IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203023/A4
[2023] EWCA Crim 644

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 25 May 2023

Before:

LORD JUSTICE COULSON

MR JUSTICE HILLIARD

MR JUSTICE CONSTABLE

REX

V

EVERET WINSTON HIGGINS

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MR R TULLY KC appeared on behalf of the Applicant.

J U D G M E N T

LORD JUSTICE COULSON:

1.Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's 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. The applicant is now 65. After changes of certain of his pleas to guilty, on 14 September 2022 he was sentenced in the Crown Court at Bristol by HHJ Ambrose to a lengthy period of imprisonment. The sentence divided in two parts. In respect of the two indecent assaults of "C1", the applicant received an 8-year term of imprisonment. In respect of the three sexual offences involving "C2", he was sentenced to a consecutive special custodial sentence, for an offender of particular concern, pursuant to section 278 of the Sentencing Act 2020, comprised of a custodial term of 6 years and a further 1-year licence period.
3. He renews his application for permission to appeal against that sentence following refusal by the single judge.

2. The Offending against C1.

(a) General Conduct

4. In the mid-1990s, C1 met the applicant through a friend at school. C1 was 14 years old. Although the applicant told C1 he was in his early 20s, he was in fact 39. He began to meet C1 regularly and bought her alcohol and drugs. He also gave her gifts such as clothes and a mobile phone. He regularly picked her up in his car and gave her alcohol while they drove around. He told C1 that he loved her. C1 tried to break off contact but the applicant responded by threatening to commit suicide and telling C1 that she needed to support him because he had cancer and because a member of his family had just died.

(b) Count 2: Indecent Assault.

5. Between 1 September 1996 and 9 December 1997, the applicant took C1 to the car garage where he worked, and into a camper van parked out at the back. He gave C1 alcohol and began to kiss and touch her. C1 asked the applicant to stop because he was being too rough. However, the applicant put his hand inside C1's trousers and underwear and put his finger inside her vagina. C1 told him that it hurt, but the applicant told her that it was meant to feel nice. He kept his finger inside her vagina. C1 was 14 or 15 years old at the time of that offence.

(c) Count 4: Indecent Assault.

6. Between 10 December 1996 and 9 December 1998, when she was 15, the applicant drove C1 to a dark street near Victoria Park in Bath. He gave her alcohol and suggested they had sex in the back of the car. C1 refused. The applicant then listed for C1 all he had done for her during the past week, including taking her out, buying her clothes, giving her friends money and picking her up at the end of a night out. He said that the least she could do was suck his penis, and that is what people did when they cared for each other. C1 said she did not know how to do it and the applicant told her just to suck. C1 put the

applicant's penis in her mouth and the applicant immediately pushed her head down, causing her to choke and making it difficult for her to breathe. He held her head down for approximately 30 seconds.

(d) Consequences.

7. C1 produced a victim personal statement which made clear the severe effect that the applicant's criminality had had on her. One extract will suffice for present purposes:

> "After meeting [him], I begun to self-harm by cutting myself. I do not know why I would do this; I cannot explain it. Maybe I wanted someone to notice something was not right and help, maybe I wanted to punish myself for putting myself into the situation. I know now I could have spoken out at the time, but it was not as simple as this. Whatever the reason, it is no coincidence that I started this when his offending begun. It has become a coping mechanism/a form of self-punishment and at low times in my life I continue to do this. I also suffer from flashbacks, dissociation and other trauma related behaviours, my mind switches to that frightened desperate, angry child who doesn't know how to take the next step forward. I have ended up in A&E on numerous occasions due to overdose, severe self-harm and mental health trauma related collapses."

8. The consequences identified in C1's victim support statement were supported by separate evidence from C1's father and by C1's own medical records.

3. The Offending against C2.

(a) General Conduct

9. The applicant had been friends with C2's mother for approximately 20 years and provided support in several ways, including lending her money and paying utility bills. He bought gifts for C2, took her shopping and gave her money to go out with. When he began to sexually abuse her, C1 did not tell anyone because the applicant told her she would get into a lot of trouble.

(b) Count 10: Assault of a child under 13 by penetration.

10. Between 9 August 2014 and 26 May 2019, when C2 was between 8 and 12 years old, she was in the car with the applicant who was driving back from dropping C2's sister off for her birthday. Whilst driving, the applicant reached across with his left hand to where C2 was sitting in the passenger seat. He began touching her up her leg and then moved his hand inside her trousers. C2 told him to stop, but the applicant put his hands onto her vagina and then put his fingers inside her vagina.

(c) Count 12: Encouraging the taking of indecent photographs of a child.

11. C2 set up an Instagram account for the applicant, so that he could speak to his children through the account. But in 2019, when C2 was 12 years old, the applicant began asking C2 via Instagram to send naked photos of herself to him. If she did not send the pictures, the applicant said, he would send further messages about everything he did for C2 and her family, telling her she was letting him down. He threatened to stop buying her things. In response to his messages C2 provided indecent photographs of herself. The applicant told her not to tell anyone about the photographs or they would both get in trouble. This

offending escalated. The applicant provided C2 with a vibrator and asked her to send him photos of her using it.

12. Officers recovered the Instagram messages sent between the applicant and C2 between 6 April and 26 May 2019. In these messages the applicant relentlessly requested photos and videos. During that period 69 images were sent by C2 to the applicant including 67 category C images. There were other messages from the applicant pressing C2 for sexual contact including oral sex. He repeatedly asked to lick her vagina, to get C2 to lick him and for a blow job.

(d) Count 13: Causing or inciting a child under 13 to engage in sexual activity.

13. When the applicant was arrested, police found several handwritten notes in his wallet. Among them was a birthday present wish list written by C2 and her sister. Next to the items on the list the applicant had written what they would need to do to pay for each, including "lick", "finger", "BJob" and "sex". The applicant bought the sisters some of the items on list, and showed the note to C2, who told him they would not do those things. In a further note the applicant requested more than pictures, again asking for a "BJ, lick and a fing" as promised in a previous phone call. C2 confirmed that the note referred to a conversation she had had with the applicant. The applicant would get angry if C2 refused his requests, so C2 would sometimes agree to go for a drive with him, knowing he expected oral sex from her during the drive, but not intending to perform it. Whilst out driving the applicant would ask C2 for a blow job but she would refuse and make up an excuse to leave. C2 was 12 years old at the time of this offence.

4. The Basis of Plea.

14. The applicant had originally pleaded not guilty to all but count 12. He pleaded guilty to count 12 on 7 January 2022. On the same date he also changed his plea to guilty to count 13. Thereafter, on 30 May 2022, he changed his plea to guilty on counts 2, 4 and 10. The other counts were all ordered to lie on the file on the usual terms.

15. After the pleas had been entered, a written basis of plea was updated to the DCS. In respect of counts 2, 4 and 10 the admissions were qualified with the words "at the time he did so, he reasonably believed she was consenting". The judge raised this with counsel at the start of the sentencing hearing. Mr Tully KC, who appeared before the judge and again before us this morning, clarified that it was not being said that there was an objectively reasonable belief in consent. There was simply the applicant's subjective belief. In the light of the fact that both victims were below the legal age of consent, it seems to us that this therefore made little or no difference to the sentencing exercise. The laws are there to protect children, sometimes from themselves.

5. The Sentencing Exercise

16. In relation to C1, counts 2 and 4 were offences under the Sexual Offences Act 1956. The approach to sentencing in the modern day for such offences is set out in *R v Forbes* [2016] EWCA Crim 1388; [2017] 1 WLR 53. In particular:
    (a) The sentence is limited to the maximum sentence available at the date of commission of the offence. For indecent assault under the 1956 Act, the maximum term was 10 years.
    (b) The court should have regard to any applicable Sentencing Guidelines for

equivalent offences under the Sexual Offences Act 2003, using the Guidelines in a measured and reflective manner to arrive at the appropriate sentence. The court should not attempt to construct an alternative notional Sentencing Guideline, nor approach the determination of sentence in an overly mechanistic way.

(c) The court must have regard to the seriousness of the offence, assessed by reference to culpability and harm.

(d) Harm must be assessed carefully by reference to the facts available and the relevant harm factors set out in any applicable guideline. It is always necessary to avoid double counting, because the Guidelines take account of the harm inherent in sexual offences in any event.

17. The judge considered that count 4 was the most serious offence involving C1. By reference to the equivalent current Sentencing Guidelines, he assessed culpability in category A and harm in category 2. There was and can be no doubt about the assessment of culpability given the use of alcohol, the significant degree of planning, the lie the applicant told about his age, and the length of time over which the grooming took place.
18. There was an argument as to whether the judge was entitled to conclude that C1 had suffered severe psychological harm. The point was taken that there was no independent psychological report. However, the judge concluded that there was plenty of evidence that C1 had suffered severe psychological harm as a result of the applicant's offending.
19. By reference to the Guidelines, a category 2A offence has a starting point of 10 years' custody and a range of 9 to 13 years. The judge identified C1's age as an aggravating factor.
20. As to count 2, there was some debate about categorisation, but the judge concluded that culpability was definitely category A and said that the starting point would be close to 8 years under the current Guidelines.
21. Taking all these points together, the judge concluded that, after trial, the sentence on count 4, encompassing the entirety of the offending against C1, would have been 9½ years, with 15 per cent credit for his guilty plea. Rounding down, the sentence on count 4 was therefore 8 years' imprisonment.
22. Turning to the offences against C2, the judge took count 10 as the lead offence. C2 was of course under 13 at the time of that offence. The culpability was category A for the same sorts of reasons as for the offending against C1. On the evidence of harm available in respect of C2, although the judge concluded that there had been serious psychological harm, he could not describe it as severe. Accordingly, harm fell within category 3. Pursuant to the current Guidelines, a category 3A offence has a starting point of 6 years custody and a range of 4 to 9 years. The judge said that the fact that the applicant had previously committed offences against C1 was an aggravating factor.
23. In respect of the offence under count 12, the judge had regard to the pressure that the applicant had put on C2, the offer of financial incentives in the context of a relationship of trust, significant grooming behaviour, and the huge disparity of age. The judge thought the starting point after a trial would have been at the top of the category range, namely 3 years.
24. Count 13 was in category 2 for harm and culpability A, for the same reasons as before. That had a starting point of 8 years with a range of 5 to 10 years. The same aggravating factors applied, although the judge indicated that there had to be a significant downward

adjustment to reflect the fact that the activity itself did not in fact occur.

25. The judge said that, in isolation, the sentence on count 10 would have been 6 years; on count 12, 3 years reduced to 2 years and 4 months; and on count 13 it would have been 5 years reduced to 4 years with a credit for plea.
26. The judge then had regard to totality and produced a careful calculation of the appropriate sentence. In addition to the 8 years on count 4, the judge passed a consecutive 6 year custodial term on count 10, taking into account counts 12 and 13. He said that the term would otherwise have been 8 years, but reduced it to 6 to reflect totality. He then passed an additional year as an extended licence period. That made the sentence on count 10 one of 6 years and a 1 year extended licence.

6. The Appeal against Sentence.

27. The following criticisms are made of the sentencing exercise. It is said that:
    (a) The judge failed properly to assess the relative seriousness of the case.
    (b) The judge failed to make sufficient adjustments to properly reflect the totality principle.
    (c) The judge improperly placed far too much reliance on C1's victim support statement without sufficient or adequate supporting evidence.
    (d) The judge failed to make due allowance for significant mitigating features contained in an expert psychological report.
    (e) The judge was overly mechanistic in his application of the Sentencing Guidelines, particularly when structuring the sentence in such a way that the applicant would have to serve two-thirds of the sentence in respect of each of the two separate consecutive terms of imprisonment.
28. We deal with those criticisms in that order, which is slightly different to the order in which they were advanced by Mr Tully this morning. Before turning to the individual points, we should express our gratitude to him, for his measured submissions. Moreover, despite the number and range of the points that he raises, Mr Tully fairly accepted that his alternative sentence for these offences would have been between 9 and 12 years' custody, as opposed to the 14 years custody (plus the 1 year extended licence) actually imposed. He also expressly accepted that the judge was entitled to find that 1 year extended period in any event and that therefore that would have to be added to his 9 to 12 year range.

7. Ground 1: Relative Seriousness

29. We do not accept that the judge failed properly to assess the relative seriousness of the case. On the contrary, we consider that his careful sentencing remarks properly reflect the seriousness of these five separate offences committed against two children.
30. Mr Tully's complaint is that the overall sentence in this case was "obviously and instinctively too high... The act of sentencing a case remains an art not a science. It must involve an overall feel for the correct overall sentence. This case lacks such an overall approach."
31. That is, with respect, a rather nebulous argument. Questions of ‘feel’ and ‘instinct’ cannot be disregarded altogether, and often form a very useful mechanism by which a judge can check a sentence produced solely by reference to the Guidelines. But they can never be more important than that. The modern approach to sentencing requires a much more structured and analytical approach. The Sentencing Guidelines are there to provide

a framework for the sentencing judge to ensure that all potentially relevant matters are taken into account. Those Guidelines cannot simply be disregarded on grounds of instinct or feel.

32. Furthermore, Mr Tully's submission proceeds on the rather uncomfortable basis that the applicant's offending is not as serious as some other cases involving the sexual abuse of children. With respect, that is an untenable argument. Of course, in any sentencing exercise, it is almost always possible to point to a worse offence. But we ask rhetorically: so what? That is again what the Sentencing Guidelines are there to address: to provide a way of ensuring that the comparative seriousness of the offending is reflected in the recommended starting point and the ranges for each category.
33. The only specific point made in support of this first ground of appeal is the suggestion that the 8 years on count 4, with its starting point of 9½ years before the discount for plea, was too high in circumstances where the maximum sentence for the indecent assault under the 1956 Act was 10 years. That might be a fair point if the 9½ year starting point related to a single offence. But it did not. The judge was very clear that it also included the indecent assault covered by count 2, the painful digital penetration of C1 when she was 15. In those circumstances, we consider that a starting point of 9½ years for two separate indecent assaults was entirely justified.
34. For all those reasons therefore, we reject ground 1 of the appeal.

8. Ground 2: Totality.

35. These were sentences which involved two different victims, carried out at different times, and which therefore warranted consecutive sentences. Any other course would have been unjust to the victims.
36. In his sentencing remarks, the judge expressly had regard to totality, when he arrived at the appropriate sentence in relation to the second set of offences, namely counts 10, 12 and 13. He did that by imposing a term of 6 years on count 10 and making the sentences on counts 12 and 13 concurrent. That was generous to the applicant, given the aggravating factors that the judge himself identified. It was also generous because, as the judge noted, a term of 4 years was justified on count 13 alone.
37. So, in our view, the judge carefully made allowance for totality. No greater allowance than that which he made was justified. We therefore reject the second ground of appeal.

9. Ground 3: C1's victim personal statement.

38. In our view, the judge was entitled to find that, by reference to her victim personal statement and the other evidence, C1 had suffered severe psychological harm as a result of the applicant's offending. That was a matter for his consideration and judgment, in the light of all the material that he had. Our own reading of the victim personal statement, which is in places harrowing, makes us unsurprised by the judge's conclusion.
39. It is wrong in principle to suggest that, in order to conclude that a victim has suffered severe psychological harm, a judge must be furnished with an independent report that finds the necessary severity and which demonstrates the required causation. The Sentencing Guidelines do not suggest that such a report is mandatory. A sentencing judge is, in our view, quite able to consider the material and reach his or her own view as to the psychological harm suffered by the victim and its nature, scope and extent. The Sentencing Guidelines are not intended to provide yet another hoop through which a

victim of sexual abuse and the CPS must jump in order to see an applicant properly sentenced. We therefore reject the third ground of appeal.

10. Ground 4: The psychological report concerning the applicant.

40. The complaint is that the judge failed to take into account the report on the applicant. Mr Tully fairly said that he put the report before the judge on the basis that it was a "warts and all" report, and that it should have been reflected more fully in the judge's sentencing remarks. We consider that that complaint is unfair to the judge. He summarised the report in his sentencing remarks. He noted that the applicant had a multiplicity of both mental and health issues and he said that he took those matters into account when sentencing.

41. On our reading of the report, the judge might have been entitled to conclude that the report made matters worse for the applicant rather than better. To be entirely fair to Mr Tully, he does not for a moment shy away from that. It is notable that Dr Indoe identified the applicant's "severe lack of empathy", his "cognitive distortion about children and their views on sex", his "significantly reduced self-awareness", and that the applicant "does not accept he has harmed his victims." Those and other comments might be said to justify still further the approach to sentencing which the judge took. By way of simple example, those comments, particularly in relation to the applicant's distorted thinking about children and their views on sex, explain why the applicant was considered by the judge to be an offender of particular concern. They demonstrate too, that whatever the applicant thought about consent (as per his basis of plea), it was based on deeply distorted thinking.
42. There was a specific complaint that the judge failed to have regard to what Dr Indoe's report said about the applicant's low IQ. Again, we do not consider that that is correct. Indeed, there is a lengthy passage in which the judge dealt with that very point. He said:

> "I have considered both the guideline and Mr Tully submissions, I observe that Dr Indoe does not draw any explicit conclusion that your IQ or your development make you less responsible for your actions. Nor does he draw any conclusion that your IQ or development led you to have an affinity with children or to feel more comfortable in their company than in the company of adults. Indeed, his report would tend to suggest the opposite. As paragraph 110 makes clear, and which is quite striking in the light of the issue that I am currently considering, you are found by him to have a severe lack of empathy with children. At the same time, as paragraphs 107 and 109 makes clear, you share the cognitive distortion of and you are emotionally congruent with adult sex offenders. Looking more widely at the evidence, there is nothing in your work record in a skilled occupation over many years to support the conclusion that you suffer a defect of ordinary functioning or that you are particularly childlike or naïve. There is also nothing in any of the references from those who know you well to support such a conclusion. Indeed, the references speak of you as an excellent father to two girls and a son, a role which

> would inevitably have required you to understand what the boundaries are. Whether you chose to observe with other people's children is a different matter. In my judgment, looking at the evidence in the round, I do not accept that your culpability is reduced by virtue of a developmental disorder."

We set out that passage at some length to demonstrate the care with which the judge dealt with the points that were made to him. He was clearly entitled to reach those conclusions. In those circumstances, there is nothing in the fourth ground of appeal.

43. So just standing back at this point, we must ask ourselves whether this sentence, when considered in the round, was manifestly excessive. We do not consider that it was. Given the length of time of the offending, the nature of grooming, the particular offences and the age of the victims, this sentence was, in our judgment, entirely justified.

11. Ground 5: Was the sentence overly mechanistic?

44. We turn to the final complaint, that the judge was overly mechanistic in his application of the Sentencing Guidelines. As noted above, the phrase comes from *Forbes* and the warning against approaching sentencing in such a way. There are really two elements to this criticism in the present case. The first element comes back to the point where we started, namely that the judge did not demonstrate sufficient instinct when approaching the sentencing exercise. We had already rejected that criticism. The judge paid proper regard to the Sentencing Guidelines as he was obliged to do, but he did not follow them slavishly, and nothing warrants the suggestion that he was overly mechanistic.

45. The second element of this complaint is that the judge artificially structured the sentence in such a way as to ensure that the applicant would have to serve two-thirds of the sentence in respect of each of the two consecutive terms of imprisonment. We do not accept that the sentence was calculated in such a way as to mean that the applicant would have to serve two-thirds of each of those two constituent parts of the sentence before being eligible for release. There is nothing that supports that analysis: it is not how the sentencing remarks read. But in any event, to the extent that that was the judge's intention, it was incorrect.
46. There can be no doubt that the special custodial sentence of 7 years, comprising a custodial term of 6 years and a further period of 1 year on licence, was subject to section 244A of the Criminal Justice Act 2003. The sentence was imposed on or after 28 June 2022. In consequence, the applicant must serve two-thirds of the custodial term, namely 4 years before being eligible for release for 1 year on licence. There can be no criticism of the judge's statement to that effect. As we have said, Mr Tully realistically does not complain about the 1-year extension period.
47. But to the extent that the judge thought that the applicant would serve two-thirds of the 8 year determinate term for the offences against C1, he was wrong. Section 244ZA of the Criminal Justice Act 2003 increased the requisite custodial period, but only where the underlying offence was listed in schedule 15 of the Criminal Justice Act 2003, for which the maximum penalty is life imprisonment. The offences covered by counts 2 and 4, by reference to section 14 of the Sexual Offences Act 1956, carry a maximum term of 10 years' imprisonment. Thus, they did not fall within the remit of 244ZA.

48. In those circumstances, the requisite custodial period in relation to the 8 year determinate term is half, not two-thirds, of the sentence imposed. It is appropriate to make that plain in open court and we are entirely confident that Mr Tully will relay that message to the applicant. However, it does not affect the term imposed by the judge and, for the reasons that we have given, the renewed application for permission to appeal against that term is refused.

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