Neutral Citation Number: [2020] EWCA Crim 1736

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002747/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 11 December 2020

Before:

LORD JUSTICE SINGH
MR JUSTICE GARNHAM
HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the CACD)

ATTORNEY GENERAL'S REFERENCE
S.36 CRIMINAL JUSTICE ACT 1988

REGINA
V
CALLUM HAYCOCK

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Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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Mr P Jarvis appeared on behalf of the Attorney-General

Miss A Nixon appeared on behalf of the Offender

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J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of the Attorney General for permission to refer a sentence to the court under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"). On 14 February 2020 the respondent was convicted by a jury at the Crown Court at Worcester of a single count of rape of a child under the age of 13, contrary to section 5(1) of the Sexual Offences Act 2003 ("the 2003 Act").

2. On 1 October 2020 he was sentenced by His Honour Judge Jackson to a three-year community order with a rehabilitation activity requirement ("RAR") of a maximum of 35 days. He was also fined £200, ordered to pay compensation to the victim in the amount of £2,500 and ordered to pay the appropriate victim surcharge.

The factual background

3. The respondent lives in Kidderminster with his guardians JS and RS. Their daughter, S, would visit her parents regularly from Devon. She would be accompanied by her daughter, A, who was aged five at the time of the offence. A and the respondent would often play during those visits.

4. On 9 October 2016, when the respondent was aged 17 years and eight months, he and A played together in a shed at the bottom of the garden where he kept his toy cars. S and A stayed for a few days before returning to Devon. Once they were home, A disclosed to her mother that the offender had "put his tinkie" down her throat. She explained that she was talking about his penis and that his penis had touched the back of her throat and that it had tasted "horrid". S reported the allegations to the police.

5. In her ABE interview on 16 October 2016, A repeated the allegations. She told the police that the offender told her to go to the shed with him. She had never been in the shed with him before. While they were in there the respondent had put his "tinkie" in her mouth "and pumped my head up and down". It only happened one time, when the adults were not around, and lasted about three seconds. She said that his penis was "pointing up", in other words that it was erect. A described the top bit of his "tinkie" as "disgusting". The respondent had not said anything to her during the incident. She described the experience as "nasty" and said it left her feeling "sad".

6. The police arrested and interviewed the respondent on 6 December 2016. He denied the offence. He said that A may have misunderstood something he told her at the time about

him being the victim of sexual abuse when he was younger. He said he tried to warn her about bad people. The respondent was released on bail.

7. On 23 August 2017 the police interviewed him for a second time. He was eventually charged on 4 April 2019 with a single offence of rape of a child under the age of 13. He pleaded not guilty and his case was fixed for trial on 10 February 2020. His defence was that the rape had never happened. A gave evidence but the offender did not give evidence at his trial.

8. The respondent was born on 26 January 1999. At the time of sentencing he had no previous convictions, cautions, warnings or reprimands.

9. The sentencing judge had before him a psychiatric report from Dr Imran Waheed dated 1 August 2019 and an addendum report dated 12 July 2020. In the first report, Dr Waheed concluded that the offender was fit to stand trial. He noted that the respondent had a history of inappropriate sexualised behaviour towards a teacher in 2008 or 2009, and also towards JS and S. This behaviour consisted of him touching their breasts and exposing himself. Records showed that whilst he had been in care and before moving to live with his guardians, the respondent himself had been the victim of a sexual assault committed against him by another child.

10. During his childhood, the respondent had been diagnosed with ADHD and mild learning disability. He takes medication for his ADHD without which he is prone to bouts of aggression and impaired concentration. The respondent also had some traits of autism, including restricted, stereotyped and repetitive interests and activities. But not all of those behaviours typical of autism were present, which meant that Dr Waheed was unable to diagnose him as suffering from autism.

11. In his addendum report, which was prepared for the purposes of sentencing, Dr Waheed commented that the respondent would be very vulnerable in a custodial setting. He would find it very difficult to cope with the change in his environment and interact with other inmates. He would probably attract the unwanted attention of other detainees which would make him a target of bullying and other physical abuse. Dr Waheed expressed the opinion at paragraphs 18 to 19 of his addendum report that it is unlikely that the respondent would receive the necessary support to ensure his wellbeing in a prison setting, that it is very likely that he will struggle to cope in that setting and that his wellbeing will significantly deteriorate.

12. There was also before the sentencing judge a psychological report from Dr Dennis Trent dated 1 May 2020 and an addendum report dated 5 June 2020. Dr Trent concluded that the respondent's cognitive reasoning, verbal comprehension and levels of concentration

were in the extremely low range. His non-verbal reasoning was slightly better, being in the borderline range. He had an IQ of 62 and a mental age of someone aged 11 or 12. Dr Trent observed that the respondent had difficulty placing himself in the position of other people and viewing events from their perspective.

13. In her written submissions to this court, Miss Abigail Nixon has made the submission on behalf of the respondent that Dr Trent examined him some years after the date of the offence and so it is likely that he would have had the mental age of an even younger child at the time of the offence.

14. The judge also had a pre-sentence report dated 15 August 2020. The report noted that the respondent said that he had been unable to attend mainstream schooling as a child because of his special needs. He had been the victim of neglect as a young child and he was taken into care. The reports said that the respondent presented a medium risk of reconviction and a significant risk of causing harm to children should he re-offend. It observed that he would find life in prison very difficult. The author thought that the motive for the index offence could have been the respondent's sexual curiosity. As an alternative to custody, the report suggested that the respondent could be made subject to a community order with an RAR for 35 days and a curfew requirement.

15. The judge also had a victim personal statement by S on behalf of her daughter, A. Since the offence she had noticed that A had become nervous around men and started to wet her bed having not done so before. She suffered from night terrors and wakes up in the middle of the night crying and sweating. She has also become more conscious of her body and covers herself up more. S said that the rape had had a devastating impact on the family as a whole. Her mother took the respondent's side and this had caused a rift between A and her grandparents. A no longer has a relationship with her grandmother, although she does still see her grandfather on occasions.

The judge's sentencing remarks

16. The judge observed that during the trial the trial process had had to be adapted considerably to accommodate the respondent's significant difficulties, namely neurological deficits, ADHD, learning difficulties and aspects of autism. Special measures included assistance by an intermediary.

17. The judge was well aware of the difficulty of the sentencing exercise which he had to perform. On the one hand he said that he was dealing with a serious offence against a child which, even at the lowest level on the relevant Sentencing Guideline, would attract a significant custodial sentence for an adult. On the other hand, he was dealing with an

offender to whom the Over-arching Guideline concerning offenders suffering from a mental disorder must apply. He had to take into account the respondent's chronological age at the time of the offence, when he was still 17, and therefore the Guideline for dealing with young offenders was also relevant.

18. Turning to the Definitive Guideline on sexual offences of this kind, the judge said that in his view the offence fell into Category 3B. He could not say it involved any form of grooming. This was not a situation where the respondent had been entrusted with A's care. If the judge had been dealing with a defendant who did not have "the deficits" that this respondent has, he would very likely consider this to be a case where A was a particularly vulnerable person due to her very young age. However, he considered this case to be more analogous to one where an offence was committed by one child upon another.

19. The judge reminded himself that when dealing with an offender under the age of 18 at the time of the offence a significant discount, as much as 50 per cent in the case of an offender aged 15 to 17, should be applied to the starting point for any sentence to reflect the offender's age and immaturity. He also noted that the Definitive Guideline says that there may be wholly exceptional cases in which a lengthy community sentence may be appropriate as an alternative to custody. He referred to the psychiatric and psychological reports before him. He then noted that the reality of this case was therefore that he was dealing with an offender who "was and still remains in terms of their functioning and maturity a child and one even now not much above the age of criminal responsibility".

20. The judge referred to the decisions of this court in R v PS and others [2019] EWCA Crim 2286, [2020] 2 Cr.App.R (S) 9 and R v H [2018] EWCA Crim 541.

21. In PS, this court in a constitution consisting of Lord Burnett of Maldon LCJ, Fulford LJ VP and Holroyde LJ, the Chairman of the Sentencing Council, gave guidance in relation to the relevance of mental disorder and impairment to the sentencing exercise: see paragraphs 7 to 21, in particular paragraph 17.

22. In R v H this court allowed an appeal against sentence in a case in which the appellant was aged about 12 or 13 at the time of his offences and aged 14 at the time of sentence. One of those offences was penetration of a child under 13, contrary to section 5 of the 2003 Act. A sentence of three years' detention was imposed after guilty pleas. In the circumstances of that case, this court considered that a non-custodial sentence should have been imposed as had been recommended in a pre-sentence report: see in particular paragraphs 43 to 44 in the judgment, which was given by Hamblen LJ.

23. Before this court, Mr Jarvis, who has appeared on behalf of the Attorney General, has

rightly reminded us that R v H is distinguishable, not least for the reason that there were guilty pleas in that case whereas in the present case the matter had to go to trial. Of course, Mr Jarvis correctly submits that does not constitute an aggravating feature but it does mean that mitigation that would otherwise have been available to the respondent is not available to him.

24. Returning to the present case, the sentencing judge said that the pre-sentence report before him was "well considered". By reference to the new Guideline for Sentencing Offenders for the Mental Disorder, the judge considered that the respondent's condition did significantly impair his ability to exercise appropriate judgment, make rational choices and understand the nature and consequences of his actions. This was because he is a vulnerable individual who functions at the intellectual level of a child.

25. On the question of dangerousness, the judge did not consider that the respondent needed to be dealt with as a dangerous offender. He said that this incident appeared to be very much a one-off. No issue has been taken before this court on that aspect of the sentencing remarks.

26. The judge also bore in mind the potential impact of a sentence of immediate custody on the respondent. Because he was now 21, if sentenced to custody, he would be detained in an adult prison. The judge said that that cannot be the place for someone in his position, especially not in the current climate created by the Coronavirus pandemic. He said that a custodial sentence would have a serious and far-reaching damaging effect on a young man who already labours under significant handicaps in his daily life.

27. The judge did not underestimate the impact that the offence had had upon A. However, he said that the purposes of the sentencing were not limited to punishment alone. They include the prevention of future offending and rehabilitation. He concluded that this was "one of those wholly exceptional cases where a departure from the strict parameters of the sentencing guidelines for the offence of rape of a child under 13 is called for". He said that a carefully considered proposal had been made in the pre-sentence report. He concluded that that proposal was a realistic one, offering a real prospect of protecting the public by preventing future offending by an offender who is likely to continue to function at the level of a child for the remainder of his life.

28. The judge appears not to have considered expressly the recommendation in the pre-sentence report that there should be a curfew requirement. The respondent would have to comply with the notification requirements for a person convicted of a sexual offence for a period of five years. In the very particular circumstances of this case the judge did not consider that a Sexual Harm Prevention Order was necessary.

Sentencing guidelines

29. The Definitive Guideline relating to the offence of rape of a child under 13 was issued by the Sentencing Council with effect from 1 April 2014. Under that Guideline, Step 1 is to determine the offence category by reference to categories of harm and culpability. It is common ground that none of the factors in categories 1 and 2 were present here and so this was a case of Category 3 harm.

30. So far as culpability is concerned, it was common ground before the sentencing judge that none of the factors in Category A were present. Before this court it has been submitted on behalf of the Attorney General that there was a deliberate isolation of the victim, although not grooming, and so it did fall into Category A. This is denied on behalf of the respondent.

31. At Step 2 the Guideline recommends a starting point for Category 3A cases of 10 years' custody, with a range of eight to 13 years. For Category 3B cases it recommends a starting point of eight years' custody, with a range of six to 11 years.

32. Amongst the mitigating factors mentioned in the Guideline are the offender's age and/or lack of maturity where it affects his responsibility and mental disorder or learning disability, particularly where linked to the commission of the offence. The Guideline also states that there may be exceptional cases where a lengthy community order with a requirement to participate in a sex offender treatment programme may be the best way of changing the offender's behaviour and of protecting the public by preventing any repetition of the offence.

33. Before this court, Mr Jarvis has submitted on behalf of the Attorney General that the present case did not fall within the strict terms of that exception. That may be so, but nevertheless, for reasons to which we shall return, that did not prevent the sentencing judge properly from taking the view that the present was indeed a wholly exceptional case.

34. The judge rightly had regard to the new Guideline issued by the Sentencing Council on "Sentencing Offenders with Mental Disorders, Developmental Disorders or Neurological Impairments" which came into effect on 1 October 2020, the very day when he was passing sentence in this case. As that Guideline makes clear, reflecting what this court had said earlier in R v PS, culpability may be reduced if an offender was at the time of the offence suffering from an impairment or disorder: see paragraph 9. In some cases the impairment or disorder may mean that culpability is significantly reduced: see paragraph 12. At paragraph 15 the Guideline recommends that courts may find the

following questions a useful starting point, although they are not exhaustive and they are not a checklist since the range of offenders, impairments and disorders is wide. The first bullet point raises the question whether at the time of the offence: did the offender's impairment or disorder impair their ability to exercise appropriate judgment, to make rational choices or to understand the nature and consequences of their actions? At paragraph 22 the Guideline states:

i. "Where an offender is on the cusp of custody or detention the court may consider that the impairment or disorder may make a custodial sentence disproportionate to achieving the aims of sentencing and that the public are better protected and crime reduced by a rehabilitative approach."

Submissions for the Attorney General

35. On behalf of the Attorney General it is submitted by Mr Jarvis that the sentence imposed was unduly lenient. This was a case where a 21-year-old, who was almost 18 at the time of this offence, received a community sentence after unsuccessfully contesting the allegation at trial. Moreover, the sentence contained no punitive element other than a £200 fine. The court had made no ancillary orders with a view to protecting either the victim or other children from the risk of the offender committing further such offences.

36. Contrary to the concession which was made at the sentencing hearing before the judge, it is now submitted that this was a case where the offender did deliberately isolate the victim from her family by taking her to the shed so that he could sexually abuse her. It is conceded that A's youth was not "extreme" so the facts did not fall into Category 2 harm, nevertheless her age was clearly an aggravating feature. It is submitted that the physical difference between the victim and the offender in terms of their relative size and strength meant that she was effectively helpless to prevent him from placing his penis into her mouth.

37. Accordingly, it is submitted that his culpability fell into Category A. Therefore this was a Category 3A case and not a 3B case. On that basis the starting point recommended is one of 10 years' custody in the case of an adult.

38. It is submitted that the circumstances of the offender, including his intellectual impairment and other matters of mitigation could not reasonably have resulted in the imposition of a community sentence. It is submitted that the offence and its circumstances were just too serious so that the judge was not entitled to depart from the Definitive Guideline and certainly not to the extent that he did.

Submissions for the respondent

39. On behalf of the respondent, we have had submissions by Miss Nixon. She submits that this was not a case in which the respondent deliberately isolated the complainant in order to commit the offence and at no time had this previously been suggested. It is submitted that the judge correctly identified the difficult competing interests in the sentencing exercise which he had to perform. The judge correctly concluded that he was dealing in reality with a child just above the age of criminal responsibility. He also correctly gave consideration to the impact of custody on the offender, particularly at this time during the pandemic. Miss Nixon submits that in the circumstances of this case the judge was entitled to conclude that it was wholly exceptional and his sentence was not unduly lenient.

The approach to be taken by this court

40. In giving the judgment of this court in Attorney General's Reference No 4 of 1989 [1990] 90 Cr.App.R 366, Lord Lane LCJ said at 371:

    i. "The first thing to be observed is that it is implicit in the section [section 36] that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot ... have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. 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 must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature." (Emphasis in original)

41. Lord Lane LCJ went on to state that, even where this court considers that a sentence was unduly lenient, it has a discretion as to whether to exercise its powers. We should also mention Attorney General's Reference No 132 of 2001 (Johnson) [2002] EWCA Crim 1418, [2003] 1 Cr.App.R (S) 41 in which the judgment of this court was given by Potter LJ. At paragraph 24 he reminded this court that there is a line to be drawn between the

leniency of a sentence in a given case and a sentence which is unduly lenient. The purpose of the system of Attorney General's References includes the avoidance of gross error, the allaying of widespread concern at what may appear to be an unduly lenient sentence and the preservation of public confidence.

Conclusions

42. We emphasise again that the judge faced an exceptionally difficult sentencing exercise. There can be no doubt that in the vast majority of cases nothing other than an immediate custodial sentence could reasonably be imposed in a case such as this, which involved the rape of a child as young as five. There is also no doubt that the judge showed leniency by taking the exceptional course of imposing a community penalty in this case.

43. The question for this court is not whether it would have taken the same course, but only whether the sentence was unduly lenient. We do not accept the submission for the Attorney-General that the judge was wrong to place this case into Category 3B by reference to the relevant guideline. It is common ground that the category of harm was 3 but it is now submitted that the respondent's culpability should have been assessed as falling into Category A because it is said he deliberately isolated the victim from her family. The judge was better placed than this court can be to make that factual assessment, especially as he had presided over the trial and heard all the evidence. He was entitled to reach the view that the respondent and A used to play together when her family visited and there was nothing untoward in this happening on this occasion in his shed where he kept his toys.

44. More generally we consider that the judge performed this difficult sentencing exercise conscientiously and with great care. He had regard to all relevant features of the case, both on the facts and by reference to relevant case law and sentencing guidelines, even to the extent of applying the new guideline on mental disorder which only came into effect on the very day when he was passing sentence in this case. Furthermore, the judge had impressive reports before him which recommended that he should not impose a custodial sentence. Those reports included the expert medical views of Dr Waheed and Dr Trent, as well as the pre-sentence report. We cannot say that the only reasonable course open to him was to reject those expert reports.

45. The judge was entitled to take the view that in the exceptional circumstances of this case it would better serve the purposes of sentencing to impose a community order with an RAR than to send this respondent to an adult prison, which would be unlikely to provide the support he would need, in particular for the purposes of rehabilitation. The judge was entitled to take the view that that course would be more likely to prevent re-offending by the respondent and therefore to protect the public.

46. In the circumstances of this case, the judge was also entitled to take into account the likely impact on the respondent of the current pandemic if he were sentenced to prison: see Attorney General's Reference (R v Manning) [2020] EWCA Crim 592, [2020] 2 Cr.App.R (S) 46 in the judgment of Lord Burnett of Maldon LCJ, at paragraph 41.

47. We are concerned, however, that the judge did not accept the recommendation in the pre-sentence report in full. In particular he did not impose a curfew requirement as was recommended in that report. Nor did he explain in his sentencing remarks why he did not do so.

48. In our view this was a case in which the punitive aspect of sentencing did require more than was done by the judge. A fine was insufficient having regard to the seriousness of the offence. The compensation order was precisely that; its purpose was to compensate the victim not to punish the offender.

49. To that extent, we do think that the sentence in this case was unduly lenient. We will therefore add a curfew requirement to the community order that was made in this case. It will require the respondent to be at the address of his guardians between the hours of 7 pm and 7 am for a period of 12 months, starting from today. We do not alter the sentence otherwise.

50. In summary, we grant the application for permission to refer the sentence to this court under section 36 of the 1988 Act and we alter the sentence imposed by the Crown Court to the extent of adding a curfew requirement in the terms set out above.

MR JARVIS: There was an exchange with my learned friend about whether that would be electronically monitored or not but I notice you have not ordered it to be electronically monitored.

LORD JUSTICE SINGH: My understanding is that is the default position. We are not changing that.

MR JARVIS: Very well. We will make a note of that.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk