[2022] EWCA Crim 80

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100147/B5 & 202100191/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 26 January 2022

Before:

LADY JUSTICE CARR DBE
MR JUSTICE WALL
HER HONOUR JUDGE DHIR QC
(Sitting as a Judge of the CACD)

REGINA
V
JOHN E

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MR S ROSE appeared on behalf of the Applicant

J U D G M E N T

LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, 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 section 3 of the Act.

Introduction

1. JE is now 45 years old. This is his renewed application for leave to appeal conviction and his appeal against sentence for which limited leave has been granted. For convenience we refer to him throughout as the appellant.

2. He was convicted on 15 December 2020 following trial in the Crown Court at Basildon before His Honour Judge Hurst of multiple sexual offences under the Sexual Offences Act 2003, namely eight counts of rape, contrary to section 1(1) (counts 9, 10, 12 to 16 and 18), one count of assault of a child under 13 by penetration, contrary to section 6 (count 1), two counts of sexual activity with a child, contrary to section 9 (counts 2 and 8), two counts of engaging in sexual activity in the presence of a child, contrary to section 11(1) (counts 3 and 11), one count of causing or inciting a child to engage in sexual activity, contrary to section 10(1) (count 4), two counts of sexual assault of a child under 13, contrary to section 7(1) (counts 5 and 6), one count of assault by penetration, contrary to section 2 (count 7) and one count of inciting a family member to engage in sexual activity, contrary to section 26 (count 17).

3. The offending took place over the years between 2007 and 2017 and involved two of the appellant's stepdaughters, whom we shall call C1 and C2. Specifically, counts 1 to 4 involved C1, born in November 1996, and counts 5 to 18 involved C2, born in April 1998. C1 was aged between nine and 14 years at the time of the offending; C2 between 11 and 17.

4. The appellant was sentenced as follows:

Count on indictment	**Offence**	**Pleaded guilty or convicted**	**Sentence**	**Consecutive or Concurrent**	**Maximum**
1	Assault of a child under 13 by penetration, contrary to section 6 of the Sexual Offences Act 2003	Convicted	14 years' imprisonment	Concurrent	Life imprisonment
2	Sexual activity with a child, contrary to section 9 of the Sexual Offences Act 2003	Convicted	7 years' imprisonment	Concurrent	14 years' imprisonment
3	Engaging in sexual activity in the presence of a child, contrary to section 11(1) Sexual Offences 2003	Convicted	2 years' imprisonment	Concurrent	10 years' imprisonment
4	Causing or inciting a child to engage in sexual activity, contrary to section 10(1) Sexual Offences Act 2003	Convicted	4 years' imprisonment	Concurrent	14 years' imprisonment
5	Sexual Assault of a child under 13, contrary to section 7(1) Sexual Offences Act 2003	Convicted	4 years' imprisonment	Concurrent	14 years' imprisonment

6	Sexual Assault of a child under 13, contrary to section 7(1) Sexual Offences Act 2003	Convicted	5 years' imprisonment	Concurrent	14 years' imprisonment
7	Assault by penetration, contrary to section 2 Sexual Offences Act 2003	Convicted	10 years' imprisonment	Concurrent	Life imprisonment
8	Sexual activity with a child, contrary to section 9 Sexual Offences Act 2003	Convicted	4 years' imprisonment	Concurrent	14 years' imprisonment
9	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	19 years' imprisonment	Concurrent	Life imprisonment
10	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	EDS (24 + 6)		Life imprisonment
11	Engaging in sexual activity in the presence of a child, contrary to section 11(1) Sexual Offences 2003	Convicted	2 years' imprisonment	Concurrent	10 years' imprisonment
12	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	19 years' imprisonment	Concurrent	Life imprisonment
13	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	EDS (24 + 6)	Concurrent	Life imprisonment
14	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	19 years' imprisonment	Concurrent	Life imprisonment
15	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	EDS (24 + 6)	Concurrent	Life imprisonment
16	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	20 years' imprisonment	Concurrent	Life imprisonment
17	Inciting a child family member to engage in sexual activity, contrary to	Convicted	5 years' imprisonment	Concurrent	14 years' imprisonment

	section 26 Sexual Offences Act 2003				
18	Rape, contrary to section 1(1) Sexual Offences Act 2003	Convicted	18 years' imprisonment	Concurrent	Life imprisonment

His overall sentence was thus an extended determinate sentence of 30 years, comprising 24 years' imprisonment and a six-year extended licence period. The judge did not say in terms that the sentences on counts 1, 14 and 16 were to run concurrently but as a matter of arithmetics that was clearly his intention. Equally, he appears to have imposed a global extended licence period of six years, rather than attaching it to a specific offence, an error which we shall correct if necessary.

5. The renewed application for leave to appeal against conviction arises out of two bad character rulings made during the course of trial. The appeal against sentence rests on the single submission that a custodial term of 24 years was simply too long.

6. For the purpose of the application and the appeal, the appellant has had the very significant benefit of representation by Mr Rose. We acknowledge at the outset the quality of the submissions that we have heard from him this morning.

The facts

7. The appellant became involved with the mother of C1 and C2 and moved in with her and her six children in around 2006.

Counts 1 to 4

8. C1 ran away from home when she was 13. She first gave an ABE interview in June 2010. Her complaints were however not actioned at the time and she subsequently withdrew her allegations. But after C2 subsequently made similar allegations, C1 was contacted again by the police and gave a further ABE interview in around March 2018. In that interview C1 stated that the appellant would put his fingers inside her female parts, this starting when she was about nine years old (count 1). Her mother was not present and her siblings were sent upstairs by the appellant. The appellant asked her to give him a massage and he put his hands down her trousers. When she asked what he was doing, he told her that it was fine. His fingers then went inside her. He only stopped when C1's siblings came down the stairs.

9. C1 explained that the appellant used to do this quite often and that it was a regular thing. He would ask her to massage him and it would be the same procedure all over again. She recalled an occasion when they had moved to a new address and she was grounded. The appellant asked her to massage him and he inserted his fingers into her vagina. There were also occasions when this happened at another address. One instance was when C1 was doing the washing-up. The appellant came up behind her and put his fingers inside her vagina. Another instance occurred in the appellant's bedroom.

10. In her interview, C2 recalled an occasion when she witnessed the appellant with his hands down C1's trousers (count 2).

11. C1 also described how the appellant would also masturbate in front of her and that every time he inserted his fingers into her vagina he would play with himself and his penis

would be hard (count 3). He would also grab C1's hand and put it on his penis (count 4). The abuse against C1 ended when she went into permanent foster care.

Counts 5 to 18

12. C2 gave her first ABE interview in September 2017 when she was 19 years old. She had earlier made disclosures to work colleagues and also in a 2017 journal and letters. Her work colleagues had been concerned about her wellbeing before her contact with the police.

13. In her ABE interview, C2 stated that the appellant had been abusing her since she was 10 and that by the time she was 14 he was having sex with her. The abuse started with the appellant touching her chest area and her vagina. It started after C1 had been taken into care, although it may have happened a couple of times before that. The appellant would touch C2's breasts (counts 5) or vagina (count 6) whenever he had the opportunity.

14. The family moved address in April 2011. Social Services were involved with the family at this stage and C2 was placed under a Child Protection Plan. C2 described how she was in the kitchen packing up for the move when the appellant grabbed her. He was touching her vagina and putting his fingers inside her, trying to make her legs open wider. This incident lasted for around five minutes (count 7). C2 described also how the appellant had laid her on the floor and was kissing her on her vagina (count 8).

15. C2 described how the abuse worsened when the family moved into the new address. The appellant began to rape C2 vaginally, orally and anally. The appellant would put his penis

in C2's mouth and push her head down. She would gag because she did not like it. He would be laughing and pushing her head so it would go up and down. He would remove his penis from her mouth before he ejaculated. This first happened in the living room (count 9), but it happened multiple times in various rooms throughout the house. The appellant told C2 not to tell anyone or she would be in trouble (count 10).

16. The vaginal rape would occur regularly (counts 12 and 13). C2 explained that when she was in year 11 she was on a reduced timetable at school and would come home early. The appellant would tell her to go upstairs where he would then vaginally rape her. He did not ejaculate inside her vagina in order to avoid her becoming pregnant. He would hold her down and she would cry throughout.

17. The first instance of anal rape occurred in the living room when the appellant told C2 to pull her trousers down, to face the wall and he then penetrated her anus with his penis (count 14). This happened about three times (count 15). The appellant also inserted his finger into C2's anus a few times.

18. As well as the sexual abuse and rapes of C2, the appellant would masturbate to the point of ejaculation (count 11) and make C2 touch his penis and masturbate him to the point of ejaculation (count 17). C2 explained that her mother would be upstairs, shopping taking or collecting the other children from school or sleeping upstairs. She would never be downstairs, said C2. Some of the children would have been at home when the sexual touching happened, but they would be upstairs or outside playing.

19. C2 also said that the appellant sexually abused her in a loft (count 16) said to have been used by the appellant to grow cannabis plants. C2 said that the appellant would go to the loft every day and call C2 to take water up. He would close the hatch and vaginally rape her. The last time that this happened was in February 2017 just before C2 was made to leave the family home because the appellant believed that she had told her boyfriend, whom we shall call Z, about the loft. C2's evidence was that she delayed in disclosing the abuse that had taken place in the loft because she feared losing her job in a primary school if she disclosed that she had been party to the cultivation of cannabis at her home address.

20. In relation to count 17, the appellant also vaginally raped C2 at another person's house in around April or May 2014 when the appellant was there to fix a roof. The same thing happened at a flat in Canvey Island when the appellant was decorating and C2 went with him.

21. Count 18 was a single instance of oral rape. C2 was 19 and it occurred when she had gone back to see her siblings. She had messaged and asked if she could go round and the appellant agreed. She was upstairs and the appellant called her down. He exposed his penis and pushed her head down so that she had to go on her knees. C2 told the appellant that she had to go back upstairs as the children were calling her. This was the last time that C2 ever returned to the home.

22. The prosecution case was that C1, C2 and their siblings lived in a climate of fear exercised by the appellant. This meant that the appellant could send the children to their

rooms at any time to ensure that he was alone with C1 and C2. He was responsible for serious sexual assaults on both C1 and C2, with the abuse of C1 occurring first and the abuse on C2 thereafter beginning once C1 had left the home. The abuse on C2 progressed to full penetrative activity. C1 and C2 gave detailed accounts of the locations and frequency of the sexual abuse. School attendance records bore out their complaints that they were sometimes absent.

23. The defence case was that the appellant had not sexually abused either C1 or C2. The appellant gave evidence at trial. He denied abusing either girl. The only time he ever touched C1 was to cut her hair. He accepted that he asked the children on occasion to massage him. He denied growing cannabis in the loft and stated that he believed that C2's boyfriend, Z, had encouraged C2 to make what were false allegations.

Bad character rulings

Ruling on the appellant's bad character

24. The appellant had previous convictions for simple possession of cannabis in August 1997, possession with intent to supply cannabis in May 2001 and simple possession of cannabis in July 2009.

25. In relation to the 1997 conviction, the prosecution no longer had any documentation going directly to the offence but produced a document from the National Police Database (which we have seen) which recorded that upon search of his flat and the finding of cannabis, the appellant was also found in possession of a tray of soil in which cannabis seeds had been sown. The appellant was recorded as saying to the police at the time that

he was trying to grow cannabis.

26. Counsel for the defence submitted that evidence of the facts there recorded, to the effect that the appellant had admitted trying to grow cannabis by planting seeds in a seed tray, should not be admitted. It was not accepted on behalf of the appellant that he had told the police that which was recorded. The evidence was weak and in dispute.

27. In what was one of a number of very careful rulings, the judge first set the background, including that the evidence of abuse was not limited to abuse in the loft, that the appellant's criminal record was for the most part to be before the jury in any event, including the appellant's previous cannabis-related convictions. He ruled that the evidence as recorded in the Police National Database was relevant to an important matter in issue between the parties, namely the credibility of C2. It was, he said, clear evidence that the appellant had, albeit some time ago, an interest in cultivating cannabis that made the likelihood of C2 simply inventing such an interest less likely. He also found that the evidence was sufficiently robust to perform that function. He went on to consider whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted and determined that it would not. He stated that the jury would be properly directed as to how to approach the evidence and its limitations.

Ruling on bad character evidence against Z

28. Z gave evidence that in the summer of 2017 C2 had disclosed the abuse to him and mentioned the cultivation of cannabis in the loft. He further said that she had shown him

a phone which she told him belonged to the appellant, upon which were images of cannabis plants being cultivated and also explicit images of the family children. He stated that he had downloaded the images via a computer to a memory card which he had handed to the police.

29. In cross-examination he stated that he would have handed the card over to the Officer in the Case or to the officer who took his statement or at a police station. However, the Officer in the Case and the statement-taker both confirmed that they had not received any such memory card, and further, all and any police records had been checked and there was no record of any card being handed over.

30. The defence contention was that Z had made up these allegations against the appellant and that his evidence about what was on the memory card was detrimental and prejudicial to the appellant. To explain why Z had allegedly fabricated the memory card incident, the defence sought to rely on evidence that another memory card had been handed in to the police on 15 November 2017 by an anonymous informant unconnected to the appellant. This memory card was said to have belonged to Z and it contained indecent images of girls in school uniform. The allegation made by Z regarding the non-existent memory card, so said the defence, was made in his police statement signed only a week later as a diversionary tactic to confuse the picture regarding the memory card implicating him.

31. The judge ruled that, whilst it was agreed by the parties that this was not bad character evidence because the material was not unlawful, the question was whether or not it was relevant to an important matter in issue. He noted that by the time that Z made his

statement in relation to the case against the appellant, the case in relation to the images attributed to Z had been closed. He therefore found that it was tenuous to suggest that this issue would still be playing on Z's mind to the extent that he would be prepared to make a false statement against the appellant. It also created a risk of satellite litigation. The judge also noted that the defence would still be able to make the point about antipathy between the appellant and Z and the fact that the police did not have the memory card which Z said he had given to them. On this basis, he ruled that the evidence in relation to the memory card attributed to Z and its investigation was inadmissible.

Grounds of appeal

32. Mr Rose emphasises the background to his renewed application for leave to appeal conviction. That background is that the question of whether or not the appellant was cultivating cannabis in the loft, providing him with the opportunity to commit the most serious of the acts of sexual abuse against C2 with the frequency alleged, was a crucial issue. It was always the defence case that the loft and privacy issues were misconceived. Mr Rose emphasises the manner in which the allegations of abuse in the loft arose, said to have been unsatisfactory. There had been no disclosure of these matters in 2010 by C1, nor did C2 raise the allegations in her first interview.

33. The submission is that the battle on the issue as to whether or not abuse took place in the loft, where cannabis was being cultivated, was undermined so far as the defence was concerned by the judge's refusal to exclude the evidence surrounding the 1997 cannabis offending. The evidence should not have been admitted at all; even if it was admissible, the jury ought to have been properly directed as to the hearsay nature of the evidence in

question.

34. As to admissibility in the first place, Mr Rose submits that the mere proposition that the circumstances of the 1997 offending could support a proposition that so many years down the line and to a far greater degree the appellant was cultivating cannabis, even taking the 1997 material at its highest, was unsustainable. There was no other evidence of successful cannabis cultivation by the appellant subsequently. The box of seeds referred to in the 1997 offending was allowed to assume a significance far greater than it could sensibly have merited. The record on the Police National Database was unreliable in the sense that it was not entirely clear what the appellant had said and not said, and moreover, it is to be noted that the appellant was never in fact prosecuted for cultivation of cannabis seeds in 1997.

35. Beyond that, no doubt because the defence took no objection on hearsay grounds at the time, the judge made no ruling as to whether or not the evidence in question was admissible hearsay. This is said to have been an error. The only gateway for admitting the evidence would have been pursuant to section 114(1)(d) of the Criminal Justice Act 2003. The judge made no ruling in this respect and the evidence should not have been admitted as hearsay having regard to the factors identified in section 114(2).

36. Mr Rose submits that the hearsay aspect was never drawn to the jury's attention. The jury should have been directed as to the limitations of what was multiple hearsay evidence and of the prejudice to the appellant arising out of the fact, for example, that the relevant police officers in attendance in 1997 were not available for questioning.

37. In short, the appellant was deprived of the opportunity to say that there was no independent evidence of cannabis cultivation or of the protection afforded by full and proper hearsay directions.

38. This ground alone is said to be sufficient to render, at least arguably, all of the appellant's convictions unsafe. This was a case where, as would be expected, cross-admissibility directions were given to the jury and a case where C1 and C2 as siblings had spoken to each other.

39. As a bolster and alongside ground 1, Mr Rose also advances a second ground of appeal. The submission is, in short, that the judge was wrong to rule against the admission of the evidence of the provably existent memory card against Z. The evidence went to an issue of substantial importance and was of substantive probative value. The judge should have allowed the evidence to go in as a balance to the prejudice caused to the defence by the admission of the evidence as to the circumstances of the appellant's offending in 1997.

40. So far as sentence is concerned, Mr Rose submits in short that, having regard to all the factors and circumstances in the case, a custodial term of 24 years was simply too long. No criticism is made of the judge's finding of dangerousness. As to term, particular reliance is placed on the authority of R v S [2016] EWCA Crim 2058. That was an extremely serious case involving, so far as one victim was concerned, a campaign of rape. There were other similarities, it is said: the victims were daughters, the sexual offending took place within a course of conduct, there was a background threat of

violence and one victim was offended against for much longer periods than another. It is said for the appellant that the offending in S was more serious than the offending here. The complainants in S were younger and both were raped. In that case, this court held that a custodial term of 25 years was too long. It was reduced on appeal to 22 years before credit for guilty plea.

Discussion and analysis: conviction

41. Ground 1. We can understand why the judge considered the circumstances as recorded of the 1997 offending to be relevant to C2's credibility and that the admission of the evidence would not have such an adverse effect on fairness that it ought not to be admitted. If it was true, it was highly unlikely to be mere coincidence that C2 was making suggestions that she was fabricating lies about cannabis cultivation. The evidence was directly relevant to her credibility. The evidence came into existence before the importance of cannabis cultivation was ever on the cards and apparent. There was a clear record by the police made in a database and a clear record of what the appellant said. Further, not only could the appellant challenge the evidence; he did challenge it.

42. Putting to one side the additional arguments as to hearsay, the short point in our judgment is that the admission of the evidence relating to and the circumstances surrounding the appellant's 1997 conviction did not arguably render the appellant's convictions unsafe. The prosecution case on cultivation in the loft was supported by witness evidence, as well as the police database record. We point for example to C2's own evidence and the records in her 2017 diary. On the appellant's own evidence there was an inference of such activity, given his limited funds and his lifestyle involving cannabis and alcohol

consumption and the need to provide for the family.

43. Additionally, the evidence cannot be said to have caused significant unfair prejudice such as to render the convictions unsafe, in circumstances in particular where the appellant's cannabis-related convictions and cautions were on any view going before the jury. Further, the appellant was able to recall the events in 1997 and, as we have already indicated, provide an alternative account to the jury. He accepted that there had been a tray at the time containing cannabis seeds, but no soil. He was also able to and did call multiple witnesses to the effect that there had been no cannabis grown in the loft.

44. The judge directed the jury on the limited purpose for which the material had been adduced. It amounted to some evidential support for C2's credibility depending on the jury's findings on the facts. The judge reminded the jury of the appellant's denial of the presence of soil and also reminded the jury that the conviction in 1997 was a long time ago. The jury was also directed in terms that evidence contained in records was to be treated with caution. Unlike the position in R v Smith [2020] 2 Cr.App.R 27 the evidence was not highly prejudicial. The loft and cannabis cultivation issue was an important background issue, but it was not central and certainly not determinative of the allegations being made.

45. For these reasons, we do not consider that ground 1 renders the appellant's convictions arguably unsafe.

46. As for the second ground, the chronology is important, as the judge himself identified.

The memory card attributed to Z came to police attention on 15 November 2017. This was after C2 had made her allegations against the appellant. The decision to close any complaint against Z was taken the next day on 16 November 2017. The card was forfeited. Formal disposal of the case took place on 17 November 2017. Z did not make his witness statement in relation to C2 until 21 November 2017.

47. Any suggestion therefore that Z was trying to deflect blame is difficult, if not impossible, to understand in these circumstances. Further, the appellant was in any event able to and did suggest to Z that he had an accepted antipathy towards the appellant. This was an issue thoroughly explored in the evidence.

48. We therefore refuse the renewed application for leave to appeal conviction.

Discussion and analysis: sentence

49. The judge was well-placed to sentence the appellant following what was a lengthy seven-week trial. He used that advantage to good effect in what were detailed sentencing remarks, describing amongst other things the harsh and capricious household regime run by the appellant. There were numerous cruel and excessive punishments. The children were routinely grounded, physical violence threatened and on occasion meted out. On occasion their heads were shaved. Basic dignities such as the use of the toilet were controlled. Staying at home was a punishment. C1 and C2 were clearly terrified of the appellant. The home was described as the appellant's "kingdom", ruled by fear and terror. From the victim personal statements, one of the deepest effects felt by C1 and C2 was that they effectively lost their mother and their families to the appellant. Their mother in

particular had stood by him. The judge also described the damage caused to C2's mental health in particular. She has suffered acute mental collapse. She has undergone periods of admission and in-community psychiatric care. She has contemplated suicide and actually self-harmed. She is unable to be physically intimate in a loving relationship and has a pathological fear of men. She has been vilified by her siblings and thrown out of the family, including by her mother. The judge described her as a shadow of the person that she once was, directly as a result of the sexual abuse. C1 described feeling as if she had been thrown out with the rubbish and she spoke of her fear at the time.

50. The judge found the appellant to be dangerous and, rightly, there is no criticism of that conclusion. He emphasised the need to avoid double-counting and the need to take totality into account. For the 1A offending on the rape offences committed on C2, the starting point for a single offence was 15 years but, as he stated, the offences could be of such severity, for example involving a campaign of rape, that sentences of 20 years and above could be appropriate. The offending on C2 did involve a campaign of rape. There were then aggravating features of ejaculation, location, being reluctant to go home and ultimately forced to leave home, the presence of other children in the house or close by. The offending on count 1 on C1 fell to be categorised as 2A offending, again with aggravating features involving the home environment and the effect on her placed within the family. On the remainder of the counts, there were the common themes of threats of violence, intimidation and the general coercive regime, location, timing, reluctance to go home, abuse of trust and lack of mitigation.

51. We do not find significant assistance in the case of R v S [2016] EWCA Crim 2058. The

argument by analogy is not persuasive. Amongst other things, R v S involved a 71-year-old appellant entering a guilty plea and in very poor health. Here the appellant is neither elderly nor in poor health. Every case turns on its own facts.

52. We can find no fault in the judge's approach to the sentencing exercise as a matter of principle or in his assessment of culpability and harm. He respected the principle of totality. This was exceptionally serious sexual offending carried out over more than a decade, set in a background of controlling and coercive behaviour with devastating consequences for the victims. The overall sentence of 24 years with an extended licence period of six years was not manifestly excessive.

53. We therefore dismiss the appeal against sentence. We do however correct the global imposition of the extended licence period by attaching that extended licence period to the sentence of 24 years' imprisonment imposed on count 13.

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