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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 407



No. 202002526 B4

Royal Courts of Justice

Wednesday, 3 March 2021

Before:

LADY JUSTICE CARR
MR JUSTICE WILLIAM DAVIS
MR JUSTICE CALVER

REGINA
V
CHARLES ELPHICKE

**REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992**

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Ms R. Gokani appeared on behalf of the Appellant.

Ms E. Marshall QC and Ms M. Wolfe appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE CARR:

The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Introduction

- 1 The applicant is a 49-year-old former Conservative party politician. On 30 July 2020 he was convicted following trial in Southwark Crown Court of three counts of sexual assault, contrary to s.3 of the Sexual Offences Act 2003. He was sentenced by the trial judge, Whipple J (“the Judge”) on 15 September 2020 to 14 months' imprisonment on Count 1, ten months' imprisonment on Count 2, to run consecutively to the sentence on Count 1, and ten months' imprisonment on Count 3, to run concurrently. His overall sentence was thus one of two years' imprisonment. He was made automatically the subject of notification requirements. The Judge also ordered him to pay prosecution costs in the sum of £35,000 within twelve months.
- 2 This is his renewed application for leave to appeal against sentence, for which purpose he has had the benefit of representation by Ms Gokani. Ms Marshall QC and Ms Wolfe have represented the respondent, as they did below.

The facts

- 3 The applicant's offending relates to sexual assaults on two women: first, his children's nanny, whom we shall call A, in 2007 (Count 1), and secondly, his Parliamentary researcher, whom we shall call B, in 2016 (Counts 2 and 3). A and B's complaints in relation to the applicant came to police attention in around October 2017. However, B had made a formal complaint about the applicant to the Conservative Party Whip's office in December of the previous year.

The sexual assault of A

- 4 A, then aged 30 years, took up post as a live-in nanny with the applicant's family in January 2007. In June 2007 the applicant's wife went away on a short business trip. One evening at home, in his wife's absence, the applicant invited A to join him alone for a drink in the garden. As it started to turn dark and cold, the applicant suggested they move into the sitting room. They did so, initially sitting apart. At some point the applicant started to talk suggestively to A, including as to her sexual preferences and her then boyfriend, albeit in a light-hearted manner. A tried to steer the conversation back to more comfortable topics. The applicant invited A over to sit next to him in order for him to re-fill her glass of wine. She accepted. At some point the applicant stood up or leant over A so that she was sprawled against the back of the sofa. He pushed her back by the shoulders, placed his knee between her legs and held one of her arms rigid to her side. He went to kiss her on the mouth, which she dodged, so that he ended up kissing her cheek. At the same time, he reached under her dress and put his hand on her right breast. His hand, on the Judge's findings, made contact with her naked breast. A pushed him off then and ran away. As she left the room, the applicant slapped her bottom. He was chanting, "I'm a naughty Tory". A described him as animated and clearly enjoying himself. He followed A as she went downstairs, trying to slap her bottom again. She got to her room and locked the door. The Judge described this, understandably, as a terrifying incident for A.

5 A telephoned her sister and then boyfriend, and then left the house by her private entrance in a taxi. Only once the applicant's wife had returned to the home, did she return. The next week she spoke with the applicant who said that he had enjoyed himself that night and they should repeat it. A stated that she could no longer work for him. She asked for two months' wages for living and accommodation expenses whilst she found new employment. The applicant paid her more than £3,000 in cash to this end.

Sexual assaults of B

6 In March 2016 B, then aged 23 years old and a new intern in the Parliamentary research unit, started working for the applicant, who was by then a member of Parliament, following his request for a new Parliamentary researcher.

7 One evening in April the applicant and B were alone in his Westminster office. He opened a bottle of champagne and they discussed work related matters. The applicant then commented on how well they worked together and that they shared the same taste in music. B began to feel uncomfortable. At one point the applicant put his arm around her and said how much he liked her. B shifted away, to which the applicant asked whether B did not like him. B answered that she liked him as a boss.

8 All of a sudden the applicant lunged at B, kissed her quite forcefully on the lips, continued trying to kiss her and put his hand down her top, groping her breast by cupping it over her bra. She pushed him away. She said that she did not know what was going on. The applicant said that there was nothing wrong; they both liked each other. B stated, first, he was her boss; secondly, he was 21 years her senior, and thirdly, he was married. The applicant continued, grabbing B's hands and trying to kiss her again. B left. As she did so, the applicant put his arms inside her coat, around her waist and pulled her towards him. She pulled away and left. He followed her out, with the words, "Oh, I'm naughty sometimes, aren't I?" They returned to their respective homes by tube.

9 B told the jury that she was shocked and terrified by the what the applicant had done. She had felt very trapped. B told a friend that evening of the incident. The following day the applicant asked her whether she was cross with him. She told him that it must not happen again. The following day, her birthday, the applicant asked B to meet him whilst his wife was away. She declined. A few days later, the applicant called B into his office. He came close to her, grabbed her hands and started stroking them, interrupted only by the arrival of someone else. B left the office. The applicant later sent her a text reading "Grrr" in apparent frustration at having been interrupted.

10 Count 3 arose out of an incident in early May 2016. The applicant had chosen to drive B to his local constituency, rather than letting her get the train, to which B had reluctantly agreed. Within a short time of her getting into his car, the applicant ran his hand over her trousers, up the inside of her leg, moving up to her groin area. She removed his hand to stop him. They remonstrated with each other, the applicant maintaining that they could have a relationship. Upon arrival at the applicant's constituency home, the applicant asked B to rub sun cream properly into his face. She told him not to be stupid. She refused to let him kiss her. After this incident, the applicant continued to pursue B. Her final rejection of him came towards the end of June 2016, when he invited her to lunch and she told him that she did not like him in a sexual way.

11 The Judge described this behaviour as a campaign of harassment of B involving planning to get B alone. After the applicant was finally rejected, he created a toxic atmosphere

at work. B decided to leave her job, but not without first reporting the applicant's conduct to a number of people, including her office manager.

Pre-sentence report and victims' personal statements

- 12 The author of the short-form Pre-Sentence Report expressed the view that the applicant displayed reflective insight into his behaviour on both occasions. He had felt that the atmospheres had been flirtatious, and genuinely thought that the women were interested in him. The author stated that in his view the applicant was not a "sexual predator per se, but had been unable to satisfactorily assess situations he had initiated with the two victims". The applicant was said to present a low risk of serious harm now that these issues had come to light. Custody would punish, but would also have a severe impact on his family dynamics, with his 13-year-old son suffering the most. Unusually, the author chose to express his personal view of appropriate categorisation within the relevant Sentencing Council Guideline, and his disagreement with what he understood to be the respondent's assessment that the offending fell within Category 2A. He proposed a community order with requirements of rehabilitation activity and unpaid work.
- 13 A's victim personal statement speaks to the lasting impact of the applicant's offending on her. In the immediate aftermath, she had no firm home base and struggled to find permanent work. She struggled financially. Perhaps more fundamentally, she mistrusted men and still has an increased sense of anxiety and caution around them. She is wary of male strangers and avoids being alone with men who she does not know. It took her a long time to form a romantic relationship after the incident. She felt too wary and vulnerable to continue a career as a nanny.
- 14 B also eloquently describes the consequences for her. At the time, she felt trapped, frightened and constantly on edge. She was incredibly vulnerable at the time, left with feelings of complete powerlessness and inferiority. Her relationships with close family and some friends were affected. She remembers feeling that there was nothing she could do to challenge the applicant.

Sentence

- 15 The Judge proceeded on the basis that the jury had accepted the evidence of both A and B. The applicant was, in her words, a "sexual predator", who had used his success and respectability as a cover. He had taken advantage of his position as an employer and abused it. He got both victims alone, lured them into a false sense of security with wine and cork chat, and then attacked them. He then treated what he had done as a joke, attempting to trivialise his behaviour, which was also an abuse of power.
- 16 The Judge considered the applicant's character references, letters from the applicant's then wife, a medical report and the pre-sentence report. She accepted the applicant's particular bond with and responsibility for his 13-year-old son, the loss of a good career, reputation and prospects. She noted that the applicant was undergoing psychotherapy and had accepted some responsibility for his actions. Whilst she noted that the applicant had expressed remorse to the probation officer and that he was unlikely to reoffend, she rejected the views expressed in the Pre-Sentence Report as to the applicant's conduct and motivation, which in her view underplayed the seriousness of the offences.
- 17 The Judge identified the relevant Sentencing Council Guidelines. She placed the offending under Count 1 in Category 2A, with a starting point of two years. It involved the touching of a naked breast and an abuse of trust. A lost her job and home, and the offence took place

within the work place. Taking into account aggravating and mitigating factors, she arrived at a term of 18 months' imprisonment before further downward adjustment for totality and the impact of the pandemic. She placed the offending under Counts 2 and 3 in Category 3A. Both assaults were over clothing, though for Count 2 the applicant had clearly intended more. Each was an abuse of trust of particular seriousness. The applicant was in his mid-40s with an important job and all the trappings of power and success. He preyed on B, who was half his age, in her first job and vulnerable to manipulation. Taking Counts 2 and 3 together, without further adjustment for totality and the impact of the pandemic, the Judge arrived at a term of 12 months' imprisonment.

- 18 After adjustment for totality and the circumstances arising out of the pandemic, the Judge sentenced the applicant to the overall sentence of two years' imprisonment. Whilst recognising the applicant's personal mitigation, bearing in mind the applicant's gross breach of position of power and abuse of his employee's trust, the Judge concluded that appropriate punishment could only be achieved by immediate custody.

Grounds of appeal

- 19 Lengthy written grounds of appeal have been lodged on behalf of the applicant. Ms Gokani has chosen in her oral submissions to focus on four issues, namely harm, culpability, mitigation and suspension. She has (sensibly) not pursued the application for leave to appeal against the costs order imposed. We deal with each of the matters raised in turn, taking into account the particular emphases placed on the merits by Ms Gokani today.
- 20 First, it is said that there was no evidential basis for the Judge's conclusion that the applicant is or was a sexual predator. These were "[...] isolated and momentary acts of sexual assault". All that the applicant had done was to misread a social situation or flirtatious text messages and conversations.
- 21 Secondly, it is said that the Judge made fundamental errors of classification under the Sentencing Council Guideline for Sexual Offences:
- i) Specifically, on Count 1, there was no touching of a naked breast in the sense intended by the Guideline such as to justify a proceeding on the basis of Category 2, not 3 harm. Reference is made in particular to the decision in *R v Ahmed* [2015] EWCA Crim 2357 ("*Ahmed*"), where the court placed the offending overall in Category 3. Ms Gokani emphasises the evolution of A's evidence in relation to the question of harm. She refers to early accounts in November 2017 in which A did not mention the touching of her naked breast by the applicant. Rather, she stated that the applicant had "grabbed her boob" or touched her breast over her bra. This, submits Ms Gokani, was how the case was opened to the jury. When A gave her evidence in the witness box, the most that she said was that she had thought that the applicant went "half over a mixture of her breast and bra". In circumstances, submits Ms Gokani, where A herself could not be sure, the Judge was not entitled to reach the certain conclusion that the applicant had touched A's naked breast. Whilst it was for the Judge to exercise her own judgment on the material before her, she gave no explanation for her finding in this regard. In any event, as already indicated, even if her finding of fact was justified, there was no harm in the sense intended by the Guideline. Adopting a common sense approach to what is intended in Category 2, there has to be more than mere skin-on-skin contact. The applicant was entitled to the benefit of the doubt, and the Judge erred in failing to categorise harm on Count 1 in Category 2. She should have categorised the harm in Category 3;

- ii) Ms Gokani submits that the Judge was wrong to describe B as vulnerable and to treat that as an aggravating factor. At the time of Counts 2 and 3, B was not vulnerable. On the contrary, she demonstrated her ability to stand up to the applicant when treated unfairly;
- iii) Complaint is made of the Judge's conclusion that the applicant's conduct amounted to an abuse of trust. This raises the question of culpability upon which Ms Gokani has centred today. She submits, as was argued for the applicant before the Judge, that the fact of an employer/employee relationship does not of itself give rise to an abuse of trust situation. It is important to distinguish opportunity from breach of trust (see *R v AH* [2017] EWCA Crim 117 at [12] and [13]), and also important to distinguish inequality from breach of trust. One needs to examine the facts closely to see whether the offender utilised a particular trust placed in him to commit the offending (see *R v Forbes* [2016] EWCA Crim 1388 at [18] and *R v Lo* [2018] EWCA Crim 1545 (“*Lo*”) at [12]). There must be clear justification if abuse of trust is to be found. The Judge did not carry out such an exercise here and there was no such clear justification, it is said. Neither victim trusted that the applicant would not assault them because he was their employer. Ms Gokani submits that the Judge wrongly shoehorned what were aggravating factors into a finding of abuse of trust. There was no sufficient feature of a duty of care or special trust to justify such a finding.

As a result of these errors, Ms Gokani's fundamental submission is that the Judge adopted a starting point on Count 1 that was too high. Indeed, on all the counts the appropriate starting point was a high level community order.

- 22 Thirdly, it is said for the applicant that the Judge's approach to aggravating and mitigating factors was illogical and unjustified. None of the aggravating factors identified in the Sentencing Council Guideline on Sexual Offences applied. In terms of mitigation, the applicant had no previous convictions, was of previous good character, as to which the Judge had a "wealth of evidence", had taken steps to address his offending and expressed remorse.
- 23 In this context Ms Gokani submits that the Judge erred in failing to give adequate weight to the applicant's good character when considering the sentence on Counts 2 and 3. She stated that she would give his good character little weight because of the earlier offending in Count 1. The applicant had not at the time of the offending in Counts 2 and 3 been convicted on Count 1. Ms Gokani submits that this was therefore an impermissible approach.
- 24 Allied to this submission is the fourth ground relied upon, namely that the Judge ought to have made the same reduction for mitigation on counts 2 and 3, namely a period of six months, as she did on Count 1, leading to a non-custodial sentence by reference to a starting point of 26 months' imprisonment for Category 3A offending.
- 25 Fifthly, it is submitted that the Judge erred in disregarding the findings and recommendations of a highly experienced probation officer.
- 26 Sixthly, the Judge is said to have taken account of irrelevant factors, including the applicant's decision to plead not guilty, and failed properly to suspend the custodial sentence. Ms Gokani has emphasised the question of suspension in particular before us today. She submits that all of the factors pointing towards suspension, as identified in the Sentencing Council Guideline on the Imposition of Community and Custodial Sentences

existed. There was a realistic prospect of rehabilitation, strong personal mitigation and custody would have a profound impact on the applicant's teenage son. Her submission is that the impact of an immediate custodial sentence was disproportionate. She emphasises that prison is reserved for the most serious offending. The consequences for the applicant have been particularly extreme in the circumstances of the pandemic. He has not seen his son in person for some six months. On one occasion he has been forced to spend 47 hours in his cell. Complaint is made that the Judge failed to reflect the impact of COVID-19 on prison conditions in the excessive sentence which she, nevertheless, imposed.

- 27 Ms Marshall for the respondent submits that the conclusion that the applicant was a sexual predator was an accurate description. As for harm in Count 1, the Judge was entitled to conclude that the applicant had made deliberate contact with A's naked breast. A was not in reality querying whether or not her breast had been touched. There was a hard, deliberate grope, involving a mixture of contact with A's bra and breast. Moreover, during the course of her evidence, A gave a demonstration of the deliberate grope, which clearly involved the applicant's hand going inside and up to the cup of A's breast. Ms Marshall emphasises the context of this offending for the purpose of considering categorisation of harm. This was an aggressive and intentional assault whilst A was vulnerable. She had to push him off. When one looks at the totality of this offending, the Judge's categorisation of harm, as well as culpability, was entirely justified. In terms of abuse of trust, Ms Marshall asks rhetorically: if this was not a case of abuse of position of trust then when would such abuse arise?

Discussion and analysis

- 28 Although very lengthy, detailed and sometimes overlapping written grounds are advanced, supplemented by Ms Gokani's helpful oral submissions, the ultimate question is a simple one, namely whether the Judge, who presided at what was a full trial during which the applicant himself gave evidence over three days, arrived at an overall sentence that was manifestly excessive.
- 29 The overarching theme of this application is that the applicant's offending was only minor, was not predatory, but merely "sexually clumsy", involving only "momentary acts of sexual assault". So for example, it is said that in the incident the subject of Count 1 the applicant had merely, "taken advantage of a pleasant social meeting involving wine and friendly, suggestive conversation".
- 30 The Judge, who heard and saw the witnesses, clearly took a very different view. We say at once that her conclusions on the facts are ones which this court is bound to respect, absent any obvious error of approach or perversity. The grounds of appeal in large part seek simply to reargue the sentencing exercise by repeating the original defence submissions, as opposed to addressing the relevant question, namely whether or not there are any proper grounds for appellate interference with the conclusions reached and the sentences imposed by the Judge, however much the applicant and/or his advisers may disagree with them.

Sexual predator

- 31 We see no arguable force in the complaint of the Judge's description of the applicant as a "sexual predator". Whilst an emotive phrase, its use did not affect the sentencing exercise. The substantive question is whether the Judge was justified in concluding that the applicant was someone who without compunction was prepared to exploit women for sexual purposes.

32 In our judgment, the Judge was fully entitled to reach the view that he was such a person. The applicant was someone prepared, in B's case repeatedly, to exploit his position of power and trust in order to pursue his sexual desires, as opposed to being sexually clumsy and unable to read social signals, as suggested for the applicant. He preyed on those in a weaker position than himself, using his success and respectability as a cover. A trusted the applicant in whose home she was living and working, to enjoy what she thought was to be a friendly chat. As for B, the applicant repeatedly asked her out for drinks inside and outside the political estate, finally engineering an occasion when he sexually assaulted her in his office after work hours. She politely rejected his advances, but only days later, he assaulted her in his car on the way to carry out constituency business. He used his power to create conditions where he believed that he could act on his sexual desires without fear of consequence.

Classification

33 The first substantive point relates to classification of the offences for the purpose of the Sentencing Council Guideline for Sexual Offences. As we have noted, the applicant challenges the Judge's finding that there was Category 2 harm under Count 1 and that the offending in all counts involved an abuse of trust. The Guideline describes Category 2 harm as including the touching of naked breasts. The Judge was clear that the applicant's hand did deliberately touch A's naked breast, whatever the evolution of her account. The fact that that touching was achieved whilst A was clothed and/or was only partially successful because of the presence of underwear does not, in our judgment, justify some lesser categorisation. The facts here are very different to those in *Ahmed* when the anaesthetist defendant put his finger into the loose top of a female nurse's gown, coming into contact with her naked breast.

34 We would also add, that whilst not amounting to severe psychological harm, A suffered on any view, real psychological damage. Common sense, in our judgment, is in no way offended by placing the harm under Count 1 in Category 2 when the assault is viewed in its proper context as a whole, involving the touching, with A pinned down, the attempt to kiss her on the mouth, and the subsequent chase and slap.

35 As for abuse of trust, and as identified in *Lo* at [12], whilst not determinative on its own, a hallmark of abuse of trust is inequality of power. There clearly was such an inequality of power on the facts here. A was reliant on the applicant, both in terms of accommodation and living expenses. By 2016 the applicant was a powerful politician in Westminster. B was a new intern, whose future work prospects could well be compromised in the event of rejection by her of his unwelcome advances.

36 It is clear from her sentencing remarks that the Judge was struck by the applicant's abuse of his powerful position. She was uniquely well placed to assess the evidence and entitled to conclude that there was clear justification for a finding of abuse of trust, namely that in order to commit these crimes the applicant used the trust placed in him by A and B that they would be safe. It was this trust that led to the circumstances of the applicant being alone with the women in his home or in his office with alcohol or in his car, which allowed him to offend. The Judge did not, as is suggested, assume breach of trust simply because of the existence of an employer/employee relationship. Rather, she concluded that he took advantage of his apparently respectable position and the reasonable expectation of A and B that he would not seek to make unwanted sexual advances to them. In other words, he used his particular position of trust and the power imbalance that came with it to commit the offence. There was ample evidence to support that conclusion, as reflected starkly in the victim personal statements.

Vulnerability as an aggravating factor

- 37 The Judge relied on B as being vulnerable at the time of the applicant's offending as an aggravating factor. The complaint that the Sentencing Council Guideline for Sexual Offences only refers in its list of aggravating factors to a "particularly" vulnerable victim, and so the Judge was wrong to do so, is misplaced. The Guideline is not to be read as a statute, nor is the list of aggravating factors exhaustive. The Judge's finding on the evidence that B was vulnerable as a young woman in her first job being assaulted by her powerful boss in the work place was of course something that she was entitled to take into account as an aggravating factor.

Balance of mitigating and aggravating factors

- 38 The applicant argues that the mitigation afforded him by his previous good character and the punitive effect of his fall from grace were given insufficient weight. We do not consider either of these propositions to be arguable. First, the applicant's previous good character was of limited value in the context of this offending. As the Guideline expressly recognises:

"Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor."

- 39 Further, the Judge was entitled when considering sentence on Counts 2 and 3, to take into account the applicant's earlier conduct on Count 1. Whether or not he had been convicted, he was on any view aware of his previous behaviour, and the similarity of the offending is striking.
- 40 Finally, the argument that, having reduced the sentence by six months on Count 1, the same deduction ought to have been applied to the sentences on Count 2 and 3, cannot be right. Sentencing as a whole is never a purely arithmetical exercise. The suggestion ignores the fact that there were two offences committed on B and the particular circumstances surrounding that offending.

The Pre-Sentence report

- 41 The Judge disagreed with the findings of the author of the Pre-Sentence Report on the basis that in her judgment they underplayed the seriousness of the offences. She was entitled to do so. Indeed, she was obliged, independently and on the basis of all the material before her, to reach her own judgment as to the seriousness of the offending and appropriate disposal.

Reference to contesting the case

- 42 We do not consider the Judge's factually accurate reference to the fact that the applicant lied to the jury and others arguably played any material part in her reasons for arriving at the sentences that she did. She was recording the position and confirming that there was no credit to be afforded for any guilty plea at trial, as opposed to identifying a further aggravating factor.

Overall

- 43 We then ask ourselves whether, standing back, there is any arguable basis on which to contend that the overall sentence of two years' immediate imprisonment was manifestly excessive. The Judge was correct to pass consecutive sentences in respect of Count 1, on the one hand, and in respect of Counts 2 and 3 on the other, involving as they did separate victims and offending many years apart. On the basis, as we have found, that the Judge was entitled to approach the question of categorisation as she did, there is no realistic basis for impugning the custodial terms at which she arrived. A term of two years on Count 1 before reduction for mitigation of six months down to eighteen months, and then consideration of totality and the impact of COVID-19 on prison conditions, leading to a final term of fourteen months' imprisonment cannot be said to be manifestly excessive.
- 44 Equally, an aggregate sentence of twelve months' imprisonment on Counts 2 and 3 before reduction to take into account the impact of COVID-19, cannot be impugned, even though the starting point for an assault in category 3A was six months' imprisonment. As we have said, there were here two separate assaults and further aggravating factors.
- 45 As for suspension, this was something which the Judge said that she had considered carefully. There is, in our judgment, no basis for appellate interference with her conclusion that it was not an option. She took the view that appropriate punishment could only be achieved by immediate custody, given the gross breach of position of power and the abuse of trust. These were matters that she was entitled to take into account. Carrying out the balancing exercise and addressing the relevant considerations under the Sentencing Guideline on the Imposition of Community and Custodial sentences is never simply a numerical exercise. It is a question of attributing weight to those factors as appropriate in the evaluative assessment of the sentencing judge.

Conclusion

- 46 For all these reasons, we refuse permission. We take the view that the grounds advanced on this application fail to reflect the undoubted seriousness of this offending. They invite us impermissibly to interfere with the Judge's reasoned findings following trial. Whether individually or cumulatively, they do not, in our judgment, give rise to any arguable basis for impugning the overall sentence of two years' immediate imprisonment imposed.
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CERTIFICATE

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This transcript has been approved by the Judge.