high up on his body, not on his legs, and she could feel his trouser belt digging into her back. Again the appellant was doing what he called the tickle game, touching the complainant on her upper thigh, close to her vagina, on her chest and on her stomach underneath her chest. He was doing the "grabby" thing again and she tried to get him off, but he held his hands on

to her stomach and hip area and held her in place. She tried to move his hands away but he carried on. The appellant only stopped when he heard the door and her father returning. He then moved back onto the sofa and pretended that nothing had happened. This was the subject matter of count 2.

8. By the time the complainant was aged 11 the family had moved house. She was at home when the appellant was visiting once again. Her mother was putting her baby brother to bed and her father told her to play Monopoly with the appellant in the kitchen. The complainant went to the kitchen, where the appellant had already set the game up and had his chair and the complainant's chair close together. She moved her chair away from him in order to play. During the game the appellant told the complainant that she was pretty and paid her compliments. When she went to give him a card he would intentionally touch her hand. He kept moving his chair a lot closer to her chair as the game went on. He did that until he was very close. He then began to touch the complainant's leg under the table with his leg as he was sat with his legs apart and he kept widening them so that his legs would brush up against hers. This was the subject matter of count 3.

9. The appellant was arrested and interviewed on 22nd January 2022. He denied the offences, claiming that there was never any sexual contact between him and the complainant. Not guilty pleas were entered at the plea and trial preparation hearing. However, a matter of weeks later, and around 6 months before trial, he pleaded guilty to all 3 offences.

10. The appellant has 3 convictions for 13 offences. On 5th September 2005 (i.e. prior to the current offending), he received a 3 year community order for sexual activity with a female child under 16. Then subsequent to the current offending, but before it came to light, on 10th May 2018 he received a suspended sentence order of 12 months' imprisonment suspended for 2 years for indecent assault on a female under 14, and indecent assault on a male under 14.

Thereafter, on 19th May 2021, he was sentenced to 3 years' imprisonment for attempting to incite a girl under 13 to engage in sexual activity, 2 offences of attempting to engage in sexual communication with a child, 2 offences of making indecent photographs of children, 2 offences of possessing prohibited images of children, possession of extreme pornographic images, and distributing indecent photographs of children. A consecutive sentence was imposed for breach of the Suspended Sentence Order.

11. The Learned Judge identified that the appellant's offending amounted to a course of conduct over some time, with the young complainant being sexually assaulted in her own home, out of sight of her parents. The appellant relied on the complainant's naivety and the expectation that the complainant would never complain. The Judge considered, we are satisfied rightly, that the prior and subsequent sexual offending against children amounted to an entrenched interest in young children. He identified by reference to the Victim Impact Statement that the complainant was suffering continuing harm. In this regard the Victim Impact Statement refers to feelings of anger and a change in behaviour at school, with him taking away her innocence. She stated that she cannot see male medical practitioners, which has impacted on her daily life, and she has an ongoing major distrust of men. She had hoped that this would improve as she grew older, but it has not. She proposed to have counselling to cope with being alone in the workplace with men.

12. The prosecution suggested that in relation to the sexual offences guideline, the appellant's offending amounted to Harm Category 3 (on the basis of no harm Category 2 or 1 factors being present), and Culpability B (no Culpability A factors present). That was a suggestion with which the defence agreed. The starting point for a single offence was 6 months' imprisonment and a range of a high community order to 1 year's custody.

13. The Learned Judge acknowledged such submissions, though he did not expressly say

whether he agreed with them. He identified as aggravating factors: the location of the offending given that a child should feel safe in their own home; and the fact that the appellant was not of previous good character and had a relevant previous conviction in September 2005 for sexual activity with a female child under 16. He stated:

> "My revised starting point for each offence, 15 months, which seems to me a proper uplift in the circumstances."

14. The Judge referred to psychiatric reports in respect of the appellant, but considered that he knew that what he was doing was seriously wrong. He considered that the reports afforded no mitigation in that respect. He also considered that the appellant showed no remorse and a lack of empathy, and as such it appears that he considered that there was little by way of personal mitigation. He stated that the appellant's guilty plea justified a modest reduction. As he then imposed sentences of 12 months' imprisonment on each count, it appears that the reduction may well have been 20 per cent.

15. The Judge considered that the appellant was dangerous, but he did not consider that an extended sentence would offer any additional protection. He then imposed consecutive terms of 1 year's imprisonment on each count, which he said seemed to him "looking at [the] maths in the round, [was] not sufficient but all the law allows".

16. The appellant submits that the sentence imposed was manifestly excessive in that:

> (1) Insufficient weight was given to the principle of totality and concurrent sentences should have been passed, or a significant further reduction applied if the sentences were to be consecutive; and/or

(2) Insufficient weight was given to the fact that this offending pre-dated offending for which the appellant had already served a substantial custodial sentence.

17. We are grateful to Philip Farr of counsel who appears on behalf of the appellant for the quality of his written and oral submissions.

18. The Learned Judge's sentencing remarks were brief, and he did not spell out all the stages of his reasoning so as to explain how he arrived at the sentence he did. It has been necessary in such circumstances for us to consider the offending for ourselves, its proper categorisation, the aggravating and any mitigating factors, totality, and the appropriate credit for the guilty pleas to assess whether the total sentence that was passed was manifestly excessive.

19. This was, on any view, serious sexual offending against a young child, on no less than 3 separate occasions, in circumstances where the Sentencing Guideline starting point and range relates to a single offence. Where, as here, there is a course of conduct involving separate, serious sexual offences over a period of time, it is not wrong in principle to impose consecutive sentences. Equally, it would have been open to the Learned Judge (in circumstances where the maximum sentence for the offence was 14 years' imprisonment) to impose a sentence on one count to reflect the totality of the offending, with the offending on other counts being treated as aggravating factors. Whichever approach is adopted, it is then necessary to consider whether the total sentence passed is just and proportionate to the totality of the offending, making any necessary adjustments to ensure that it is.

20. There were a very large number of aggravating factors in the present case, as we have identified and as were recognised by the Learned Judge, of which the most serious was the fact that the appellant was already a convicted sex offender with a relevant prior offence of

sexual activity with a female child under 16. This factor alone would have required a very substantial uplift from any chosen starting point, with a further uplift for the additional aggravating factors.

21. The difficulty that the present case presented for the Learned Judge was the significant psychological harm that the complainant has undoubtedly suffered and continues to suffer many years after the offending, as evidenced in the Victim Personal Statement. If that amounted to severe psychological harm, it would have been Category 1B offending, which would have had a starting point of 4 years' custody and a range of 3 to 7 years' custody for a single offence. Harm less than severe psychological harm does not feature as a specified example of harm in category 2. Nevertheless, the categories relate to the harm caused, and we consider that where there is significant psychological harm, it would be appropriate for a sentencing judge at least to have regard to the category range for Category 2B offending, whilst also having regard to Category 3B. Certainly a judge could not be criticised for considering that the present offending was on the cusp of category 2B/3B. Category 2B has a starting point of 2 years' custody and a range of 1 to 4 years' custody for a single offence.

22. Here the Learned Judge had to sentence in respect of 3 separate offences with substantial aggravating features. We consider that a sentence of around 33 months' imprisonment would have been a just and proportionate sentence to reflect the totality of the appellant's offending, before appropriate credit (around 15 to 20 per cent) for guilty pleas, resulting in a sentence of 2 years and 3 months' imprisonment.

23. In such circumstances, we consider that the sentence that was passed of 3 years' imprisonment was not simply severe but manifestly excessive. Accordingly, we quash the sentence on each of counts 1, 2 and 3, and impose a sentence of 9 months' imprisonment on each of counts 1, 2 and 3, to run consecutively to each other – a total sentence of 2 years and

3 months' imprisonment.

24. To that extent the appeal against sentence is allowed.
