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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1795



No. 202100555 A1

Royal Courts of Justice

Tuesday, 2 November 2021

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE SPENCER

HIS HONOUR JUDGE KEARL QC RECORDER OF LEEDS

REGINA

V

DAVID DIBELL

**REPORTING RESTRICTIONS APPLY:
THE SEXUAL OFFENCES (AMENDMENT) ACT 1992**

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MR N. LUMLEY QC appeared on behalf of the Appellant.

J U D G M E N T

MR JUSTICE SPENCER:

- 1 This is a renewed application for leave to appeal against sentence, following refusal by the single judge.
- 2 It is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead members of the public to identify the victim of the offences. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.
- 3 On 29 January 2021, in the Crown Court at Durham, the applicant, now aged 27, was sentenced by HHJ Adkin, the Recorder of Durham, to an extended sentence of 30 years' imprisonment, comprising a custodial term of 24 years and extension period of six years. The applicant had been convicted by the jury after trial of very serious offences of sexual and physical abuse, committed over a period of several months, against a young girl aged five or six, the daughter of the woman with whom he was living.
- 4 The offences were rape of a child under 13, contrary to s.5(1) of the Sexual Offences Act 2003 (Count 1); sexual assault of a child under 13, contrary to s.7(1) of the Act (Count 2); engaging in sexual activity in the presence of a child, contrary to s.11(1) of the Act (Count 3); cruelty to a person under 16, contrary to s.1(1) of the Children and Young Persons Act 1993 (Counts 4 and 5); and causing grievous bodily harm with intent, contrary to s.18 of the Offences Against the Person Act 1861 (Count 6).
- 5 The judge made it clear that he was reflecting the criminality of all the offending in the custodial term of 24 years which he imposed on Count 1, the charge of rape. There were concurrent sentences on all the other counts: in descending order of length, 14 years' imprisonment for causing grievous bodily harm with intent (Count 6); five years' imprisonment for sexual assault of a child under 13 (Count 2); 40 months' imprisonment for child cruelty (Count 4 and 5); and six months' imprisonment for engaging in sexual activity in the presence of a child (Count 3).
- 6 In addition, the applicant had been committed for sentence to the Crown Court in respect of two further offences committed after the offending on the indictment. For an offence of assault occasioning actual bodily harm, there was a concurrent sentence of eight months' imprisonment, reduced from 12 months after full credit for plea. For an offence of dangerous driving, there was, likewise, a concurrent sentence of eight months' imprisonment after full credit for plea.
- 7 The grounds of appeal settled by trial counsel were that the judge took an incorrect starting point under the Sentencing Council Guideline for the offence of rape (Count 1), that he did not sufficiently consider totality, and that the overall sentence was manifestly excessive.
- 8 The renewed application for leave has been presented by Mr Lumley QC, who did not appear below. We are grateful for his written and oral submissions. He has focused on totality.

The facts of the offences

- 9 The complainant was a little girl born in September 2012. She was therefore five years old when the offending began in about June 2018 and six years old when it ended in November 2018. The applicant was then 24 years old. He is now 27. The complainant's mother was three years older than the applicant.

- 10 By the middle of 2018, mother and child had moved in to live with the applicant. His relationship with the mother was volatile and punctuated by rows and violence. The judge's assessment, after hearing the trial, was that superficially the applicant professed to have some interest in the child, but in fact he resented having another man's child to look after and he could not cope with the fact that the mother might still have anything to do with her ex-partner. The applicant took out his aggression and frustration on the complainant, a small child.
- 11 The full extent of the physical and sexual abuse came to light only after the child was admitted to hospital at the end of November 2018. She had been vomiting for the past two to three days. An X-ray showed that there was an obstruction of the bowel. The judge was satisfied that the condition was life-threatening. We assume that this was on the basis of expert evidence given at the trial. Surgery was undertaken to determine what was the cause of the obstruction. It revealed that there was bruising within the duodenum wall and surrounding tissues, consistent with a history of recent blunt injury. It was also noted at hospital that the child had bruises on her buttock and lower limbs. There were ten separate areas of bruising to her body. The mother had given false explanations to the doctors. Social services intervened.
- 12 The child went to live with her natural father, with whom she had always had a good and close relationship. Over the next few weeks, as she became more settled, the child began to disclose the abuse that she had suffered at the hands of the applicant. She disclosed that he had variously punched her in the tummy, pulled her hair, pulled her upstairs by her hair, bitten her finger and sat on her head with a cushion so she struggled to breathe.
- 13 The applicant was first interviewed by the police on 1 February 2019. By then he had split up from the mother. He denied that he had ever assaulted the child.
- 14 An ABE interview was conducted with the child on 11 February 2019. She was now aged six. She made further disclosure of the applicant's violence and cruelty towards her. She said that he had kept punching her in the stomach, really hurting her, and she kept being sick and had to go to hospital. That was the s.18 offence of causing grievous bodily harm with intent (Count 6).
- 15 The allegation of child cruelty in Count 4 covered the physical abuse of pulling her hair, dragging her upstairs by her hair, choking her, punching her and swearing at her. There was a further specific allegation of child cruelty and that the applicant had videoed himself shaving the child's back with an electric razor (Count 5).
- 16 In the course of her ABE interviews, the child also disclosed that the applicant used to "do rude things", as she put it. He would expose his penis to her. This would take place in her bedroom when her mother was at work (Count 3). She disclosed that the applicant had pulled down her tights and underwear and touched and scratched her vagina (Count 2). Most serious of all, the applicant had told her to lick his penis. She had said no, but he made her do it and he put his penis in her mouth and ejaculated over her legs. That was the allegation of oral rape (Count 1). The child told the police that the applicant had threatened her and that she was too scared to tell her mother in case he did it again.
- 17 Following these disclosures, the police interviewed the applicant again on 25 February 2019. He continued to deny any abuse of the child, physical or sexual. He suggested that the child's mother or grandmother must have put the child up to making false allegations. However, analysis of his mobile phone revealed a video of him shaving the child's back with an electric razor. There were text messages he sent her, apparently

with reference to hair on her back, in which he described her as "a rat" and told her she would "grow up to be a gorilla".

- 18 It emerged from school and medical records that injuries to the child had been noted in September and October 2018, but the child's mother had explained away the bruises as accidents at school. The mother's own responsibility for failing to protect her child was reflected in a count she faced of causing or allowing the serious injury of a child. She pleaded guilty to that offence and received a suspended sentence with unpaid work and rehabilitation activity requirements.
- 19 We can summarise the further offences very briefly, as they were dealt with by concurrent sentences. It should be observed, however, that both offences were committed after the offending against the child had come to light. Although the applicant was not technically on bail, he was well aware of the other serious allegations against him and must have been released under investigation.
- 20 The assault occasioning actual bodily harm took place on 20 April 2019. The applicant punched a man in the face outside a pizza shop in the early hours of the morning, knocking him unconscious.
- 21 The offence of dangerous driving took place on 16 November 2019 and involved the deliberate ramming of a car driven by the child's mother, from whom he had separated in January 2019. The applicant deliberately drove into the offside of her vehicle twice on the open road, and as she tried to drive away he reversed into the front of her vehicle, forcing her off the road onto a grass verge. The applicant then sped off. We note that this offence was committed only three days before his appearance in the magistrates' court for the s.47 assault offence outside the pizza shop.

Antecedents and pre-sentence report

- 22 The applicant had previous convictions for violence and aggressive behaviour. In 2016 he was fined for an offence of battery. In 2017 he was made the subject of a community order for criminal damage. That involved smashing up the house of an ex-partner. There was a further conviction for offences of criminal damage and threatening behaviour in January 2019 arising from the termination of his relationship with the child's mother.
- 23 There was a pre-sentence report, which concluded that the applicant posed a very high risk of harm to the public. He continued to deny the offences against the child, persisting in the suggestion that the child's mother and grandmother must have put such ideas into her head.

The judge's sentencing remarks

- 24 In his sentencing remarks, the judge described the history of abuse. He said the applicant had dehumanised the child. He had called her names, beaten her up, sexually abused her and inflicted injury to her bowel by repeatedly punching her hard in the stomach, an injury which was undoubtedly life-threatening. The judge described it as "a disgraceful catalogue of vile offending against a very vulnerable child"; it was inevitable that he must be severely punished.
- 25 The judge took the view that the rape (Count 1) was on the cusp of category 2 and category 3 under the relevant Sentencing Council Guideline. In the event, however, he put it into category 3A, which has a starting point of 10 years with a range of eight to 13 years. There were aggravating factors which required an increase from the starting point. The offences were committed in the home where the child should have felt safe. He had

taken steps to stop her complaining by making threats. He had ejaculated. The rape was committed in the context of other violence to the child. The judge said that standing alone the sentence on Count 1 after trial would have been 13 years.

- 26 The judge was satisfied that the offence of causing grievous bodily harm with intent (Count 6) was a category 1 offence under the relevant Sentencing Council Guideline. There was greater harm because of repeated blows and the life-threatening injury. There was high culpability in that he deliberately targeted the child, choosing to make her bear the brunt of his rage and frustration when she was particularly vulnerable, out of touch with her father, and with her mother out of sight. There was also a breach of trust, as the applicant was supposed to be nurturing the child as part of his new family. The violence was done in the home where she should have felt safe.
- 27 The starting point under the guideline was 12 years with a range of nine to 16 years. Previous convictions for violence were an aggravating factor, as was the separate assault on the man outside the pizza shop. The judge concluded that had the s.18 offence stood alone, the sentence would have been 14 years' imprisonment. For sexual assault of a child under 13, touching her naked genitalia, the starting point under the guideline for a category 2A offence was four years. Standing alone, the sentence here would have been five years.
- 28 Counts 4 and 5 reflected multiple events of physical child abuse. The judge acknowledged that it was difficult to assess the extent of any harm to the child and for that reason the sentence was restricted 40 months' imprisonment concurrent for each offence.
- 29 Engaging in sexual activity in the presence of a child (Count 3) had a starting point of six months under the guideline.
- 30 The judge then turned to the question of dangerousness. There is no challenge to his finding of dangerousness and it is accepted that an extended sentence was justified. The judge said he had no hesitation in concluding that the applicant was an exceptional danger to female partners and their children and that the danger was of physical abuse and sexual abuse, including penetrative offences.
- 31 The judge made it clear in his sentencing remarks that he proposed to aggregate the criminality of all the offending in the custodial term of 24 years imposed on Count 1, the rape. All other sentences would be made concurrent. The judge imposed the appropriate period of disqualification from driving. He also made a restraining order and sexual harm prevention order. There is no challenge to any of those ancillary orders.

Grounds of appeal and submissions

- 32 Although the first ground of appeal, as settled by trial counsel, asserted that the judge took too high a starting point for the offence of rape, Mr Lumley accepts that this complainant was misconceived, as the single judge pointed out in giving her reasons for refusing leave. In fact, the judge placed the offence in category 3A of the guideline, as defence counsel had invited him to do, not category 2, as the prosecution had suggested.
- 33 Mr Lumley has focused his submissions in writing and this morning orally on the question of totality. Put shortly, he submits that even for offending of this seriousness a custodial term of 24 years was simply too long, particularly for a young man who had not previously served a custodial sentence. The way he put it in his written submissions was that a sentence of this length was "unjustifiably and crushingly enormous." He suggested in his skeleton argument that a custodial term of 20 years would have been more appropriate.

- 34 Mr Lumley submits that the judge should have given greater weight to the fact that the rape was a single offence; there was no campaign of penetrative sexual offending. He submits that the ejaculation was not as serious as it might have been in that it was not into the child's mouth. He submits that the sexual touching and exposure to the child were just the sort of offences which occur as part of the escalation of sexual offending culminating in oral rape and that in themselves they did not truly aggravate the offence of rape. Putting it another way, he submits, it would be a very rare case indeed where there was a rape without associated lesser sexual offending.
- 35 Mr Lumley submits that the s.18 offence was perhaps not an offence at the very upper level of the range, as the judge seemed to have concluded. He points out that there was no weapon involved. There had been punching and repeated punching, Mr Lumley accepts on the basis of the child's ABE interview, but the injury itself, although life-threatening, may have been caused by a single blow. He also makes the point that the child appears to have made a complete physical recovery.
- 36 Mr Lumley submits that the judge paid no or insufficient attention to what might be described as the positive side of the applicant. There were before the judge character references from members of his family, from the mother of his child, from his own mother from an aunt, and from a friend of the family, all of which described him in glowing terms. They portrayed a completely different character from the way he had behaved abusing this child over a period of several months. Mr Lumley submits that this sentence was simply too long when one stands back.

Discussion and analysis

- 37 We have considered all these submissions carefully, but we are unable to accept them. The judge was particularly well placed to assess the seriousness of this offending, having presided over the applicant's trial. We do not have that same advantage. This case was unusual, in our experience, in that not only was there a very serious sexual offence against a young child, but also a very serious offence of violence as well. Taken individually and for the reasons he explained, the judge would have quite entitled to pass a sentence of 13 years for the rape and a sentence of 14 years for the s.18 offence of causing grievous bodily harm with intent, but it did not stop there. Those two very serious offences were committed against a background of further serious sexual offending and child cruelty within the family home. Then while effectively on bail and well aware of the allegations he was facing in respect of the physical and sexual abuse of this young child, the applicant went on to commit a completely separate vicious assault on an innocent victim, knocking him unconscious. Then only a matter of days before he was due to appear in court for that offence, he deliberately drove at the vehicle being driven by his former partner, the child's mother, ramming her vehicle four times in total and forcing her off the road.
- 38 The judge plainly had totality very much in mind. In principle, the rape and the s.18 offence called for consecutive sentences. Although they involved the same victim, they represented entirely separate and distinct criminality of the most serious kind, committed against a very young child. In principle consecutive sentences for the other counts of sexual abuse and child cruelty would have been justified as well. Finally, the two committal offences were again entirely separate and distinct, calling for consecutive sentences in principle, not least because the applicant was effectively on bail.
- 39 Had the judge made all the sentences consecutive, the total by our calculations would have been 37 years and two months (13 years, plus 14 years, plus five years, plus three years and four months, plus six months, plus eight months, plus eight months). Plainly, that would have been far too long. But even if the judge had reflected all the sexual offending and the

13-year notional term for Count 1 and all the violent offending, including the committal offence of assault, in the sentence of 14 years for s.18 offence on Count 6, the total sentence would have been 27 years. There would still have had to be a consecutive sentence, it seems to us, for the child cruelty (three years and four months) making a total of over 30 years and, in principle, a further consecutive sentence for the dangerous driving.

- 40 Apart from the guilty pleas to the committal offences and the applicant's comparative youth, there was really no mitigation. There were character references, as we have said, from the mother of his own child, from an aunt, from his own mother and from a friend. They did show a different side of his character. But, as the Sentencing Guideline makes clear, for offences of this seriousness previous good character and exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence. The more serious the offence, the less weight which should normally be attributed to these factors.
- 41 The judge's task in this case was to pass a sentence that was just and proportionate in all the circumstances. The seriousness of this offending demanded a properly severe sentence. We are quite unable to say that the total custodial term of 24 years' imprisonment was even arguably either manifestly excessive or wrong in principle.

Conclusion

- 42 Accordingly, despite Mr Lumley's attractive and tenacious submissions, the renewed application for leave is dismissed.
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This transcript has been approved by the Judge.