IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2021 03331 B5

[2022] EWCA Crim 957

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
JONATHAN DIBA-MUSANGU

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MR DL BRUCE appeared on behalf of the Appellant

J U D G M E N T

MR JUSTICE GRIFFITHS:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to the victims of the offences shall during their lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence.
2. On 24 September 2021 the appellant was sentenced by His Honour Judge Potter in the Crown Court at Minshull Street, Manchester following his pleas of guilty to two counts (counts 10 and 15) and his conviction after a trial on a further twelve counts, making a total of fourteen counts for which he fell to be sentenced.
3. This is an appeal against sentence with limited leave from the single judge. We have before us also a renewed application to argue additional grounds. The limited leave, as we will explain, cannot change the overall effect of the sentence, but the proposed additional grounds might if leave were given and they were successful.
4. The sentence ultimately passed by the judge was as follows.

- Count 1, count 2 and count 5 were offences of rape of a child under 13, contrary to section 5(1) of the Sexual Offences Act 2003. The victim in each case was KN. The sentence on each of counts 1, 2 and 5 was a concurrent extended determinate sentence of 28 years, consisting of a custodial term of 24 years and an extended licence period of 4 years.
- Count 9 was another offence of rape of a child under 13, contrary to section 5(1). The victim in this case was BT. The sentence on count 9 was a concurrent extended determinate sentence of 28 years, again consisting of a custodial term of 24 years and an extended licence period of 4 years.
- Count 14 was rape contrary to section 1(1) of the Sexual Offences Act 2003. The victim in that case was VM. The sentence on count 9 was again a concurrent extended determinate sentence of 28 years, consisting of a custodial term of 24 years and an extended licence period of 4 years.

No separate penalty was imposed on the other counts because the previous sentencing reflected all the criminality including these counts. They were:

- Count 3, assault of a child under 13 by penetration contrary to section 6(1).
- Count 4, causing or inciting a child under 13 to engage in sexual activity contrary to section 8(2).
- Count 7, sexual assault of a child under 13, contrary to section 7(1).
- Count 8, causing or inciting a child under 13 to engage in sexual activity contrary to section 8(1).
- Count 10, causing or inciting a child to engage in sexual activity contrary to section 10(1).
- Counts 11, 12 and 13, sexual activity with a child contrary to section 9(1) of the 2003 Act.
- Count 5 was possessing an extreme pornographic image contrary to section 63(1) of the Criminal Justice and Immigration Act 2006.

5. The facts were that the appellant was the son of a pastor and was popular with the church's congregation. He was the drummer in the church band and was a talented footballer. He had played professional football at league and non-league level in the North West from the age of 16, which added to his popularity. He used his position within the church community to rape and sexually abuse children.
6. Counts 1 to 5 concerned the first victim, KN. She was aged around 7 or 8 at the time of the offending against her, between May 2012 and May 2014. The appellant was aged 15 and, by the end, 16.
7. The first occasion of sexual abuse happened at the appellant's parents' home. He took KN into a bathroom, removed her underwear and vaginally raped her. That was count 1.
8. On another occasion, again at his parents' home, the other adults had gone out leaving the appellant alone in the living room with KN and a 4-year-old child. He told KN to sit on his knee on a chair in the living room out of sight of the other child and then he anally raped her. That was count 2. At the same time he penetrated her anus with his finger. That was

count 3. He showed her a video on his phone of a woman performing oral sex on a man. He told KN that she should do a similar act to him and that if she did not, he would not allow her to play on the computer. That was count 4. She refused.

9. The final offence against KN occurred when she was aged 8. The appellant took her to a bedroom in his parents' house on the pretext of finding her sister. He then anally raped her. That was count 5.
10. Counts 7 and 8 related to the victims EW and JW, who were sisters. The offending occurred between 1 June 2014 and 30 June 2015. EW was aged 11 or 12. JW was aged 8 or 9. The appellant was aged 15 or 16. The appellant was asked to take care of EW and JW while adults were at prayer in another part of his father's church. The appellant suggested to the two young girls that he would teach them to dance in a nearby toilet. He first took EW into the toilet and told her to bend forward over the toilet facing away from him. She did so and he held her hips in the region of his groin. EW asked him what this had to do with a dance and they then both left the toilet. This was count 7. The appellant then returned to the same toilet with JW on the same pretext. He told her to put her head into the toilet and remove her pants. She challenged this and then they both left the toilet. That was count 8.
11. Count 9 was an offence of rape against BT, who was aged 12 at the time in August 2016. The appellant was by then 18 and BT had been left in his care. He took her into his parents' bedroom, saying that he wanted to tell her something and then pinned her to the bed and vaginally raped her. He removed BT's clothes before he raped her, and when he returned from the bathroom, he told her that he had taken a photograph of her naked on his phone and that if she told anyone what happened he would show the naked photos of her to others.
12. Counts 10 to 13 related to the victim OW. When OW was aged 13 she and the appellant started a sexual relationship. Within the relationship, at a time when OW was under 16 years of age, the appellant encouraged her to send him videos of herself to his mobile phone. The videos showed her in sexual poses and included naked pictures of her breasts and clothed pictures of her genitalia. That was count 10. This happened regularly throughout the period when OW was aged 13 to 14.
13. When OW was 15 and the appellant was 19 or 20 the appellant attempted to penetrate her vagina at her home when her parents were out. He was not successful. This was count 11.
14. On a later occasion when OW was still 15 he again attempted to penetrate her vagina. That was count 12. He then encouraged her to perform oral sex on him, which she did. That was count 13.
15. Count 14 concerned the victim VM. It was an offence of rape in December 2017 when VM was 19 and the appellant was 20. They had been in a consensual sexual relationship but this had ended. The appellant visited VM and suggested that they engage in activity on her bed. She repeatedly told him to stop and to leave. She thought he was about to leave, but as he approached the door he turned back towards her, picked her up and forcefully raped her vaginally.
16. When the appellant was arrested in respect of these offences his mobile phone was seized. An extreme pornographic image of a person performing oral sex with an animal was found on the phone. That was count 15.
17. The judge initially imposed a series of consecutive determinate sentences, coming to an overall custodial sentence of 24 years, followed by an extended licence period of 4 years. However, after pronouncement of sentence, the judge reconsidered and decided to restructure the sentence so that in place of consecutive terms, he passed an extended determinate sentence with a custodial sentence of 24 years and an extended licence of 4 years on each of the five rape counts and no separate penalty on any of the other counts, all the sentences to run concurrently as we have already set out. For practical purposes the effect was the same, but this corrected what would otherwise have been an unlawful global extended licence period, as explained in the case of DJ [2015] EWCA Crim 563 at [52-53]. The judge discussed the restructured sentence with counsel for the prosecution and defence in his chambers and offered to pronounce it in open court if necessary, but no one

considered it necessary and it was not so pronounced. This was contrary to rule 28.4(2)(b) of the Criminal Procedure Rules. The limited leave to appeal given by the single judge allows us to correct the position by pronouncing the sentence ourselves. But before dealing with that aspect we will consider the proposed additional grounds of appeal which might reduce the overall sentence and for that purpose we must say more about the sentencing remarks.

18. The judge noted that the appellant was 23 years of age and had no previous convictions. He was entitled to 20 per cent credit for his pleas of guilty to counts 10 and 15. He was himself aged between 15 and 20 at the time of the offences. He was a talented footballer and intelligent. He was also, said the judge, a predatory sex offender with a sexual interest in abusing children and in particular girls, sometimes as young as 7 years of age. He manipulated and lied to his victims. He had significantly harmed each of his victims, both physically and psychologically. This was borne out by the victim personal statements which had been heard and received by the court.
19. In mitigation, the judge took into account that at the time of the offending in counts 1 to 5, 7 and 8 the appellant was aged 15 and 16. The judge referred to the Guideline on Sentencing Children and Young People, with its guideline reduction to a sentence broadly within the region of half to two-thirds of the adult sentence in the case of youths aged 15 to 17. The judge also referred to submissions which had been made to him based on [19-22] of the case of Forbes.
20. The judge referred to the totality guideline and the need to pass a sentence which was just and proportionate, reflecting the entirety of the offending. He referred to the guidelines and categorised the offences on the indictment as follows.

- Count 1, guideline category 3B, starting point 8 years.
- Count 2, category 3B, starting point 8 years.
- Count 3, guideline category 3B, starting point 4 years.
- Count 4, guideline category 2B, starting point 6 years.
- Count 5, guideline category 3B, starting point 8 years.
- Count 7, guideline category 3B, starting point 26 weeks.
- Count 8, guideline category 3B, starting point 2 years.
- Count 9, guideline category 3A (because of the taking and retention of images), starting point 10 years.
- Counts 10, 11 and 12, guideline category 1A, starting point 5 years on each.
- Count 13, guideline category 3B, starting point 5 years.
- On the main indictment, count 10, causing or inciting a child to engage in sexual activity, guideline category 3A, starting point 26 weeks.
- Finally, on count 15, possession of an extreme pornographic image (on which there was no guideline) the maximum sentence was 2 years.

No challenge is made to any of the guideline categorisations on the facts of these cases.

21. The judge noted as aggravating features the offending against the victims KN and OW occurring more than once over a period of time. He also noted the location of sexual activity offending: at the victim's home, his own father's home, and his father's church. He also noted the threat to disclose naked photographs if the victim reported him.
22. The judge made a finding of dangerousness such that a determinate extended sentence was necessary to protect the public from serious harm. This finding was supported by the pre-sentence report, which, whilst saying that the appellant was not lacking in empathy, unequivocally found a high risk of causing serious harm to children and the public, notably future intimate partners. It was also supported by the features of the case which the judge had seen at trial. They included:

- First, abuse of six separate victims over a 5-year period, including two victims abused repeatedly.
- Second, the serious nature of the abuse, including rape, and indications in the evidence that it became increasingly manipulative and violent.

- Third, a lack of insight even into offending which the appellant admitted, and an attempt by the appellant to minimise the real nature of the abuse. This was an observation of the judge himself which he was well placed to make after presiding over the trial.

23. The proposed additional grounds of appeal are:

- first, that the imposition of the extended determinate sentence was unnecessary, and
- secondly, that the sentence of 24 years for a man of 23 at the date of sentence was manifestly excessive.

24. It is pointed out that the earliest possible date of release under the sentence passed by the judge would be when the appellant is aged 39 and might be (if the custodial term is served in full) when he is 47. It is argued that insufficient allowance was made for the appellant's maturity and age throughout the offending period and particularly at the beginning. It is also argued that insufficient allowance was made for the total impact of the sentence on a man as young as 23 at the date of the sentence. These proposed additional grounds have been skilfully developed before us by Mr Bruce of counsel, to whom we are grateful.
25. So far as ground 1 is concerned -- the imposition of the extended sentence -- the pre-sentence report, the facts of the offending, the judge's advantage of having seen the appellant give evidence at the trial, and the cogent points made by the judge in support of the extended sentence made an extended sentence in this case unchallengeable and the extended licence period of 4 years was fully justified notwithstanding the length of the custodial term. Accordingly, we refuse permission to argue ground 1.
26. Turning to ground 2 and the custodial term of 24 years, we agree with the single judge who considered the application for permission to appeal under section 31 that this was extremely grave offending against multiple young people involving the wholesale manipulation, degradation, intimidation and abuse of seven victims. However, for most of the offending the appellant was not an adult, and even when he reached the age of 18, the case of Clarke, Andrews and Thompson [2018] EWCA Crim 185 makes it clear that this was not to be regarded as a cliff edge.
27. Given the number and gravity of offences, the period over which they were carried out, the number of victims, and their age and vulnerability, a long sentence was clearly necessary, even taking account of the principles of totality and the relative youth of the appellant. The appellant was not an adult at the start of the period of offending but he was by the end. He was over 18 at the dates of counts 9 to 15; and 20 at the date of the final rape on count 14, which was the only rape perpetrated when he was an adult. There is no indication that the appellant lacked maturity appropriate to his age at the various times. His intelligence, sporting achievements and leadership activities demonstrated a maturity at least appropriate to his age and he was fully capable of understanding exactly what he was doing.
28. Lack of previous convictions has little weight given the period of offending and the young age at which it began. This was not a person who could be regarded as of good character in the ordinary meaning of those words. We are, however, pleased to hear that he is engaging constructively and well within the prison environment and we note indications in the pre-sentence report that there is the possibility of some rehabilitation, particularly in the context of a long prison term.
29. Although a very long sentence was undoubtedly required in this case, we have been persuaded that a sentence of 24 years for the custodial element of this extended determinate sentence against a defendant who was 23 at the time of sentence, a child or young person (under 18) at the time of most of the offending, and no more than 20 years old when committing the last rape, was, for such a young offender, excessive, indeed manifestly excessive, and should be reduced to 21 years.
30. We therefore grant leave to appeal, quash the extended determinate sentences of 28 years and substitute extended determinate sentences of 25 years, comprising a custodial term of 21 years and a 4-year extended licence period on each of counts 1, 2, 5 and 9, and 14, to run concurrently.
31. On the other counts, namely counts 3 and 4, 7 to 13, and 15, like the judge, we impose no

separate penalty because the previous sentencing reflects all the criminality including these counts.

32. There is no statutory surcharge because of the date of the offending. However, having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003, the appellant is required to comply with the police notification provisions of the Act for the rest of his life. This includes a duty to keep the police informed at all times of his personal particulars, the address at which he is living and any alteration in the name he is using. Having been convicted of a specified offence, the appellant will or may be included in the relevant list by the Disclosure and Barring Service. Days spent in custody awaiting sentence will count towards the sentence. The appellant will serve two-thirds of the custodial term before being considered for release on parole. It will be for the Parole Board to consider whether, when and on what terms he may be released after that point, but whenever he is released, he will be subject to a licence that continues until the end of the sentence as a whole.
33. By pronouncing the sentence at length in this way, both in respect of the sentences which we have quashed and replaced and in respect of the sentences which we have not interfered with, we have dealt with the failure to pronounce the original sentences in open court.