IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2023/03971/B3
NCN:[2024] EWCA Crim 554

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 11th April 2024

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE HOLGATE

THE RECORDER OF SOUTHWARK
(Her Honour Judge Karu)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

D C B

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Miss C Howell appeared on behalf of the Appellant

J U D G M E N T

Thursday 11th April 2024

LORD JUSTICE SINGH: I shall ask Mr Justice Holgate to give the judgment of the court.

MR JUSTICE HOLGATE:

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 offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. We will refer to the two victims as "C1" and "C2". We also order that the name of the appellant is anonymised as DCB in order to protect the identity of the two victims.

2. On 25th August 2023, following a trial in the Crown Court at Leicester before His Honour Judge Keith Raynor and a jury, the appellant was convicted of three counts of rape against C1 (counts 9, 10 and 11), five counts of indecent assault against C1 contrary to section 14(1) of the Sexual Offences Act 1956 (counts 1, 3, 5, 6 and 8), and two counts of indecency with a child, C1, contrary to section 1(1) of the Indecency with Children Act 1960 (counts 2 and 4) . He was also convicted of three counts of indecent assault against C2 contrary to section 14(1) of the 1956 Act (counts 16, 17 and 18), and three counts of indecency with a child contrary to section 1(1) of the 1960 Act (counts 14, 19 and 20).

3. On 26th October 2023, the appellant (then aged 82) was sentenced by the trial judge to an overall custodial term of 19 years and an extended licence period of one year, made up as follows: on each of counts 16, 17 and 18, consecutive terms of 12 months' imprisonment; on count 9, a Special Custodial Sentence, pursuant to section 278 of the Sentencing Act 2020, of 17 years, comprising a custodial term of 16 years and an extended licence period of one year.

He was also sentenced to a number of concurrent terms of imprisonment: 6 years on each of counts 10 and 11; 30 months on each of counts 1 and 3; 14 months on each of counts 5, 6, 8 and 14; and 12 months on each of counts 2, 4, 19 and 20.

4. The appellant now appeals against sentence with the leave of the single judge.

5. The appellant was convicted of historic sexual offences committed against his biological daughter C1, and his stepdaughter C2, when they were children. The offences were committed between 1973 and 1980, when the appellant was in his thirties and forties. During that period the appellant's wife (and the mother of C1 and C2) was frequently absent from the family home and the marriage was under strain. The appellant had been unemployed for a period of about five years. Often he was the only adult in the house. He told C1 that she should not mention what had taken place to anyone, and sometimes he gave her gifts to buy her silence.

6. We summarise the offending against C1. When she was aged between 7 and 9, the appellant invited her into a work room at the family home. He then touched her vagina over her underwear (count 1). On at least five occasions, when C1 was aged between 7 and 12, the appellant made her lift up her top while he lay on the bed and masturbated (count 2). On a least three occasions, when C1 was under the age of 13, the appellant fondled her chest while he masturbated (count 3). On at least two occasions, when C1 was aged 13, the appellant exposed her chest while he masturbated (count 4). On at least two occasions when C1 was aged 13, the appellant touched her chest while he masturbated (count 5). On at least two occasions when C1 was aged between 14 and 15, the appellant touched C1's chest while he masturbated (count 6). On at least two occasions, when C1 was aged between 7 and 15, the appellant touched her vagina over clothing while she lay on a bed (count 8).

7. Under count 9, the appellant raped C1 when she was aged between 8 and 11. The modern equivalent of this offence is rape of a child under 13 (section 5 of the Sexual Offences Act 2003). The appellant coaxed C1 to sit on top of him and to put her weight down onto him so that he could insert his penis into her vagina. On two further occasions the appellant raped C1 when she was aged under 16 (counts 10 and 11).

8. We summarise the offending against C2. When she was aged 8, the appellant made her masturbate him (count 14). When she was aged between 8 and 15, the appellant tried to penetrate C2's vagina with his penis. He stopped when she resisted (count 16). Count 17 involved similar offending, when C2 was aged between 8 and 15; and count 18, when C2 was aged between 13 and 15. On at least two occasions when C2 was aged between 8 and 12, the appellant would make her expose her chest while he lay on the bed and masturbated (count 19). On at least two occasions, when she was aged 13, the appellant made C2 lift her top while he masturbated (count 20).

9. The appellant was interviewed by police on 9th May 2019. He denied the offences. He had no previous convictions.

10. The appellant had no previous convictions. The judge sentenced the appellant without a pre-sentence report. For the purposes of section 33 of the Sentencing Act 2020, we are satisfied that a pre-sentence report was not required in the Crown Court and is not necessary for this appeal.

11. We have read the reports of the consultant psychiatrist, Dr Series (on the appellant's fitness to plead and to stand trial), and of the consultant physician, Dr Starke. The latter set out the appellant's medical history. In 2009 he had part of his kidney removed to deal with cancer. In 2010 prostate cancer was treaded with radio therapy, and there was no recurrence.

In the same year an abdominal aortic aneurism was detected. In 2012, moderate chronic obstructive pulmonary disease ("COPD") was diagnosed, and a self-management plan provided. In 2019, obstruction to airflow was described as mild to moderate. Since then the appellant has become wheezy. In 2015 type two diabetes was diagnosed. He has a tremor which causes some difficulty with the use of his hands.

12. Dr Starke produced an addendum report for the purposes of sentencing. As regards the effects of imprisonment, he said that the appellant's tolerance of exercise has reduced and so he would probably find it difficult to participate in communal activities. He would be at risk of catching infections which, on the balance of probabilities, would eventually result in pneumonia, from which his COPD would make it difficult for him to recover. The stress of being in custody would increase the appellant's blood pressure and the risk of a heart attack, or rupture of the aneurism.

13. No further medical report has been obtained on the appellant's medical condition since he was imprisoned.

14. We have also read the Victim Personal Statements of C1 and C2, which make plain the serious long-term effects which they have suffered because of the appellant's offending.

15. In his sentencing remarks, the judge carefully directed himself by reference to the relevant guidelines for sexual offences and totality, and a number of decisions of this court on sentencing in cases of historic sexual offending, the impact of such offending on victims, and taking into account an offender's age and medical condition.

16. He treated count 9 as the lead offence, which was aggravated by the other offences, including the rapes under counts 10 and 11. The judge decided that the appellant's culpability

was category A because of his abuse of trust. He found that the psychological harm was highly significant, but not severe so as to be sufficient in itself to fall within category 2 harm. But the particularly vulnerable position of C1, due to her personal circumstances, was sufficient to amount to category 2 harm. They included the absence of any support from C1's mother. Effectively, she was alone.

17. In the alternative, the judge also relied upon the approach in *R v KC* [2020] 1 Cr App R(S) 41, that even if, technically, the circumstances of a case relate to category 3 harm, nevertheless a combination or multiplicity of factors may justify a level of sentence appropriate for category 2, so long as care is taken to avoid double counting: see [41] to [47].

18. In this case the judge said there was the repeat pattern of offending, C1's particular vulnerability, and the highly significant level of psychological harm. The judge drew particularly upon the decision of this court on a Reference by the Attorney General in *R v DP* [2022] EWCA Crim 57 at [21] and [27].

19. The judge said that for a category 2A rape of a child under 13, the starting point is 13 years' custody. The rapes on counts 10 and 11 aggravated that figure to 17 years; and the other offences against C1 to 18 years. The judge then considered at some length the issues of the appellant's age, health and previous good character, and reduced the figure of 18 years to 16 years on count 9.

20. The judge then decided that the offending against C2 had to be marked by consecutive sentences of one year's imprisonment on each of counts 16, 17 and 18; but the sentences for the other offences against that victim should run concurrently.

21. We are grateful to Miss Howell for her eloquent and clear submissions, both in writing

and orally before us this morning. In summary, she submits that a sentence effectively of 21 years' imprisonment, before allowing for mitigation, was manifestly excessive and did not respect the totality principle.

22. She submits that the judge erred by placing the harm into category 2, rather than category 3. She says that the judge relied upon threats against C1, of which there was no evidence, and that the giving of gifts was insufficient in itself to elevate the harm. To suggest that C1 was vulnerable because her mother was absent from home and so was alone with the appellant involved double counting, because his abuse of trust was treated in itself as category A culpability. The aggravating features in this case should have been allowed for by upwards adjustments within the range for category 3A.

23. On totality, Miss Howell criticised the judge's approach, whereby he arrived at a sentence of 18 years' imprisonment for all the offending against C1, before allowing for mitigation. She says that this sentence was at the top of the range for a category 1A rape of a child under 13, and that the addition of a further three years for counts 16 to 18 went beyond that range before allowing for mitigation. Very fairly, Miss Howell accepted in her submissions before us this morning that the appellant makes no criticism of the judge's decision to reduce the length of sentence by 2 years for personal mitigation.

Discussion

24. We consider that no criticism can be made of the judge for treating the rape of C1 under count 9 as falling within category 2A. Plainly, there was a gross abuse of trust by the appellant, whether or not his wife was living at home. With respect, Miss Howell's submissions on harm wrongly characterised the judge's reasons as relying upon relatively trivial or unsupported matters in order to conclude that C1 was particularly vulnerable by reason of her personal circumstances. Instead, the judge carefully based his reasoning on the

approach taken by this court in *KC* and *DP*. Here the starting point was that, although the level of psychological harm was not severe, it was still, nonetheless, highly significant. In other words, the difference was one of degree. Added to that, C1 was relatively young when the offending began and the first rape took place. She was rendered more vulnerable by the repeat pattern of the offending and the absence of her mother to whom she might otherwise have looked for protection. That last factor does not involve double counting.

25. We do not consider that the uplift applied by the judge to the starting point of 13 years for the category 2A rape of a child under 13 produced a sentence which breached the totality principle. It was not manifestly excessive or wrong in principle. A comparison between the sentence of 18 years for the offences against C1, or a sentence of 21 years, taking into account also the offences against C2, with the upper end of the range for a category 1A rape of a child under 13 (that is 19 years' imprisonment), says nothing about whether the totality principle has or has not been respected. That range relates to a single offence under section 5 of the 2003 Act, falling within category 1A. Here, in addition to the category 2A s.5 rape, there were two other rapes of C1 as a child, other offences against C1 as a child, and offences against C2 when she was a child aged between 8 and 15.

26. The true question is whether the sentences arrived at were just and proportionate to the seriousness of the overall criminality, before allowing for mitigation. In our judgment, they were.

27. The remaining issue is whether the judge's allowance for personal mitigation could have been considered to have been inadequate so as to result in an overall custodial term which was manifestly excessive or wrong in principle. As we have indicated, this was not a point which counsel thought fit to pursue this morning, but it is nonetheless a matter which we have carefully considered.

28. As the guideline makes clear, previous good character does not attract any significant weight for offending as serious as this. In any event, the offending was persistent. Any previous good character was lost at an early stage in the offending. Time has passed since the offences, but there was evidence of C1 being told not to mention to anyone what had occurred. We have not been shown any positive evidence of subsequent good character which could have afforded any significant mitigation in relation to the offences against C1 and C2.

29. The judge did take into account the effect of prison on the appellant, having regard to his age and medical condition. He reduced the sentence by two years. The fact that prison may bear more harshly upon the appellant, as compared with a younger person in better health, had to be balanced against the serious nature of the offending in this case. We are unable to say that the judge made an insufficient allowance for this factor.

30. Even if the overall sentence might be considered severe, in our judgment it was not manifestly excessive. For these reasons the appeal is dismissed.
