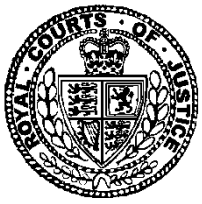
Neutral Citation Number: [2024] EWCA Crim 366

IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 2024004429 A4

Royal Courts of Justice

Thursday, 21 March 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE WALL
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(RECORDER OF SHEFFIELD)

REX
V
ATD

REFERENCE BY THE ATTORNEY GENERAL
UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

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

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Mr. T. Walkling appeared on behalf of the Applicant.
Mr. N. Hearn appeared on behalf of the Crown.

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J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during the person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as victim of the offence. We shall refer to victim as C. Given the familial relationship between C and the offender, he shall be anonymised for the purpose of any reporting of this case. The case will be reported as Rex v ATD.

2 On 9 November 2023 the offender was convicted after trial of a single count of sexual assault, contrary to section 14(1) of the sexual offences Act 1956. On 5 January 2024 he was sentenced to a term of 4 years' imprisonment. The offence fell within schedule 13 of the Sentencing Code. Therefore, pursuant to section 278 of the Code a special custodial sentence was imposed. To the custodial term of 4 years was added an extended licence period of one year. His Majesty's Solicitor General now applies to refer that sentence, pursuant to section 36 of the Criminal Justice Act 1988 as being unduly lenient. He argues that the custodial term should have been significantly longer than 4 years.

3 The offender is now aged 70. He has a single previous conviction in 1984 for an unrelated offence in respect of which he was conditionally discharged. He is of effective good character. He has been married for nearly 50 years. He and his wife have three children. One of those children is C, a daughter. She is now in her late thirties.

4 On an occasion between 1991 and 1993, when C was aged either four or five, she and the offender were in the offender's bedroom together. It was early evening. They were lying under a quilt. As they were lying next to each other, the offender put his hand on to C's vagina and then inserted his finger into her vagina. This was the only occasion upon which this, or indeed, any other abuse occurred.

5 Many years later, when C was in her early 30's, she told a counsellor what had happened. She subsequently told her husband and other family members. She confronted the offender. He denied that anything had happened as she described. The police were informed. The offender was interviewed in April 2021. He denied the allegation to the police. In due course, he was tried and convicted by a jury.

6 At the point of sentence the judge had a victim personal statement from C. The judge also had seen C give evidence at trial. In her victim personal statement she said that the whole ordeal had had a very significant impact on her whole life, both mentally and physically. From a very young age she had self-harmed in a very unusual way, namely by pulling her eyelashes out. That had progressed as she got older into hair pulling. All this affected her confidence throughout her younger years. Physically, the disorder took over her life. She got to a point where she could no longer cover the patches on her hair where she had pulled hair out. She started to wear wigs. This involved very significant continuing cost. Mentally, she had been affected over her whole life, requiring psychological support, psychiatrists, counselling, hypnotherapy and medication. The antidepressants she was taking affected her physically and caused her to suffer side effects. She had lost contact with both her parents and her siblings. Not unusually, she feels guilt at having reported the offence, notwithstanding the fact she had absolutely no reason to.

7 The judge also had a Pre-sentence Report in relation to the offender. It was apparent from the report that the offender maintained his denial of the offence. The offender had worked all his life. He now was retired. He had some health problems. He had been fitted with a pacemaker to correct irregular heart rhythms when he was in his mid-sixties. He attended his local hospital on a regular basis for review. His wife was of a similar age to the offender. She suffered from severe arthritis. The offender helped her around the house.

8 In sentencing, the judge set out the circumstances of the offence, as we have rehearsed them, and she said this:

> "This is an offence that is over 27 years old. In sentencing you I have to sentence you in accordance with the regime that applies at the time of sentence, having regard to the maximum sentence that could have been imposed at the time of your offending, which was 10 years. I have had regard to the guidance on sentencing historical sexual offences, as set out in the general guidelines and *R v H* [2011] and the principles and purposes of sentencing. I have taken a measured reference to the analogous guidelines which provide assistance in identifying the relevant factors that should be taken into account in order to assess the seriousness of your offending."

9 Having set out those general principles, the judge in relation to harm said that she was satisfied that the harm caused to C was "at the highest level". She referred to "severe and significant psychological and emotional harm throughout C's life", resulting from the offence. She said that "Culpability is also at its highest". There was a clear abuse of trust.

10 We observe that the judge did not specifically identify to which guideline she was referring in her sentencing remarks. The harm and culpability factors mentioned by her appear in the guideline not only for assault by penetration of a child under 13, but also in the guideline for sexual assault of a child under 13 and causing a child under 13 to engage in sexual activity.

11 In any event, the judge, taking account of those features of culpability and harm, concluded that the appropriate starting point was 4 ½ years. There were no statutory or other aggravating factors requiring an uplift from that starting point.

12 In relation to mitigating factors, the judge had regard to the length of time that had passed since the offence with no offending. She disregarded the minor conviction in 1984 and treated the offender as someone without previous convictions. She noted that he was in poor health. She said this: "Whilst this may be considered strong mitigation, this is a serious offence and as such the mitigation carries less than ordinarily it would have done."

It served to reduce the custodial term from 4 ½ to 4 years.

13 The Solicitor General submits that the analogous guideline in respect of offences under the Sexual Offences Act 2003 was assault by penetration of a child under the age of 13. By reference to that guideline, harm was in category 2 and culpability was high.
A category 2A offence under that guideline has a starting point of 11 years, with a category range of 7 to 15 years. The starting point identified by the judge, namely 4 ½ years, did not involve a measured reference to that guideline, even allowing for the fact that the maximum sentence for indecent assault was 10 years. It is said that the custodial term should have been no less than 7 years.

14 On behalf of the offender, Mr Walkling, who appeared in the court below, submits that measured reference to the guideline required a proper reflection of the fact that the maximum sentence for the 2003 Act offence was life imprisonment whereas 10 years was the maximum sentence for the offence of which the offender was convicted. The starting point and category range in the Sentencing Council's modern guideline was based on that maximum sentence. A significant adjustment was required to allow for the much reduced maximum sentence available for the offence of indecent assault. Taking that factor into account, the sentence imposed, submits Mr Walkling, whilst lenient, was not unduly lenient.

15 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 Number 4 of 1989,* reported at [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."

It follows that for us to conclude that this sentence was unduly lenient, we must find it was not reasonably appropriate for the judge to find that the starting point before mitigating factors were taken into account should be 4 ½ years.

16. This was an archetypal case of an historical sexual offence. Although the judge did not refer

specifically to *Forbes and others* [2016] EWCA Crim 1388, she appears to have had in mind the principles set out at [8] to [10] of that judgment:

> "It was submitted on behalf of the prosecution that the court should, after selecting the applicable current guideline, sentence in accordance with the guideline, capping the sentence, if required, by the maximum sentence provided by the legislation for the offence in question. We do not consider that the submission is consistent either with R v H or annex B. A court should, in assessing the appropriate sentence, in any case, have regard to the maximum sentence applicable to the offence and not simply apply in a mechanistic way guidelines premised on much higher maximum sentences……..
>
> The phrase 'have regard to' (which was intended to have the same meaning as 'by measured reference to') was intended to make it clear that the judge should not simply apply the relevant guideline applicable at the date of sentence, subject to any lower statutory maximum sentence applicable at the date the offence was committed, but use the guideline in a measured and reflective manner to arrive at the appropriate sentence.
>
> As annex B makes clear, what is required is first the selection of the relevant guideline and then the determination of the sentence having regard to that guideline as adjusted by reference to the maximum sentence applicable to the offence charged. It is therefore important for the sentencing judge to guard against too mechanistic an approach, either in terms of an equivalent offence or in adopting the figures in the guideline without having regard to the fact that generally higher maxima are provided for some of the modern day offences. Whilst a judge should have regard to the current guidelines in this way, the judge should go no further and should not attempt, as the judge mistakenly did in *AG Reference 27 of 2015* [2015] EWCA Crim 1538, to construct an alternative notional sentencing guideline."

17. The reference by the judge to "the guidance on sentencing historical sexual offences as set out in the general guidelines" was a reference to annex B to the Sentencing Council's Sexual Offences Definitive Guideline. This is annex B as mentioned in *Forbes*. In *Attorney General's Reference 27 of 2015*, the judge was sentencing for a series of historical sexual offences charged as indecent assaults. The modern equivalent of those offences was, as here, assault by penetration of a child under 13. As here, the offences fell into category 2A. In that case the judge identified the overall sentencing range for the modern offence was 2 to 19 years. The starting point for a category 2A offence was close to the middle of that range. The judge determined that she should determine the sentencing range

for indecent assault and fix the starting point for the sentence at the midpoint of that range. Her conclusion was that the range for indecent assault was 4 to 7 years, so the mid-point was 5 ½ years. This court concluded that the judge's approach was wrong in principle. Sentencing for sexual offences had to reflect modern attitudes to historical offending. They were reflected in current guidelines. What the judge did in that case was to construct an alternative guideline with no basis in sentencing principle.

18. We cannot say that the judge in this case fell into error in the same way. She did not explain how she arrived at a starting point of 4 ½ years. Thus, we cannot suggest that she engaged in an exercise of guideline construction. Equally, lacking any explanation, it is impossible to say how she reached that figure. Mr Walkling is not able to suggest how that figure was reached. The Solicitor General has assumed that the judge took the guideline for assault by penetration of a child under 13 as the appropriate analogous modern offence.
As Mr Walkling points out, the judge at the end of the sentencing exercise, imposed a sentence pursuant to section 278 of the Sentencing Code. That by definition meant that the judge took assault by penetration of a child under 13 as the equivalent offence. We consider that the judge, therefore, must have used it in her exercise of "measured reference".

19. There is no doubt that the offence committed by the offender would have involved a starting point of 11 years, had it occurred today and constituted an offence under the 2003 Act. It is even arguable in the light of C's victim personal statement that the extreme impact of the psychological harm and C's vulnerability at the time would have elevated harm to category 1. There was certainly sufficient to justify some uplift to the starting point for category 2A. On the other hand the mitigation was substantial. As well as the factors referred to by the judge, there was going to be an apparent and significant impact on the offender's wife by reference to his incarceration. If sentenced by reference to the current guideline, the offender would have been likely to receive a custodial term of around 10 years. How the judge then determined that the proper starting point was less than half this figure is, with respect to her, very difficult to identify.

20. It may be that what she had in mind was what was said in relation to one of the appellants in *Forbes and others*, a man named Rowse, who had also committed an offence involving digital penetration. At paragraphs 145 to 147 of *Forbes* the court said this:

> "Whilst the judge correctly identified the modern equivalent offences in respect of these facts, the maximum penalty in respect of these offences is imprisonment for life, whereas the maximum in respect of s.15(1) of the Sexual Offences Act 1956 is 10 years. In following annex B and having regard to the guidelines, it is essential that the court take into account the fact that the equivalent modern offence guidelines are in respect of offences with significantly higher maxima.
>
> The judge was entitled to find that the harm to C was severe. [...] In respect of count 5, the starting point for a single offence would be 11 years under the guideline for assault by penetration of a child under 13.
>
> In these circumstances it can be helpful to make some reference to the starting-point for sexual assault or sexual activity with a child under 13. If categorised as sexual assaults, the starting-points would have been four years (with a range of three to seven years) whereas [for the latter offence] they would have been a higher figure of eight years (Category 2A) reflecting the penetrative nature of the sexual activity."

21. If that passage is what the judge had in mind, albeit that she did not articulate her thought process, it would provide a basis for concluding that a starting point of around 8 years would be appropriate, even though the analogous offence identified by the prosecution and accepted by the defence had been assault by penetration of a child under 13. That would be a measured reference to the current guidelines. But that analysis could not sensibly result in a starting point of 4 ½ years. If, for instance, this were to be assessed as the equivalent of the offence contrary to section 8 of the 2003 Act, it could not be regarded as anything other than a very serious example of that offence. It can be said that the judge was less than generous in her discount for the mitigating factors. It could be said that more than 6 months ought to have been deducted from the notional starting point. Even so, we do not consider that the reduction could be more than 12 months. The offender's ill-health cannot be said to be of such significance that it would affect the length of sentence. We have a prison report in relation to the offender which does not suggest any problem in managing his heart

condition, something of which the prison is clearly aware. The offender's wife undoubtedly will miss her husband's support. It does not appear that she will be left unsupported by other members of the family or friends.

22. The conduct of the offender over the 30 years since the offence is of some value.

Nevertheless, the rubric in the relevant guideline will apply:

> "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."

23. Looking at matters in the round, we consider that by the route we have identified the judge could and should have arrived at a custodial term of seven years. We cannot see any legitimate means by which she could have concluded four years was the appropriate term after taking account of mitigation. We are, of course, very conscious that the judge had heard the trial. She was in the best possible position to assess the effect on the victim and the attitude of the offender. None of that is in issue. She explained those matters clearly. We proceed on the basis of her findings. We regret to say that we cannot perceive any satisfactory explanation for the final sentence she imposed. That sentence was not one that was reasonably open to her.

24. It follows that we give leave to the Solicitor General to refer the sentence as unduly lenient. We shall quash the sentence of four years' imprisonment with an extended licence of one year. We impose in its place a sentence of seven years' imprisonment with an extended licence of one year.

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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