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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 666



No. 202300979 A2

Royal Courts of Justice

Thursday, 18 May 2023

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE JEREMY BAKER
MR JUSTICE PICKEN

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

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REPORTING RESTRICTIONS APPLY
Sexual Offences (Amendment) Act 1992

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MR R QUAIFFE appeared on behalf of the Applicant.

MS J FAURE-WALKER appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. Under those provisions, where a sexual offence has been committed against a person, no matter relating to the victim shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as a victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. We shall refer to the victim as V. Because the victim is the offender's son, it has been necessary to anonymise the name of the offender in order to protect V's anonymity.
- 2 On the first day of his trial in the Crown Court at Exeter the offender pleaded guilty to five counts of historic sexual offending committed between 1976 and 1981. The victim V is the offender's son. He was then aged between 11 and 15. Each of the counts reflected multiple offending over the course of a year. Counts 1, 2 and 3 charged indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960, reflecting offending when V was aged 11, 12, and 13 respectively. Counts 4 and 5 charged indecent assault on a male, contrary to section 15 of the Sexual Offences Act 1956, reflecting offending when V was aged 14 and 15 respectively.
- 3 On 23 February 2023 he was sentenced (as varied by a subsequent amendment under the slip rule) as follows. Count 1, one year's imprisonment with a further licence period of one year under section 278 of the Sentencing Act 2020; Count 2, one year's imprisonment with a further licence period of one year under section 278 of the Sentencing Act 2020; Count 3, 18 months' imprisonment; Count 4, two years' imprisonment; Count 5, two years' imprisonment. All sentences ran consecutively. The total sentence was, therefore, one for a custodial term of seven-and-a-half years' imprisonment with a further aggregate licence period of two years.
- 4 His Majesty's Attorney General applies pursuant to section 36 of the Criminal Justice Act 1988 for leave to refer the sentence as unduly lenient.

The Offending

- 5 The offender is now 87 years of age. At the time of the offences he was in his mid- to late-40s. V was the youngest of three siblings. The offender was a domineering man. The family, including the mother, was scared of him. When V was aged 11 the offender moved him from the bedroom he had shared with a brother and placed him in an area downstairs where he was to sleep alone. The offender had converted a small space under the stairs for this purpose, in which he put a single bed enclosed with a curtain.
- 6 The offender made it his habit to wait until the rest of the family had gone to bed and then visit V. He would open the curtain and enter. He would be wearing only a pair of shorts through which his erect penis was obvious or he would already have his penis exposed as he approached V. He would rub his penis against V's body and kiss him all over, including on his bottom. V would have to suck the offender's penis until he ejaculated, sometimes into V's mouth. At other times the offender would suck V's penis. During such activity, once V was mature enough, he ejaculated into the offender's mouth. The offender always had a handkerchief with him to clean up. Before leaving, he would often kiss V on the lips, penis or testicles.
- 7 The abuse occurred several times a week and sometimes daily over the whole five years of the indictment period.
- 8 Counts 1 to 3 reflected the offender putting his penis in V's mouth. Counts 4 and 5 reflected

the offender making V put V's penis in his mouth. Although these were charged as being the first kind of offending when V was aged 11 to 13, and the second when aged 14 and 15, in fact, both types of abuse occurred throughout the period of the indictment.

- 9 Reflecting on the behaviour, V stated that the offender "guided me to be sexually active and guided me on how to pleasure him before I could experience this myself." He said that on turning 15, he was "able to feel sexual pleasure myself and I would get an erection in anticipation of him coming into my room in the evening. The anticipation of him coming into my room was because of the repeated and continual sexual abuse and interactions in the manner in which he had groomed me."
- 10 Other aspects of the offender's behaviour, both when V was a child and subsequently, are relevant. When V tried to invite friends to his house, the offender refused to allow anyone to visit again. This caused V to become a loner in order to avoid his father's disapproval. The offender insisted on cutting V's hair, as a child, and would press his crotch against him as he did so. V did not like the style of cut and was left feeling like a small child.
- 11 The sexual activity and the controlling behaviour continued after the indictment period. When aged 16, V went out, accompanied by his sister, but his father was so distraught about this that V had to promise him never to go out again. When V was aged 18, he wanted to go to university some distance away but the offender chose one nearer to home for him. Once at university, the offender frequently sent him letters, sometimes more than once a day, in which he expressed how much he missed and loved him. The offender asked V to keep a detailed journal of his daily activities to share with him which V duly did. V had to telephone the offender every evening at 6 p.m. to relay what he had done in the previous 24 hours and what he planned to do in the next, to be told by the offender what he had done wrong, whom he should not meet and whom he could not trust. The emotional manipulation discouraged V from socialising with others, leading him to be socially withdrawn and not attending the communal dining room. Every Friday, the offender collected V from university for the weekend, and the sexual conduct continued. The offender changed job and rented a cottage nearer to V's university and had V move in with him.
- 12 In 1989, when V was aged 23, he told the offender he wanted the sexual activity to stop. He continued, however, to live at the family home for a time in order to try to keep his parents together. In fact, when V eventually moved out six years later his mother left shortly afterwards.
- 13 V had what he describes as a "suicidal episode" in 2000 and began counselling the following year. He ceased contact with the offender at that stage. However, 18 years later, in 2019, he sought out the offender by social media. In 2020 he directly challenged the offender about what had happened and told him about the impact it had had on him. The offender did not deny it, but rather said it was his fault and expressed regret.

The Proceedings

- 14 Police officers visited the offender at his home address in August 2021. When told that an allegation had been made, he said, "I know what I've done is bad," and went on to admit that there had been sexual touching of V in his early teenage years for which he said he was sorry. He also said that it would never go to trial as he would "jump off a cliff".
- 15 In October 2021, the offender was interviewed under caution. He told officers, "I did it. Whatever [V] says I did, I did." When parts of V's statement were read to him, he said he could not recall events, blaming poor memory. He accepted that V would have been 11 or

12 when the abuse started. He said, "Everything was fine until [V] was 11 and started secondary school." When asked how many times sexual activity took place, he replied, "Innumerable from 12 until he went to university," agreeing that it happened several times a week.

- 16 The offender was charged on 2 March 2022 and made his first appearance at the Magistrates' Court on 30 March 2022. He did not indicate a guilty plea. At a plea and trial preparation hearing on 28 April 2022, he pleaded not guilty to all counts. A trial date was fixed for 9 January 2023. No positive defence was advanced.
- 17 Due to V's declining health, the prosecution applied to admit his statement as hearsay. That application was listed to be heard on the first day of the trial. On that day, 9 January 2023, the offender did not attend. A warrant was issued, and he was produced later in the day. Before the hearsay application was heard he indicated a desire to change his plea. He was re-arraigned and pleaded guilty to all counts. Sentencing was adjourned. No pre-sentence reports were ordered or produced.

Victim Impact

- 18 V made two victim personal statements, one in March 2022 and the other in January 2023. He had dealt with a great deal of shame and self-blame. Excessive drinking was his way to overcome the thoughts and to help him interact with other people. Throughout adulthood he had experienced intense mood swings from deep depression to highs of positivity, as well as anxiety, self-hatred, three suicide attempts and addictions. He was unable to build wholesome relationships at work, or to network. He had had a breakdown in January 2018, leading to several months off work. His previous coping strategy of blocking out his childhood memories had crumbled. He had seen many specialists over the course of 28 years.
- 19 There was a report from a consultant clinical psychologist, Professor Roberts, who assessed V in 2022 and concluded that he was probably suffering from complex post-traumatic stress disorder and depression with dissociation, consistent with it having been caused by traumatic childhood abuse.

Sentencing

- 20 The offender has no convictions or cautions for any other offending before or since.
- 21 When passing sentence, the judge referred to *R v Forbes* [2016] EWCA Crim 1388, [2016] 2 Cr App R (S) 44, and the need to make measured reference to modern day equivalent offence guidelines, bearing in mind the difference in maximum sentences which he correctly identified. Counsel had agreed that the equivalent modern offences were: for Counts 1 and 2, rape of a child under 13 contrary to section 5 of the Sexual Offences Act 2003; for Count 3, rape contrary to section 1 of that Act; and, for Counts 4 and 5, causing a child to engage in sexual activity contrary to section 10 of that Act.
- 22 The judge identified that the starting point under the section 5 guideline for the first two counts was the Category 1A starting point at 16 years. It was Category 1A because it caused extreme lifelong psychological harm and involved an abuse of trust. For similar reasons the starting point under the section 1 guideline for the Count 3 offence was 15 years. For the Counts 4 and 5 offences, he identified the modern equivalent starting point as being in each case five years. Those starting points were for a single offence in each case. The judge said that the total sentence under the guidelines for the equivalent modern offences, allowing for totality, would likely have been beyond the 20-year mark. However, he said he was constrained by the very much lower maximum sentences for the offences

under the law applicable at the time they were committed. Taking that into account, he took a starting point of two years on each of Counts 1 to 3 and five years on Counts 4 and 5. Although he did not spell out this calculation, that would have given a total of 16 years.

- 23 The judge identified the aggravating features of ejaculation, the subsequent controlling and domineering conduct and the location being in the family home. He said that that would take the total sentence up to 17 years before considering mitigation. That 17-year period, the judge said, would not be unjust or disproportionate given the offender's very high culpability and the extreme harm caused to the victim.
- 24 The judge then referred to *R v Clifford* [2014] EWCA Crim 2245, [2015] Cr App R (S) 32, and said that he was aware that the gravity of offending by modern standards could properly be reflected by passing consecutive sentences even where the sentencing powers are constrained by the maximum sentences available, providing that the overall sentence is just and proportionate to the overall seriousness of the offending.
- 25 The judge then said that there had to be a significant reduction applied for the mitigation available. He identified that mitigation as the absence of convictions; the offender's advanced age and associated ill-health; and his guilty plea. As to age and ill health, he referred to *R v Clarke* [2017] EWCA Crim 393, [2017] 2 Cr App R (S) 18, and said that it required him to treat those as significant mitigating factors. He rejected the submission that the offender was remorseful in the light of his not guilty pleas until the day of trial. He acknowledged that there were positive features to the offender's character and the life he led both before and after the extended period of offending, but observed that such good character should not normally be given significant weight in cases of this kind. For all the mitigation, other than the late plea, he reduced the sentence from 17 years by half to one of eight-and-a-half years. He then reduced it further by one year to reflect credit for plea of about 10 per cent. He distributed the seven-and-a-half years equally amongst the counts, imposing an 18-month consecutive sentence on each.
- 26 The parties subsequently realised that the provisions of section 278 of the Sentencing Act 2020, requiring a special sentence for certain offenders of particular concern, applied to Counts 1 and 2. On 29 March 2023 the matter was listed under the slip rule. The custodial terms on Counts 1 and 2 were reduced from 18 months to 12 months so as not to exceed the maximum penalty, taking into account the further one-year licence periods. The custodial terms on Count 4 and 5 were increased from 18 months to two years to achieve the same overall custodial term as had been indicated before.

Submissions

- 27 On behalf of the Solicitor General, Ms Faure-Walker submits, first, that the appropriate guideline for the modern equivalent of the Count 4 and Count 5 offences would have been that for the offence of sexual activity with a family member, contrary to section 25 of the 2023 Act, which would have produced a starting point of several years above the point taken for each of the Count 4 and Count 5 offences. She further submits that the judge's reduction from a sentence of 17 years for age and other factors was so excessive as to lead to a sentence outside the range reasonably open to a judge. She relies on what was said in *R v Clarke* to the effect that ill health should not be assumed in the absence of a report (para. 22) and that age and ill health afforded some but limited mitigation (para. 25) because it is to be presumed, in the absence of contrary evidence, that the prison system can make appropriate provision for them (para. 23) and they must be balanced against the gravity of the offending and the effect on the victim (para. 25).

28 As to the absence of convictions, Ms Faure-Walker reminds us of the Sentencing Council guidelines for serious sexual offences which include the following guidance (at the end of Step 2):

"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.

In the context of this offence, previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence."

29 That guidance appears in the guidelines for the modern equivalents of all the offences with which we are concerned.

30 On behalf of the offender, Mr Quaife submits that the judge was entitled to take the 17-year starting point and to make the reductions he did for the mitigation available. He submits that the judge was entitled to treat the offender as of ill health, despite the absence of a report, on the basis of his submissions, of the judge's ability to observe him in the dock when sentencing and the fact that at a previous hearing the prison had asked that the offender attend by video link due to what were described as "mobility issues". We asked Mr Quaife what could be observed of the offender in the dock so far as ill health was concerned and were told that he had appeared with crutches. Mr Quaife also reminds us of the familiar statement of Lord Lane CJ in *Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41, p.46A, that a sentence will 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"; and to what Lord Lane went on to say in that case about tempering justice with mercy.

Analysis and Conclusions

31 The applicable principles for historic sex offending by adults are set out in the Sentencing Council guidelines which provide:

"When sentencing sexual offences under the Sexual Offences Act 1956, or other legislation pre-dating the 2003 Act, the court should apply the following principles:

- 1 The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. Under sections 57 and 63 of Sentencing Code the court must have regard to the statutory purposes of sentencing and must base the sentencing exercise on its assessment of the seriousness of the offence ...
- 2 The sentence is limited to the maximum sentence available at the date of the commission of the offence ...

- 3 The court should sentence by measured reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003 ...
 - 4 The seriousness of the offence, assessed by the culpability of the offender and the harm caused or intended, is the main consideration for the court. The court should not seek to establish the likely sentence had the offender been convicted shortly after the date of the offence.
 - 5 When assessing the culpability of the offender, the court should have regard to relevant culpability factors set out in any applicable guideline.
 - 6 The court must assess carefully the harm done to the victim based on the facts available to it, having regard to relevant harm factors set out in any applicable guideline ... "
- 32 The reference in 3 to making measured reference to the sentencing guidelines for the equivalent is to be interpreted in accordance with the principles identified in *R v Clifford, R v Forbes* and *R v DL* [2020] EWCA Crim 881. Taken together with the principles identified in 4 and 5, that requires the sentence to give effect to modern attitudes for the purposes of assessing the harm to the victim and the culpability of the offender, and to the sentence lengths which the guidelines reflect for those factors. That is subject to the constraints imposed by maximum sentences at the time the offences were committed. The exercise is not, in the case of adults at the time of the offending, one of seeking to determine what sentence would have been imposed had the offender been sentenced at the time of the commission of the offences or reflecting attitudes at that time.
- 33 The judge was right to approach the sentencing task by seeking to fix upon an appropriate overall sentence, having regard to totality, and then to distribute it amongst the offences to achieve the correct overall result. The appropriate total sentence should be imposed even if, as a result of the maximum sentence available on individual counts, it results in consecutive sentences and sentences on other counts which are greater than those which would have been imposed on those other counts had they constituted the whole of the offending. That is in accordance with the approach in *R v Clifford* and *R v Griffiths* [2020] EWCA Crim 732, [2020] 2 Cr App R (S) 54.
- 34 The judge was also right to say that under the guidelines for the equivalent modern offences a total sentence would have attracted a starting point in excess of 20 years for what would properly be characterised as including a campaign of rape.
- 35 Where, in our judgment, the judge first fell into error is in feeling constrained to take a lower figure than that of 20 years by reason of the maximum sentences for the offences charged, which led to him to treat an appropriate sentence after trial as one of 17 years for all the offending before taking account of personal mitigation. The maximum total sentence available for the offences charged was one of 26 years, which gave ample scope for sentencing in accordance with the guidelines for the equivalent modern offences so as to reflect modern attitudes. He was not constrained to pass sentences on Counts 4 and 5 which were no greater than those which would have been imposed had that offending stood alone.
- 36 Moreover, he was entitled to have regard not merely to the maximum sentences for the offences charged but to the maximum sentences for the offending which they reflected.

These were multiple offence counts and could just as easily have been charged as a number of specimen counts in addition to multiple counts for both types of offending over the whole period which would have made a far greater total maximum sentence available. Sentences at or approaching the maximum would not, therefore, have been wrong in principle on any of the counts if justified by the overall offending as a matter of totality.

- 37 The maximum sentences available did not, therefore, in our view, provide any constraint on the judge sentencing for the totality of the offending in line with the guidelines for the equivalent modern offences.
- 38 The judge's second error, in our view, was to give far too great a reduction for the offender's personal mitigation. In truth, the mitigation was not very substantial. We are prepared to accept that the judge was entitled to assume some element of ill health from the circumstances in which the offender had wanted to be sentenced remotely and by observing him being on crutches in the dock. That was not such as to attract a very substantial degree of mitigation in the absence of any report or of any detailed information about the nature of the ill health or any prognosis. The offender's age, now 87, provides real mitigation but applying *R v Clarke* is not such as to warrant a lengthy reduction in a case of this severity: compare *R v Forbes* (paras. 80-81); and, *R v F* [2017] EWCA Crim 481, para.10, (7 April 2017 case ref. 201700784/A4, which reference we also give because the case is not easily found in the online reports from its neutral citation number), where a reduction for old age of about four years from a 20-year sentence was considered appropriate for an 80 year old, where there was in that case also remorse. Prisons are generally able to make provision for the elderly, and there was no evidence or suggestion to the contrary in this case. Similarly, the absence of convictions is not a significant mitigating factor in sexual offending of this nature where the offences are so serious and the effect on the victim has been so traumatic. The judge's reduction of one half for these factors is simply much too much.
- 39 We think that an appropriate total sentence, taking account of all available mitigation, would have been not less than 17 years after a trial which, with a discount of about 10 per cent for the plea, would become one of 15 years three months.
- 40 We will accordingly grant leave and adjust the individual sentences as follows. We will leave in place the sentences on Counts 1 and 2, that is to say a one-year custodial term and a one-year additional licence period pursuant to section 278 of the Sentencing Act 2020 on each count. We will quash the sentence on Count 3 and increase it to two years. We will quash the sentence on Count 4 and increase it to six years. We will quash the sentence on Count 5 and increase it to five years and three months. The sentences on all counts will continue to run consecutively. The total sentence will, therefore, involve a custodial term of 15 years three months with a further licence period of two years in the aggregate.

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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