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[2022] EWCA Crim 620

No. 2022000177 A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION



Royal Courts of Justice

Wednesday, 23 February 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE HILLIARD
HIS HONOUR JUDGE CONRAD QC

**IN THE MATTER OF A REFERENCE BY
HER MAJESTY'S SOLICITOR GENERAL UNDER
SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988**

AZ

Respondent

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

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MR K. HECKLE appeared on behalf of HM Solicitor General

MR C. PATTISON appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences with which we are concerned. No matter relating to the persons against whom the offences were committed shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as victims of the offences. Given the relationship between the offender and the persons to whom the 1992 Act gives protection, we shall refer to the offender throughout as "AZ". Were he to be identified, this would be likely to lead to the identification of his victims.

Introduction

- 2 On 17 December 2021 AZ was sentenced by HHJ David Potter sitting in the Crown Court at Liverpool to an extended determinate sentence of 17 years pursuant to s.279 of the Sentencing Act 2020. The custodial term was 12 years' imprisonment and the extended period of licence was five years. That was the sentence imposed in respect of Count 1 on the indictment which charged rape of a child under the age of 13. Concurrent determinate terms of 40 months' imprisonment were imposed on Counts 2 and 3 which charged sexual assault of a child under the age of 13. The same sentence was imposed on Count 4 - making indecent photographs of a child. The same offence was charged on Count 5, where the sentence was 16 months' imprisonment. On Count 6 a sentence of four months' imprisonment was imposed for distributing an indecent photograph of a child. All of the determinate terms were ordered to run concurrently with each other and with the extended determinate term.
- 3 AZ made his first appearance at the Magistrates' Court on 19 October 2021. He indicated pleas of guilty at that point. He was sent to the Crown Court. He pleaded guilty to the indictment at the PTPH in line with the indication he had given earlier. Sentence was adjourned to permit the preparation of a presentence report and a psychiatric report. The primary purpose of the reports was to assist the judge in his assessment of risk and dangerousness.
- 4 The Solicitor General seeks leave, pursuant to s.36 of the Criminal Justice Act 1998, to refer the sentence to this court as unduly lenient.

The Facts

- 5 AZ is now 30. He was born in January 1992. He married in 2015. There are two children of the marriage: a son born in 2017, to whom we shall refer as "RO"; a daughter born in 2019, to whom we shall refer as "EM". At the time of the offences in September 2021 the family lived in Southport. AZ worked in a warehouse locally. He had no criminal convictions. To all outward appearances he enjoyed a normal family life. However, in September 2021 he committed extremely serious sexual offences against both of his very young children.
- 6 On 14 September 2021 early in the morning on a sofa in the family home AZ raped his two-year-old daughter. What he did is not in doubt, because he filmed what he did on his mobile telephone. The video later recovered from his telephone lasted for about 28 seconds. It showed EM sat on the sofa naked from the waist down with her legs apart. AZ knelt in front of her. His lower half was naked with his penis erect. Initially, he put his penis towards the area of EM's anus. He then rubbed his penis against the front of EM's vagina. The tip of his penis entered her vagina. At around 10 seconds into the video EM closed her legs. AZ pushed them apart so that he could continue to rub his penis against her vagina. He held her legs apart when EM tried to close them again. What happened after the video finished is not known. She was too young to be interviewed.

- 7 This was not the only occasion on which AZ sexually abused his daughter. On at least one occasion in September 2021, he rubbed his penis against her vagina and ejaculated over her. On one such occasion RO, the four-year-old son, was present and watched what happened. On 9 September 2021 AZ took some still images of his daughter. They were taken at the same time of the morning as the video recording was made. They showed her naked on her back with her legs apart and her vagina exposed. On 21 September he distributed one of those images.
- 8 The sexual abuse of EM first came to light when AZ communicated on an app called KIK used by those interested in sex with children with someone whom he believed had a mutual interest in child abuse. In fact, that person was an undercover officer with the National Crime Agency. AZ told the officer that he was actively abusing his daughter. He sent an image of EM and asked whether he should apply more cream to her vaginal area to help with recovery. He said that he had "put his tip in both holes". He stated that he planned to abuse his daughter again the following week when his wife was at work. AZ also said that he had attempted sexual activity with his son, but that he had not got very far because his son "just whinges".
- 9 AZ was identified. He was arrested at his home on 29 September 2021. When interviewed, he admitted engaging in conversations on the KIK app and sending a photograph of his daughter. He said that the content of his conversation was fantasy. He was bailed pending further investigation. His mobile telephone was taken away for examination.
- 10 AZ lived with his mother after being bailed. The children stayed with his wife. On 8 October 2021 she was bathing the children. She noticed a tube of lubricant in the bathroom. Her son, RO, told her that AZ had put "the cream" on his hand and put his penis up his bottom so that it hurt. RO said that EH had been there when this happened. On 16 October the police received the results of the examination of the offender's mobile telephone. These revealed the video and the still images. He was interviewed again on 18 October 2021. AZ now admitted sexually assaulting his daughter on two separate occasions, saying that the tip of his penis could have entered her vagina though he did not intend that to happen. He said the abuse was not planned. He had ejaculated on one occasion. The offender also admitted sexually assaulting RO by rubbing his penis against his bottom. He said he had never penetrated RO.

Material Considered by the Judge

- 11 Neither child was interviewed at any stage of the investigation. It is clear to us that both were regarded as too young. The offender's wife made a victim personal statement. She explained that there had been a noticeable change in her son's behaviour. He was very protective towards his sister. He had said, "I saw daddy hurt EM and told him to stop it." She described RO as "no longer that carefree happy four-year-old boy". She said that AZ's actions had "completely destroyed our family".
- 12 There was a pre-sentence report from an experienced Probation Officer. In the assessment of the risk of serious harm, the author of the report said this:

"[AZ's] behaviour can be described as extreme. It is rare, in my experience, to see such clear evidence of such serious sexual offending behaviour against such young victims. [AZ] is the father of the victims and was supposed to be caring for them at the time of the offences. As such, one element of this case is the inherent gross breach of trust. The extremely young ages of the victims make it difficult to predict the long-term consequences for them but it must be the case that [AZ] exposed them to the risk of serious psychological harm. It is quite possible that his actions could also have caused them serious physical harm, although, thankfully, this does not

appear to have materialised. The fact that [AZ] was able to offend in such a manner shows that he was capable of breaching innumerable boundaries as to what is viewed as acceptable."

- 13 There was a psychiatric report from Dr Andrew Shepherd. Dr Shepherd reviewed AZ's life and experiences at some length. He was unable to provide any psychiatric explanation of the offender's actions. We quote from p.24 of his report:

"I conclude that [AZ] displays no evidence of major mental disorder ... But may display some traits suggestive of personality disruption that could have interacted with his subsequent offending behaviour.

[...]

I have attempted to offer some tentative initial formulation of [AZ's] offending behaviour - though the nature of the offence is contradictory to many of his experiences and difficult to understand."

The Sentence

- 14 The judge referred to the relevant guideline in relation to each offence. In respect of the rape of EM, he concluded that there was higher culpability by reason of the abuse of trust and the element of planning which was inherent in the act of filming the abuse. The judge found that harm was in Category 2, because EM was particularly vulnerable due to extreme youth. Since she was only two and a half years old, the harm approached Category 1. That was because of the extreme nature of the relevant harm factor. A category 2A offence indicated a starting point of 13 years' imprisonment with a range of 11 to 17 years. The judge noted the aggravating effect of the location of the offence and the long-term impact on EM and the wider family unit.
- 15 In relation to the offences of sexual assault, they were both Category 2A offences in the relevant guideline, giving a starting point of four years with a range of three to seven years.
- 16 The video which AZ took of his rape of EM was in Category A in the guideline relating to indecent images of children. This provided a starting point of six years' custody with a range of four to nine years. The judge noted the lesser starting points for the other offences concerning indecent images.
- 17 The judge's approach to the sentencing exercise was to impose a sentence on Count 1, the rape of EM, longer than indicated by the guideline in order to reflect the totality of AZ's offending. The offender clearly presented a significant risk of causing serious harm for specified sexual offences. Thus, an extended determinate sentence would be imposed in relation to that count. Concurrent sentences were imposed on the other counts "to ensure that the overall sentence is just and proportionate".
- 18 Had AZ pleaded not guilty and been convicted after a trial, the judge said that an extended determinate sentence of 23 years would have been appropriate, namely a custodial term of 18 years and an extended licence period of five years. Because pleas of guilty had been indicated at the first opportunity, the custodial term was reduced to 12 years. Shorter and concurrent determinate sentences imposed on the other counts reflected the judge's approach.

Discussion

- 19 On behalf of the Solicitor General, it is acknowledged that the judge's approach in large measure was correct. He identified and used the correct guideline in relation to each offence. He correctly took Count 1 as the lead offence. He accepted that the extreme youth of EM was critical when determining the level of harm. He did not double count in relation to the video taken by the offender of his act of rape. He found that the offender was dangerous. The Solicitor General does not argue that it was wrong to impose an extended determinate sentence rather than a life sentence.
- 20 The first point at which the judge is said to have fallen into error is in relation to the starting point for the offence of rape of EM. Because she was so young, the harm category should have been Category 1. On that basis, the starting point was 16 years' custody before consideration of any aggravating factors. There then should have been a significant increase from that starting point to take account of the aggravating factors. By that route, a sentence after trial of 18 years' custody solely for the offence of rape would have been the very minimum appropriate sentence.
- 21 The second point flows from the first. If the proper sentence after trial simply for the offence of rape would have been 18 years' custody, the overall sentence on Count 1 should have been significantly longer in order to reflect the totality of AZ's offending. The overall sentence required a significant uplift to mark the offence against RO. The indecent image offences were aggravated by the fact that images of EM were shared with others.
- 22 The submission on behalf of the Solicitor General is in the alternative. Either the custodial term in relation to Count 1 should be increased significantly or the sentence to be imposed in relation to other offences should commence forthwith, as determinate sentences, with the extended determinate sentence to run consecutively.
- 23 On behalf of the offender, Mr Heckle argues that a reference under s.36 of the Criminal Justice Act 1998 is intended to correct a gross error by a sentencing judge. He cites the observation to that effect by Thirlwall LJ in *YZ* [2019] EWCA Crim 466. He contends that the judge in this case had considered the factual background with great care and had analysed the offending properly by reference to the Sexual Offences Definitive Guideline. The sentence taken by the judge as an appropriate sentence after a trial was of sufficient length to reflect the gravity of the offending. Mr Heckle relies on the fact that the offender's full admissions saved any further enquiry with his children.
- 24 We consider that the correct formulation of what amounts to an unduly lenient sentence is still that provided by the then *Lord Chief Justice in Attorney-General's Reference No 4 of 1989* [1990] 1 WLR 41:
- "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."
- 25 By reference to that formulation, we consider that the sentence imposed in this case was unduly lenient. We respect the fact that the sentencing judge gave very careful consideration to the case. His core approach was correct. However, we conclude that the sentence on the lead offence did not reflect the overall criminality of the offender.
- 26 Had AZ's offending been restricted to the offence of rape of his daughter, a custodial term after trial of 18 years might have been a sufficient reflection of the gravity of the offence. It certainly would not have been unduly lenient. We are in no doubt that the offence fell squarely

within Category 1 harm in the guideline, because of the extreme nature of the relevant Category 2 factor, namely "child is particularly vulnerable due to extreme youth". The author of the pre-sentence report may not have had the guideline in mind when he said what he did as we have quoted above. It is, however, a very clear exposition of how extreme the harm was in this case. The aggravating factor - the location of the offence - and the multiple higher culpability factors - planning, gross abuse of trust due to the familial relationship, recording of the offence - justified a substantial uplift from the starting point of 16 years.

27 The custodial term after trial identified by the judge in relation to Count 1, thus, did not reflect the following:

- (i) the other sexual assault on EM, which involved the offender rubbing his penis against her vagina and ejaculating;
- (ii) the fact that RO was present at the time of this sexual assault;
- (iii) the taking of an indecent image at or around the time of the other sexual assault, which was shared with others;
- (iv) the sexual assault on RO, which involved the offender rubbing his penis against RO's buttocks;
- (v) the fact that EM had been present on this occasion.

28 All of these matters added to the overall seriousness of the offending, which the judge was required to reflect in the lead sentence. In particular, the sexual abuse of RO, which was distinct from the abuse of his sister, was very serious. He was only four years old. The guideline in relation to sexual assault of a child under the age of 13 by definition covers a wide age range. RO was and is at the lower end of the age range. He suffered clear and obvious psychological effects as a result of the abuse. The guideline indicates that a case of particular gravity may require upward adjustments from the starting point, before any further adjustment for aggravating factors. This was a case of particular gravity. For that offence, taken in isolation, a sentence after trial at the top of the category range would have been required. Even allowing for the need to take into account totality and to maintain proportionality, the gravity of the offence involving RO required a substantial uplift to the total sentence.

29 We take the view that we should follow the approach of the sentencing judge. We should determine the appropriate sentence to reflect the entirety of offending and impose that sentence on Count 1 with shorter determinate sentences on the other counts. The determinate sentence in relation to the offence involving RO requires adjustment to indicate its seriousness, but that sentence will be ordered to run concurrently. We emphasise that, just as the judge sought to represent the overall criminality in the sentence on Count 1, so do we.

Conclusion

30 We give leave to the Solicitor General to make a reference to this court under the provisions of s.36 of the Criminal Justice Act 1988. We find that the sentence imposed on the offender was unduly lenient for the reasons we have set out. Taking the same approach as the judge, we conclude that the proper custodial term after a trial on all counts would have been 22 years' imprisonment prior to any issue of future risk of dangerousness. Giving full credit for the pleas of guilty, the appropriate custodial term is 14 years and eight months.

- 31 We quash the sentence on Count 1, namely an extended determinate sentence of 17 years with a custodial term of 12 years and an extended licence period of five years. We substitute an extended determinate sentence of 19 years and eight months. The custodial term will be 14 years and eight months. The extended licence period will be five years. Further, we quash the sentence of 40 months' imprisonment on Count 3 (the sexual assault of RO) and substitute a sentence of 54 months. That determinate sentence will run concurrently with the extended determinate sentence imposed on Count 1. All the other sentences we leave untouched.
- 32 The effect of the substituted sentences is the offender will serve two thirds of the custodial term of 14 years and eight months before he is eligible for release. Whether he will be released at that point will be a matter for the Parole Board to decide, who will only release him if they consider it safe to do so. Whenever he is released, he will remain on licence for any remaining part of the custodial term and for a further five years thereafter.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.