IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00322/A4
[2023] EWCA Crim 351

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 22nd March 2023

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE KERR

HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v –

B R J

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Mr B Lloyd appeared on behalf of the Attorney General

Mr A Sharp appeared on behalf of the Offender

J U D G M E N T
(Approved)

Wednesday 22nd March 2023

LORD JUSTICE HOLROYDE:

1. This case concerns sexual offences against young girls. Each of the victims is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of these offences. We shall refer to the victims simply as "C1, "C2" and "C3". In view of the family relationship between the offender and two of his victims, it is necessary for any report of this case to be anonymised by using the randomly-chosen letters "BRJ" in place of his name.

2. The offender pleaded guilty to a total of 41 offences. On 4th January 2023, in the Crown Court at Cardiff, he was sentenced by the Honorary Recorder of that city, Her Honour Judge Lloyd-Clarke, to life imprisonment, with a minimum term of 13 years and 209 days.

3. His Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.

4. Between December 2009 and February 2011, the offender committed repeated offences against his daughter, C1, starting when she was just one year old. On the first of two indictments against him, he pleaded guilty to 20 offences of rape of a child under 13, those offences involving his penetrating C1's anus or vagina with his penis; one offence of assault of a child under 13 by penetration, an offence which involved his digital penetration of C1's anus; and three offences of sexual assault of a child under 13, and five of causing or inciting a child under 13 to engage in sexual activity, those offences all involving his sexual touching of C1 and his causing her to touch his erect penis. In addition, he pleaded guilty to one offence of

making indecent photographs of a child, one offence of distributing such photographs, and one offence of possessing indecent images of children.

5. The offender had recorded his crimes and had compiled a collection of 200 photographs and one video which showed what he had done to his daughter. C1's face was clearly visible in the imagery, but his own face had been carefully obscured. For that reason, although the images had been circulating on the dark web for several years and had come to the attention of law enforcement authorities in a number of countries, it was for a long time impossible to identify the offender. Recently, however, it became possible to clarify the images of the offender by the use of new technology, and the National Crime Agency were able to identify and locate him.

6. When arrested, the offender admitted that he was the man shown in the photographs, admitted that he had taken them, and said that he had distributed them to a man he had met through the dark web. He initially denied any act of penetration, and for that reason did not immediately indicate his guilt of the four charges of rape on which a magistrates' court first sent him for trial. Later, however, he accepted that there had been penetration, and he pleaded guilty or indicated his guilt of all other charges at the first opportunity.

7. When asked by the police in interview if he had committed any other offences, the offender volunteered that he had done so in relation to two other young girls. As a result, he was charged on a second indictment with further offences committed between 2005 and 2007 against his niece, C2, who was then aged four to five. In relation to C2, he pleaded guilty to two offences of assault of a child under 13 by penetration, involving his penetrating C2's vagina with his finger and with a pink plastic object shaped like a penis; one offence of sexual assault of a child under 13, involving his sexual touching of C2; and one offence of taking indecent photographs of a child and one of distributing indecent photographs of a child. Images of C2 have also

circulated on the dark web.

8. The offender also pleaded guilty to offences of taking and distributing indecent photographs of a young child. These offences were committed in 2010. The offender took photographs of a young child, C3, who was having her clothes changed by her mother on a beach. Later, he distributed those photographs, though possibly to only one other person, rather than on to the dark web generally.

9. Finally, the offender pleaded guilty to three counts of possession of indecent photographs of a child. These related to imagery found on various devices seized from him by the police. The images comprised 789 in category A, 989 in category B, and 2,327 in category C. The category A images included some which were particularly serious, such as the sadistic rape of a baby.

10. The offender is now aged 51. He had but one previous conviction, for a motoring offence long ago, which added nothing to the seriousness of these offences.

11. At the sentencing hearing, the judge was assisted by a pre-sentence report. There was a victim personal statement written by C2, in which C2 referred to her bewilderment and horror on learning that the offences had been committed against her by an uncle whom she had loved and trusted. She made clear that her life had been turned upside down when the police revealed the facts to her, and was deeply worried as to whether she would ever be able to form any trusting relationship in the future.

12. No victim personal statement was available from C1 because she had not, at that time, been made aware of the offences against her. The judge observed, with justification, that when C1 does receive that information, it will no doubt have a devasting effect on her.

13. In her detailed and careful sentencing remarks, the judge commented that the nature and depravity of the offending was shocking, even for those who frequently have to deal with sexual offences. She allowed the offender 25 per cent credit for his guilty pleas tendered at the plea and trial preparation hearing to the four counts of rape on which he had been sent for trial, and allowed full credit on all other counts.

14. The judge considered the Sentencing Council's relevant definitive guidelines and concluded that each of the contact offences fell into category 1A of the guidelines concerned. For the offences of rape, the starting point was 16 years, with a range of 13 to 19 years' custody. The judge found that in the circumstances it was appropriate to start at the lower end of that range, because the case came into category 1 harm by reason only of the presence of a single category 2 factor of an extreme nature. She adopted the approach of treating the offences of rape as the lead offences, increased the sentences for those offences to reflect the overall offending, and imposed concurrent sentences for each of the other offences.

15. The judge emphasised the fact that the victims must live with the knowledge that indecent images of them have been circulated on the internet and cannot be recovered or removed. She further referred to the repetition of the offending over a long period of time, the fact that the offender had ejaculated onto C1 on at least two occasions, and the fact that he had offended against more than one victim.

16. The mitigating factors identified by the judge were the offender's admissions and co-operation with the police from the outset; his admission of the offences against C2 when they were not known to the police or under investigation; the passage of more than a decade since the contact offences, albeit that the various indecent images were still in his possession when arrested; his effective previous good character; and the consequences he had brought upon

himself in terms of the ending of his relationship with his children.

17. The judge found the offender to be dangerous, as that term is defined for sentencing purposes. She concluded that it was impossible to make a reliable estimate of the length of time for which he would continue to pose a danger, and that it was therefore necessary to impose life sentences. She did so in respect of each of the 20 offences of rape of C1. By a slip of the tongue, she referred to one of those offences as count 46 on the first indictment, when it is clear that she must have meant to refer to count 45. The Crown Court record should be corrected in that regard.

18. The judge concluded that the notional determinate sentence for each of the rape offences, to run concurrently, would have been 28 years, before giving credit for the guilty pleas. She then determined the appropriate minimum term by taking two thirds of the notional determinate sentence which would have been imposed, after giving credit for the pleas. In the result, she imposed sentences of life imprisonment on each of the 20 rape offences, with a minimum term of 13 years and 209 days on counts 1, 27, 40 and 52 of the first indictment, and a minimum term of 12 years and four days on each of the others. She imposed shorter concurrent determinate sentences on each of the other counts on the two indictments. She also made ancillary orders, to which we need not refer further.

19. On behalf of the Solicitor General, Mr Lloyd submits that the total sentence was unduly lenient. He challenges the judge's decision to make an initial movement downwards from the guideline category 1A starting point for the rape offences, and submits that any one of those offences fairly and squarely merited the guideline starting point. He also challenges the extent to which the judge then moved upwards, to reflect the many other offences and the offending against two other victims. He suggests that only limited mitigation was available to the offender. Overall, he submits that the notional determinate term of 28 years should have been

much higher.

20. Mr Lloyd acknowledges that in *R v AYO and Others* [2022] EWCA Crim 1271, at [24], the court stated that case law showed that:

> "… it will be comparatively rare for the total custodial term of an extended sentence for multiple sexual offences to exceed about 30 years after a trial. Sentences of greater length have been reserved for particularly serious offending."

Mr Lloyd submits, however, that this is a particularly serious case. Indeed, he suggests that it is an extreme case of its kind, and that the minimum term should accordingly have been calculated on the basis of a determinate sentence significantly in excess of 28 years.

21. Mr Adam Sharp, representing the offender in this court as he did below, submits that the judge carefully considered all relevant factors, both aggravating and mitigating, and made a substantial uplift from the notional determinate sentence for a single offence of rape to reflect the number of offences. He submits that the total sentence was not unduly lenient.

22. We are grateful to both Mr Lloyd and Mr Sharp for their admirably focused submissions.

23. The judge clearly took considerable care in reaching her decisions as to sentence in this serious case. No doubt because she took that evident care, neither party takes any issue with the judge's overall approach, her finding of dangerousness, or her conclusion that life imprisonment, which she recognised as the sentence of last resort, was necessary. Nor is any issue taken with her assessment of the appropriate reduction for the guilty pleas, or with her calculation of the minimum term once the notional determinate sentence had been determined. We therefore focus on the notional determinate sentence which she decided was appropriate.

24. This was, on any view, grave offending. The offender repeatedly raped C1 from a very young age in dreadful breach of trust and with no regard for her extreme vulnerability. He committed other serious sexual offences against her and compounded his crimes by causing the imagery of them to be circulated on the internet. He committed serious offences against C2, whose images are also in circulation on the internet. Both victims have suffered, and will continue to suffer, serious harm. The judge was right to point to the additional harm caused to the victims by having to live their lives under the cloud of knowing that images of them are available for others to view. The offences in respect of C3, and the continuing possession of indecent images of children, show a very worrying interest on the offender's part in the sexual abuse of very young children, and were important in the judge's unchallenged decision that life imprisonment was necessary. It is, however, impossible to argue that the judge was not fully aware of the seriousness of all these aspects of the case.

25. Moreover, there was, in our view, significant mitigation to set against the seriousness of the offending. It is comparatively unusual for a man who has committed offences of this nature to admit them as soon as questioned by the police, to volunteer admissions of other offences not then under investigation, and to plead guilty either at the first opportunity or soon thereafter. It is also a feature of this case that the offender had no previous convictions of any relevance and had committed no contact offences for a decade or more before his arrest. Collectively, those matters did carry some weight.

26. It must be remembered that the future protection of the public is provided for by the fact that the offender, who will be in his mid-60s before being eligible even to apply for release on licence, will be subject to the conditions of his licence for as long as he lives. The issue in this case relates to the minimum term which he must serve by way of punishment for his offences. The judge concluded that just and proportionate punishment would be provided by a minimum

term based on a notional determinate sentence of 28 years.

27. We see no basis on which the judge's balancing of all relevant factors, and her conclusion in that regard, could be challenged. We are not persuaded by Mr Lloyd's submissions to the effect that she should have taken a higher starting point for an individual offence of rape of a child under 13. But, in any event, our focus must be on the total sentence after upwards adjustment of the starting point.

28. We do not accept the submission that the judge was required to impose a much longer minimum term than she did. It may well be that the offender could not have brought any successful appeal if the judge had taken a slightly longer notional determinate sentence than she did; but that is not the test. We remind ourselves of the familiar statement of Lord Lane CJ in *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41 (at page 46A), that a sentence would only be unduly lenient "where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate".

29. In all the circumstances of this case, the total sentence was, in our judgment, within that range and cannot be said to be unduly lenient.

30. For those reasons, leave to refer is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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