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Neutral Citation No. [2023] EWCA Crim 65

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

CASE NO 202203554/A2



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday 19 January 2023

Before:

LORD JUSTICE DINGEMANS

MRS JUSTICE MAY DBE

HIS HONOUR JUDGE CONRAD KC

(Sitting as a Judge of the CACD)

**REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988**

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“WVF”

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MR J SMITH appeared on behalf of the Attorney General.

MS C FRASER appeared on behalf of the Offender.

**J U D G M E N T**

(Draft for Approval)

LORD JUSTICE DINGEMANS:

**Introduction**

1. This is the hearing of an application by His Majesty's Solicitor General for leave to refer a sentence which the Solicitor General considers to be unduly lenient. The sentence was imposed on the respondent (who we will refer to as "WVF" to protect the identity of her daughter). WVF's daughter is, as a victim of sexual offending, entitled to lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992.
2. WVF is 43 years old and was of previous good character. The Reference raises issues about what was the appropriate Sentencing Council Guideline to consider for these offences and whether there was an abuse of trust.
3. On 9 August 2022 WVF pleaded guilty at the PTPH to the offences of: (i) making indecent photographs of a child contrary to section 1(1)(a) of the Protection of Children; (ii) distributing indecent photographs contrary to section 1(1)(b) of the Protection of Children Act; and (iii) taking indecent photographs of children contrary to section 1(1)(a) of the Protection of Children Act; and four separate offences of causing or inciting a child under 13 to engage in sexual activity (no penetration) contrary to section 8 of the Sexual Offences Act 2003. One of the four separate offences of causing or inciting a child under 13 to engage in sexual activity was a multi-incident count of at least two occasions. All of the offences involve WVF's daughter.
4. On 8 November 2022 WVF was sentenced for these offences to a total of 18 months' imprisonment suspended for 24 months for the offences of causing or inciting a child under 13 to engage in sexual activity and to 15 months' imprisonment suspended for 24 months concurrent for the offences of making, distributing and taking indecent photographs of children. We grant leave for the Reference.

### **The factual background**

5. WVF, who lived with her partner and three children, was in financial difficulties. WVF persuaded her 12-year-old daughter to engage in sexual behaviour which was photographed or video recorded or took place on the telephone for men that WVF had met on line. Some of the photographs were taken by WVF's 9-year-old son. The offending took place over a period of around 2 weeks in February to March 2020. The offending was for payment because WVF received around £1350 for selling images of her daughter and herself online.
6. The first incident of offending took place in late February or early March 2020. WVF asked her daughter to come into her bedroom in the evening and told her to undress to her underwear. WVF arranged for her 9-year-old son to photograph the two of them posing in their underwear. The posing lasted for around half-an-hour. When asked why this was taking place WVF lied to her children, telling them that it was in response to a challenge circulating on Facebook. The images were actually being recorded so that WVF could circulate them online for money. This incident was count 4. Thereafter WVF and her daughter regularly took photographs together which WVF would sell online. Her daughter would either wear only her underwear or only her knickers and would be photographed with her breast area exposed. On occasion WVF asked her daughter to change her underwear as she did want "him" getting disappointed. The further posing was reflected in count 5, the multiple incident count which required at least two occasions of offending.
7. On another evening WVF called her daughter downstairs and told her to undress to her bra and knickers. Despite her daughter making it clear that she did not want to do this,

WVF was insistent. WVF then posed with her daughter exposing her own breasts. She also told her daughter to remove her bra which her daughter did but then tried to obscure her breast area by placing her arms across her chest. WVF took photographs and a video on her mobile phone (count 6).

8. The daughter eventually challenged WVF as to why she was being asked to pose in this way. WVF said that the family was struggling financially. She was acting as a "Sugar Baby" and was taking photographs for a "Sugar Daddy" in exchange for money. The daughter understood that there was more than one Sugar Daddy. The daughter was asked to speak to the Sugar Daddies over the phone. They asked her about her school day and called her "Princess". The daughter thought she spoke to three Sugar Daddies on five or six occasions. She was also asked to record voice messages for the Sugar Daddies. On a further occasion WVF engaged in phone sex with a Sugar Daddy at the family home. The daughter could hear WVF screaming "Faster Daddy" in a neighbouring room. WVF's partner entered the room and WVF ended the call. The next day however WVF called the Sugar Daddy back with her daughter present. WVF blamed her children for the interruption the previous day and continued the phone sex. The Sugar Daddy asked WVF to slap her daughter's legs. Her daughter was told to bend over and WVF slapped her daughter's legs until they were red and raw with handprints. The Sugar Daddy listened in over the phone and her daughter could hear him saying "Harder, harder. Slap her harder". After around 5 to 10 minutes the Sugar Daddy asked WVF to put cream on her daughter's leg which WVF did. WVF promised her daughter a payment of £150 to £200 although this was never made. That offending is reflected in count 7 and it is relevant to record at this stage that no photographs or video was made of that.

9. During the phone sex the daughter described her younger siblings asking her what their

mother was doing and having to hide the offending from them, telling them to stay out of WVF's way and play on the computer.

10. Financial enquiries carried out by the police indicated that WVF had received four payments totalling £1350. The payment references referred to the daughter's name and said on one of the references "Enjoy Ladies". All payments came from the same man.
11. The offending came to light in June 2020 after an intervention by Social Service which revealed domestic violence between WVF and her partner and resulted in the daughter being interviewed by Social Services. During that interview the daughter disclosed drug and alcohol abuse at the home address and that WVF had sold the daughter's property to get money and the daughter also disclosed this offending. The daughter and her two siblings were removed from WVF's care as the children were considered to be at risk of significant harm. The address was searched, the phone seized which contained images, both videos and photographs and the voice notes. Seven videos were recovered on WVF's mobile telephone. These showed first (March 2020) a 10-second video of WVF and the daughter, both sat on the bed wearing underwear. WVF said "Hi Daddy" looking into the camera. WVF then said to her daughter: "You didn't want to wear my underwear, did you?" The daughter replied "No". They were both smiling throughout. Another video on 1 March, a 10-second video of WVF and her daughter both sat on a bed with underwear. WVF says to her daughter: "So tell me how you've been feeling today", and the daughter replied. Then there was a further video on 1 March, a 2-second video of WVF and her daughter lying on a bed in underwear. WVF said to the camera: "So I've told my daughter that you're going to be helping us and looking after us and spoiling us. You're happy with that baby?" and the daughter replied "Yeah". Yet a further video on 1 March, a 2-second video of WVF and her daughter lying on a bed. They could only be

seen from the waist upwards. They were wearing underwear tops. WVF was smiling and laughing and nothing was said. On 17 March, a 10-second video of WVF and her daughter, sat on a bed wearing only knickers. The daughter was covering her breasts with her arms. WVF was displaying her breasts. WVF said: "Hi Daddy" to the camera, the daughter said "Hi" to the camera and the video was graded as category C as the daughter was topless. On 17 March 2020 a 10-second video of WVF and her daughter sat on a bed wearing only knickers. WVF was filming and displaying her breasts. Her daughter was covering her breasts with her arms and there was no speech. Then again on 17 March a 2-second video of WVF and her daughter sat on a bed with no tops on, which was also graded as category C.

12. Three further indecent images of the daughter were recovered from WVF's mobile phone, all categorised as C. These were an image of WVF and her daughter naked. They were posing for a selfie-style image taken by WVF. The daughter and WVF were side by side facing the camera and WVF's breasts were exposed, the daughter was naked and posing with her arms across her stomach area. Her breasts could be seen. There was an image of WVF semi-naked and wearing only a pair of black knickers, sat next to her was her daughter who was also naked from the waist down. WVF's breasts were exposed while the daughter covered her breasts with her crossed arms. There was a 21-second film in which the daughter and WVF were naked from the waist upwards and clearly posing. Both WVF and the daughter were smiling. The camera then panned down to their bodies showing WVF's naked breasts. The camera moved to show the daughter who had covered her breasts with her crossed arms before moving back up to their faces. There were four images recovered from the phone which were the subject of the indictment, all classified as category C.

13. Also recovered from the phone were 23 voice recordings dated between 28 February 2020 and 15 March 2020. These included WVF leaving a message for Daddy in which she referred to her daughter saying:

"She didn't take up much encouragement. I told her that it was for fun and that was it. She's more adventurous than what I thought. She really enjoyed it and thought it was fun so I didn't tell her she'd be completely undressed but I did tell her she could wrap a towel around but she was happy to be how she was. So I'm just happy that you're happy. Let me know if I can do anything else for you. Bye Daddy".

14. The transcripts continued with talk about spoiling and further displays for the purposes of Daddy.

15. WVF was arrested after the disclosures on 2 June 2020. In interview WVF said that she had taken photographs with them when they were both wearing underwear and that her son had been present when some of the photographs had been taken. She claimed that she had asked her daughter if she wanted to do modeling together and it was like an amateur art hour. That had happened on between two and five occasions. She accepted that she had taken some photographs to send to men, both to some she knew and to a website called "Panty Deal". However she denied sending images of her daughter only of herself. The website allowed users to upload videos or photographs for money. WVF said she had met a man on the site called "Sugar Daddy" but that he had also used other more explicit names and she had stopped contact after he had begun to pester her online. She denied receiving any money. She denied that her daughter had ever spoken to him or that she had sent images of her daughter.

16. Of course, the effect of those denials meant that a full police investigation required to be undertaken. That is relevant because a point relied on in mitigation was delay. WVF was interviewed again in December 2020. The daughter's account to police was put to WVF

as was the content of electronic devices which had now been examined. It is only fair to WVF to record that she had provided the police the PIN numbers for her mobile phone and access to her email addresses and financial evidence showing the evidence of the payments. In that interview WVF made no comments to the questions asked.

### **The sentence**

17. So far as sentencing was concerned, there was no victim personal statement from the daughter but she had said in her interview with the police that she considered the offending to be her biggest secret. She had cried about it when returning home from school as she felt so ashamed and embarrassed. The daughter had threatened to tell family members about the offending but WVF had told her that the shame and shock would be so great that it would kill them.
18. There was a pre-sentence report before the court. WVF told the author of the report that she had struggled financially during the Covid pandemic and had sold underwear on a website called Panty Deal. She had met a user who identified himself as "Sugar Daddy". She said she was disgusted by her behaviour. The author of the pre-sentence report formed the view that WVF had huge deficits in her thought processes and decision making as her actions had led her to groom, exploit and expose her daughter and that there was a gross breach of trust and that WVF had failed in her duty as a mother to protect her daughter. She was assessed as posing a high risk of harm to children especially those within her care. She was assessed as a low risk of reoffending more generally. The report recommended rehabilitation activity requirement days or unpaid work if appropriate.
19. WVF also relied on references from her employer, which spoke of her as a diligent and conscientious staff member and confirmed that her job would remain open to her if she



was not sentenced to immediate custody. She relied on a reference from her ex-partner currently caring for their children, who stated that WVF had shown remorse for the offending and continued to see the children regularly. He also confirmed that WVF was providing financial support. WVF relied on a reference from her mother and uncle. Her mother had suffered a stroke and her uncle had rheumatoid arthritis. Both said that WVF helped them attend appointments, shopping and day-to-day life. The letter said that WVF had undertaken charity work before becoming homeless and she had struggled after becoming homeless and had lost weight.

20. At the hearing it was submitted on behalf of WVF that there was no abuse of trust within the meaning of the Sentencing Council Guideline for causing or inciting a child under 13 to engage in sexual activity and that the relevant Guidelines which should be applied were for posing, distributing and producing indecent photographs of children, all of which led to a starting point of about 18 months.

21. The judge must have accepted the submissions made on behalf of WVF because he said when sentencing that he had to follow the Guidelines but that whichever way one looked at it there was a start point of 18 months under the Guideline. The judge then imposed the sentence already indicated.

#### **The relevant sentencing council guideline**

22. There are relevant Sentencing Council Guidelines. These are for indecent photographs of children and for causing or inciting a child under 13 to engage in sexual activity. In our judgment, the judge was wrong to ignore the Guideline for Causing or Inciting a Child under 13 to engage in sexual activity and to concentrate only on the starting point in the Guidelines for indecent photographs.

23. This is because section 59 of the Sentencing Act 2020 requires that every court must in

sentencing an offender follow any Sentencing Guidelines which are relevant to the offender's case unless the court is satisfied it would be contrary to the interests of justice to do so. The judge did not make a finding that it would be contrary to the interests of justice to ignore the Guideline on causing or inciting a child under 13 to engage in sexual activity, and it is in the interests of justice and compliant with section 59 to have regard to that Guideline. This is because WVF's most serious criminality was the causing or inciting her 12-year-old daughter to strip naked, pose and engage in sexualised conversations with an older man and to engage in sexualised behaviour, namely the spanking and rubbing of cream onto her to satisfy the requests of an older man. This caused real harm to her daughter and feelings of shame and embarrassment. As was noted in the course of submissions, the behaviour in relation to the spanking and cream did not in any event involve the taking of any photographs.

#### **Abuse of trust**

24. The fact that the causing or inciting of a child under 13 to engage in sexual activity is the most serious offence part appears from the starting points under the relevant Guideline. The category 3A offence for causing or inciting sexual activity in a child under 13 had a starting point of 5 years for a single offence and a range of 3 to 8 years. The Guideline for the category C images has starting points as follows: possession had a starting point of high level community order; distribution had a starting point of 13 weeks' custody and production had a starting point of 18 months' imprisonment.
25. We therefore turn to the causing or inciting a child under 13 to engage in Sexual Activity Guideline. One of the culpability A factors is abuse of trust. We deal with the submissions made to the judge below that this offending by WVF did not involve an abuse of trust because it was said that the decision in R v Forbes [2016] EWCA 1388;

[2017] 1 WLR 53 meant that there needed to be something more before a parent was guilty of breach of trust in sexual offending against children.

26. The submission below seems to have been based on a passage in Archbold Criminal Pleading Evidence and Practice 2022 repeated in 2023 at paragraph 20-386 at (v) where it is said:

*"Abuse of trust*

In determining whether abuse of trust amounts to an aggravating factor, whilst in the colloquial sense, a parent, other relation or neighbour is in a position of trust, the phrase 'abuse of trust', as used in the guideline, connotes something more than that. The phrase plainly includes a relationship such as pupil and teacher, priest and child, scoutmaster and boys in his charge, or for example an ad hoc situation such as a late night taxi driver who takes a lone female fare; what is necessary is a close examination of the facts and clear justification if abuse of trust is to be found."

27. It is submitted by Mr Smith on behalf of the Solicitor General that the passage in Archbold runs together two separate paragraphs in Forbes and therefore misrepresents the guidance given by Forbes. Ms Fraser, on behalf of WVF, does not submit to the contrary. The relevant paragraphs in Forbes are paragraphs 17 and 18 which read as follows:

"17. Whilst we understand that in the colloquial sense the children's parents would have trusted a cousin, other relation or a neighbour (as in the case of Forbes – see paragraph 47, and Farlow - paragraph 208) to behave properly towards their young children, the phrase 'abuse of trust', as used in the guideline, connotes something rather more than that. The mere fact of association or the fact that one sibling is older than another does not necessarily amount to breach of trust in this context. The observations in para 54 of R v H (J) [2012] 1 WLR 1416 should be read in this light.

18. The phrase plainly includes a relationship such as that which exists between a pupil and a teacher (as in the case of Clark, who grossly abused his position of trust as a teacher at a boys' preparatory school by a sustained course of conduct over 7 years – see paragraphs 70 and following), a priest and children in a school for those from disturbed backgrounds (as in the appeal of McCallen - see paragraphs 86-92 and 97) or a scoutmaster and boys

in his charge (as in the case of Warren to which we have already referred). It may also include parental or quasi-parental relationships or arise from an ad hoc situation, for example, where a late night taxi driver takes a lone female fare. What is necessary is a close examination of the facts and clear justification given if abuse of trust is to be found."

28. In our judgment, Forbes did not say that a parent was not in position of trust so far as the meaning of 'abuse of trust' in the Guidelines was concerned. Indeed the reasons why school masters or scoutmasters are in a position of trust is because, according to the common law, they are acting in the place of parent. A parent is always likely to be in a position of trust so far as their own non-adult children are concerned. We accept that there might be different situations, for example, if a parent is estranged and has lived away from the children. Forbes was addressing the sentencing of historic sexual offences and the passages at paragraphs 17 and 18 quoted above were intended to address the situation of where, for example, an older sibling has looked after a younger sibling and committed a sexual offence. As was noted in Forbes, that might colloquially be considered to be an abuse of trust but was not the situation aimed at by the reference to "abuse of trust" in the culpability sections of the relevant Guidelines. That said, it is of course always important to have a close examination of the facts and a clear justification for any finding of abuse of trust.

29. We should record that even if it had been necessary to show something more to establish a breach of trust, which it is not, there was something more in this case. WVF manipulated her 12-year-old daughter into posing for photographs by lying about her Facebook challenge and then persuaded her daughter to strip naked to be photographed and to indulge in role play and sexualised conversations. The pre-sentence report writer was, in our judgment, right to describe this as a "gross breach of trust".

### **The appropriate sentence**

30. We find that the offences of causing or inciting a child under 13 to engage in a sexual activity was harm category 3 because harm categories 1 or 2 did not apply. We find that this was culpability A because there was abuse of trust. There was also another culpability A factor, being commercial exploitation and/or motivation. The starting point for a single offence is 5 years with a range of 3 to 8 years. There were four separate such offences, one of which was a multiple incident count of at least two instances. This means there were at least five separate offences.
31. We consider it right to reflect all of the criminality in the sentences for the counts for causing or inciting a child under 13 to engage in sexual activity and to make those sentences concurrent with each other and the indecent photograph offences.
32. We have to have regard to the fact that the offending occurred within a 2-week period and issues of totality. In our judgment, to reflect all of the criminality disclosed by the relevant counts would take the appropriate sentence up to about 7 years or just over before addressing WVF's considerable mitigation in this case. That mitigation included WVF's previous domestic situation, her financial situation at the time of the offending, her good character, her remorse and her attempt to re-build her relationships with her children. We consider that after a trial a sentence of 5 years was the least that could be imposed to reflect all of the offending and the mitigation.
33. We turn then to the issue of credit for the plea. At the Magistrates' Court no plea was indicated and it was submitted that that was because there was a requirement to get advice. In circumstances where the charges had been set out clearly in relation to the sexual offending which have occurred the need for advice might not have been obvious, because any individual who would certainly have known exactly what she had done. In circumstances however where it does seem that the lawyers then representing WVF were

seeking advice from counsel, and in circumstances where WVF was of previous good character, and where as soon as she had advice from counsel she did before the PTPH indicate that she was going to plead guilty, we are persuaded that is one of those exceptions to which F1 of the relevant Overarching Guideline applies. This is that in considering whether this exception applies sentences should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact guilty of charges and cases in which a defendant merely delays guilty pleas in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.

34. In those circumstances we are persuaded that WVF was entitled to credit of 33 per cent for her plea. Taking a sentence of 60 months, a discount of one-third gives a sentence of 40 months, which is 3 years 4 months. Therefore the Reference succeeds and we impose an overall sentence of 3 years and 4 months on counts 4 to 7 concurrent both with each other and the sentences on counts 1 to 3, which remain at 15 months but which are obviously no longer suspended.

35. We are very grateful to both Mr Smith and Ms Fraser for their written and oral submissions.

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

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