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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT SHREWSBURY  
(HIS HONOUR JUDGE BARRIE) [22GA1037622]

Case No 2024/02507/A5  
[2024] EWCA Crim 1367

Thursday 3 October 2024

**B e f o r e:**

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

**MR JUSTICE GARNHAM**

**MR JUSTICE SWEETING**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v -**

**A Y X**

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**Mr B Holt** appeared on behalf of the Attorney General

**Miss A Jackson** appeared on behalf of the Offender

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**JUDGMENT**  
**(Approved)**

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Thursday 3 October 2024

**LORD JUSTICE HOLROYDE:**

1. This offender was convicted of sexual offences against his stepdaughters. They are entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. We shall refer to them as "C1" and "C2". Given the familial relationship, identification of the offender would inevitably lead to the identification of his victims. His name must therefore be anonymised in any report of this hearing. For that reason he has been referred to in the court list by the randomly chosen letters AYX.

2. The offences were committed over a period of about 13 months. The offender (a man of no previous convictions) was then aged in his early 30s. C1 was aged between 7 and 9; her older sister, C2, between 13 and 15.

3. In relation to C1, the offender was convicted of one offence of rape of a child under 13 (count 1) and two offences of sexual assault of a child under 13 (counts 3 and 4). In relation to C2, he was convicted of six offences of sexual activity with a child (counts 5 to 8, 9 and 10). Some of the counts in the indictment charged multiple offences. In all, the jury by their verdicts found that the offender raped C1 on one occasion; sexually assaulted C1 on at least four occasions by rubbing her genitalia; touched C2's breast over her clothing on at least four occasions; and touched C2's genitalia on at least four occasions over her clothing, and on at least four occasions under her clothing.

4. The judge imposed a total determinate sentence of two years' imprisonment, with a consecutive special custodial sentence, pursuant to section 278 of the Sentencing Code, of eight years, comprising a custodial term of seven years and a further licence period of one year. He reached that total by imposing concurrent terms of two years' imprisonment on each

of counts 3, 4, 9 and 10, and concurrent terms of three months' imprisonment on each of counts 5 to 8. The consecutive special custodial sentence was imposed on count 1. Ancillary orders were made, about which we need say no more.

5. His Majesty's Solicitor General believes the total custodial sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.

### **The facts**

6. The parents of C1 and C2 separated from one another some years ago. Initially, the girls lived with their mother for about five years. They then went to live with their father and their grandmother. For three to four years their mother had no contact with them. When contact was resumed, in 2020, the mother was living with the offender, with whom she has two children.

7. The offences were committed on weekends, when C1 and C2 together with their brother were staying overnight with their mother and the offender. As we understand it, that happened on all or most weekends for a period of more than a year. The offending came to light in early 2022, when C2 reported it.

### **The sentencing hearing**

8. The father of C1 and C2 provided a statement setting out the effect of the offending upon the victims. C1 had changed from being a happy, independent girl to being angry, emotional and less independent. She now finds it difficult to form and maintain relationships with other children. C2 was described as a more complicated child who was being assessed for Autism Spectrum Disorder. She had become distant with her family and her sister, whom she blamed for the fact that she could no longer see her mother and the offender. Her relationship with

her sister had broken down and she had self-harmed.

9. Reports about the offender showed a history of anxiety and depression. At the time of sentencing he was prescribed an antidepressant medication. He was diagnosed with a mild depressive episode which was currently in remission. It was submitted on his behalf that his mental health issues and reduced cognitive functioning meant that imprisonment would be significantly harder for him than for other offenders.

10. Submissions were made to the judge about the Sentencing Council's definitive guidelines relating to each of the three types of offence of which the offender had been convicted. In each of those guidelines abuse of trust is a factor indicating the highest level of culpability. The prosecution submitted that it was present in this case. The judge observed that the guideline "conspicuously does not put stepparents expressly in the category of those who owe a duty of trust, although many people think it should".

11. Defence counsel accept that the offender was in a "quasi-parental role as a stepfather", but submitted that it was not a "full and clear-cut abuse of trust case".

### **The sentencing remarks**

12. The judge stated that when C1 and C2 came to stay at weekends the offender was in the position of their stepfather and had taken advantage of their being in his home to commit sexual offences against them. He noted that when Social Services had been considering whether the girls' mother could have staying contact with C1 and C2, the offender had taken part in the observed contact meetings to reassure both Social Services and the girls' father that they would be safe. The judge went on, however, to say this:

"In ordinary language, your sexual abuse was a grave abuse of

trust. But stepfather relationships are commonplace sadly in courts when they deal with this kind of offending, and if the Sentencing Council had intended that the position of a stepfather should be regarded as a position of trust, that would I am sure have been spelt out in the detailed guidance on this difficult question that is part of the guideline.

I have come to the conclusion that your breach of ordinary trust is a serious aggravating feature of your offending, but, in the absence of any other category A culpability features, I do not think it is right in the circumstances of this case to treat it as something which leads me to put the case in category A for culpability."

13. The judge therefore placed the rape offence in category B3 of the relevant guideline, with a starting point of eight years' custody and a range from six to 11 years. He placed the sexual assault offences against C1 in category B2, with a starting point of two years' custody and a range of one to four years. He placed some of the sexual activity offences against C2 in category A2, with a starting point of three years' custody and a range of two to six years; and other offences into category A3, with a starting point of 26 weeks' custody and a range of up to three years. He did not find the offender to be dangerous for sentencing purposes. He accepted that the offender "has some difficulties". Taking into account the personal mitigation, delay in the proceedings and totality, he imposed the sentences to which we have referred.

### **The submissions to this court**

14. For the Solicitor General, no challenge is made to the overall structure of the sentencing, or to the judge's conclusion as to dangerousness. It is, however, submitted that the total sentence was unduly lenient because the judge erred in his categorisation of the offences under the relevant guidelines; or, alternatively, because he did not aggravate the sentence sufficiently to reflect the relationship between the offender and his victims. Mr Holt submits that the judge appeared wrongly to distinguish a stepfather from a biological father, when the key point was whether the offender had a significant level of responsibility towards his

victims when they were staying in his house. Mr Holt submits that the significant level of responsibility plainly existed in this case and that it should therefore have made no difference whether the offender was biological father or stepfather.

15. Miss Jackson, representing the offender in this court as she did below, submits that the judge's approach to the sentencing guidelines was correct. She emphasises that the judge had heard the evidence given at trial and was therefore in the best position to assess the nature of the relationship between the offender and C1 and C2.

16. We are grateful to both counsel for their written and oral submissions. Although we have summarised them very briefly, we have in mind all the points they have raised.

### **Analysis**

17. The electronic version of each of the sentencing guidelines to which we have referred features a dropdown menu which provides further guidance as to the culpability factor "abuse of trust". It reads as follows:

"A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.

Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.

Additionally an offence may be made more serious where an offender has abused their position to facilitate and/or conceal

offending.

Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply."

18. The necessary fact-specific approach was noted in *Attorney General's Reference (R v RGX)* [2023] EWCA Crim 1679, in which this court gave guidance as to the factor "abuse of trust" in the context of familial relationships in cases of sexual offences. On the facts of that case it was common ground that there was a very clear abuse of trust. But at [26] of the judgment of the court, Edis LJ expressed this important general point:

"... not every familial relationship involves trust in the sense of that word used in the guideline. It is a matter of fact whether such a relationship existed or not. ..."

19. In the present case, we bear very much in mind Miss Jackson's submission that the judge, having heard the evidence, was in the best position to assess the nature of the relationship between stepfather and stepdaughters. We have for that reason hesitated to differ from him. We are, however, satisfied, with all respect to the judge, that he fell into error in his approach to the guideline culpability factor. The expanded explanation of that factor which we have quoted identifies the correct approach and makes clear that it does no more than provide some examples of factual situations in which the factor may be found to be present. Those examples are explicitly non-exhaustive. The judge appears to have regarded the absence of any specific reference to a stepparent as indicating that such a relationship does not, or at least generally does not, involve the necessary level of responsibility towards the stepchild on which the child would be entitled to rely. In that regard he fell into error.

20. True it is that in common parlance the term "stepfather" may describe a range of relationships, and for that reason the judge was correct not to assume that a sexual offence by



someone called a stepfather against his stepchild necessarily involves the high culpability factor of abuse of trust. But here, the offender was in an enduring relationship with the girls' mother. He and she had two children of their own. Staying contact at weekends was permitted on the basis that C1, C2 and their brother would be joining their mother in her new family and would be safe in the care of her and her partner. Such staying access took place on all or most weekends for more than a year. When C1 and C2 were with the offender he plainly had a high level of responsibility towards each of them, and they were entitled to rely on him to behave appropriately

21. In those circumstances, we have no doubt that the offending involved an abuse of trust, not only (as the judge put it) "in ordinary language", but also in the terms of the applicable guidelines.

22. There was, therefore, an error of categorisation. We would add that, even if it had been open to the judge properly to conclude that the high culpability factor of abuse was not present, the total sentence would in our view have failed sufficiently to reflect the overall seriousness of the offending.

23. The rape offence charged in count 1 should have been placed into category A3 of the relevant guideline, with a starting point of ten years' custody and a range of eight to 13 years. In the circumstances of this case, the aggravating features suggested by the Solicitor General of exploitation of contact arrangements and the domestic context of the offending can fairly be regarded as aspects of the abuse of trust, and do not necessitate an upwards adjustment from the starting point.

24. However, as count 1 has appropriately been treated as the lead offence in respect of C1, there must be an upwards adjustment to reflect the other serious offences against that child.

Although there was some mitigation available to the offender, it could carry only limited weight: certainly not enough to result in a downwards movement from the starting point which would be appropriate for the rape alone.

25. Balancing these considerations, and giving as much weight as we can to the personal mitigation, we conclude that the least custodial term properly to be imposed on count 1 is 11 years.

26. Having regard to totality and to the structure of the sentencing, we do not depart from the overall sentence of two years' imprisonment imposed for the offending against C2. That sentence would have been significantly higher if that offending had stood alone.

### **Conclusion**

27. We conclude that the total sentence imposed below was unduly lenient and that the sentence on count 1 must be increased. We accordingly grant leave to refer. We quash the sentence imposed below in respect of count 1. We substitute for it a special custodial sentence, pursuant to section 278 of the Sentencing Code, of 12 years, comprising a custodial term of 11 years and one year's further licence. As before, that will run consecutively to the determinate sentences totalling two years' imprisonment, all of which remain unchanged and all of which are concurrent with one another.

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