IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202104052/A4

NCN [2022] EWCA Crim 268

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 16 February 2022

LORD JUSTICE HOLROYDE

MR JUSTICE PEPPERALL

MR JUSTICE SWEETING

REGINA

v

"BGI"

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS J McCULLOUGH appeared on behalf of the Appellant.

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: This is an appeal by leave of the single judge against sentences totalling 12 months' imprisonment for sexual offences committed against an adolescent girl (to whom we shall refer as "C"). C is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences. In view of the family relationship between the appellant and C it is necessary for his name to be anonymised in any report of these proceedings. For that reason, he is referred to by the randomly-chosen letters "BGI".
2. When the offending began, C was just 14 years old. She lived with her aunt, who developed a relationship with the appellant and eventually began living with him. C thus acquired a new home and had to change schools.
3. Over a period of more than a year the appellant engaged in inappropriate sexual behaviour, some of it in the nature of grooming. On numerous occasions, generally when they were alone in the house, he smacked C's bottom. He squeezed her thigh when they were in the car together. He hugged her inappropriately, making her feel uncomfortable. He showed her pornographic magazines and asked her to look at them. He told her that she was sexy and offered her money to allow him to watch her undressing.
4. His offending came to light after events on an occasion in March 2021. C was then aged 16, the appellant 61. The appellant went, uninvited, into C's bedroom wearing only his boxer shorts. He appeared to masturbate himself and asked her to watch, which C tried to avoid doing. He touched her breast and offered her £20 if she would let him stay longer. He spoke of an earlier occasion, apparently when C had been asleep, when he said he had placed her breast back inside her clothing.
5. C reported the offending. The appellant was arrested. C and her aunt left the appellant's house and returned to their previous home. C went back to her former school, where she faced the difficulty that she was repeatedly asked why she had returned but did not want to explain what had happened.
6. In a victim personal statement written more than 9 months after the offences were reported, C described the impact of the offences on her. She had become anxious and defensive, and felt unable to trust men. Her school studies had suffered.
7. The appellant pleaded guilty in the Crown Court at Carlisle to three offences: count 1, sexual assault contrary to section 3 of the Sexual Offences Act 2003, related to the course of conduct of repeatedly smacking C's bottom over a period of some 14 months. Count 4, engaging in sexual activity in the presence of a child, contrary to section 11 of the 2003 Act and count 5, sexual assault, related to the appellant's conduct on the occasion in March 2021 to which we have referred. Those pleas were not indicated at the first stage of the proceedings but the judge (HHJ Barker) accepted that it had been necessary for the appellant's fitness to plead to be investigated and so allowed full credit.
8. The appellant had a number of previous convictions, but they were for offences of dishonesty many years ago. There had been no previous conviction of any sexual offence.
9. At the sentencing hearing the judge was assisted by a pre-sentence report, a medical report and a number of testimonials. The pre-sentence report referred in particular to the appellant's role as the full-time carer for two young adults with learning disabilities, one his son and the other the child of a former partner. The report indicated that

arrangements had been made for the care of these vulnerable persons if the appellant were imprisoned, but indicated that his absence would cause them significant distress and would have a destabilising effect. The medical report described the appellant's history of serious physical health difficulties and depressive/anxiety symptoms, which would to some extent have been present during the period of the offending. It was not suggested that the mental health difficulties had significantly affected the appellant's culpability. The authors of the testimonials spoke of the appellant's ready willingness to help others, and expressed their astonishment on learning of offending which they all regarded as wholly out of character.

10. The judge in his sentencing remarks indicated that he placed each of the offences into category 3A of the Sentencing Council's relevant definitive guideline. For the sexual assault charges, the guideline indicated a starting point of 26 weeks' custody, with a range from a high level community order to 12 months' custody. Although in part his sentencing remarks are not entirely clear, it appears that the judge also placed the count 4 offence in category 3A, with a similar starting point and category range. He summarised the appellant's course of sexualised behaviour and sexual assault on a young impressionable female who was in his care. He found that the offending had impacted greatly on C. He referred to the mitigating features of the appellant's significant ill-health and caring responsibilities.
11. Giving full credit for the guilty pleas the judge imposed a sentence of 6 months' imprisonment on count 1. He imposed sentences of 6 months on count 4 and 4 months on count 5, those sentences being concurrent the one with the other but consecutive to the sentence on count 1. Thus, the total term of imprisonment was 12 months.
12. The judge then considered whether that term of imprisonment could be suspended. It is evident that in grappling with this issue he had in mind the Sentencing Council's Imposition guideline. He accepted that there were reasons why the sentence should be suspended, both in terms of the rehabilitation of the appellant and also because of the impact on others of immediate imprisonment. He concluded, however, that the offending was so serious that only immediate imprisonment was appropriate.
13. Ms McCullough, representing the appellant in this court as she did below, realistically accepts that a custodial sentence was inevitable, but submits that it could and should have been suspended. She submits that the judge did not give sufficient weight to the mitigating factors, including in particular the appellant's health problems, the difficulties he faced serving a custodial sentence during a time of pandemic and the effect upon others of his imprisonment. She suggests that the sentencing remarks did not specifically refer to all relevant matters and that it is difficult to see what adjustment of sentence the judge had made for them.
14. We are grateful to Ms McCullough for her assistance. She was undoubtedly correct to accept that the custody threshold was passed and a term of imprisonment was unavoidable.
15. There can, in our view, be no complaint about the length of the total term. There was a substantial disparity of age between the appellant and C. The offences were committed over a period of more than a year, starting soon after C's 14th birthday and in circumstances where she was not only in the appellant's care but also coping with a move of home and a change of school. Although the judge did not find her for sentencing purposes to be particularly vulnerable due to her personal circumstances, she was

undoubtedly vulnerable, and the appellant took shameless advantage of his position. We agree that counts 1 and 5 fell within category 3A of the Sexual Assault Guideline. We are unclear why count 4, which we understand to involve the appellant masturbating himself, was not placed in category 2A of the relevant guideline, with a starting point of 2 years' custody. Ms McCullough has helpfully explained that the description given by C of the appellant's activity with his hand inside his boxer shorts may have left room for doubt as to whether it fell within a strict definition of masturbation. Acknowledging that that may be so, it seems to us that, at the very least, the judge would have been entitled to move upwards from the category 3A starting point to reflect the nature of the sexual activity.

16. The judge correctly identified the mitigating factors and, in our view, he clearly took them into account. As he put it, he reached his decisions as to the appropriate terms of imprisonment "weighing in those aggravating features and the mitigation as I have identified them". It was not necessary for him to say precisely what allowance he had made for each separate matter. It would have been better if he had referred explicitly to the well-known decision in R v Manning, but we have no doubt that he had well in mind Ms McCullough's submissions as to the particular difficulty of serving a prison sentence during the Covid-19 pandemic.
17. The judge faced head-on the difficult issue of whether it was possible to suspend the total sentence. Again, he correctly identified the factors which were relevant to his approaching that issue in accordance with the Imposition guideline. It is a very sad feature of the case that the appellant's offending has not only caused serious harm to C but also, as a result of his imprisonment, causes harm to the young adults for whom he cares. The judge was however appraised of the alternative arrangements which could and would be made for their care, and had all the information he needed to make a fair assessment of the extent to which imprisonment of the appellant would have a significant harmful impact upon others.
18. In our judgment, having weighed the relevant considerations, the judge was entitled to conclude that the offending was so serious that appropriate punishment could only be achieved by immediate imprisonment. For those reasons, grateful though we are to Ms McCullough, this appeal fails and is dismissed.

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