IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01932/A1
[2023] EWCA Crim 818

On appeal from the Crown Court at Carlisle
HH Judge Phillips

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 5th July 2023

B e f o r e:

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

MR JUSTICE FOXTON

SIR NIGEL DAVIS

R E X

- v -

A Z V

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Mr M Rickard and Miss K Ososami appeared on behalf of the Appellant

Mr K Laird appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 5th July 2023

LORD JUSTICE HOLROYDE:

1. In 2005, in the Crown Court at Carlisle, the appellant pleaded guilty to an offence of sexual assault, contrary to section 3 of the Sexual Offences Act 2003. He was subsequently sentenced by His Honour Judge Phillips to imprisonment for public protection, with a minimum term of 15 months, less 121 days which the appellant had spent remanded in custody. He now appeals against that sentence with the leave of the full court.
2. The victim of the offence, and the victim of another offence to which it will be necessary to refer, are each 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 them as the victims of an offence. We shall refer to them as "C" and "B" respectively. In view of the familial relationship between B and the appellant, it will be necessary in any report of this appeal for the appellant's name to be anonymised and for him to be referred to by the randomly-chosen letters AZV.
3. At the time of the sexual assault, C was 70 years old. She was homeless. On a night in May 2005 she was approached in the street by the appellant, who was then aged 22. He asked her if she knew anywhere that he could sleep and then asked her if she wanted sexual intercourse. C began to scream. The appellant grabbed her and dragged her down an alleyway and into a yard. C fell to the ground. The appellant tried to remove her clothes, but ran away when members of the public came to C's aid. The appellant was detained nearby. When first questioned he denied any offence. He said that he had gone to the assistance of C when she had fallen over. However, he pleaded guilty at an early stage of the proceedings.
4. Six years earlier, in April 1999, the appellant had pleaded guilty to an offence of

indecent assault on a male under 16, contrary to section 15 of the Sexual Offences Act 1956. That offence was committed in late 1997 or early 1998, when the appellant was aged 15. The victim, B, was his younger brother, then aged 13. It appears that the offence consisted of touching B's penis. The appellant was made subject to a supervision order for 12 months and became subject to the statutory notification requirements. In June 2001 he committed a breach of those requirements by failing to notify a change of name or address – an offence for which he was conditionally discharged for six months. He subsequently committed further offences, but they were neither numerous nor serious, and none was of a sexual nature. His only custodial sentence was three weeks' detention in a young offender institution for an offence of dangerous driving, committed when he was aged 18.

5. The statutory provisions in force at the time of sentencing had only recently come into effect and had not yet been the subject of consideration by this court in the well-known case of *R v Lang* [2005] EWCA Crim 2864, [2006] 1 WLR 2509.

6. Section 225 of the Criminal Justice Act 2003, so far as is material to this case, was at the material time in the following terms:

> "**225. Life sentence or imprisonment for public protection for serious offences**
>
> (1) This section applies where —
>
> (a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and
>
> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.
>
> (2) If —
>
> (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life or in the case of a person aged at least 18 but under 21, a sentence of custody for life.

(3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection or in the case of a person aged at least 18 but under 21, a sentence of detention in a young offender institution for public protection.

…"

7. Section 229 of the 2003 Act , so far as material, provided as follows:

"**229 The assessment of dangerousness**

(1) This section applies where —

(a) a person has been convicted of a specified offence, and

(b) it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.

…

(3)If at the time when that offence was committed the offender was aged 18 or over and had been convicted in any part of the United Kingdom of one or more relevant offences, the court must assume that there is such a risk as is mentioned in subsection (1)(b) unless, after taking into account—

(a) all such information as is available to it about the nature and circumstances of each of the offences,

(b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and

(c) any information about the offender which is before it,

the court considers that it would be unreasonable to conclude that there is such a risk.

(4) In this Chapter '*relevant offence'* means —

(a) a specified offence,

…"

8. In the circumstances of this case, the statutory provisions at the time did not permit the imposition of an extended sentence.

9. At the sentencing hearing on 30th September 2005, the judge was assisted by a pre-sentence report prepared by Miss Fox and by a psychological report prepared by Miss Boden. Each of these reports described the appellant's difficult and unsettled childhood. He had been diagnosed as having learning difficulties and had attended special schools. As an adolescent, he had been sexually abused by an uncle with whom he was living. He was taken into care, but discharged himself at the age of 16 and thereafter led a nomadic lifestyle, being homeless most of the time and having little contact with his family. He had twice attempted suicide when aged 17 or 18 and had engaged in acts of self-harm. He had never been in employment. He had had a relationship with a young woman, but she had left him before giving birth to his child.

10. The appellant told Ms Fox that at the time of the offence against C he had been fretting about his child, not knowing whether he had been born, and felt rejected by his family and his former partner. He had consumed alcohol and drugs. Miss Fox found the appellant to suffer an overwhelming sense of shame about the abuse he had suffered from his uncle, which he was unable to discuss. She found that the appellant recognised the harm he had caused to C and expressed remorse, but that he lacked insight into his sexual offending. Miss Fos described the offence against B as a "textbook case of the cycle of abuse from victim to perpetrator". She noted that the reports prepared at that time had assessed the appellant as functioning at the level of an 8 year old, with no insight and no mental resources. She observed that, despite his nomadic life, he had not accrued a lengthy criminal record.

11. Ms Fox assessed the appellant as presenting a medium level of risk of further offending, which could include sexual offending. She said that he needed to address the issues behind his sexual offending and noted that he had expressed willingness to

engage in counselling or behavioural programmes.

12. Ms Boden opined that the offence against C was driven by the appellant's ruminations regarding the negative events in his life and his perceived harm and rejection by others. She, too, noted that the appellant had difficulty in taking responsibility for his sexual offending, but was willing to engage in therapeutic interventions. She felt that the offence against B may have been early exploratory sexual behaviour associated with the confusion the appellant experienced around the time when he was a victim of abuse. Ms Boden assessed the appellant as a moderate risk of further sexual offending and suggested a number of treatment options to minimise that risk.

13. In his sentencing remarks, the judge referred to those two reports and to sections 225 and 229 of the 2003 Act. He stated that the appellant was "probably experiencing sexual frustration" at the time of the offence against C; and that the offences against B and against C had the common feature that they were both sexual offences against persons more vulnerable than the appellant. He said that the reports demonstrated a consistent view that there was a moderate to high risk of further specified sexual offences being committed by the applicant, which would inevitably result in serious harm. He took into account as mitigation the appellant's "truly unfortunate and appalling background", in particular the physical and sexual abuse to which he had been subject, which entitled him to "a degree of sympathy". He also took into account the appellant's remorse, willingness to engage in therapy and his guilty plea. He stated that after a trial the appropriate sentence would have been 48 months' imprisonment, which he would have reduced to 45 months to reflect the mitigation. He gave full credit for the guilty plea and based the minimum term on the resultant notional determinate sentence of 30 months.

14. The judge stated that he was required by law to assume that there was a significant risk to the public of serious personal injury caused by the appellant's committing further specified offences and that he did not consider that it would be unreasonable to

conclude that there was such a risk. He said that he was therefore required by law to impose a sentence of imprisonment for public protection. He specified a minimum term of 15 months (less the 121 days which the appellant had spent remanded in custody).

15. The consequence of that sentence has been that the appellant has been in prison for more than 15 years. His tariff expired in August 2006, but another decade passed after that before he was allowed short periods of release on temporary licence. He was released on licence for the first time in August 2018, and recalled four months later; released on licence again in May 2020, and recalled three and a half months later; released on licence for a third time in December 2021, and recalled in May of this year. He is currently in custody as a result of that recall.

16. This appeal first came before the court on 2nd February 2023. The court on that occasion granted a long extension of time, granted leave to appeal and gave a number of directions in preparation for this substantive hearing of the appeal.

17. We have been greatly assisted by the written and oral submissions of Mr Rickard for the appellant and Mr Laird for the respondent, neither of whom appeared below. We are grateful to them both.

18. Mr Rickard submits that the imposition of the sentence of imprisonment for public protection was wrong in principle and manifestly excessive. He relies on the principles stated by this court in *Lang*. He submits that the judge, who of course did not have the benefit of that judgment, misapplied the law as it was subsequently stated to be. In particular, he suggests that the judge applied an incorrect test. He submits that in any event the judge erred in finding that there was a significant risk of serious harm being caused by further offending, and suggests that the judge wrongly thought that he had no discretion as to the type of sentence he should impose, with the result that he wrongly failed to disapply the statutory assumption.

19. Mr Laird reminds us that the role of this court is to conduct a review of the sentence

imposed below, not to engage in a fresh sentencing exercise. He submits that the judge's approach cannot be faulted and was entirely consistent with what was later said in *Lang*. He further submits that the judge was entitled to conclude that it would not be unreasonable to make the statutory assumption.

20. Both counsel have invited our attention to paragraph 17 of the judgment of the court in *Lang*. Rose LJ (Vice-President of the Court of Appeal, Criminal Division) there emphasised that the risk identified must be significant – a higher threshold than the mere possibility of occurrence. In assessing the risk of further offences being committed, the sentencer should take into account the nature and circumstances of the current offence; the offender's history of offending, including not just the kind of offence but its circumstances and the sentence passed, and whether the offending demonstrates any pattern; social and economic factors in relation to the offender, including accommodation, employability, associates, relationships and drug or alcohol abuse; and the offender's thinking, attitude towards offending and supervision, and his emotional state. Sentencers must guard against assuming that there is a significant risk of serious harm merely because the foreseen specified offence is serious.

21. At [17(v)] the Vice President said this:

> "(v) In relation to the rebuttable assumption to which section 229(3) gives rise, the court is accorded a discretion if, in the light of information about the current offence, the offender and his previous offences, it would be unreasonable to conclude that there is a significant risk. The exercise of such a discretion is, historically, at the very heart of judicial sentencing and the language of the statute indicates that judges are expected, albeit starting from the assumption, to exercise their ability to reach a reasonable conclusion in the light of the information before them. It is to be noted that the assumption will be rebutted, if at all, as an exercise of judgment: the statute includes no reference to the burden or standard of proof. As we have indicated above, it will usually be unreasonable to conclude that the assumption applies unless information about the offences, pattern of behaviour and offender show a significant risk of serious harm from further offences."

22. For the purposes of this hearing we have been provided with a helpful updating report

by the probation service, and both counsel have made submissions as to what course this court could and should take if the appeal succeeds.

23. The judge was faced with a difficult sentencing process, applying statutory provisions which had only recently come into force. He approached his task with obvious care. It is, in our view, clear that he understood that section 229(3) of the 2003 Act gave rise to a rebuttable assumption. We therefore reject the submission that the judge wrongly thought that the law left him with no choice other than to impose a sentence of imprisonment for public protection.

24. We are, however, persuaded that the judge fell into error in his judgement as to whether it would be unreasonable to conclude that there was a risk of the kind contemplated by section 225. Had he had the benefit of the guidance later provided in *Lang*, we believe that he would have reached a different conclusion. In any event, we are satisfied that he should have done for the following reasons.

25. It is important to note that the judge did not find that the nature and circumstances of the offence against C were in themselves such as to show the existence of such a risk. It is, in our view, clear that he focused on the assumption in section 229(3), and that he reached his conclusion on the basis that the law required him to make that assumption unless he considered that it would be unreasonable to do so. In finding that it would not be unreasonable to make the statutory assumption, the judge must necessarily have given significant weight to the offence against B. It was there, in our view, that he fell into error. The offence against B bore the hallmarks of youthful sexual experimentation and was committed by a boy aged 15, with intellectual limitations which caused him to function at a level equivalent to children of a much younger age, who had himself been the victim of intrafamilial sexual abuse. With respect to the judge, it was, in our view, not open to him to derive any pattern of behaviour from a combination of that offence with the very different offence seven years later against C. In the years between those offences, far from showing any

worrying pattern of behaviour, the appellant had not come to the attention of the police for any sexual misconduct, even though he was living in circumstances in which any tendency to act out of sexual frustration could be expected to become evident. Furthermore, both Ms Fox and Ms Boden assessed the appellant as willing to engage in appropriate therapeutic interventions, which would reduce the risk of further offending. In short, once the judge had decided, in our view correctly, that he could not infer the existence of the relevant risk from the circumstances of the offence against C alone, he should not have given the weight which he did to the circumstances of the offence against B.

26. We of course hesitate to interfere with the evaluation made by the judge. But we are satisfied that in all the circumstances of this case, he should have considered it unreasonable to conclude that the relevant risk existed. It was not properly open to him to apply the statutory assumption.

27. It follows that the judge should have imposed a standard determinate sentence of not more than 30 months' imprisonment. After anxious consideration of the practical consequences of our decision, we are satisfied that that is the sentence which should be substituted. We are glad to read in the updating probation report that the appellant has made good use of his time in custody. He has undertaken a number of interventions and the core therapeutic work has been completed.

28. For those reasons we allow this appeal. We quash the sentence of imprisonment for public protection and substitute for it a sentence of 30 months' imprisonment.

(There later followed further submissions by Mr Rickard)

LORD JUSTICE HOLROYDE:

29. Earlier this morning we allowed this appeal, quashed the sentence imposed below and substituted a determinate prison sentence. Mr Rickard, having reflected upon our decision, has invited us to reconsider the length of that custodial term. We have listened to his submissions, but we are not persuaded that there is any reason to alter

what we said earlier this morning.

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

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