

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE PHILLIPS

MR JUSTICE JULIAN KNOWLES

R E G I N A

v

DAVID ALLEN

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
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(Official Shorthand Writers to the Court)

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Mr S Evans appeared on behalf of the **Appellant**

Miss F Wilmott appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

LADY JUSTICE NICOLA DAVIES:

1. On 16 January 2019 in the Crown Court at Liverpool, the appellant was convicted of three offences. On 8 February 2019, he was sentenced by His Honour Judge Watson QC, the trial judge, as follows.
 - Counts 1 and 3, assault of a child under 13 by penetration, a special custodial sentence under section 236A of the Criminal Justice Act 2003 (“the 2003 Act”) of 11 years and six months, comprising a custodial term of 10 years and six months and an extended licence of one year to run concurrently with the sentence on Count 2;
 - Count 2, rape of a child under 13, a special custodial sentence under section 236A of the 2003 Act of 14 years, comprising a custodial term of 13 years and an extended licence of one year, to run consecutively to the sentence imposed on 12 November 2014 in the Crown Court at Warrington.
2. The appellant appeals against sentence by leave of the single judge.
3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, no matter relating to the victim 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.

The facts

4. In 2011 the appellant was in a relationship with the mother of the victim, BB. In 2017, when BB was 14, she disclosed that when she was younger she had been sexually assaulted by the appellant on three occasions on the sofa in the living room. The first assault occurred when BB went downstairs to get a drink, the appellant was in the kitchen, he was drunk. He digitally penetrated BB’s vagina causing pain. The appellant stopped when he heard someone coming and told BB not to tell anyone because she would get into trouble. About a week later the appellant went upstairs and told BB to go downstairs. He asked her if she wanted to watch a film before vaginally raping her. About a month later the appellant digitally penetrated BB’s vagina when other members of the family were upstairs. The appellant and BB’s mother separated a relatively short time after the final offence. BB has not seen him since.
5. BB thought the offending occurred in 2013 when she was 10 or 11. At trial there was material before the court which indicated the likely year to have been 2011; BB was nine in July of that year.
6. In 2013 the appellant was arrested and remanded in custody for an offence of sexual activity with a female with a mental disorder by penetration. The victim was his 20-year-old natural daughter. She lacked capacity to consent due to a learning disability. The appellant pleaded guilty and at Warrington Crown Court was sentenced to 14 years’ imprisonment. He was also sentenced in respect of ten offences of possession of extreme pornographic images (bestiality) to a term of four months’ imprisonment on each count to

run concurrent to each other and to the 14-year sentence.

7. Following the disclosure by BB, the appellant was interviewed by the police in 2017 and denied the allegations.
8. In sentencing the appellant at Liverpool Crown Court, the judge was provided with the 2014 Pre-Sentence Report prepared for the purpose of the Warrington Crown Court offences and an addendum to the report to take account of the offences involving BB. The 2014 report did not assess the appellant as being dangerous. The 2017 report assessed the appellant as posing a high risk of causing serious harm to children, particularly girls, through the commission of sexual offences. It stated that the appellant was able to exploit his relationship with BB's mother in that it allowed him to target BB as there were occasions when he was alone with her.
9. In sentencing the appellant, the judge did so upon the basis that BB would have been eight or nine at the time of the commission of the offences. The judge accepted that the appellant had told BB not to tell anyone. Following the first offence, the appellant asked BB if she had told anyone and he reassured her that she had done the right thing by not telling anyone, saying she would get into trouble. The judge found that the impact upon BB was very significant in that it changed her behaviour because it put her in a vulnerable position in relation to other adult males; the evidence being that she had had sexual contact with an older male who had been convicted of sexual offences in relation to her. The judge found that the impact of the appellant's offending resulted in severe psychological harm to BB and even if that was not correct it represented such a seriously aggravating feature so as to move the offending from Category 3A to 2A in the relevant Sentencing Council Guidelines.
10. The judge noted that having committed the offences on BB in 2014, he committed offences against his own daughter and was presently serving a 14-year sentence.
11. The judge concluded that the appellant is dangerous. He found that the appellant is an offender of particular concern. As such a sentence pursuant to section 236A of the 2003 Act as amended was appropriate. The judge was satisfied that all three offences were Category 2A offences within the Sentencing Council Guidelines: Category 2 because it was severe psychological harm, the aggravating features being that the appellant told BB not to tell anyone and his consumption of alcohol.
12. Within the Sentencing Council Guidelines for the offence of rape the starting point is 13 years' imprisonment. For the offences of assault by penetration the starting point is 11 years' imprisonment. The judge took account of the principle of totality. He stated that were it not for the fact that the appellant was already serving 14 years, the custodial element of the sentence would be 16 years on Count 2 and a lesser offence on Counts 1 and 3. To reflect totality, the judge made a downward adjustment of the custodial term from 16 to 13 years but stated that had to be expressed as a 14-year sentence because of the extended licence of one year under section 236A.

The 2014 sentence

13. The respondent has provided the following detail for the purpose of this appeal. The appellant pleaded guilty to all offences. The circumstances of the offence in which the appellant's daughter was the victim (SG) were that between 1 October 2012 and 30 November 2013 the appellant had vaginal sexual intercourse with her. SG was assessed as having a mental disorder in the form of a moderate learning disability. As a result she did not have the capacity to consent to sexual activity. SG was assessed as extremely vulnerable, she lived in supported accommodation. The appellant had not been present in his daughter's life between the ages of 12 and 18, but was re-introduced to her when she became an adult. He was aware of her learning disability. They referred to each other as father and daughter.
14. As a result of the sexual intercourse between the appellant and SG, she became pregnant. SG gave birth to a daughter. The child has been removed from her care. SG said the sexual intercourse had taken place on several occasions. She thought that her father would stop loving her if she did not agree to have sex with him.
15. In a report dated 27 October 2014, a consultant forensic psychologist described how SG's disability meant that she has very little personal resilience or coping ability. The psychologist concluded that the effect on SG of the appellant's offending would have life-long consequences. They would be ameliorated but not undone by long-term care and support in order to try and repair some of the psychological damage caused by the perception that SG had lost her father for a second time and had lost her baby.

Grounds of appeal

16. The essence of the appeal is that the sentence passed in 2019, which is to run consecutively to the 2014 sentence, results in a term of imprisonment of 27 years. The Sentencing Council Guidelines for Offences Taken into Consideration and Totality state that the approach to be taken where an offender is serving a determinate sentence in respect of offences committed before the sentence to be imposed is that the court is to consider what the sentence length would have been if the court had dealt with the offences at the same time and ensured that the totality of the sentence was just and proportionate in all the circumstances. If it is not, an adjustment should be made to the sentence imposed for the latest offence.
17. The appellant does not contend that His Honour Judge Watson QC failed to follow that approach. The submission is that he failed to apply it properly in that the adjustment made was insufficient to ensure that the totality of the sentence was just and proportionate.

The respondent's submissions

18. It is the respondent's case that when all relevant features of both sets of offending are taken into consideration the total effective sentence of 27 years is not manifestly excessive. These were distinct sets of offences committed at least a year apart with little factual similarities, save that they were serious sexual offences committed against particularly vulnerable individuals. Consecutive sentences were clearly appropriate and the judge

made an appropriate adjustment to reflect totality.

Discussion and conclusion

19. The 2019 offences were committed at least a year before the offence involving the appellant's biological daughter. The 2019 offences took place in the victim's home where the appellant was staying. On at least one occasion he was drunk. The appellant took advantage of his relationship with BB's mother and of BB's young age. He gave no thought to the consequences for BB. There have been serious consequences which have made her vulnerable to further sexual exploitation by an older male. The judge correctly found that there was severe psychological harm and identified appropriate aggravating features. The judge placed Count 2 within Category 2A of the Sentencing Council Guidelines, a starting point of 13 years' imprisonment and a range of 11 to 17 years. No issue is taken with this categorisation. Aggravating features which entitled the judge to increase the starting point from 13 years to 16 years included the age of the victim, the separate offences of assault by penetration, location, the victim was warned not to tell anyone and on one occasion the appellant had been drunk.
20. The sentence of 13 years' imprisonment plus the one-year extension was imposed to reflect the totality of the three offences committed against a young girl. She is the daughter of the woman with whom the appellant was in a relationship, as a result of which he was able to stay at the home of the victim and was able, on occasion, to be alone in a room with her. He took full advantage of that situation in committing the three offences. We accept that his offending has had a significant impact on his victim which has led to her being exploited sexually by another older man.
21. It is clear that the judge had in mind the principle of totality. We accept that the only issue is whether there was a sufficient downward adjustment to reflect what was said in the Sentencing Council Guidelines, namely consideration should be given to what sentence would have been passed if all sentences were before the same court and dealt with at the same time. The 2014 sentence and the 2019 sentence are factually separate in respect of the offences but together demonstrate the gravity of the offending of this appellant in respect of two vulnerable young females. Also, they demonstrate the significant risk which he poses to all young girls.
22. We do not seek to minimise the gravity of the appellant's offending, still less its impact upon either of its victims. However, we have concluded that the totality of the sentence passed in Liverpool Crown Court in February 2019 upon Count 2 which resulted in a total 27-year sentence is manifestly excessive. Applying the principle of totality, we quash the sentence of 13 years' custody with a one-year extension on Count 2 and substitute for it a sentence of 10 years and six months' custody, with a one-year extension, pursuant to 236A of the 2003 Act. That sentence is to run consecutively to the sentence imposed on 12 November 2014 in the Crown Court at Warrington. To this extent, the appeal is allowed.

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

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