IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00558/A3
[2023] EWCA Crim 1633

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 21st December 2023

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE SWIFT

R E X

- v -

COLIN BARKER

Computer Aided Transcription 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)

Miss K Thorne KC appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Thursday 21st December 2023

LORD JUSTICE HOLROYDE:

1. On 16th January 2009, in the Crown Court at Croydon, the applicant pleaded guilty to three offences of sexual activity with a child family member, contrary to section 25 of the Sexual Offences Act 2003 (counts 6, 11 and 15); one offence of causing or inciting a child under 13 to engage in sexual activity, contrary to section 8 of the 2003 Act (count 7); and nine offences of making indecent photographs of a child, contrary to section 1(1)(a) of the Child Protection Act 1978 (counts 17 to 26).

2. On 11th February 2009, His Honour Judge Macrae imposed sentences of detention for public protection, pursuant to section 226 of the Criminal Justice Act 2003, with a minimum term of four years (less the days spent on remand in custody) on each of the first four charges. The judge imposed no separate penalty for the offences of making indecent photographs. Ancillary orders were made to which we need not refer further.

3. The applicant now seeks an extension of time (of about 14 years) in which to apply for leave to appeal against his total sentence. His application has been referred to the full court by the Registrar.

4. The victims of these offences are twin sisters. They are entitled to the lifelong 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 either of them as a victim of the offences.

5. We need say little about the facts of the offences. They were committed when the applicant was aged 19 or 20 and his victims were aged 11. In relation to one of the girls, the

offending involved the applicant causing her to watch pornography with him and then to masturbate him; and causing her to pull down her trousers, masturbating himself and ejaculating onto her leg, with contact being made between his genitals and her. In relation to the other girl, the offending involved touching her vagina and standing behind her, touching her bottom with his penis. Aggravating features were the breach of trust involved in the offences, the fact of ejaculation (albeit in the context of non-penetrative offences), and the presence of the first child when the applicant committed the offences against her sister.

6. Investigation of the applicant's computer revealed that he had downloaded some 400 indecent images. Most were at category 1, the lowest of the five categories under the classification used at that time; but five of the images depicted penetrative sexual activity and were in category 4.

7. There was clear evidence that the offending had caused significant psychological harm to both girls.

8. The applicant was of previous good character.

9. Having committed the offences, he had removed himself to Scotland where he had confessed his offending to his sister. He had, at least for a short time, contemplated suicide.

10. The judge was assisted by a pre-sentence report which assessed the applicant as posing a high risk of serious harm to children.

11. The judge found the applicant to be a dangerous offender, as that term was defined for sentencing purposes. His sentencing remarks continued as follows:

> "In these circumstances I am driven to conclude that I must impose a sentence of detention for public protection."

The judge indicated that he took into account the applicant's young age and his guilty pleas. He assessed the appropriate notional determinate sentence as one of eight years. He therefore imposed the sentences to which we have referred.

12. We say at once that the judge was in error in describing the sentences as detention for public protection. Having regard to the applicant's age when he was convicted, such sentences were not available and the judge should instead have imposed sentences of imprisonment for public protection.

13. No appeal was brought at the time.

14. The applicant remained in custody for many years. In January 2020, the Parole Board directed his release, subject to the strict conditions of his life licence. The applicant then sought advice from those who now represent him.

15. In her grounds of appeal and in her very helpful written and oral submissions, Miss Thorne KC challenges the judge's approach to the imposition of a sentence of detention for public protection, rather than an extended sentence. She also challenges the length of the custodial term.

16. Before considering those submissions, we must address the explanation given for the lapse of so many years before the application for leave to appeal was brought. In part it is due to difficulties which have recently been encountered by Miss Thorne and those instructing her in seeking to obtain the necessary papers and to make contact with the

previous legal representatives. The majority of the delay has been explained by the applicant in a statement. He says that he was initially advised that there were no arguable grounds of appeal, and that he accepted that advice in the belief that he would be released after about three years. As time passed, he found himself unable to progress because of the unavailability of courses which he was told he would need to take before he could be considered for release. In 2012 he saw on television that the sentence of imprisonment for public protection had been abolished. He thought, incorrectly, that this meant that his sentence would at some stage be altered. He was eventually able to complete a number of courses between 2014 and 2016; and in 2017 he made his first application to the Parole Board for release on licence. His application was refused, and he understood that he would have to complete further courses, one of which had recently been discontinued. The applicant indicates that through this long process his mental health deteriorated, he lost all hope, and he saw no point in trying to appeal. Eventually, the Parole Board concluded that his continued incarceration was no longer necessary and that it was not necessary for him to take the course which had replaced that which had recently been discontinued. In those circumstances he was released, and then for the first time sought advice on appeal.

17. We see no reason to doubt that account given by the applicant.

18. Miss Thorne realistically accepts that the judge was entitled to find the applicant dangerous, and she does not seek to challenge that part of his decision. She further accepts that imprisonment for public protection was, in principle, available. But she emphasises that such a sentence was not mandatory. The judge also had a power to impose an extended sentence. Miss Thorne submits that the judge wrongly failed to consider that course.

19. She further submits that the notional determinate term of eight years was far too long for non-penetrative offences committed by a young man of previous good character who had

pleaded guilty. She has assisted us by reference to the guidelines published by the Sentencing Guidelines Council to which courts had to have regard at the time when the applicant was sentenced.

20. As is well known, the original statutory provisions governing sentences of imprisonment for public protection required such sentences to be imposed in certain circumstances. With effect from July 2008, however, section 225 of the Criminal Justice Act 2003 was amended. In its amended form it provided that in circumstances where the court had found an offender aged 18 or over upon conviction to be dangerous and the court was not required to impose a sentence of imprisonment for life, the court may impose a sentence of imprisonment for public protection if either the offender had a previous conviction for a relevant scheduled offence, or the notional minimum term to be specified was at leas two years.

21. At the time of sentencing, section 227 provided that where the court had found an offender aged 18 or over upon conviction to be dangerous, and the court was not required to impose a sentence of imprisonment for life, the court may impose an extended sentence of imprisonment if either the offender had a previous conviction for a relevant scheduled offence or the appropriate custodial term would be at least four years. An extended sentence would comprise the appropriate custodial term and an extension period comprising a further period of licence "of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by [the offender] of further specified offences".

22. Where, as in this case, the offender had been convicted of specified sexual offences, the maximum extension period was eight years.

23. On 26th November 2008, this court gave judgment in *Attorney General's Reference No*

55 of 2008 (R v C and Others) [2008] EWCA Crim 2790, [2009] 1 WLR 2158. At [14], Lord Judge CJ said this:

> "Returning to the exercise of the court's discretion, or more accurately, its judgment, whether a sentence of imprisonment for public protection should be passed when the necessary criteria are established, the court is entitled to and should have in mind all the alternative and cumulative methods of providing the necessary public protection against the risk posed by the individual offender. For example, structured around a determinate sentence, or indeed an extended sentence under section 227 of the Act, which we shall shortly address, a sexual offences prevention order, with appropriate conditions attached could form part of what we may colloquially describe as the total protective sentencing package. Apart from the discretionary sentence of life imprisonment, imprisonment for public protection when the necessary conditions are fulfilled, is the most draconian sentence available to the court. If they are, we re-emphasise that the primary question is the nature and extent of the risk posed by the individual offender, and the most appropriate method of addressing that risk and providing public protection. If what we have described as the overall sentencing package provides appropriate protection, imprisonment for public protection should not be imposed."

24. With all respect to the sentencing judge, it does not appear that he followed the approach stated by the Lord Chief Justice in that passage. The words which we have quoted from the judge's sentencing remarks (see paragraph 11 above) are somewhat equivocal. They might mean either that the judge believed that the statutory provisions left him with no alternative but to impose a sentence of imprisonment for public protection; or they might mean that the judge was aware that such a sentence was discretionary, but concluded that in all the circumstances it was necessary and appropriate. If the judge meant the former, he would have been in error. We are not confident that he did fall into that error. But assuming that he meant the latter, he gave no indication of why he took the view that an extended sentence for this young adult of previous good character would not provide sufficient protection for the public.

25. We recognise that, at this remove in time, there is a limit to the material available to us. We are nonetheless bound to say that we can find nothing in the facts of the offending, and nothing in the pre-sentence report, which could provide any sufficient basis to enable the judge to conclude that an extended sentence would not provide adequate protection for the public or that "the second most draconian" sentence was unavoidably necessary.

26. As to the length of the custodial term, we bear in mind that the absence of any clear indication of the extent of the reduction made for the applicant's guilty pleas was by no means atypical at the time of sentencing. We note, however, that the applicant's guilty pleas were entered only about three months after his arrest. Under the Sentencing Guidelines Council's guideline then in force, it seems to us that the applicant must have been entitled to a reduction of at least one-quarter, if not one-third. The notional determinate term of eight years which the judge took therefore implies a total sentence after trial of between ten and a half and 12 years. Even giving full weight to the seriousness of the offences, the period of time over which they were committed and the harm which they caused to two very young victims, we accept the submission that such a sentence was too long for a young adult of previous good character.

27. An appropriate total sentence after trial, taking account of personal mitigation, would, in our view, have been about seven years' imprisonment. Allowing a little more than a 25 per cent reduction, to reflect the likelihood that the pleas were entered before the stage at which a trial date would have been set, the appropriate total sentence is five years.

28. We therefore grant the extension of time and grant leave to appeal. We allow the appeal. We quash the sentences of detention for public protection. We substitute for them, on each of counts 6, 7, 11 and 15 concurrently, extended sentences comprising custodial terms of five years' detention in a young offender institution and extension periods of five years. As

before, there is no separate penalty on counts 17 to 26.

29. Those sentences take effect as at the date of the original sentencing. The practical result of our decision, from the appellant's point of view, is that he has completed his sentence and is no longer subject to any licence.

30. Miss Thorne, thank you very much for your assistance.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
