IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2023/02933/A2
[2024] EWCA Crim 551

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 10th May 2024

B e f o r e:

LADY JUSTICE WHIPPLE DBE

MRS JUSTICE FARBEY DBE

MR JUSTICE WALL

R E X

- v -

DAVID LEE SALISBURY

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Non-Counsel Application

J U D G M E N T

LADY JUSTICE WHIPPLE: I shall ask Mrs Justice Farbey to give the judgment of the court.

MRS JUSTICE FARBEY:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, no matter relating to the victim of the offences 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 the offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 10 August 2023, following a trial in the Crown Court at Leeds before Mr Recorder Khan KC and a jury, the applicant (then aged 43) was convicted of two offences of sexual activity with a child. On 11 August 2023, the Recorder imposed sentences of nine years' imprisonment on each count, to run concurrently. Appropriate ancillary orders were made, including a Restraining Order and a Sexual Harm Prevention Order.

4. The applicant now renews his application for leave to appeal against sentence after refusal by the single judge.

5. We turn to the facts. In 2006, when V was 14 years old, she was involved in a relationship with the applicant who was then aged 27. V lived a few doors away from the applicant and his partner XA. The applicant began to send text messages to V after obtaining her telephone number from XA's telephone. The relationship became physical when the applicant kissed V at the home of one of XA's relatives. At some point XA and her children moved to live elsewhere on a temporary basis while the applicant set about renovating their home. Their absence provided the applicant with the opportunity to meet V alone on a regular basis.

6. In around January or February 2006, the applicant and V had sex at his address. He took off her school uniform and penetrated her vagina with his penis, ejaculating inside her without using protection (count 1). Also in 2006, V left school one day to meet the applicant at his address. He took off her uniform before leading her to the bathroom and turning on the shower. He bent her over, with her head under the water, and penetrated her vagina with his penis. Again he used no protection and ejaculated inside her (count 2).

8. At trial, evidence from V's childhood friends was to the effect that she told them that she had lost her virginity to the applicant. She was naïve, genuinely thinking that the applicant loved her and would leave XA for her.

9. V contacted the police on 10 May 2021. She was interviewed on 5 June 2021. The applicant was arrested on 30 September 2021 and interviewed. He was released on bail pending further investigations. He was re-arrested on 9 November 2021 and interviewed further. He admitted living near to V at the relevant time but denied any form of relationship or sexual activity with her.

11. The applicant had 74 convictions for offences between January 1998 and November 2020, largely for road traffic offences and breaches of court orders. He had no previous convictions for sexual offences.

12. In his sentencing remarks the Recorder applied the relevant sentencing guideline. As the offences involved penetration of the vagina, the offences fell within category 1 harm. As for culpability, the Recorder noted that the applicant had used grooming behaviour against V and

that there was a significant disparity in age. Culpability level A applied. The starting point for a category 1A offence is five years' custody, and the category range is four to ten years' custody.

14. The Recorder dealt with aggravating factors which included the ejaculation on both occasions without the use of protection. He stated that he would deal with the applicant on the basis that V was "a reluctant participant". By way of mitigation, the Recorder took into consideration that these were the applicant's first sexual offences. There was in truth no other mitigation. The Recorder emphasised that he was sentencing the applicant for two separate offences which made the offending significantly more serious.

16. In his grounds of appeal, the applicant submits that the Recorder's reference to V being a reluctant participant demonstrates that he treated the offences as involving the use of force when that was not the case. That error had caused the Recorder to apply an excessive uplift from the five-year starting point. He had in addition given insufficient weight to the principle of totality.

17. The grounds of appeal are not arguable. The Recorder did not confuse reluctance with force. The reference to V's reluctance simply reflected V's evidence that she did not consent to sexual activity in the sense that she said neither yes nor no. In any event, the Recorder was sentencing the applicant for two separate offences, which fully justified a significant upward adjustment from the starting point in the sentencing guideline which applies to one offence. This was very serious sexual offending against a vulnerable girl. The applicant could expect a severe punishment. It is not arguable that the overall sentence of nine years' imprisonment was manifestly excessive or wrong in principle.

18. We should add that the Recorder stated that the statutory surcharge applied and ordered that it should be paid. Given the age of the offences, he had no power to impose the charge, as the relevant statutory provisions did not apply. The Crown Court have not recorded the surcharge on the record sheet, stating in a note on the sidebar of the Digital Case System: "No surcharge … predates". The court's note (made on the day of sentence) reflects the law. The victim surcharge could not lawfully be imposed. It appears that the Recorder recognised his error in a further entry on the sidebar on the same day. It would have been preferable for the error to have been corrected by way of a re-pronouncement in court, as the imposition of the surcharge had formed part of the sentence, but it makes no difference to the application for leave to appeal.

20. For these reasons, and for those given by the single judge with which we agree, this renewed application is refused.
