IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202001179/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Neutral Citation Number: [2020] EWCA Crim 1386

Wednesday 9 September 2020

Before:

LORD JUSTICE BEAN
MR JUSTICE LAVENDER
MRS JUSTICE COCKERILL DBE

REGINA

V

DANIEL MCKEOWN

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MR R JONES appeared on behalf of the Appellant.

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J U D G M E N T

MR JUSTICE LAVENDER: This is an appeal against sentence brought with permission granted by the single judge.

On 6 March 2020, in the Crown Court at Bolton, the appellant was sentenced to a total of 6 years' imprisonment on nine counts, having pleaded guilty to counts 1 to 7 at the plea and trial preparation hearing on 10 April 2019 and to counts 8 and 9 on the day of trial 20 January 2020.

The offence on each of counts 1 to 8 was sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003. The offence on count 9 was causing or inciting a child under 13 to engage in sexual activity, contrary to section 8(1) of the Sexual Offences Act 2003. The victim in each case was the appellant's niece, whom we shall refer to as "A". Pursuant to the Sexual Offences (Amendment) Act 1992, no matter relating to A shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.

The appellant, who was of previous good character, is about 5 years older than A. He was born on 21 April 1996. He is now 24, and was 23 when he was sentenced. But he was aged between 11 and 16 when he committed these offences. They all took place at A's home, which the appellant used to visit most weekends.

Six of the offences consisted of the appellant touching A's vagina. He did this: when he was 11 and A was 6 (count 1); when he was 12 and A was 7 (count 2); when he was 13 and A was 8 (count 3); when he was 14 and A was 9 (count 5); when he was 15 and A was 10 (count 7); and when he was 16 and A was 11 (count 8). The remaining three offences involved A touching the appellant's penis. This happened: when he was 13 and A was 8 (count 4); when he was 14 and A was 9 (count 6); and when he was 16 and A was 11 (count 9).

Understandably, this conduct has had a considerable effect on A; as described in her statement. She first told her mother about these offences in November 2017, a week after the appellant moved into their home as a result of difficulties he was experiencing in his own home. Following a number of discussions within the family, on 11 December 2017 the appellant, accompanied by his father, attended Wigan police station and made a number of admissions, which resulted in his arrest. He gave no comment during his initial police interview, but he did make some more limited admissions during a second interview on 20 September 2017 after officers had spoken to A. These were then a considerable delay until he was charged on 6 February 2019.

The appellant told the probation officer that he did not know why he committed the offences. He said that he did not find the victim sexually attractive and denied being sexually aroused when offending. The appellant described feeling guilty afterwards. Issues of sexual curiosity and sexual gratification were considered possible motivations. He did not attempt to blame the victim or justify his actions. He was assessed as presenting a low risk of reoffending, a medium risk of reconviction for a sexual offence and a high risk of sexual and emotional harm to female children.

The Recorder considered that counts 1 to 8 fell within category 2B in the sentencing guidelines for the section 7 offence. The harm was in category 2 because of the touching of naked genitalia and the culpability was in category B because none of the factors in category A were present. No complaint is made about that assessment. The starting point for a category 2B offence in the case of an adult offender is 2 years' custody with a range of 1 to 4 years.

The Recorder did not deal separately with the guideline applicable to count 9, but the starting point and the range would have been the same, on the basis that the appellant's offence fell

within category 3B in the guideline for the section 8 offence. None of the aggravating factors listed in the guideline was present, save perhaps for the location of the offence, since these offences were committed in A's home, but the Recorder did not refer to that factor.

As to mitigating factors, the appellant had no previous convictions, he had expressed remorse, his age and lack of maturity affected his responsibility for the offence, the delay was also a mitigating factor and the Recorder considered that a discount of 25% was appropriate for the appellant's guilty pleas, having regard to his voluntary attendance at the police station and the admissions made then. No complaint is made about the amount of the discount.

The Recorder also had regard to the Sentencing Council's Definitive Guideline on Totality; which required him to impose a total sentence which reflected the totality of the appellant's offending behaviour but which was no more than was just and proportionate. However, although he referred to the appellant's age, the Recorder did not expressly refer to the Definitive Guideline on Sentencing Children and Young People. The Recorder concluded that the total sentence after trial would have been 8 years' custody. Reducing that by 25% gave a total sentence of 6 years. This total was made up of five consecutive sentences or pairs of sentences, one for each year in which the appellant offended. The Recorder imposed sentences of: 4 months for the offence (count 1) committed when the appellant was 11; 4 months for the offence (count 2) committed when he was 12; 10 months for the offences (counts 3 and 4) committed when he was 13; 12 months for the offences (counts 5 and 6) committed when he was 14; 12 months for the offence (count 7) committed when he was 15; and 30 months for the offences (counts 8 and 9) committed when he was 16.

The grounds of appeal are as follows: (i) the total sentence of 6 years' imprisonment was too long; (ii) insufficient regard was given to the age of the appellant when the offences first

began and (iii) insufficient regard was given to the very long delays in dealing with the case.

Paragraphs 6.1 to 6.3 of the Guideline on Sentencing Children and Young People states as follows:

> "6.1 There will be occasions when an increase in the age of a child or young person will result in the maximum sentence on the date of the *finding of guilt* being greater than that available on the date on which the offence was *committed* (primarily turning 12, 15 or 18 years old).
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> 6.2 In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the *commission* and the *finding of guilt* of the offence but when this occurs the purpose of sentencing adult offenders has to be taken into account, which is:
> - the punishment of offenders;
> - the reduction of crime (including its reduction by deterrence);
> - the reform and rehabilitation of offenders;
> - the protection of the public; and
> - the making of reparation by offenders to persons affected by their offences.
>
> 6.3 When any significant age threshold is passed it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to that maximum may be appropriate."

These paragraphs of the guideline reflect guidance given by this court in earlier cases: see the cases cited in R v Amin [2020] Cr App R(S) 36. We note that neither counsel referred the judge to these paragraphs of the guideline or to the cases just mentioned. Had they done so, this appeal may well have been unnecessary.

The appellant passed two significant age thresholds, ie 12 and 15 during the course of his offending and a third, ie 18, between the end of his offending and his pleading guilty. If he had been sentenced when he was under 18, then the appellant would not have been sentenced to detention under section 91 of the Powers of Criminal Courts (Sentencing) Act

2000 because that section does not apply to offences under sections 7 and 8 of the Sexual Offences Act 2003.

As for a detention and training order or orders, the effect of section 100 of the Powers of Criminal Courts (Sentencing) Act 2000 is that, if he had been sentenced when he was 11, the appellant could not have been given a detention and training order. If he had been sentenced when he was 12, 13 or 14, he could not have been given a detention and training order unless he was a persistent offender. If he had been sentenced when he was 15, 16 or 17 he could have been given a detention and training order or orders. Whenever he was sentenced; no individual detention and training order could have been for longer than 24 months and the aggregate of any consecutive orders could not have been longer than 24 months.

Given that the appellant was being sentenced for a series of offences which continued until he was 16, it is appropriate to apply paragraphs 6.2 and 6.3 of the guideline by asking what sentence was likely to have been imposed and what was the maximum sentence which the court could have imposed if the appellant had been sentenced for these nine offences, on one occasion, when he was 16. The maximum sentence which the court could have imposed when the appellant was 16 was a detention and training order or orders for a total of 24 months. The likely sentence, given the number, duration and severity of his offences, but given also his entitlement to a 25% discount for his guilty pleas, was a detention and training order or orders for a total of 18 months.

Applying paragraph 6.2 of the guideline, it is appropriate to take 18 months as a starting point. That can be increased as a result of taking into account the purpose of sentencing adult offenders and it is appropriate to do so. However, applying paragraph 6.3, a sentence at or near the maximum of 24 months which the court could have imposed when the appellant

was 16 may be appropriate and it is rarely appropriate to exceed that maximum. We do not consider that this is one of those rare cases where that maximum should be exceeded.

Accordingly, we quash the sentences imposed by the Recorder. We impose instead concurrent sentences on each of counts 7, 8 and 9 of 2 years' imprisonment with no separate penalty on counts 1 to 6. The total sentence is therefore 2 years' imprisonment. This sentence will not be suspended. There are factors indicating that it might be appropriate to suspend the sentence, but the prevailing consideration is that appropriate punishment can only be achieved by immediate custody.

Finally, we mention one small point. In his sentencing remarks the Recorder stated that the statutory surcharge applied. In fact, it did not, because of the date of the offences.

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