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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101894/A4

NEUTRAL CITATION NUMBER: [2021] EWCA Crim 1250



Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 29 July 2021

LORD JUSTICE HOLROYDE

MRS JUSTICE THORNTON DBE

HER HONOUR JUDGE DHIR QC

(Sitting as a Judge of the CACD

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REGINA

v

“BN”

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)
MR P JARVIS appeared on behalf of the Attorney General.

MR I MAHMOOD appeared on behalf of the Offender.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This case concerns sentences imposed for sexual offences committed against two 12-year-old girls, the offender's stepdaughter (to whom we refer as "A") and her friend (to whom we refer as "B"). They are both entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify them as the victims of these offences.
2. In view of the family relationship between the offender and A it will be necessary for his name to be anonymised in any report of this case. We will therefore refer to him as "BN".
3. In May 2021, after a trial in the Crown Court at Guildford before Recorder Hunter and a jury, BN was convicted of four offences of sexual assault of a child aged under 13, contrary to section 7 of the Sexual Offences (Amendment) Act 2003. He was sentenced to concurrent terms of 12 months' imprisonment on each count. Her Majesty's Solicitor General believes the total sentence of 12 months to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this Court so that the sentencing may be reviewed.
4. A was aged 2 when her mother married BN in 2006. In 2016 BN left the family home but he continued to visit regularly and sometimes stayed overnight. It seems that he had a problem of binge drinking.
5. On 31 October 2016 BN attended a Halloween party at the house. He drank a lot of beer and took cocaine. He went several times into A's bedroom where A and B were playing. On one such occasion he got onto the bed and asked them for hugs and a kiss.
6. On 31 December 2016 BN attended a New Year's Eve party at the house. Six adults and eight children including A and B were present. The party went on into the early hours and it seems BN again drank a lot of alcohol.
7. The children went to bed shortly after midnight. A, B and a third child shared A's bed. Two other children slept on airbeds on the floor. An adult also slept on the floor.
8. Although the sequence and times of events are unclear, BN made a number of visits to that bedroom. On one occasion he was seen by other adults as he went into the bedroom, and he left. On another occasion the adult who was sleeping on the floor woke to find BN lying with his body on A's bed and his legs on the floor. He was holding a can of beer and claimed to be looking for his shoes. On another occasion, around 3.00 am, he again went into the bedroom. An adult guest found him slumped with his head on A's bed and removed him.
9. There were in addition to those visits to the room two occasions when BN sexually assaulted both girls. The judge found that each of these occasions lasted some minutes, with an overall timescale of about 40 minutes.
10. In relation to the first of these occasions the evidence of the two girls was as follows. A said that she had fallen asleep. She became aware that BN had come into the room when she felt him touching her leg. She had been asleep up to that point. She asked B if it was B who was touching her but B replied that it was not and that she thought that it was the offender, who was doing the same thing to her. BN touched A's upper and inner thigh between her legs. A thought that the touching lasted for about 5 minutes whilst she was awake, but she was not able to say how long it had lasted in total because she had been asleep when it began. B said that she had been awake when BN came into the

room. He had touched her legs and moved further up to her thighs. Every time B looked at him he stopped. He would then wait for a while before carrying on. She said that BN started touching her on her feet and moved up to touch her between her thighs though his hand did not get any higher than her thigh. It seemed to B that he was looking to see if she was asleep or not. In relation to both girls, the touching of their legs was over their pyjamas. After A had questioned what was happening BN got up and left the room. After BN had left, A fell asleep again. These events were charged in count 2 in relation to A and count 5 in relation to B

11. As to the second occasion, it was again the case that A was asleep when the assault began and it woke her up. She described BN doing "the same thing", putting his hand between her legs over her pyjamas. She did not want to say anything for fear of waking up others but eventually she asked BN "What are you doing?" whereupon he got up and left.
12. B similarly described the assault during the second incident as being "the same as the last time". BN touched her legs moving up to her thighs, all the while looking at her and apparently checking to see if she was asleep. Again, on this second occasion, charged in counts 3 as against A and 6 as against B, the touching was over the girls' pyjamas.
13. In February 2017 BN telephoned A and asked her for B's phone number, pretending that he needed it in order to give her a lift home from school. A refused to provide the number. Undeterred, BN sent a message to B using a social media app. He asked B if she would meet up with him but told her to "keep this between me and you". A and B discussed the messages and eventually informed their mothers. The police were called and both girls revealed what had happened on New Year's Eve.
14. The chronology of events from that point is unexplained and unsatisfactory. The ABE interviews of A and B were not recorded until late May 2017. BN was interviewed under caution in August 2017 and again in April 2018. He said that he had no recollection of events at the New Year's party, denied sending any messages to B and denied any sexual interest in children. Very regrettably, and for reasons which have not been explained, he was not charged until January 2020, very nearly 3 years after these entirely straightforward events were reported by the girls' mothers to the police. BN was sent for trial in February 2020. A PTPH took place promptly on 30 March 2020. The trial however was then delayed until May 2021 as a result of the Covid-19 pandemic. This lengthy delay was on any view very regrettable for the victims of the offences. It was regrettable for everyone else concerned, including BN. True it is that he at no point made any admissions; but the delay of nearly 3 years between initial report and charge is very difficult to understand.
15. Following the jury's verdicts, the judge proceeded immediately to sentence. No victim personal statement had been provided by either girl or by their parents. It appears that the judge, having presided over the trial, concluded that BN was not a dangerous offender and no pre-sentence report was thought to be necessary. We are satisfied that none is necessary now. We have been assisted by a report dated 5 July 2021 by BN's offender manager, which confirms the restricted regime which has been operating in the prison as a result of the pandemic, records that there have been no adverse adjudications against BN and notes that he has reported himself as suffering from anxiety and struggling in prison.
16. BN had been before a criminal court on only two previous occasions: in August 2009 he had been sentenced to a community order for offences of criminal damage and assault

occasioning actual bodily harm. In January 2010 he was convicted of failing to comply with the requirements of that community order, which was ordered to continue with the addition of further specified activity sessions.

17. In his brief sentencing remarks the judge assessed each of the four offences as falling within category 3A of the Sentencing Council's relevant Definitive Guideline, with a starting point of 1 year's custody and a range from 26 weeks to 2 years. He said that BN clearly had a sexual interest in the girls and his inhibitions were lowered by his consumption of drink and/or drugs. The offences had had a very unsettling effect on the girls. The judge identified as aggravating factors the abuse of a position of trust and the fact that the offences occurred "whilst they were in the privacy of a bed, asleep or half asleep which must have added to the anxiety that they feel now".
18. The judge found very little mitigation. However, he reduced what would otherwise have been a total sentence of 15 months' imprisonment, to take into account BN's lack of relevant convictions before or since these offences and the difficult conditions in which he would have to serve his sentence. He imposed, as we have said, concurrent sentences of 12 months' imprisonment on each count.
19. The judge also made a sexual harm prevention order. No issue arises in that regard, but it must be noted that the Crown Court record incorrectly shows the order to have been made pursuant to section 103 of the Sexual Offences Act 2003. The correct statutory power was section 345 of the Sentencing Code established by the Sentencing Act 2020, and it will be necessary for the Crown Court record to be corrected accordingly.
20. For the Solicitor General, Mr Jarvis submits that the judge failed properly to reflect the seriousness of the offending. He submits that the offences against A, who was asleep when the sexual assaults began and was therefore particularly vulnerable, should have been placed into category 2A of the guideline, with a starting point of 4 years' custody and a range of 3 to 7 years, whilst those against B should have been placed in category 3B, with a starting point of 26 weeks and a range of up to 1 year. Insofar as counsel who prosecuted at trial had submitted that all offences fell into category 3A, he was in error; but the Solicitor General on this application is not bound by that error.
21. Mr Jarvis realistically acknowledges that the judge did not receive the help he should have received from , and in particular was not referred to any of the case law as to the circumstances in which a victim may be regarded as particularly vulnerable due to her personal circumstances for the purposes of categorising an offence under the sexual offences guidelines.
22. Mr Mahmood, who represents BN in this Court as he did below, submits that no error of categorisation was made, and that the total sentence was not unduly lenient. He does not seek to argue that a person who is asleep is never to be regarded as particularly vulnerable in this type of context. He does however submit that the court should appraise all relevant circumstances, including here the fact that there were others in the room including an adult. For those reasons he does not accept that A should have been treated as a particularly vulnerable victim for the purposes of applying the guideline. He emphasises that all the touching of both girls was over clothing and that neither girl was touched on the areas of her breasts or vulva. He urges the court, if considering any increase in the sentence, to bear in mind the particular distress and anxiety suffered by BN in facing this application when he is within a few weeks of his anticipated release date from his present sentence. Mr Mahmood emphasises the serious limitations within

the prison as a result of the pandemic and has very helpfully addressed us about the particular consequences of that so far as BN is concerned.

23. We are grateful to counsel for the written and oral submissions which we have received. We have reflected on those submissions and on the case law referred to by counsel.
24. The guideline which the judge was required to follow in this case directs the sentencer at Step 1 to determine the categories of harm and culpability by reference only to the tables set out in the guideline. In that way the offences placed into the appropriate category, with a starting point which reflects the inherent seriousness of such an offence against a young victim. The sentencer may then adjust the starting point either upwards or downwards, to reflect as appropriate the presence of more than one factor relevant to that category, or the presence of other factors relevant to either a higher or a lower category.
25. We have no doubt that when each of the offences against A began she was "particularly vulnerable due to... personal circumstances" because she was asleep. In R v Rak [2016] EWCA Crim 882, the Court made clear that the personal circumstances need not be enduring characteristics such as age or a physical disability. In that case and also in three of the other cases cited to us, namely R v Bunyan [2017] EWCA Crim 872, R v Sepulvida-Gomez [2020] 4 WLR 11 and R v Behdarvani-Aidi [2021] EWCA Crim 582, the court found an adult victim of a sexual offence to be "particularly vulnerable due to personal circumstances" when she was both asleep and to a greater or lesser extent intoxicated when the offence began. We are unable, however, to accept a submission that a sentencer could only find a victim to be particularly vulnerable where there is a combination of intoxication and sleep. In R v LD [2017] EWCA Crim 2575, the Court made clear at paragraph 26 that a victim who is asleep when the sexual activity begins is particularly vulnerable, just as a victim who was insensible through intoxication would be. We find it difficult to see how a child or adult who is asleep when the sexual activity begins, and therefore does not know what is happening and so is powerless to resist or to protest, could generally be said to be anything other than particularly vulnerable due to their personal circumstances.
26. Each of the offences against A therefore falls into category 2 harm. We accept, however, that but for her being asleep, the case would have fallen into category 3 and, in view of the nature and extent of the touching, would not have been a serious example of category 3 harm. We also accept that A was able to, and did, wake up when the sexual touching began. The guideline starting point can properly be adjusted downwards significantly to reflect those features.
27. Mr Mahmood realistically acknowledges that the offences against A fell into culpability category A because they involved an abuse of trust. Again, we accept there was only that one factor which led to that categorisation.
28. So far as the offences against B are concerned, it seems to us that they fell into category 3B. We think however that although B was not particularly vulnerable, because she was awake when the offending began, it is nonetheless a serious aspect of the offending generally that BN clearly hoped both girls were asleep, and would therefore not know what he was doing, and he was trying to check that B was asleep whilst he carried out the assaults.
29. The aggravating features of all the offences were as follows. There were two victims, each of whom must have been aware of the sexual assault upon the other; the offences were committed in the presence of other children who might have woken at any moment;

and BN was heavily intoxicated.

30. The mitigating factors were as follows: the nature and extent of the touching was limited as Mr Mahmood has submitted; there was a long period of delay before BN was charged, for which he cannot be criticised, and the time scale of the proceedings was then lengthened by the pandemic; BN has no previous convictions for sexual offending; he is experiencing custody for the first time in circumstances which make imprisonment particularly difficult; and, we accept, he is struggling to cope with that experience.
31. Collectively those factors do, in our view, carry some weight. In the light of the limited assistance which counsel have been able to give us today as to the chronology of the proceedings, we are particularly struck by the fact that the lengthy and unexplained delay in charging in this case brought about the situation in which the offender must now serve his sentence in the conditions prevailing during the pandemic. That consideration has led us to make a further adjustment downwards from what we felt would otherwise be the appropriate sentence.
32. In our judgment, the least total sentence which could be justified in these circumstances was one of 2 years 6 months' imprisonment. It follows that the sentencing below was unduly lenient, in particular because of the error which was made as to the categorisation of the offences against A.
33. We therefore grant leave to refer. We quash the sentences of 12 months' imprisonment imposed for the offences against A (counts 2 and 3) and substitute for them concurrent sentences of 2 years 6 months' imprisonment. The sentences for the offences against B (counts 5 and 6) remain as before. The sexual harm prevention order remains as before, but the Crown Court record must be corrected as we have said.
34. The overall result is that BN's total sentence is now 2 years 6 months' imprisonment, of which he must serve half before being released on licence.

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

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