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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01823/A3

Neutral Citation: [2024] EWCA Crim 76

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 19th January 2024

B e f o r e:

LORD JUSTICE COULSON

MRS JUSTICE FOSTER DBE

MR JUSTICE HILLIARD

R E X

- v -

MORTEZA AZIZI-SAFA

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Miss J Shepherd appeared on behalf of the Appellant

J U D G M E N T
(NH and AF Approved)

Friday 19th January 2024

LORD JUSTICE COULSON: I shall ask Mrs Justice Foster to give the judgment of the court.

MRS JUSTICE FOSTER:

Introduction

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 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 offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 15th March 2023, following a trial in the Crown Court at Bradford, the appellant (then aged 68) was convicted of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. He was acquitted of counts 1 and 2 (rape) and count 4 (indecent assault).

3. On 15th May 2023, he was sentenced to three years' imprisonment and made subject to a restraining order, pursuant to section 360 of the Sentencing Act 2020, for five years.

4. The appellant now appeals against sentence by leave of the single judge.

Background

5. At the date of his sentence, the appellant was aged 68. He had no previous convictions.

6. The events charged in the indictment were alleged to have taken place between 8th July 1996 and 8th July 1997, when the complainant was aged 15. The count upon which the

appellant was convicted was therefore one of a number of charges of a more serious character of which he was acquitted. Count 3, of which he was convicted, read thus:

> "*PARTICULARS OF OFFENCE*
>
> *Morteza Azizi-Safa between the 8th day of July 1996 and the 8th day of July 1997 indecently assaulted [the complainant] ..., a female person 15 years of age.*
>
> *(Pressing his penis against her vagina on the first occasion that they had vaginal intercourse*)"

Counts 1 and 2 alleged rape when the complainant was 15; and count 4 (a multiple incident count) was another count of pressing his penis against her vagina on at least three occasions.

7. All four counts were tried together. Count 3, on which the appellant was convicted, was an allegation concerning the first time that the complainant and the appellant had allegedly had sexual intercourse. There was no charge of having sexual intercourse, the Crown explained, because by the date of the indictment the offence of having unlawful sexual intercourse was statute barred. The alleged offences were charged under the then contemporary statute, namely section 14 of the Sexual Offences Act 1956, indecent assault on a woman, for which the maximum penalty was ten years' imprisonment. That section was in force between 1st January 1957 and 30th April 2004.

8. The way in which the case was put against the appellant by the prosecution at trial was as follows. When the complainant was aged 14, she began working for the appellant. The appellant would give her gifts such as cigarettes, money, necklaces and earrings. He was generally very nice to her and always said that she looked beautiful and he called her his "baby". She said that he would touch her ears and neck and come up behind her when she was opening the fridge.

9. When the complainant was aged 15, she and the appellant entered into a relationship. The first sexual encounter between them was alleged to have taken place around 1996 or 1997, when he was aged 41 or 42. He took her back to his bungalow and whilst they were in bed together, he pressed his penis against her vagina (on the outside) and simulated sex until he ejaculated. That was the count 3 allegation. They went on to have sexual intercourse, to which the complainant did not say she was unwilling, but to which she could not in law consent.

10. Their relationship continued and they went on to have further consensual sexual intercourse. The complainant and the appellant gave very different accounts of the relationship.

12. Following his conviction, a pre-sentence report was prepared. Its author assessed the appellant as posing a low risk of general offending and a low risk of serious re-offending. As a result of the fact of this conviction, he was necessarily regarded as a medium risk to female children. He was not assessed as posing any significant risk of harm to the public. The report recorded his fear that he would die of shame in prison. It recognised the possibility of a custodial sentence, but made a recommendation that he be made subject to a community order for a period of 18 months, with a requirement of a number of days of rehabilitation activity.

13. The evidence before the court on mitigating matters revealed that the appellant had health problems and suffered with depression. He had been prescribed antidepressant medication, Sertraline and a number of other medications. He also suffered with angina, diabetes and high blood pressure.

Legal Framework

14. The Guideline for historic sex cases – Sexual Offences Historical: Sentencing – indicates that a section 14 offence of indecent assault on a woman had a maximum sentence of ten years' imprisonment. That offence did connote penetration. Further, the definition of a child has changed over time. The note to the guidance indicates that on 11th January 2001 the age definition of a child increased from under 14 to under 16; hence the charge under section 14. Offences of this character are now dealt with by section 9 of the Sexual Offences Act 2003, which provides so far as material:

> "**Sexual activity with a child**
>
> (1) A person aged 18 or over (A) commits an offence if —
>
> (a) he intentionally touches another person (B),
>
> (b) the touching is sexual, and
>
> (c) either —
>
> (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
>
> (ii) B is under 13.
>
> (2) A person guilty of an offence under this section, if the touching involved —
>
> (a) penetration of B's anus or vagina with a part of A's body or anything else,
>
> (b) penetration of B's mouth with A's penis,
>
> (c) penetration of A's anus or vagina with a part of B's body, or
>
> (d) penetration of A's mouth with B's penis,
>
> is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.
>
> (3) Unless subsection (2) applies, a person guilty of an offence under this section is liable —

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years."

It may be seen that there is a penetration offence and a non-penetration offence. The penalties provided are different, and the non-penetration offence may be tried either in the Magistrates' Court or in the Crown Court.

15. The applicable guidance referred to by counsel before us provides:

"**Harm**

Category 1

- Penetration of vagina or anus (using body or object)
- Penile penetration of mouth

In either case by, or of, the victim.

Category 2

Touching, or exposure, of naked genitalia or naked breasts by, or of, the victim

Category 3

Other sexual activity

Culpability

A

Significant degree of planning

Offender acts together with others to commit the offence

Use of alcohol/drugs on victim to facilitate the offence

Grooming behaviour used against victim

Abuse of trust

Use of threats (including blackmail)

Sexual images of victim recorded, retained, solicited or shared

Specific targeting of a particularly vulnerable child

Offender lied about age

Significant disparity in age

Commercial exploitation and/or motivation

Offence racially or religiously aggravated

…"

Various other factors relating to motivation against those of particular orientation or identity are set out.

"[Culpability] **B**

Factor(s) in category A not present"

The notes include the following:

"When sentencing appropriate category 2 or 3 offences, the court should also consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?"

16. Mitigating factors include: no previous or no relevant/recent convictions, and serious medical conditions which require urgent, intensive or long-term treatment.

The Sentencing Exercise

17. For the purposes of sentence, the Crown produced a note indicating that the maximum sentence at the time of the offence was ten years' imprisonment. They invited the court to consider the equivalent offence under the Sexual Offences Act 2003, which was the section 9 offence. They submitted that harm was category 1: penetration of the vagina; and culpability A: there was grooming behaviour (the jewellery and other such gifts). The starting point was therefore five years' imprisonment, with a range of four to ten years.

18. On behalf of the appellant, the defence, acknowledging that it was culpability A, submitted that it was category 2: touching, or exposure, of naked genitalia, not penetration. As counsel pointed out orally to the Recorder, the Crown had put its case as non-penetrative activity; sexual intercourse was not charged. That is clear from the extract from the indictment which we have set out above.

19. Before the Recorder, there was admitted by the defence to be a significant disparity of age (27 years) and grooming behaviour. The defence had also submitted in terms that the appellant had been convicted only of count 3. Category 2, culpability A had a starting point after trial of three years' imprisonment, and a category range of two to six years. It was submitted that this would clearly have been appropriate.

20. Counsel submitted to the Recorder that the sentence should be suspended. She said:

> "*Mr Azizi-Safa tells me this morning that since the GP put his medical report up, he is currently under investigation for cancer and has a number of investigations including endoscope at Salford Royal Hospital. He is now 68 years of age and the offence, your Honour will recall, was that it was not far off her 16th birthday. Whilst that is not mitigation itself, it perhaps puts matters in context. He is of good character; he has no*

previous convictions or cautions. He has a number of serious underlying health conditions.

Mr Azizi-Safa's low likelihood of re-offending means he does not meet the criteria for the accredited sexual offender's programme, and that the proposal that was proposed is a community order of 18 months with 30 rehabilitation activity requirement days. Whilst on the guidelines I cannot put forward that, that proposal in itself, that could be incorporated within a suspended sentence, and your Honour will be aware there has been no offending of this nature in the intervening time to today ..."

21. When he passed sentence, the Recorder said:

"*The offence occurred between 1996 and 1997. The allegation was, in that case, that you pressed your penis against the vagina of [the complainant], who was then 15 years of age. The fact is it went on to be fully penetrative sex, and you went on, after her 16th birthday, to have a relationship with her...*

When this offence of indecent assault was committed against her, as I say, she was 15 years of age and you were 42 years of age. There is, therefore, a significant disparity in age. The maximum sentence for an offence of indecent assault was ten years' imprisonment. There is some dispute as to the closest category of offending under the new legislation. It seems to me, if I include penetration so as to make this a category 1 offence, that would lead to a starting point of five years' imprisonment with a range between four and ten years' imprisonment. If, on the other hand, penetration is not to be counted as a feature, then this would be a category 2A offence, with a starting point of three years and a range between two and six years' imprisonment.

It seems to me in this case that there was significant grooming by you. She was much younger than you. I have heard the victim personal statement, and clearly this has had a significant effect upon her life. It seems to me that, if this was to be a 2A offence, this is above the starting point for such an offence and the appropriate sentence would be one of four years' imprisonment. However, I have had regard to the fact that the maximum sentence at the time was ten years' imprisonment. Therefore, I must measure a reflection and reflect that in the sentence that I impose upon you. In those circumstances, the sentence would be one of three years' imprisonment.

That means this: you will serve 18 months in custody. After

> *that period of time, you will be released on licence. If you commit any further offences whilst the subject of your licence, you can be returned to prison. I have considered whether your sentence might be suspended, but it seems to me that, even if I was to reduce your sentence further, suspension is not appropriate in a case like this, and it seems to me that only imprisonment can achieve the appropriate sentence in your case. So, that is the sentence: one of three years' imprisonment; 18 months in custody and 18 months on licence*."

The Recorder also made a restraining order.

22. On behalf of the appellant, Miss Shepherd argued in her application that the Recorder failed to have sufficient regard to the jury's acquittal on counts 1, 2 and 4 and the resulting sentence was manifestly excessive. She submits that the offence for which he was sentenced was a single, isolated offence; that the aggravating feature of grooming was less apposite to the single count of indecent assault, rather than to a multiple incident count; that there was an element of double counting in citing the disparity of age as an aggravating factor (which determined the sentencing character); that no regard was had to the maximum sentence, which was ten years' imprisonment for the offence of indecent assault, (as opposed to the maximum sentence of 14 years' imprisonment for sexual activity with a child), which should have attracted a downward reduction from the starting point; that in light of the appellant's previous good character and personal mitigation, the sentence should have been reduced to two years' imprisonment or less; and that the sentence should have been suspended. Further, it is said that an immediate custodial sentence of three years' imprisonment was not inevitable or warranted; the starting point should have been 24 months or less.

23. In admirably succinct submissions before us this morning, Miss Shepherd has repeated the framework of her appeal.

Consideration

24. We say at once that we accept that the Recorder has fallen into error. We accept that he failed to have sufficient regard to the acquittal of the appellant on counts 1, 2 and 4. Further, and importantly for the purposes of categorisation, count 3 did not allege penetration. It was an allegation under the 1956 Act and quite distinct in scope, and different in terms of penalty.

25. It appears to us from his remarks that the Recorder may have been encouraged to consider an offence which was in truth not equivalent to the 1956 Act offence. Category 1A considerations under the 2003 Act guidance were relied upon by the Crown, which did not apply to the facts of this charge. Correctly, reference was made to the maximum sentence of ten years' imprisonment under the 1956 Act. We understand that the conclusion reached by the Recorder may well have been as to a sentence by reference to category 2A of the modern guidelines, although it is not entirely clear to us that that is the case.

26. Accordingly, we accept the submission that the Recorder fell into error in taking too high a starting point. Essentially, he failed to give weight to the fact that the appellant had been convicted of a single count. The circumstances clearly put the offence within category 2A, as had been submitted at first instance.

27. As a single, isolated offence, it was said the aggravating factor was less apposite, given that the appellant was convicted of only the one offence. Nonetheless, we bear in mind that the grooming aspect was a real part of the nature of the offence which was charged. We are however of the view that, in any event, the sentence was too long in the circumstances. In light of the appellant's previous good character and his personal mitigation, in our view the offence should have attracted a starting point of two years' imprisonment. Further, there is no indication that the mitigation advanced was taken into consideration. We would reduce that sentence further by reason of the mitigation, as it was advanced to the Recorder, and as we

have set it out.

29. In the present case there was an argument for a suspended sentence. It was said that the offence took place took place a long time ago, and there had been no previous, nor indeed subsequent, offending. Further, the appellant was not considered to be a danger to the public.

30. However, the circumstances of the sexual activity, although unusual, were serious. They were aggravated by the age disparity and also the fact that the appellant was the complainant's employer. The age disparity was a very significant feature in this case and does not connote, as was tentatively suggested, an element of double counting in the circumstances of this particular case.

31. Accordingly, we have come to the conclusion that the circumstances are so serious that we are unable to say that there was an error in the Recorder's refusal to suspend the appellant's sentence.

32. However, we consider that the sentence of three years' imprisonment was manifestly excessive. We quash it and we substitute for it a sentence of 18 months' imprisonment. The restraining order remains in place. Accordingly, the appellant will very shortly be released.

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

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