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Neutral Citation No. [2023] EWCA Crim 728

IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202300870/A5



Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 12 May 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE FRASER

MR JUSTICE SWIFT

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

REX
V

“BHL”

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MR B LLOYD appeared on behalf of the Attorney General.

MR J PATEL appeared on behalf of the Offender.

J U D G M E N T

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. We grant leave.
2. The victims of the offending in this case have the right to lifelong anonymity, pursuant to the provisions of the Sexual Offences (Amendment) Act. In order to protect this anonymity, and for no other reason, we have anonymised the name of the respondent to "BHL".
3. BHL is now aged 44 years. He was before the events of late 2019 and early 2020 (when he was aged 40) a person of good character. At that time BHL was in a long-term relationship with his partner, who had a daughter by a previous relationship. BHL and his partner had two children, one born in 2019 and one born in 2016.
4. Towards the end of 2019 BHL began abusing drugs and alcohol, in particular amphetamine and cannabis. As he put it in a letter of apology to the judge, this effectively destroyed his character, and he embarked on what the judge called "an astonishing course of sexual offending" over a 10-month period. It is only fair to BHL to record that, since his arrest and imprisonment, the reports from prison show that he is working hard to become a responsible prisoner.
5. BHL's sexual offending resulted in prosecutions before two different courts. These were the Crown Court at Isleworth, where BHL was sentenced to a determinate sentence of 30 months for offences against a fictitious person, called "Paris", and the Crown Court at Stoke-on-Trent, where he received an extended sentence of 9 years, comprising 6 years' imprisonment with a 3-year extended licence. It is only right to record that the way in

which the offending ended up before the courts made the second judge's sentencing task in the Crown Court at Stoke-on-Trent more complicated.

6. The Solicitor General submits that the sentence imposed in the Crown Court at Stoke-on-Trent was simply too short and did not reflect the gravity of the offending. Particular complaint is made of: first, the judge's failure to identify all of the aggravating features in relation to count 3, which was sexual activity with a 14-year-old girl; secondly, too great a reduction for totality was made by the judge; and, thirdly, there was an excessive reduction for mitigation.
7. It is submitted on behalf of BHL that the judge had a difficult sentencing exercise, which was approached with care. The discount for totality and mitigation were generous but they were permissible discounts, and the sentence, as a whole, was not unduly lenient.
8. We are very grateful to Mr Lloyd and Mr Patel for their helpful written and oral submissions.

The circumstances of the offences

9. It is necessary to set out the circumstances of the offending. BHL's partner's daughter, who BHL had brought up as his own child from an early age, went to a local school. There was a pupil at that school called "CB". In late 2019 and early 2020, CB (then aged 14) received a Facebook friend request from someone calling themselves "David Haynes" - in fact it was BHL. He gave the impression that he was a teenage boy. CB was 14 and responded to him. BHL repeatedly requested to meet up. CB eventually agreed to a meeting. She met at midday on a weekend in February 2020, in the car park at Ford Green Hall. This was significant because the same method was later used by BHL when he planned to meet Paris, to whom we will come to shortly.
10. CB was expecting to meet a teenage boy, instead she met BHL, although BHL

maintained that by the time they had met CB knew that he was the father of someone at her school. He smacked her buttocks and took her hand. He led her to his car, and they sat inside. He offered her alcohol and cannabis, which she refused. BHL touched her thigh and then began to kiss her. They moved to the backseat of the car. He pulled down her trousers and inserted his fingers into her vagina. He kept them there for about 2 minutes. BHL told her to masturbate him. As she did so, BHL demanded that she do it faster. He continued to insert his own fingers into her vagina and BHL filmed him masturbating CB on his own mobile. CB asked why he was filming. BHL then got on top of CB. He tried to insert his fingers again before putting penis in her vagina. He pulled up her top. The two had sex for about 5 minutes. BHL told CB not to tell anyone or else he would be banned from seeing his children. In the months that followed, BHL continued to message CB including on WhatsApp, Snapchat and from his own real Facebook account. It is apparent from all the circumstances of the offending that BHL manipulated CB and took advantage of her inexperience and lack of maturity at the time. BHL continued to ask to meet up. He sent her a picture of his penis and asked for photos in return.

11. In August 2020 BHL and his partner separated. BHL moved to his mother's house and suggested that CB come and visit him there. He asked that she meet him with some other men. He pleaded with her that if she agreed, that would be the final thing he would ask of her.
12. When BHL's telephone was eventually seized (after the Paris incident, to which we will come) it contained 185 category A images (count 10 on the indictment), 152 category B images (count 11) and 160 category C images (count 12) and extreme pornography of bestiality. The relevant schedule shows that BHL had collected graphic images of serious

child abuse. BHL had also found like-minded paedophiles online. He was a member of a number of discussion groups on Kik on this topic in September 2020. He discussed his interest in children. He sent still and moving images in category A (count 7), in category B (count 8) and category C (count 9). Count 8 related to the video which BHL had filmed and retained of CB. This was a category B film and an interrogation of his phone confirmed that he had sent that video 23 times to different people including seven times to those purporting to be children.

13. At the same time that BHL was trying to cajole CB to meet him and his friends, BHL was trying to find like-minded sexual offenders to have further sexual activity with CB. Seven of the individuals with whom BHL communicated were purporting to be children. One of them was called "Paris" (to whom we have already referred). That in fact was an undercover police officer. BHL arranged to meet Paris in a car park in London, in much the same way that he had met CB. The police in fact then met BHL and he was arrested. He made no comment in interview. This resulted in counts for an offence of attempted offending and contrary to section 15A of the Sexual Offences Act, six counts of attempting to cause a child to watch a sexual act and attempting to meet a child after grooming. BHL had already been sentenced at Isleworth Crown Court for these matters before the sentencing in Stoke-on-Trent.
14. The remaining six individuals were subjected to sexual messages including messaging one about travelling to meet up for sex. A number of the children appeared to be abroad and BHL would discuss sexual themes, he would share sexual images, including of CB, and asked for images in return. One of the supposed children was called "Emily" who seemed to be based in the United States of America.
15. In September 2020 BHL and Emily discussed how frequently BHL had the chance to see

his own children naked. Emily was interested in seeing "A" (BHL's son, who was then 3 years old). BHL recorded a video of himself changing A's nappy (count 2). During that process he rubbed A's penis twice (count 1). On the second occasion, A said: "Don't dad". BHL took the video and created a redacted still from it. He sent it to Emily. This was carried out by BHL in the hope that he would get pictures back from Emily. As is apparent from that summary, the offending was stopped by his arrest in relation to the attempt to meet up with Paris.

The offending against CB

16. As the lead offence, count 3 was an offence within category 1A. There were multiple features of culpability which required significant upward adjustment from the starting point. Thereafter there were aggravating features which required further adjustment, in particular, steps taken to prevent the victim reporting the incident and the repeated distribution of the video of the victim online.

The sentencing

17. So far as the judge was concerned at the sentencing exercise, he had the benefit of a pre-sentence report. That was dated 13 February 2023. The author noted that despite engaging well throughout the interview, BHL provided an account of the offences that did not reconcile with the prosecution case and sought to minimise and apportion blame, especially in relation to CB.
18. The author of the pre-sentence report noted that while it was probable that the breakdown of BHL's relationship left him without emotional support and intimacy, and exacerbated his use of amphetamines and alcohol, there were clear elements of grooming, targeting of children and seeking specific material, that evidenced a sexual attraction towards teenage females. There was a victim personal statement from CB which demonstrated the

continuing harm caused by BHL's offending.

19. In the sentencing remarks the judge noted BHL's age and lack of previous convictions.

The judge described the course of conduct as frankly astonishing, and he noted that BHL had lost his job and contact with his family. The judge noted the factors which might have contributed to offending but recorded that nothing began to explain the depths of depravity to which BHL sank in attempts to gain sexual gratification from adults, children and images. There was no basis of plea. The judge recorded that it was a matter of concern, identified by the author of the pre-sentence report, that BHL appeared to minimise responsibility with CB. The most shocking example, the judge said, was the agreement that BHL made to film himself sexually abusing his 3-year-old son.

20. The judge, in order to confront the difficulties posed by the fact that there had already been a sentence at Isleworth Crown Court, worked out a notional sentence for all of the offending. He found that as regards the offending the most serious count was count 3, which concerned CB. The starting point was 5 years' custody. There were other sexual acts performed and there was multiple sharing of the video, and the judge said that he would have taken a starting point, after trial, of 6 years' custody before considering issues of mitigation and discount for plea.

21. In respect of BHL's son, the most serious count was count 1, which had a starting point of 4 years. The fact that the image was shared did not aggravate as that was taken into account in reaching that starting point. The judge said that the various offences relating to attempted communications with children each had a starting point of 2 years but there were six people involved because that excluded Paris who had already been sentenced (the subject of sentence) and the overall starting point would be 2 years 6 months. In relation to indecent images, the most serious offence was distributing category A, which

had a starting point of 3 years. There were multiple recipients, there were other images both distributed and retained. The appropriate starting point, the judge said after a notional trial, would have been 3 years 6 months before discounts for mitigation and then plea, although the judge was careful not to double count. Adding all of those sentences together, the judge said would give a sentence of 16 years. The starting point in relation to the sentence for Paris would have been 4 years 6 months. That would mean an overall sentence of 20 years and 6 months, and the judge said that was too high and that the appropriate starting point before discounts for mitigation and plea would have been 15 years.

22. The judge said in relation to the 15 years it was attributed as follows: 6 years in respect of the CB, 4 years in respect of his son A and 5 years in respect of communication with and meeting various other child victims including Paris. From that figure of 15 years, the judge made a deduction for mitigating factors and reduced the starting point to 13 years. That was a discount of 2 years. From that sentence the judge deducted one-third for the guilty pleas. That reduced the sentence to 104 months. The time served in relation to the Paris offending was excluded, namely 30 months and that reduced the sentence to 74 months, ie 6 years and 6 months. The judge then rounded that down to 6 years' imprisonment and made findings in relation to the extension and therefore extended the licence period by 3 years.

The sentence on count 3

23. It was common ground that the sentence for count 3 involving CB was harm category 1. This was because there was penetration and culpability A. That was because there was grooming, and the offender lied about his age. There was a significant disparity in the age. Sexual images of the victim were recorded, retained and shared. Category 1A has a

starting point of 5 years under the Sentencing Guideline and a range of 4 to 10 years. There were numerous factors increasing the seriousness of this offence, including steps taken to prevent the victim reporting the incident, the duration of the offending and the repeated distribution of the CB video online and the repeated contact with CB after the sexual activity. The judge's sentence for this was of 6 years alone. In our judgment, this was simply too short to reflect the whole of this offending and the numerous aggravating features. In our judgment, if the judge was to take the approach to count 3 that he did, he really should have taken a sentence, before discounts for mitigation, totality and plea of 9 years and, in our judgment, the difference between the 6 years and 9 years shows that that sentence was unduly lenient.

Totality

24. So far as totality is concerned, the judge identified an overall sentence of 20 years 6 month for all the offending including the Paris offending. Identifying a notional overall sentence was a perfectly permissible approach to take to the sentencing but the increase of 3 years that we have made in relation to count 3 would increase that to 23½ years. As already indicated, the judge reduced that sentence to 15 years from 20 years 6 months to reflect the totality. The Sentencing Council Guideline on Totality provides that:

“All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate...

It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.”

25. This is very broad guidance, and the practical application of the Guideline can cause difficulty. Whichever way one structured the sentence and however one started, in our

judgment, the reduction for totality made by the judge was simply too great. It was important to remember that there was separate harm and criminality caused to CB, a 14-year-old very vulnerable girl, much affected by BHL's offending and A (BHL's 3-year-old son) as well as the exploitation of other children and attempt to commit further offences. If we adopt the judge's approach to the structure of the sentence, a reduction to 17 years from the 20½ years might have been appropriate. As it is, we have taken a notional 23½ years before deducting for totality, which we will reduce to 19 years and we will make a further reduction at the end as indicated later.

Mitigation

26. BHL did have mitigation. He had no previous convictions before he embarked on this course of sexual offending. However, as the Sentencing Council Guideline notes in relation to previous good character, the more serious the offence the less weight which normally would be attributed to this factor in relation to sexual offending. There was other mitigation, including the fact that he had, after his release, obtained work and his use of qualifications obtained in prison and the fact that he is making progress in prison. In this case, this was a sexual offending of the greatest seriousness. A reduction of 2 years for mitigation apart from the plea of guilty was simply too much. In our judgment, appropriate mitigation, on the judge's approach, would have been 1 year before the separate discount for guilty pleas. On our calculations this would give 18 years as a proper sentence.

A proper sentence

27. We agree with the submissions made on behalf of BHL that the judge approached this sentencing exercise with care. In our judgment, however, he came up with a sentence that was unduly lenient. The sentence on count 3 was, as we have already

explained, simply too low and the reductions for totality and mitigation before discount for plea were impermissibly large. The result was that the sentence was not proportionate to the appellant's criminality and harm which the appellant had caused to a number of individuals.

28. Adopting the judge's approach and making the appropriate reductions, we have come to the sentence of 18 years. Full discount for plea gives a sentence of 12 years. Taking off the sentence of 13 months, which has already been served for the Isleworth Crown Court matter, leaves a sentence of 9 years 6 months. Stepping back and looking at the proportionality of the sentence, in our judgment, that is still slightly too long, and we would therefore give a further discount for totality which we have already referred to above, to give a custodial element of the extended sentence of 9 years.

29. We therefore allow the Reference, to the extent that we will increase the sentence on count 3 to reflect all of the criminality disclosed in this indictment. The increase is from an extended sentence of 9 years, which comprised 6 years' imprisonment and 3 years extension, to a sentence of 12 years, which comprises 9 years' imprisonment with an extension of 3 years. We are very grateful for the assistance that we have received.

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

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