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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2022 00784 A4

NCN: [2022] EWCA Crim 923

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 9 June 2022

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE HOLROYDE

MR JUSTICE GRIFFITHS

HIS HONOUR JUDGE DREW QC

REGINA

v

MARK VALLELY

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MS C RYAN appeared on behalf of the Applicant
MR A SLATER appeared on behalf of the Crown

J U D G M E N T

THE VICE PRESIDENT:

1. This applicant (now aged 44) was convicted of an offence of sexual assault and sentenced to 3 years' imprisonment. His application for leave to appeal against that sentence has been referred to the full court by the Registrar.
2. The victim of the offence ("C") is entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime nothing may be included in any publication if it is likely to lead members of the public to identify her as a victim of this offence.
3. In May 2019 the applicant (an amateur photographer) went to the home of C (a professional model) to take artistic photographs of her in her underwear and in the nude. No one else was present. Whilst taking photographs, the applicant told C that he was very hot, referring to a medical condition, and asked if he could take off his trousers. C was unhappy with that request but agreed to it. The applicant then began to make inappropriate comments about C's breasts, she being naked at the time, and to ask questions about her sex life. He deliberately cupped one of her breasts with his hand. C slapped him away, telling him that it was unacceptable for a photographer to touch a model. When the applicant had finished taking his photographs and whilst C was still naked, he wrapped his arms around her and held her in a prolonged embrace.
4. The applicant had no previous convictions, though he had received formal cautions for unrelated offences years ago. He had been in work effectively all of his adult life.
5. Both C and her husband made victim personal statements a short time before the sentencing hearing in February 2022. They showed that more than 2-and-a-half years after the offence, C continued to be badly affected by it. In brief, C said that she had suffered mood swings, on one occasion punching a wall so violently that she fractured a knuckle, and had become very sensitive to the behaviour and language of others. She had also become very depressed and had deliberately lost a lot of weight, making herself vomit in order to do so as quickly as possible, so that she would make her breasts smaller and "look as least feminine as possible". Her relationship with her husband was impaired; she found it difficult to socialise; and she had lost work because she only felt able to arrange photoshoots at home when her husband could also be present. She had become paranoid, and spent an appreciable time each night checking that all doors and windows were shut before going to bed. From late 2019 she attended weekly counselling sessions with a psychotherapist, which were still continuing, at significant expense.
6. Her husband in his statement confirmed the impact on C's mental health, adding that they had spent a long period living with C's parents and were planning to move house because she no longer wanted to live in the home where she had been assaulted. They had disposed of a number of items from within the home because they were associated in C's mind with the circumstances of the assault.
7. Further confirmation of C's statement was provided in a letter from her counsellor, who spoke of a continuing need for therapeutic input.
8. The judge also had the assistance of a pre-sentence report, which assessed the applicant as a low risk of further offending, and expressed the view that he would benefit from a programme designed to help men convicted of sexual offences. The applicant was assessed as being suitable for a community order, with a requirement of unpaid work and a package of other requirements.
9. The judge in his sentencing remarks placed the offence into category 1A of the Sentencing Council's relevant definitive guideline: category 1 harm because C had suffered severe psychological harm, and category A culpability because it involved an abuse of trust. The starting point was therefore 4 years' custody, with a range from 3 to 7 years. He took into account as mitigation the absence of previous convictions and the inevitable consequences of the conviction for the applicant's future employment. The judge was satisfied that the offence was so serious that only immediate custody was appropriate. In any event the least sentence he could impose was 3 years' imprisonment, which could not be suspended.

10. Ms Ryan, representing the applicant in this court as she did below, submits that the sentence was manifestly excessive in length. In her thoughtful and well-presented argument she submits in particular that the judge was wrong to find that C had suffered severe psychological harm and wrong to find that the offence involved an abuse of trust.
11. As to the level of harm, Ms Ryan accepts that for a comparatively short period after the offence that might have been categorised as severe, but she points to indications in the victim personal statements of a recent improvement in C's condition and a willingness to continue inviting people into her home for photoshoots.
12. As to culpability, Ms Ryan argues that there was not here a relationship between offender and victim such as to come within the concept of abuse of trust for the purposes of applying the guideline. Her submission accordingly is that the case did not fall into category 1A. A significantly shorter sentence was therefore appropriate, she submits, and the judge should have considered suspending it.
13. For the respondent Mr Slater submits that it was open to the judge to categorise the offence as he did and that he was indeed correct to do so. He distinguishes the case of Dylan Jones [2020] EWCA Crim 1139, to which Ms Ryan referred us, on the basis that a key feature of that case was that the evidence as to psychological harm related only to a short period after the offence and had not been adequately updated at the time of the sentencing hearing. Mr Slater also points out that, having placed the offence into category 1A, the judge imposed a sentence which was at the bottom end of the relevant category range.
14. We are grateful to counsel for their assistance.
15. The question for this court in relation to harm is whether it was properly open to the judge to find that C had suffered severe psychological harm. This court in R v Chall [2019] EWCA Crim 865 confirmed that expert evidence is not a necessary pre-requisite of making such a finding for sentencing purposes. As the court explained at [15] of the judgment in that case, this is because a judge sentencing for a sexual offence is not making a medical decision as to where a victim sits in the range of clinical assessments of psychological harm but rather is making a factual assessment as to whether the victim has suffered psychological harm and if so whether it is severe.
16. In the present case, the judge had seen and heard C give evidence. He was entitled to accept and act upon the contents of the victim personal statements and the information from the counsellor. We accept that there are indications of some comparatively recent improvement in C's condition. Nonetheless the evidence overall shows that the offence had had a severe impact upon C, which had continued for more than 2-and-a-half years by the time of the sentencing. The fact that C was continuing to work as a model was not inconsistent with her evidence of a reduced income because of her fear of further sexual assault if alone in her home with a photographer. Nor was it an indication that the impact upon many aspects of her life was any less than she and her husband described it to be.
17. Ms Ryan is, we think, on stronger ground in challenging the judge's finding that the offence involved an abuse of trust. That is a step 1 factor in the guideline, which immediately places an offence into a higher category, and it must therefore be considered carefully. To adopt Ms Ryan's elegant formulation of the point, "If the concept of breach of trust becomes too elastic it ceases to operate as it should".
18. The guideline contains an expanded explanation of this factor, which indicates that for it to apply "the relationship between the offender and the victim must be one that would give rise to the offender having a significant level of responsibility towards the victim on which the victim would be entitled to rely". It goes on to explain that abuse of trust may occur in many factual situations, including some ad hoc situations, but makes clear that the examples given do not necessarily indicate that abuse of trust is present. It adds that an offence may be "made more serious" where an offender has abused his position to facilitate or conceal offending.
19. We have considered a number of cases to which counsel have invited our attention, including R v LO [2018] EWCA Crim 1545, R v Singh [2020] EWCA Crim 1366 and R v

Oprea [2021] EWCA Crim 1695. They make clear, as indeed did the leading case of R v Forbes [2016] EWCA Crim 1388, that a careful fact-specific assessment is always necessary before a finding of abuse of trust can be justified.

20. We recognise that in everyday language C invited the applicant into her home and posed naked in front of him because she trusted him to behave in the manner appropriate for a professional or serious amateur photographer in such circumstances. But that description of the situation is not sufficient automatically to engage the guideline factor. With respect to the judge, the circumstances of the present case fell short of an abuse of trust of the kind contemplated by the guideline. The relationship between the applicant and C did not involve an inequality of power and it was not such that the applicant had the requisite "significant level of responsibility" towards C. The offence therefore fell into category 1B, with a starting point of 2 years 6 months' custody and a range from 2 to 4 years.
21. That does not mean, of course, that the circumstances relied on by the judge as showing an abuse of trust become irrelevant. Far from it. The applicant took advantage of C when she was obviously vulnerable, being alone, naked and frightened. He did so in her own home, and in the circumstances of a professional engagement where she was entitled to feel safe. Having persuaded C to permit him to remove his trousers, he persisted in unwelcome comments and questions. He was not dissuaded when she rebuked him for his touching of her breast but went on to hold her tightly before she could dress. Collectively, those aggravating features merited an increase well above the guideline starting point and towards the top of the category 1B range, before consideration of the mitigation which was available to the applicant.
22. In those circumstances, although we differ from the judge in the categorisation of the offence, we are satisfied that there is no basis on which the sentence of 3 years' imprisonment could be said to manifestly excessive. It was unarguably within the range properly open to the judge. Accordingly, grateful though we are to Ms Ryan, leave to appeal must be refused.

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