Neutral Citation Number: [2024] EWCA Crim 897

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT
AT GLOUCESTER (Sitting at Cirencester)
HHJ RUPERT LOWE
T202301237; URN 53BH0351613

CASE NO: 2024 02087/02108 A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 19 July 2024

Before:

LORD JUSTICE WILLIAM DAVIS

MRS JUSTICE THORNTON

SIR ROBIN SPENCER

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

REX

v

BFZ

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MS GEMMA WHITE appeared on behalf of the Solicitor General
MS CATHERINE OBORNE appeared on behalf of the Respondent Offender

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J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under these 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 the offence. Due to familial connection between the Offender and the victims of the offences in this case this judgment will be reported with the offender anonymised as 'BFZ'. He will not otherwise be identified and that is in order to protect the identity of the victims.
2. On 11 April 2024, before His Honour Judge Rupert Lowe and a jury sitting in the Crown Court at Gloucester, the offender was convicted of four offences of sexual assault of a child under the age of 13, contrary to section 7(1) Sexual Offences Act 2003. On 9 May 2024 the Offender was sentenced by the trial judge in respect of each offence to a period of 2 years' imprisonment. The sentences were suspended for 2 years. Requirements were attached to the suspended sentences, namely an unpaid work requirement of 300 hours and a rehabilitation activity requirement of up to 40 days. The Offender was ordered to pay prosecution costs in the sum of £3,500.
3. His Majesty's Solicitor General now applies, pursuant to section 36 of the Criminal Justice Act 1988, to refer the sentences imposed as unduly lenient.
4. The Offender was born on 14 May 1974. He is now aged 50. Before the matters with which we are concerned he was a man without any previous convictions. In 1999 he married a woman to whom we shall refer as 'W'. They had two children: a boy born in 2001, to whom we shall refer as 'C1', and a girl born in 2003, to whom we shall refer as 'C2'. There came a point at which the relationship between the Offender and W became strained. The offender apparently had affairs with other women. The marriage eventually broke down in 2012. The Offender left the family home to live with somebody else.
5. In September 2013 W found an old notebook kept by C2. In the notebook the Offender had written words for C2 to copy as a way of practising handwriting. The words included the

phrase, "give us a snog". There were other entries in the Offender's handwriting which could be taken as having a sexualised theme. W asked C2 if she knew what any of the entries meant. C2 said that she knew what "give us a snog meant". She explained it was kissing with tongues in the way that her father had kissed her. She said that the Offender had kissed her brother in a similar way.

6. Both children were interviewed by the police on 27 September 2013. C1 said that he had been kissed by his father on the mouth during which his father put his tongue into C1's mouth. He said it happened about three times a week whilst his father lived in the family home. He recalled two specific occasions. The first had been when he was in year 2 (namely he was 6 or 7). C1 had been sitting on his father's lap. They had been reading a book. When that finished the Offender held C1 and kissed him for what C1 described as "a while". The second occasion had been when C1 was aged 7 or 8. He and his father were watching television. C1 went and stood by the chair on which his father was sitting. The Offender turned towards C1. He kissed C1 on the lips and pushed his tongue into C1's mouth so that it rubbed against C1's tongue.
7. C2 said that she had been kissed by her father in the same way as the description given by C1. She thought that it had happened five to ten times or maybe more often. She described a particular incident that she could remember. The family had finished the evening meal. Her mother and C1 had left the room. Her father said that she had to give him a kiss before she could get down from the table. C2 went to kiss him on his cheek. He said he wanted one on the mouth. He kissed her on the lips and pushed his tongue into her mouth. C2 pulled away and ran to her room.
8. In circumstances to which we shall have to return, C2 was further interviewed in January 2021. She had then described an incident which occurred after her parents had separated. She and her brother were on a contact visit with the Offender. The Offender called over to her and said they needed to go back to W's house, where the children were living. The Offender grabbed C2 by the arms. He kissed her, pushing his tongue into C2's mouth. He moved his tongue around in her mouth for a few seconds.

9. The Offender was interviewed by the police in 2013, shortly after the first ABE interviews of C1 and C2. He denied kissing either child in the manner they alleged. He suggested that W had put them up to make false allegations. In relation to the notebook which was put before the jury in the trial, he said that someone had tried to copy his handwriting to make the entries with a sexual theme.

10. After the Offender was interviewed, no steps were taken for a very considerable period to commence any prosecution of the Offender. The officer in the case provided an explanation for this in her evidence. She said that the Crown Prosecution Service in 2015 decided to take no further action. The officer referred to further information being received in September 2020. In her evidence she did not explain what that information was. We have been told today that it was a statement from a witness who said that they had seen the Offender kissing one or other of the children. In the event that evidence was not used by the prosecution; she was not a witness in the trial. It appears to be common ground that she was an wholly unreliable witness. In any event, when C2 was interviewed in 2021 the interviewing officer said this: "Unfortunately the matter didn't go on." The police submitted the case for review by the Crown Prosecution Service in October 2021. There was still delay. It was not until 22 May 2023 that the Offender was charged by way of postal requisition. Given this was a bail case, the court proceedings moved with appropriate speed. The first hearing in the Crown Court was in August 2023. The Offender was tried in April 2024.

11. The indictment on which the Offender was tried contained two counts in relation to C1 and two counts in relation to C2. The counts charged specific offences: there were no multiple incident counts. The counts referred to the particular incidents described by the Offender's children in the terms we have already set out. The jury's verdicts represented that conduct and no more.

12. At the sentencing hearing the judge had a pre-sentence report. To the author of the report the Offender had maintained the account he first gave to the police in 2013 which he had repeated in his evidence at trial. Nonetheless it was considered that the Offender was

suitable for a community disposal with a rehabilitation activity requirement aimed at addressing sexual offending.

13. Both C1 and C2 made victim personal statements. They made two in each of their cases. The first statement was dated 2 August 2023, namely after the Offender had been sent for trial but before his first appearance at the Crown Court. The later statements were made on 24 April 2024, after the Offender had been convicted. Both C1 and C2 read their statements to the judge in the course of the sentencing hearing. We shall summarise those statements.

    - C1's evidence was that he suffered extreme anger as a child. He had experienced nightmares about what the Offender had done to him and he felt embarrassed and worthless. He was fearful of the Offender. Growing up he lack self-confidence. He was a nervous wreck. Even in 2023 he experienced self-doubt. His relationships with others had been affected by the Offender's behaviour because he did not wish to talk about his father. C1 explained in his second statement that the trial process for him had been a beneficial process and that he had a new-found sense of confidence.
    - C2 said that she had been petrified of the Offender when she was a child. She never felt safe. Even after he left the family home, she was frightened that he might come to the house. She had an obsession with locking the door to keep herself safe. She experienced constant anxiety. She suffered with frequent nightmares. Even in 2023 she struggled to sleep. At school she had spent time with counsellors when she would have liked to have been able to concentrate on her lessons. She felt overall that she did not have a childhood. C2 explained that she now suffered from an eating disorder for which she had received therapy. She struggled to form relationships, in part because she could not bear close contact with people. In her later statement C2 said that the experience of giving evidence at the trial had enabled her to demonstrate how strong she was. She was "weirdly grateful for the trial process".

14. The judge gave his view of them when in the course of his sentencing remarks he said:

> "No sentence I can pass can change or remotely make up for what you did to your children and the long effects of those acts which they have eloquently and movingly described in the statements which they

have read."

Early in his sentencing remarks the judge said that kissing his children became a habit of the Offender when they were between 6 and 10 years old. He later said that the Offender had carried on a course of conduct over some years.

15. Had the judge sentenced on that basis, that would have been wrong in principle. The Offender had been convicted of four specific counts. *Canavan* [1997] EWCA Crim 1773 remains good law. The fact that evidence has been given of repeated offending does not allow the trial judge to sentence for that offending unless it is represented by multiple-incidents counts or it is the subject of express admission by the offender. In fact the judge went on to say that he could only sentence on the basis of the four offences of which the Offender had been convicted. That is what he did.

16. The judge referred to the relevant Sentencing Council guideline. As with almost all guidelines, harm and culpability had to be determined by reference only to the factors set out in the tables at step 1 of the guideline. It was accepted on all sides that there was higher culpability because of the abuse of trust. The prosecution's sentencing note (provided in advance of the hearing) suggested that harm fell into category 2 because each child was "particularly vulnerable due to extreme youth and/or personal circumstances". However, the prosecution accepted that, were culpability to be placed in the higher category because of abuse of trust, then to apply the same factual background to elevate the harm to category 2 would involve an element of double counting. On that basis, harm was said to be in category 3. A category 3A case required a starting point of 1 year's custody, with a category range of 6 months to 2 years. The judge agreed with that analysis. He said in terms that the factors relating to categories 1 and 2 in respect of harm were not triggered. He identified 2 years' imprisonment as the appropriate overall sentence because there had been four separate assaults. He considered the Imposition Guideline. He concluded that this was not a case in which appropriate punishment could only be achieved by immediate custody. He accepted that the Offender continued to deny the offences which tended to rebut the suggestion that he might be rehabilitated. On the other hand, ten years or more had passed

since the offending. That of itself indicated a degree of rehabilitation. It also was of significance that the Probation Service were able to offer a requirement directed at rehabilitation. Taking all of those matters into account he concluded that it was appropriate to suspend the sentence he had imposed.

17. In the original application made by the Solicitor General it was said that the judge had correctly categorised each offence as a category 3A offence with a starting point of 12 months. In our pre-reading of the case we were concerned that the victim personal statement of C2 appeared to reveal severe psychological harm. It appeared, potentially at least, to go beyond the kind of harm which is inherent in any sexual offending against a child. Where severe psychological harm is established, harm will be placed into category 1, for which the starting point for an offence in category 1A is 6 years' custody. In consequence, prior to the hearing we invited counsel for the Solicitor General and for the Offender to provide further submissions on the issue. The Solicitor General now has served notice on the court and the Offender that she seeks to vary the application to refer the sentence. She wishes to argue that the level of harm caused to both victims, but particularly C2, was such that harm should have been categorised as category 1 or, at the very least, category 2. The effect of *Stewart* [2016] EWCA Crim 2238 is that the Solicitor General is not bound by any concession made in the Crown Court so long as she explains the rationale for any departure. She now argues that the evidence of C2, as a matter of fact, established that she had suffered severe psychological harm.

18. On behalf of the Offender it is said that, although such harm can be established by the content of a victim personal statement (see *Chall* [2019] 4 WLR 102), in this instance and without any other evidence it would be wrong to overturn the conclusion of the judge. First, the judge saw and heard C2 give evidence. He was in the best position to assess the level of harm. Second, the relevant guideline incorporates the inevitable psychological harm that will be caused by such offending. Third, the issue only being raised now means that those representing the Offender had and have had no opportunity to investigate the position, for instance by requesting the prosecution to review C2's medical records. Fourth, the

proceedings were subject to extreme delay. Had the Offender been charged when he ought to have been, the trauma to C2 would have been reduced. Arguably the cathartic effect of the trial and the verdict would have been felt years earlier. Finally, the intensely personal nature of a victim personal statement requires caution to be exercised before it is used to establish severe psychological harm.

19. In the course of oral argument, the proposition on behalf of the Solicitor General was that, if there is psychological harm which falls short of being severe but is nonetheless very significant, categorising harm as category 2 would be justified. We disagree. The categories of harm are defined solely by the factors set out in the guideline. Those factors do not include any reference to significant psychological harm short of severe harm. Either the victim suffered severe psychological harm, which would place the case into category 1, or she did not. If she did not there was no other factor within the guideline which justified placing harm in category 2. In argument it was suggested that there was some means by which the court should infer a sliding scale of harm so that serious but not severe harm could be placed into category 2. Had the Sentencing Council intended such a sliding scale, it would have been made explicit. We have concluded that it would not be appropriate to deal with the Solicitor-General's application on the basis that the judge erred in his categorisation of the offending. This was an experienced judge who conducted the trial and had seen and heard the victims when they gave evidence at the sentencing hearing. We remind ourselves what he said in terms in respect of harm:

> "….in my judgment the factors relating to categories 1 and 2 are not triggered in this case."

20. We are satisfied that the judge was wholly aware of what was needed to place an offence into category 1. This guideline was the subject of close scrutiny at the course of the sentencing hearing. It is in our view fanciful that the judge failed to observe that category 1 included severe psychological harm. The judge made an evaluative judgment based on what he had seen and heard. The position is not so clear cut that we can say his evaluation was wrong. It is also relevant to point out that those representing the Offender were not on

notice until yesterday that it might be suggested that harm was in category 1. It is not in our view fair or just to permit the Solicitor General to vary her application at this late stage. We emphasise what is said within the guideline in relation to psychological harm.

> "It is important to be clear that the absence of a finding of severe psychological harm does not imply that the psychological harm suffered by the victim is minor or trivial."

Those words apply with particular resonance to this case.

21. Returning to the original basis for the application, the Solicitor-General's argument is that repeated offending against both victims required an uplift outside the category range for a single offence, that category range ending at 2 years' custody. Moreover, there were aggravating factors including grooming behaviour and offending against the victims in the family home. Given the nature of the offences, it is said that only very limited weight could be given to the Offender's good character. The submission is that concurrent sentences were not wrong in principle so long as the total sentence was just and proportionate. Because there were two victims and each offence justified a sentence in excess of the starting point, a just and proportionate sentence would have been greater than 2 years' custody. In any event this was a case in which appropriate punishment could only be achieved by immediate custody.

22. The correct formulation of what amounts to an unduly lenient sentence is still that provided by the then Lord Chief Justice in *Attorney-General's Reference No 4 of 1989* [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

23. It follows that, for us to conclude that this sentence was unduly lenient, we must find that it was not reasonably appropriate for the overall sentence to be 2 years' imprisonment. In the alternative we must conclude that no reasonable judge could have suspended the sentence of imprisonment.

24. We accept that a significant uplift from the starting point of 12 months' custody was

required. This was principally because there were two victims. The number of offences committed against each victim was of less significance. In each case it was two offences. The position would have been very different had the indictment charged multiple-offence counts and the Offender been convicted of those counts. We further accept that, using the analysis adopted by the Solicitor General in her written submissions, had the sentences in relation to each victim been ordered to run consecutively the total sentence would have exceeded 2 years even with proper allowance for totality. For instance, the judge would have been justified in imposing sentences of 15 to 18 months in relation to each victim which would have led to an overall sentence of between 30 and 36 months before consideration of any mitigating factors. But that does not inevitably lead to the conclusion that the overall sentence of 24 months was unduly lenient. Sentencing is not a mechanistic exercise. Criminal judges will evaluate the circumstances of individual cases by reference to their experience. Clear error in the evaluative exercise has to be shown before a sentence can be described as unduly lenient. As the judge observed, in the scale of sexual assaults this offending was significantly less serious than many such offences. We say straightaway that is not to minimise what the Offender did. For C1 and C2 what he did was truly significant. The abuse carried out by the offender is the only sexual offending to which they have been subjected. Rather, it is to put the offending into the context of all offences of this type. Sexual assault of a child under 13 covers a wide range of sexual activity up to offending which falls just short of assault by penetration. We do not consider that clear error on the part of the judge is established in this case. The application by the Solicitor General accepts that the overall sentence would have been "something in the region of 3 years, before any adjustment for totality". Given that concession it is not realistic to suggest that a sentence of 2 years' custody represents a clear error.

25. Whether a sentence should be suspended is very much a matter for the judgment of the sentencing tribunal. That particularly is the case when the sentence is imposed by a judge who has heard the evidence in the trial. This court will be reluctant to interfere unless it can be shown that the judge failed to take account of appropriate matters or took account of

inappropriate factors. Here, the judge was fully aware of the Imposition Guideline and the factors to be considered therein. The judge's application of the guideline, in our judgment, cannot be described as unreasonable. This was a difficult sentencing exercise, which was conducted with care and sensitivity by the judge. The only matter to which he did not give weight which we consider to have been highly relevant was the extent of the delay. There was a delay of 10 years between the offender being interviewed and the commencement of criminal proceedings. The Sentencing Council General Guideline refers to the mitigating effect of delay in these terms:

> "Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence **if this has had a detrimental effect on the offender**."

The delay here was wholly unreasonable. Inexcusable would be an appropriate adjective to use. In the circumstances a detrimental effect on the Offender was inevitable. That much appears to be conceded by the Solicitor General. In our view it justified a not insignificant reduction in what otherwise would have been an appropriate sentence.

26. There are grounds for describing the sentence as lenient, but there is no credible basis for saying that the sentence was unduly lenient. Therefore we refuse leave to refer this sentence.