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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 5th July 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GREEN

and

SIR ANDREW SMITH

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v -

RICHARD EDWARD HYDE-GOMES

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Mr P Jarvis appeared on behalf of the Attorney General

Miss C Gardner appeared on behalf of the Offender

J U D G M E N T
(Approved)

Thursday 5th July 2018

LORD JUSTICE HOLROYDE:

1. On 11th April 2018, in the Crown Court at Croydon, the offender, Richard Hyde-Gomes, was convicted by a jury of twelve sexual offences committed between 1997 and 2000.

2. On 12th April 2018 he was sentenced to a total of ten years' imprisonment. A Sexual Harm Prevention Order was made. Her Majesty's Attorney General regards that total sentence as unduly lenient and applies for leave to refer the case to this court, pursuant to section 36 of the Criminal Justice Act 1988, so that this court may review the sentencing.

3. The offender challenges the sentencing as wrong in principle and has applied to this court for leave to appeal against sentence. That application has been referred to the full court by the Registrar. We understand that the offender has also made an application for leave to appeal against his convictions, but that matter is not presently before the court.

4. The provisions of the Sexual Offences (Amendment) Act 1992 apply to each of the offences of which the offender was convicted. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as a victim of that offence. This prohibition remains in force unless varied in accordance with the Act. It is, accordingly, necessary that any report of these proceedings be anonymised. We shall refer to the victim and to other relevant persons by the use of initials.

5. It is sufficient for present purposes briefly to summarise the facts. The offender was born on 26th January 1967 and so is now aged 51. In about 1997 or 1998 he began a relationship with a

woman to whom we shall refer as "T", who at that time lived in Portsmouth. T had four children. The two youngest children were a daughter, "CB", who was born on 6th December 1985 and so was aged 11 or 12 when the offender came into her life, and a son, "C", who was born on 20th June 1991.

6. On 10th June 1999, T gave birth to her fifth child, a daughter, "B", whose father is the offender.

7. The offender cohabited T initially at her home in Portsmouth. In about March 1998 they decided to live together in the Greater London area. The two older children remained in Portsmouth in the care of their father, but CB and C moved to London with their mother. Their new family home was originally located in Pontefract Road.

8. In about early April 1998, CB went back to Portsmouth and lived with her father and older siblings until about December of that year, shortly before her thirteenth birthday. She then returned to Pontefract Road because she was concerned about her younger brother C and perhaps also because she wished to change her home.

9. In October 1999 the offender, together with T, CB, C and B, moved to a new home in Avenue Road. They remained there for the rest of the period covered by the charges.

10. CB gave evidence that she was the victim of sexual abuse by the offender at each of the addresses we have mentioned. Her allegations were reflected in eleven counts on an indictment which alleged indecent assault, contrary to section 14 of the Sexual Offences Act 1956 and a twelfth count which alleged attempted rape, contrary to section 1 of the Criminal Attempts Act 1981. In each of counts 1 to 11, the Particulars of Offence pleaded that between 1st January

1997 and 21st March 2000 the offender had indecently assaulted CB, a girl under the age of 14 years. The Particulars of Offence were followed by a brief note (in square brackets) of the nature and location of the sexual conduct alleged. Counts 2, 4, 7, 8 and 10 were each stated to be a "multiple incident count pursuant to rule 10.2(2) Criminal Procedure Rules 2015". Count 12 (the offence of attempted rape) was charged on the specific date of 10th June 1999, which was the day when B was born.

11. CB gave evidence that sexual abuse began at the home in Portsmouth, when she had climbed into bed with her mother and the offender. She said that when her mother went downstairs he touched and rubbed the area around the entrance to her vagina. This specific incident was charged in count 1. CB said that she was upset by what happened but did not tell her mother. Her evidence was that thereafter, when she was alone with the offender in the Portsmouth house, he would take the opportunity to touch her in a similar way. This was charged in count 2.

12. Following the move to Pontefract Road, CB said that there were occasions when she was alone in the house with the offender. It appears to have been common ground between prosecution and defence that at around that time he was drinking to excess. CB said that he was prone to violent outbursts and had assaulted CB herself, her mother and her brother C. She was frightened of him. She said that when they were alone together, the offender forced her to suck his penis. Her evidence in this respect was reflected in count 3, which was particularised as "First occasion at Pontefract Road when he made her suck his penis in lounge"; and in count 4, which was a multiple incident count alleging similar conduct. CB's evidence was that if she did not comply with the offender's wishes, he would grab her by the back of her head and force her mouth on to his penis. If he became angry as a result of her reluctance, he would later take out his anger on CB, on T or on C.

13. CB also gave evidence of a specific occasion in Pontefract Road when she said that the offender laid her on the floor, took off her clothes and licked the entrance to her vagina. This was charged in count 5.

14. Count 12, as we have said, related to the day when B was born. Whilst T was in hospital, CB said that the offender took off her clothes and began to rub his penis against her vagina from behind. CB believed that he was going to penetrate her vagina. She asked him to stop, saying that she was a virgin. The offender continued to rub his penis against the cheeks of her bottom but did not, in fact, penetrate her.

15. CB's evidence was that after the move to Avenue Road there were frequent occasions (charged in counts 6 and 7) when the offender forced her to suck his penis. On one occasion he licked her vagina (count 9).

16. He would drive her to and from a dance class on Wednesday evenings after school. She said that on the way home he often stroked her vagina under her clothing (count 8). On occasions, he would stop the car, take her into an alleyway and force her to suck his penis (count 10).

17. Count 11 related to a specific occasion when the offender took CB to visit his parents. Whilst at their house he again licked the area at the entrance to her vagina.

18. In early 2000, CB told a teacher about this sexual abuse. The police were informed. CB gave an account of what had happened. The offender was arrested and interviewed. He denied the offences. He was not charged. CB was for a time taken into care.

19. In 2015, CB contacted the offender by telephone. She told him that she wanted him to apologise to her for his abuse of her. It was the prosecution case that he did so and that his apology over the telephone was recorded by CB. The offender was then arrested and interviewed in December 2015. He accepted that he had made an apology but said that it related to physical violence towards T and the children. He denied that he had ever sexually assaulted CB. He maintained his denial throughout the trial. He gave evidence to the effect that the allegations were untrue. As we have indicated, he was convicted by the jury on all counts.

20. In a Victim Personal Statement, CB said that her life changed for ever when she made her initial allegations against the offender in 2000. She had to go into care because her mother took the side of the offender. She was later able to live with her father in Portsmouth but for many years she had virtually no relationship with her mother. She had missed seeing her younger brother C, to whom she always felt close and who she wanted to protect, growing up. In her adult personal life, she indicated that she feels unable to trust others and for that reason has struggled to maintain relationships. She has a partner and children but intrusive thoughts of the sexual abuse she suffered give rise to difficulty in sexual relations and causes her to be unduly protective about her children.

21. Prosecuting counsel prepared a sentencing note for the Recorder who conducted the trial. It contained submissions as to the appropriate categorisation under the sentencing guidelines relating to the offences under the Sexual Offences Act 2003 which are the modern equivalent of the historic offending of which the offender had been convicted.

22. In his sentencing remarks, the learned Recorder said that very soon after entering T's household the offender had effectively begun a campaign of sexual abuse of CB. He said that

CB's life had been made "a living hell"; that she had been assaulted on almost a daily basis; and that she had been "effectively robbed of a childhood". He noted that CB remained affected by this abuse. He recognised that he must sentence within the limits of the maximum sentences for the offences under the 1956 Act but must also have regard to the current sentencing guidelines for equivalent offences under the 2003 Act. The Recorder took into account that the offender had no relevant previous convictions. He imposed the following sentences: on count 1, two years' imprisonment; on count 2, five years' imprisonment to run consecutively to other sentences; on counts 3, 4, 6, 7, 10 and 12, five years' imprisonment concurrent; on counts 5, 9 and 11, three years' imprisonment concurrent; and on count 8, two years' imprisonment concurrent. Thus, the total sentence was, as we have indicated, ten years' imprisonment.

23. We are grateful to Mr Jarvis for his submissions on behalf of the Attorney General and to Miss Gardner for her submissions on behalf of the offender, made with the advantage that she was trial counsel and therefore very familiar with the details of the case.

24. On behalf of Her Majesty's Attorney General, Mr Jarvis submits that the total sentence was much too short. He points out that the maximum sentence for the offence of attempted rape charged in count 12 was, at the time of the offending, and is now, life imprisonment. In modern terms, he submits, the offence would be a category 2A rape offence, for which the guideline indicates a starting point of ten years' imprisonment, with a range from nine to thirteen years. It was an offence of attempted rape, rather than the full offence. On that basis, some reduction might be made from the guideline starting point. However, the offence was aggravated by a number of other features. Overall, therefore, submits Mr Jarvis, count 12 alone merited a sentence of around ten years' imprisonment. That was the total sentence imposed for all of the offending, including, as we have indicated, frequent offences of indecent assault by conduct which today would be charged as oral rape.

24. On behalf of the offender, Miss Gardner resists the Attorney General's application and also seeks leaves to appeal against the total sentence. Her submissions reflect in large part a submission which we understand she also advances in support of her pending application for leave to appeal against conviction. She tells us that, at a late stage of the trial, the jury enquired whether the specification of an offence (presumably the offence charged in count 3) as taking place in the lounge was critical to the charge. Miss Gardner submits that in answering that question, the learned Recorder used terms which had the effect of suggesting that the location of the offending was irrelevant. Having regard to the way in which the counts of indecent assault were particularised, Miss Gardner will submit (in relation to her application for leave to appeal against conviction) that the jury were thereby caused to take an entirely wrong approach and that the convictions are accordingly unsafe.

25. So far as sentencing is concerned, she submits that the effect of that suggested misdirection was that, in relation to counts 5 and 9, counts 3 and 6, and counts 7 and 10, there was "duplicitous sentencing", which was wrong in principle. That phrase, as we understand it, reflects Miss Gardner's concerns in relation to the direction about location and her concerns that it is difficult to establish precisely how many offences the jury found proved against the offender.

26. We understand those concerns, which are no doubt to be considered in the application for leave to appeal against conviction; but the grounds of appeal against sentence are, in our view, misconceived. If leave to appeal against conviction is in due course granted and if that appeal succeeds, then of course the sentences will fall away. At present, however, there are valid and subsisting convictions of twelve serious sexual offences for which the court was bound to impose appropriate sentences. No separate ground of appeal is advanced in relation to the length

of any individual sentence or in relation to the total term of ten years' imprisonment. We regard the grounds of appeal against sentence as wholly unarguable and we therefore refuse the application for leave to appeal.

27. We turn to consider the merits of the Attorney General's submission that the sentencing was unduly lenient. We must begin by dealing with some preliminary matters. The terms in which the indictment was drafted gave rise to serious difficulties at the sentencing stage. First, the drafting of the multiple offence counts was seriously deficient. Secondly, the prosecution made a belated attempt to focus on CB's precise age at the time of particular offences in circumstances where the significance of the relevant dates had not been identified or appreciated earlier in the proceedings.

28. As to the multiple incident counts, we have already indicated the terms in which they were drafted. Rule 10.2(2) of the Criminal Procedure Rules states:

> "More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct, having regard to the time, place or purpose of commission."

It is, however, necessary for the particulars of the multiple offending to make clear the number of occasions, or the minimum number of occasions, on which the offence is alleged to have been committed. In *R v A* [2015] EWCA Crim 177, [2015] 2 Cr App R(S) 12, this court pointed out that the purpose of multiple incident counts is to enable the prosecution to reflect a defendant's alleged criminality when the offences are so similar and numerous that it is inappropriate to indict each occasion, or a large number of different occasions, in separate charges. At [47] of the judgment of the court, Fulford J said this:

> "… This provision allows the prosecution to reflect the offending in these circumstances in a single count rather than a number of specimen counts. However, when the prosecution fails to specify a sufficient number of occasions within the multiple incident count or counts, they are not making proper use of this procedure. In cases of sustained abuse, it will often be unhelpful to draft the count as representing, potentially, no more than two incidents. Indeed in this case, if there had been a multiple incident count alleging, for example, 'on not less than five occasions' with an alternative of one or more specimen counts relating to single incidents for the jury to consider if they were unsure the offending had occurred on multiple occasions, the judge would have had a solid basis for understanding the ambit of the jury's verdict and he would have been able to pass an appropriate sentence. …"

29. In the present case, the prosecution has failed to comply with that requirement. It was therefore not possible for the learned Recorder to know whether the jury had convicted of a particular multiple incident count on the basis that the offending had occurred twice or on the basis that it had occurred on a greater number of occasions. In our judgment – and as Mr Jarvis fairly concedes – the only proper course in these circumstances is for this court to consider the sentencing on the footing that each of the multiple incident counts related to two occasions of committing the relevant offence.

30. Turning to CB's age, we have already noted that each of the indecent assault charges (counts 1 to 11) related to a period between 1st January 1997 and 21st March 2000. At the start of that period CB was aged 11 years one month. At the end of it she was aged 14 years and three months and was therefore no longer "a girl under the age of 14 years". We do not know why that end date was chosen and it is not necessary for present purposes to resolve that question.

31. The important point for present purposes relates to CB's age at the time of the offences charged in counts 3 and 4. Those offences were committed when CB was living at the

Pontefract Road property. She went there when she was 12. She left after a short time to return to her father's home in Portsmouth. She returned to Pontefract Road a few days before her thirteenth birthday and was still aged 13 when the family moved to Avenue Road. If the offending in either count 3 or count 4 was committed when she was aged 12, then the equivalent modern offence under the 2003 Act would be rape of a child aged under 13. Moreover, if she was under 13 when either or both of those offences were committed, the provisions of section 236A of the Criminal Justice Act 2003 would be engaged. However, the significance in this regard of CB's thirteenth birthday was not taken into account when drafting the indictment. Both count 3 and count 4 covered a period straddling that birthday and count 4 alleged multiple offending which might have occurred either before or after the birthday – or indeed both. Nor, it seems, was any particular focus placed in the course of the evidence on the date of specific conduct on the part of the offender in relation to the date of CB's thirteenth birthday. On the face of it, CB was saying that sexual abuse by the offender was resumed almost as soon as they moved to Pontefract Road. But Miss Gardner was able to point to evidence by T which was or may have been inconsistent with that assertion and may have meant that the offending did not occur until after CB had returned from living for a time with her father in Portsmouth.

32. These problems were simply not appreciated until after sentence had been passed. The prosecution then rightly brought the matter back before the learned Recorder, pursuant to the slip rule, so that the application of section 236A of the 2003 Act could be considered. Notwithstanding the deficiencies in the drafting of the indictment, it was for the learned Recorder to determine, if he could, CB's age at the time of the offending charged in counts 3 and 4. Having listened to the detailed submissions of counsel, the learned Recorder concluded that he could not see evidence which clearly established that the offence in count 3 had been committed before CB's thirteenth birthday. As to count 4, he noted that the prosecution had accepted that it was not entirely clear whether CB had reached her thirteenth birthday. He

therefore concluded that it would be wrong for him to make a judgment based on unclear evidence that CB was aged under 13 at the time of those offences. He therefore refused to vary his sentencing.

33. It is accepted by the Attorney General that, against that background, this court must proceed on the basis that the offences charged in count 3 and count 4 were committed after CB's thirteenth birthday. The problem which we have summarised does, however, illustrate the need in cases involving allegations of sexual abuse against children for careful thought to be given before the trial begins as to the potential significance of particular dates or particular birthdays. Guidance to that effect was given by this court at [30] of the well-known decision in *R v Forbes* [2016] EWCA Crim 1388. If that guidance were followed, the indictment could appropriately be drafted. Moreover, appropriate evidential focus could be brought to bear on relevant dates. Regrettably, that was not done in this case.

34. Having dealt with those preliminary matters, we can now turn to the submissions on the issue of undue leniency. The Sentencing Council's definitive guideline on sentencing for sexual offences relates to offences contrary to the 2003 Act. In a case such as this of historic sexual offending, subject to the provisions of the 1956 Act, the correct approach to sentencing is set out in Annex B of the current guideline. It is the subject of further guidance given by this court in *Forbes*. The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. But the sentence is limited to the maximum available at the date of the commission of the offence. The sentencer should decide what would be the equivalent offence or offences under the modern legislation, should consider the guidelines applicable to the equivalent modern offences, and should use those guidelines in a measured and reflective manner to arrive at the appropriate sentence.

35. In relation to count 12, we accept Mr Jarvis' submission that the guideline applicable to rape under the 2003 Act relates to an offence for which the maximum sentence has not changed since the 1956 Act and that accordingly the modern guideline can be applied without a need to take into account any change in the maximum penalty. If the full offence had been committed against CB, we agree with Mr Jarvis' submission that it would be a category 2A offence. It involved harm category 2 because CB, as a young child in the care of the man who was effectively her stepfather, was particularly vulnerable due to her personal circumstances; and it involved level A culpability because the offender abused his position of trust towards the child who was in his care and, as the Recorder found, had on many recent occasions used violence against her.

36. The guideline for the full offence therefore indicates a starting point of ten years' custody and a range from nine to thirteen years. It must be remembered that the offence of which the offender was convicted was attempted rape, rather than the full offence. On the other hand, it was aggravated by being committed in CB's home against the background of her having been the victim of previous sexual abuse in her previous home. The only substantial mitigation available to the offender, in our view, was that he had no relevant previous convictions.

37. Counts 3, 4, 6, 7 and 10 all involved indecent assault by compelling CB to suck the offender's penis. Under the 2003 Act those offences would be charged as rape and would similarly be category 2A offences. Here, however, it plainly is necessary to apply the modern guideline in a measured way, bearing in mind that the maximum penalty for the offences of which the appellant has been convicted is ten years' imprisonment. Nevertheless, each of those offences was, in our judgment, a grave example of the offence of indecent assault on a girl aged under 14 years. Each involved an abuse of trust and each contributed to the serious and enduring harm which CB has suffered.

38. The other offences of indecent assault were somewhat less serious than those involving what would now be charged as oral rape, but were nonetheless serious offences. They were committed against a vulnerable child who was cowed by the treatment she had received from the man who occupied the position of her stepfather.

39. We note that, in his sentencing remarks, the Recorder made no reference to the equivalent offences under the 2003 Act or to the relevant current sentencing guideline. Although he identified the specific sentence imposed on each count, he did not give a detailed explanation as to how he had arrived at them or as to how he derived them from a measured reference to the sentencing guideline. At an early stage of the sentencing hearing he had indicated to counsel that he had a total sentence in mind but he did not at any stage elaborate upon his reasoning for coming to that total sentence; nor, indeed, did he indicate whether it remained the same at the conclusion of counsel's submissions.

40. Mr Jarvis invites our attention to the statement in the sentencing guideline for rape offences that "offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate". Mr Jarvis submits that if the offending had taken place more recently and if the offender had been convicted of the equivalent offences under the 2003 Act, the court may well have had that passage firmly in mind.

41. In our judgment, the gravity of the overall offending falls somewhat short of the level contemplated by that passage in the guideline. Nevertheless, this was a very grave case of sexual offending against a vulnerable child. Adopting the approach which we have indicated to the multiple incident counts, the offences of which the offender was convicted include eight instances of what would now be charged as oral rape, one offence of attempted vaginal rape and

seven offences involving touching or licking CB's vagina. For that catalogue of serious offending, we have no doubt that a total sentence after trial of ten years' imprisonment was unduly lenient. The total sentence failed to reflect the seriousness of the individual offences and of the offending as a whole. It did not impose just and proportionate punishment for the repeated sexual abuse of a child.

42. In those circumstances and for those reasons, we grant leave to refer. We conclude that the sentencing was unduly lenient. In our judgment, the least total sentence which could properly have been imposed was one of sixteen years' imprisonment.

43. On each of counts 2, 3, 4, 6, 7 and 12 we quash the sentences of five years' imprisonment and substitute concurrent sentences of eight years' imprisonment. On count 10, we quash the sentence of five years' imprisonment and substitute for it a sentence of eight years' imprisonment, to run consecutively to the other sentences. The sentences on counts 1, 5, 8, 9 and 11 and the Sexual Harm Prevention Order remain as before.

44. Thus, the total sentence which the offender must serve is increased from ten years' imprisonment to sixteen years.

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