Neutral Citation Number: [2020] EWCA Crim 10

Case No: 201903603/A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Norwich
HHJ Maureen Bacon QC
T20180455

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2020

Before :

LORD JUSTICE GREEN
MR JUSTICE JULIAN KNOWLES
and
HER HONOUR JUDGE WENDY JOSEPH QC

- -

Between :

REGINA
- and -
M

(Transcript of the Handed Down Judgment.
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Mr Ian James (instructed by **Breydons Solicitors**) for the **Appellant**
The Crown was not represented

Hearing date: Wednesday 15th January 2020

Judgment
As Approved by the Court

Lord Justice Green :

1. On 12th July 2019 in the Crown Court at Norwich the appellant was convicted of three counts. First, indecent assault on a male person contrary to Section 15(1) of the Sexual Offences Act 1956. Second, indecency with a child contrary to Section 1(1) of the Indecency with Child Act 1960. Third, indecent assault contrary to Section 14(1) of the Sexual Offences Act 1956.

2. In relation to Count 1 the appellant was sentenced to a term of imprisonment of 5 years. In relation to Count 2, he was sentenced to a term of 1 year imprisonment consecutively. In relation to Count 4 he was sentenced to a term of 1 year imprisonment consecutive. The total sentence was therefore one of 7 years imprisonment.

3. The reporting restrictions in the Sexual Offences (Amendment) Act 1992 apply to these offences and accordingly the normal protection available to the victims applies until and unless waived or lifted in accordance with Section 3 of the Act.

4. The facts may be summarised as follows. The appellant, now 47 years old, was the youngest of six siblings. The victims were the son and step-daughter of his oldest brother. In 2017 the son reported to the police that he had been sexually abused by the appellant whilst a child. Subsequently the daughter also made a statement to the police. The offences were committed between 1993 and 1996 when the appellant was between 21 and 24 years old. The son was, during that period, between 6 and 8 years old and the daughter was 6 years old. The offences were committed when the appellant acted as a babysitter for the children.

5. The facts of Count 1 are as follows. The appellant bought a suitcase of pornography with him which he showed to the son telling him that he wanted to teach him how to be a man. He made the boy undress and touched his penis. He masturbated him for about 30 seconds and encouraged him to look at the pornography. The boy was reluctant to do so. However he was made to touch the appellant's erect penis before he ejaculated into the pornographic material. The boy did not at the time realise that what had occurred was wrong and he did not tell anyone about it, though he gave evidence that the episode made him feel uncomfortable.

6. Count 2 represented a different occasion when the appellant placed pornography in front of the boy. He gave evidence that he had seen the appellant's naked penis and had smelt it. The appellant masturbated but there was no touching of the boy. Later, during his teenage years, the boy recalled the offences and confronted the appellant who responded with alarm but did not apologise. These matters were later disclosed to the boy's father who confronted the appellant. He admitted to his brother that it had been a phase that he had been passing through.

7. Count 4 concerned the niece. Whilst he was babysitting her, he kissed her using his tongue and placed her hand upon his penis over clothing. She recalled that the appellant's penis had been semi-erect. She sought to avoid the appellant subsequently. Years later, she informed her partner and upon hearing of the allegations made by her brother, she also made a formal complaint to the police.

8. The appellant was interviewed on 8th February 2018. He agreed that the boy had sent him a Facebook message in January 2017 telling him that he had told his father what

had occurred. The appellant admitted contacting his brother in order to apologise but he said that he thought it had related to an isolated episode when the boy inadvertently walked in upon him whilst he was masturbating. He denied any offending against the children.

9. He was convicted by the jury.

10. The nub of the appeal is that the judge imposed too high a sentence in relation to Count 1, of 5 years custody. In submissions the point was advanced in the following way. The historical nature of the offending necessitated the appellant being charged under the SOA 1956. In the course of a Sentencing Note, counsel for the Crown identified the change to the statutory maximum for offences now indicted under the Sexual Offences Act 2003, Section 7 and also provided guidance to the judge on the correct approach to be taken to historical offending as set out by this court in *R v H* [2011] EWCA Crim 2753. The judge also had placed before her relevant Guidelines on sexual offences. It is acknowledged that there are aggravating features in the case including the disparity in ages between the appellant and the children, and the abuse of trust.

11. In her brief sentencing remarks, the judge recorded of these matters. She observed that had the facts been prosecuted under Section 7 of the SOA 2003, namely sexual activity with a child under 13 years old, the maximum term of imprisonment would have been one of 14 years. In relation to relevant aggravating factors, had this been a case under Section 7, the fact that the appellant touched the boy's naked genitalia, and that there was an abuse of trust made this a Category 2 Culpability A case. The judge observed that the starting point was 4 years imprisonment with a range of 3 – 7 years.

12. The crux of the point raised upon this appeal is that the judge imposed a sentence which was materially above the starting point in the Guidelines. It is acknowledged that the offending is serious but within the context of indecent assaults of its kind this was not towards the upper end of the range. Indeed it is said that it may be towards the lower end of the range considering that this was a single assault that had lasted only "up to" 30 seconds. The child had not appreciated the seriousness of the matter and it had, at worst, made him feel "uncomfortable". Counsel argues that the judge has failed to identify the aggravating feature which caused her to move above the recommended starting point. When viewed in the context of the fact that the judge imposed consecutive sentences for the other counts, and the appellant's lack of previous convictions, his good character, and the fact that there was no evidence of any subsequent offending, it is said that, with all respect, that the judge erred.

13. There is some force in the argument. These were serious offences. They were not fleeting and they did exert lasting effects on the victims. However, on our reading of the sentencing remarks there is little reference or weight attached to certain aspects of mitigation. There is no explanation as to why the sentence on count 1 was above the starting point. When we view this case from the perspective of totality, we conclude that a proper sentence giving full weight to relevant mitigation would be one of a total of 6 years custody. We therefore set aside a total sentence of 7 years and we substitute in its place one of 6 years. To achieve this we make the sentence of 12 months on Count 2 concurrent with Count 1 to reflect the totality of the sentencing in relation to the offences concerning the young boy. To this extent the appeal is allowed.