Neutral Citation Number: [2021] EWCA Crim 1685

Case No: 202103033 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT PORTSMOUTH
His Honour Judge Mousley QC
S20210131

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2021

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE JACOBS
and
HIS HONOUR JUDGE KEARL QC, RECORDER OF LEEDS

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REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

REGINA	**Applicant**
- and -	
AAL	**Respondent**

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Jonathan Polnay appeared on behalf of the Attorney General
Paul Fairley appeared on behalf of the Respondent

Hearing dates: 28.10.2021

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Approved Judgment

"**Covid-19 Protocol:** This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be **2pm on Friday, 12 November 2021**."

Lady Justice Thirlwall DBE:

1. Pursuant to the provisions of the Sexual Offences (Amendment) Act 1992 no matter relating to the victim of the offences to which we shall refer in the course of this judgment may be included in any publication if it is likely to lead members of the public to identify that person as the victim of any of the offences. This prohibition applies unless waived or lifted in accordance with s3 of the Act. The respondent's name is anonymised to protect the victim's identity.

2. On 20 May 2021, having pleaded guilty in the Magistrates' Court the respondent was committed to the Crown Court at Portsmouth for sentence. On 26 August 2021 at the Crown Court he was sentenced as follows:

   i) For Indecent Assault on a Girl under 14 contrary to Section 14 of the Sexual Offences Act 1956: 2 year Community Order with requirement to undertake 40 days' Rehabilitation Activity and 200 hours unpaid work.

   ii) For two charges of making an indecent Photograph of a Child contrary to s1(10)(a) of the Protection of Children Act 1978: 2 year Community Order on the same terms as the first charge.

3. He was also made subject to:

   i) a Sexual Harm Prevention Order of 5 years duration; and

   ii) a 5 year Restraining Order.

4. As a result of the convictions he was required to notify the police of his whereabouts for a period of 5 years and was liable to be included in the relevant list by the Disclosure and Barring Service.

5. Her Majesty's Solicitor General seeks leave to refer the sentence to this court on the grounds that it is unduly lenient.

Preliminary Matters

6. The committal was expressed to be pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. That act was repealed as of 1 December 2020. The relevant provision in force from that date was Section 14 of the Sentencing Act 2020 pursuant to which the committal is deemed to be made by operation of Paragraph 4 of Schedule 21 to the Act. The statutory provisions are consistent with the decision in **R v Ayhan [2011]** EWCA Crim 3184 where this court held that the recording of an incorrect provision did not invalidate a committal where the intention of the magistrates was to commit for sentence and there was a power that they could have exercised in order to do so.

7. The Sexual Harm Prevention Order and the Restraining Order were recorded as having been imposed pursuant to s103 Sexual Offences Act 2003 and s5 of the Protection from Harassment Act 1997 respectively. In fact, the Sexual Harm Prevention Order was made pursuant to s345 of the Sentencing Act 2020 and the Restraining Order pursuant to s360 of the Act.

8. These recording errors have occurred because the Crown Court software has still not been updated. It is to be hoped the position will be remedied soon.

9. After the sentences were passed it was realised that the court had not received from the Magistrates' Court any information about a further offence of possessing three indecent photographs of (different) children contrary to section 160 (1) of the Criminal Justice Act 1988. They were all category C. When this came to light the matter was relisted in the Magistrates' Court on 7 October 2021. The respondent pleaded guilty and the magistrates sentenced him to a Community Order for 6 months with a requirement of 5 days' rehabilitation activity.

10. The report prepared for this court indicates that the respondent is not able to complete unpaid work by reason of physical disabilities. The recommendation in the PSR was an error. An application has been made to the Crown Court to remove the unpaid work requirement and replace it with a curfew.

11. We turn to the substance of the case.

FACTS

12. The respondent, AAL is 48. He was born in 1973. The offences to which he pleaded guilty took place between 1996 and 1998. At the time of the offending the respondent was living with his grandmother, having been abandoned by his parents as a young child. He still lives with her. He had been born with cerebral palsy as a result of his brain being starved of oxygen shortly before his birth.

13. In the mid-1990s his much younger cousin frequently spent time at her grandmother's home when her parents were working.

14. When she was 6 or 7 she would go up to the respondent's bedroom to play on his PlayStation. On several occasions the respondent asked her to put on a leotard, which he provided. He would then blindfold her and tie her hands with cables. He would place a ball gag in her mouth and take photographs of her. On a single occasion the respondent asked her to play a game where he put various articles in her mouth, and she had to guess what it was. He then put his penis into her mouth until he ejaculated.

15. In 2020 when the victim was about 30 she reported what had happened to her. Her current employment had caused her to reflect on her experiences and she brought them to the attention of the police.

16. The police executed a search warrant at the respondent's home where he had been living throughout. They found under his bed photographs of the victim as a little girl, with her hands tied behind her back, wearing a leotard and goggles with foam stuck over the lenses. There was also a typed story which talked about tying up two girls, one with the same name as the victim, who had been tied up with cable ties, blindfolded and smacked by their babysitter. In the story the babysitter put his penis into the mouth of the child with the same name as the victim.

17. On the respondent's computer's hard drive there was a folder which contained 87 images of the victim. In one, she was bare chested with a string chain wrapped around

her body (these were images of category C the subject of charges two and three). In the others she was wearing a leotard. In many she had some sort of restraint, or gag.

18. The respondent was arrested and interviewed almost a year later. He made full admission to all of the offences. He said to the police "I've been waiting for it to catch up with me for years."

Sentencing approach

19. The approach to be taken to sentencing in respect of offences that took place many years ago is now well understood, having been articulated in **R v H [2011]** EWCA Crim 2753, [2012] 1 WLR 1416 and codified in annex B of the definitive Guidelines on Sexual Offences published in 2013. Annex B was reviewed by this court in **R v Forbes and others [2016]** EWCA Crim 1388, [2017] 1 WLR 53. It was approved with an important caveat. At paragraph 9 of annex B the guideline says that youth and immaturity at the time of committing the offence may be regarded as personal mitigation. Lord Thomas of Cymgiedd CJ explained at paragraph [20] that age and immaturity go to culpability, as the court had concluded in **R v H** on the grounds that it better accords with principle than the approach at paragraph 9 of annex B.

20. Whilst the sentencing judge is expected to take account of the current guideline for the modern equivalent of an offence committed many years ago, the court in **Forbes** considered it appropriate in some cases to look at other guidelines to assist in the sentencing exercise.

21. An example of the approach to culpability set out in **Forbes** and to reference to a guideline other than the one applicable for the modern offence is to be found in the decision of this court in **R v Goldfinch [2019] EWCA** Crim 878. There, a man of 39 had been convicted after a trial of an offence/s of indecent assault where the facts (penetration of the mouth of a child by the offender's penis) would now be charged as rape of a child under 13. The appellant was 16 at the time of the offence, the victim was 4. The appellant's half-brother was in a relationship with the victim's mother. The appellant was the babysitter. He appealed against conviction and the sentence of 6 years and 6 months imprisonment. The appeal against conviction was dismissed. The appeal against sentence succeeded and the sentence was reduced to one of three years imprisonment. In giving judgment, Lord Burnett of Maldon CJ said the court had considered the starting point for an offence of rape of a child under 13 and considered that, in addition, the guideline for inciting sexual activity with a child might be in play for comparative purposes.

22. The provisions of section 236A Criminal Justice Act did not apply in **Goldfinch** because of the respondent's age at the time of the offence. So far as is relevant in this case section 278 of the Sentencing Act 2020 which supersedes section 236A CJA requires that where the court imposes a sentence of imprisonment upon a person convicted of an offence listed in schedule 13 to the Act, the person is aged 21 or over when convicted and the court does not impose a life sentence or an extended sentence under section 279 of the Sentencing Act
"(2) the term of the sentence must be equal to the aggregate of –

a) the appropriate custodial term, and

b) a further period of 1 year for which the offender is to be subject to the licence."

23. It does not follow that the court must impose a sentence of imprisonment for the offence – see the decision of this court in **R v F and DS** [2016] EWCA Crim 561 at paragraph 12 (Treacy LJ giving the judgment of the court). "…it does not prevent the court from passing a non-custodial sentence such as a community order. Whilst most cases involving or tantamount to an offence contrary to section 5 or 6 of the Sexual Offences Act 2003 will require a significant custodial sentence, there may be exceptional cases where, for example, a lengthy community order with a requirement of participation in a sex offender treatment programme may be the most appropriate form of sentence. Where such exceptional cases arise, section 236A [now section 278 Sentencing Act] does not preclude such a course being taken".

24. At [13] Treacy LJ dealt with the issue of a suspended sentence coupled with a sentence under section 236A. Having reviewed the purpose of the provision the court concluded: "Ordinarily the court will be considering an immediate custodial sentence: in the unusual event that the court might have considered suspending the sentence, it should consider marking a community order instead."

Sentencing Hearing

25. There was before the judge a detailed and powerful statement from the victim. It is plain from that document that the offences have had an enduring serious effect on her self-esteem which has affected her relationships. In addition, she believes that her concern about the risks and dangers to children has led her not to have children. She wrote: "I still feel emotionally lost and confused by the whole situation and I can't think of a reason why, which in itself I find distressing." She also pointed out that she had not felt able to tell her family what was happening and had maintained a façade for many years. She had been unable to have a fully honest relationship with her grandmother because she had kept from her the details of what the respondent had done.

26. The author of the pre-sentence report considered that the offences revealed a clearly deviant sexual interest and that the respondent was willing "to identify, access and exploit vulnerability in pursuit of personal sexual gratification." He acknowledged that there had been no further offence for many years. He considered that the current risk of harm was to children in the family setting only – and so unlikely to eventuate. He favoured a sentence which would assist in rehabilitation.

27. There was a report from a consultant psychiatrist, Dr Malham, who assessed the respondent. He considered that the respondent suffered from a number of neurodevelopmental and mental health difficulties including a learning difficulty (as opposed to a disability), possible autistic traits, recurrent depression, generalised anxiety and emotional dysregulation. He noted that the respondent did not perceive the world as others do and alerted the court to his vulnerability. The respondent was worrying about his grandmother who was ill, severely diabetic and who was now suffering from dementia. He said had intended to report himself to the police after his grandmother died and that was why he had kept the photographs.

28. The respondent has never had employment although he volunteers regularly for a local charity. He now looks after his elderly grandmother with whom he still lives.

29. He has no criminal record. There were a number of character references, including from the charity for whom he volunteers which spoke highly of him.

30. Several members of the respondent's extended family had written to the court. All commented on the respondent's unusual nature. He was very slow to mature and in their view is still relatively immature. In his twenties they say, and this is consistent with the psychiatric report, that he appeared much younger than the adult he was. His grandmother, who took on the task of bringing him up, treated him as a child way beyond his childhood years. Although we have no information about his IQ we note that he was for some years educated in special schools. His grandmother refused to allow him to go to a residential school with the result that he was moved to a mainstream school where he was repeatedly bullied. At the time the psychiatric report was written he was still being bullied and harassed in the street. This seems to be a feature of his life. One of his cousins who is the same age as him recounted how much younger than her he seemed when they were growing up and spent a lot of time together. In early adulthood he remained childlike. In recent years, as his grandmother's health has deteriorated, he has taken responsibility for her and is now, in his late forties, much more mature than he was in his 20s. He has no friends, but his volunteering has taken him out of his home. His grandmother is now dependent on him and would not be able to stay at home were he to be sent to prison.

31. In submissions before sentence prosecuting counsel reminded the judge that the modern offence was rape of a child under 13 years of age with a starting point for an offence in category 2A, of 13 years custody. This offence would fall into category 2A because the victim was very vulnerable by reason of her young age. There was planning – in the purchase of the leotard, the goggles and other items. The maximum sentence for the most serious offence was 10 years imprisonment.

32. The judge accepted that the guideline for rape of a child was a starting point, but he considered and both counsel agreed that he ought also to look at the guideline for sexual assault of a child under 13. Prosecuting counsel said it would remain a category 2A offence but with a starting point of 4 years with a range of 3 to 7 years.

33. Defence counsel (who also appeared before this court) said the judge had a stark choice between an extended sentence and a Community Order. This was the result of the operation of section 278 of the Sentencing Act which we have described above. It is plain from what followed that the judge had, until that point, been considering a sentence of imprisonment of a length that could be suspended.

34. In sentencing the judge described the offences and drew attention to the respective ages of victim and perpetrator. He put at the forefront of his sentencing remarks the lifelong harm caused to the victim.

35. He commented on the full and frank admission the respondent made on arrest and in interview and the guilty plea at the earliest opportunity. He referred explicitly to the offence of rape of a child and the maximum sentence of life imprisonment. He took account of the fact that the victim was, "very very vulnerable and obviously so." He considered the sentencing guideline for the sexual assault upon a child under the age of

13 and said that the starting point for sentence would be one of 4 years if it were to be treated as a category A case. He considered there were no factors which would move the starting point upwards on the basis that they were all included in the categorisation of A. He pointed to the respondent's character, that this was an isolated offence and that, notwithstanding his mental limitations he had expressed genuine and deep remorse (something which was clear in the reports).

36. He referred to the difficulties in the respondent's childhood and most of his life and the fact that he had lived within a dysfunctional family. He observed that the respondent struggles to function at age anticipated/appropriate levels and the author of the presentence report had concluded that the sexual offending appeared to have stopped and may have stopped many years ago.

37. He described the psychiatric and other matters to which we have referred and the fact that the respondent has not been able to lead a normal life. He said the mitigation would take the sentence down from 4 years to 3 years and there would then be credit for the plea of guilty.

38. The judge said that had he been able to do so he would have imposed a suspended sentence of imprisonment with conditions set out in the pre-sentence report. He considered that there was substantial mitigation perhaps even exceptional mitigation. He would, he said, have imposed concurrent sentences in relation to the two offences relating to indecent images.

39. In the circumstances he decided that the appropriate sentence was the community order to which we have already referred, along with the other protective measures.

The Application

40. Mr Polnay who appeared for the Solicitor General began his oral submissions with the proposition that given the appropriate Starting Point for the modern offence of rape of a child under 13 is 13 years custody, a community order was plainly unduly lenient. He modified that submission somewhat, in recognition of the complexities of this case. When invited by the court to identify the starting point he submitted that it should have been lower than the maximum for the offence at the time it occurred (10 years imprisonment) but not much lower. He submitted that 8 years and not 4 should have been the starting point. Notwithstanding the mitigation an immediate prison sentence was inevitable. He submitted there was significant planning and grooming and that the photographs affected the level of culpability.

41. Mr Fairley, on behalf of the respondent, submits that the judge took great care in what was a very difficult sentencing exercise. He had regard to the guideline for rape of a child and was entitled to refer also to the indecent assault guideline to determine the starting point. The rest of the exercise flowed logically from there. The sentence was lenient but not unduly so given the unusual features of the case. He referred us to the facts and decision in **Goldfinch,** pointing out that on an early plea of guilty that sentence would have been one of two years imprisonment and so of a length that could have been suspended. There were some similarities with this case, in particular the relevance of the guideline for rape of a child under 13. The victim was 4. The respondent was a 16 year old babysitter. The sentence imposed by this court was well below the lowest sentence in that guideline and at the bottom of the range for the

guideline to which the court also referred (Causing or inciting a child under 13 to engage in sexual activity). The court expressly referred to the view of the sentencing judge that the offence was a "case of sexual experimentation by a teenage boy" .

Discussion

42. We agree that this was a difficult sentencing exercise. The sentence was lenient. The question for us is whether it was unduly lenient. The judge was required to have regard to the guideline for the rape of a child but was not required to apply it mechanistically. He was entitled to look for assistance from another guideline, but in our judgment he fell into error in applying the current guideline for sexual assault. That offence is very much narrower in scope than the principal offence to which the respondent had pleaded guilty; it takes no account of penetration. Applying that guideline led the judge to select a starting point which did not adequately reflect the seriousness with which an offence of this sort is now regarded. As a result, notwithstanding the very careful sentencing exercise that followed, the resulting sentence was unduly lenient.

Starting Point

43. The enduring harm caused is life-long. The central issue is the respondent's level of culpability. Like the sentencing judge we accept that given the respondent's difficulties he would have had little understanding of the harm he was causing at the time. The repeated references to the child-like and childish behaviours from those who knew and know him well up to and including his 20s are important. His limitations significantly reduced culpability. As he got older he understood better how serious it was – hence the remarks he made to the police about waiting for the offences to catch up with him. He said to his psychiatrist that he had intended to report himself to the police when his grandmother died.

44. It is correct that the respondent took photographs of the victim in her leotard, but he did not record the assault. The offences involving photographs were an aggravating factor but, contrary to Mr Polnay's submissions, they did not go to culpability at stage 1. There was no grooming or significant planning. None was necessary because his cousin was so young, in the words of the guidelines particularly vulnerable by reason of age. As she said to the police, she thought what was happening was normal.

45. We have considered both the rape of a child guideline and the guideline for inciting sexual activity with a child under 13 as this court did in **Goldfinch.** In our judgment the appropriate starting point to reflect harm and culpability is 6 years which should be raised slightly to recognise the offences involving photographs. There was very significant mitigation: real remorse and contrition, full confessions at the earliest stage (an unusual feature in this sort of case and of particular value because the victim knows there will be no need to give evidence), no repetition in a period of 25 years, the absence of any previous convictions, his general good character and the delays between the search and interview (one year) and a further 17 months before his appearance in the Crown Court. It is clear from the letters we have read that he has been very distressed about what would happen to his grandmother were he sent to prison, as he was expecting. This has added to his anxiety and depression, overlaid onto the consequences of his cerebral palsy. A prison sentence for the respondent will be very

difficult for his grandmother who will have to move to a care home. It will also be particularly hard for the respondent, given the difficulties we have described.

46. This significant mitigation takes the sentence down to a provisional sentence before reduction for the plea of guilty to 4 years. Full credit for the plea brings the sentence down to 32 months imprisonment to which we add the additional one year's licence required under section 278.

47. Accordingly, the sentence will be one of 44 months imprisonment made up of a custodial element of 32 months and an extended period of licence of 12 months. The respondent may be considered for parole after serving one half of the custodial element of his sentence.

47A. In respect of charges 2 and 3 there will be concurrent sentences of 12 months imprisonment to be served concurrently with the sentence on the Indecent Assault. The community orders on all three charges are quashed.

48. The Sexual Harm Prevention Order is unaffected. The notification period is now indefinite.

49. The respondent must go to Eastern Police Investigation Centre at 4pm to surrender to custody. The sentence will begin from the date upon which he surrenders.

50. We are grateful to both counsel for their submissions.