



Neutral Citation Number: [2019] EWCA Crim 466

Case No: 201805285 & 201805286

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM St Albans Crown Court
HHJ A Goymer

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2019

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE SWEENEY

and

SIR BRIAN KEITH

(Sitting as a Judge of the Court of Appeal Criminal Division)

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

Between:

REGINA

and

1. YZ

2. ANDREW BARKER

Mr P Jarvis (instructed by Attorney General Office) appeared on behalf of the Attorney General

Mr M Kelly (instructed by Tuckers Solicitors LLP) appeared on behalf of the 1st Offender
Ms E Goodall (instructed by Hodge, Jones & Allen Solicitors) appeared on behalf of the 2nd Offender

Hearing date: 14th February 2019

Judgment Approved

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LADY JUSTICE THIRLWALL:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences against X in this case. No matter relating to X shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences we describe below. This prohibition continues in force unless waived or lifted in accordance with section 3 of the Act. We shall refer throughout the judgement to the victim as X and to her mother as YZ, since the relationship between them is an integral part of the judgment and identification of the mother would lead to the immediate identification of X.
2. This is an application by Her Majesty's Attorney General for leave to refer a sentence which he regards as unduly lenient pursuant to section 36 of the Criminal Justice Act 1988.
3. Andrew Barker is 53. YZ is 29. On 26 November 2018 at the Crown Court at St Albans they were sentenced to six years and nine months' imprisonment and six years' imprisonment respectively.
4. On 29 May 2018 both respondents appeared at the West and Central Hertfordshire Magistrates' Court. Barker pleaded guilty as follows:-
 - i) Charges 1,2,3: offences of making indecent photographs of a child contrary to section 1 (1)(a) of the Protection of Children Act 1978. These offences reflected 12 photographs at level A, 559 photographs and 6 movies at level B and 890 photographs at level C.
 - ii) Charge 4: possession of extreme pornography contrary to sections 63(1) and 63(7)(d) of the Criminal Justice and Immigration act 2008. This involved 47 extreme pornographic images (sexual intercourse with an animal).
 - iii) Charge 5: possession of a prohibited image of a child, contrary to section 62 (1) of the Coroners and Justice Act 2009 (11 images focused on child's genitals or anus).
 - iv) Charge 6: distribution (to YZ) of two indecent images of a child at level C contrary to section 1(1)(b) of the Protection of Children Act 1978.
 - v) Charges 7 and 8: Facilitating the commission of a child sex offence, contrary to section 14 (1) of the Sexual Offences Act 2003.The offences were committed to the Crown Court for sentence.
5. YZ faced several offences of sexual activity with a child under 13. The victim was her daughter. She was committed for trial to the Crown Court. At a hearing on 10 August 2018 the prosecution informed the court that further charges were to be brought against Barker as well as YZ. The hearing was adjourned for the charges to be drafted. It is not clear why that had not been done before. In the event a further hearing was listed for 27 September 2018 when the Crown Court judge sat as a District Judge (Magistrates' Courts) in order to send the new charges to the Crown Court to be joined with the counts against YZ. Those appearing for Barker said there would be an application to dismiss the fresh charges.
6. On 23 November 2018 all matters against both respondents were listed together at St Alban's Crown Court. Barker applied to dismiss the charges which later became counts 4, 6 and 10. The judge refused the applications. Both respondents were then arraigned on the indictment. Barker pleaded guilty to six offences of causing a child

under 13 years to engage in sexual activity, contrary to section 8 (1) of the Sexual Offences Act 2003. These were counts 4,5,6,7,9,10. YZ pleaded guilty as follows:

- i. Count 1: Making indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978.
- ii. Count 2: Distributing indecent photographs of a child, contrary to section 1(1)(b) of the Protection of Children Act 1978.
- iii. Counts 4, 5, 6 and 7: causing a child under 13 years to engage in sexual activity, contrary to section 8 (1) of the Sexual Offences Act 2003.
- iv. Counts 8, 9, 10: causing a child under 13 years to engage in sexual activity, contrary to section 8 (1) of the Sexual Offences Act 2003.
- v. Counts 11 and 12: converting criminal property, contrary to section 327 (1)(c) of the Proceeds of Crime Act 2002.

Sentences

Barker

7. For each offence on the indictment in which he was involved the sentence was six years nine months' imprisonment concurrent. This reflected a sentence of nine years' imprisonment reduced by 25% to reflect the guilty pleas tendered at different stages.
 8. The judge imposed concurrent sentences in respect of all offences which had been committed for sentence as follows:-
 - i. Three offences of making indecent photographs of a child: -
 - Charge 1: eight months' imprisonment
 - Charge 2: four months' imprisonment
 - Charge 3: three months' imprisonment
 - ii. Charge 4, possession of extreme pornography: six months' imprisonment
 - iii. Charge 5, possession of a prohibited image: six months' imprisonment
 - iv. Charge 6, distribution of indecent images of a child: eight months' imprisonment
 - v. Charges 7 and 8: facilitating the commission of a child sex offence: two years' imprisonment on each.
 9. All sentences were concurrent with each other and with the sentences imposed on the indictment. The judge also imposed a victim surcharge order and a Sexual Harm Prevention Order.
- YZ**
10. The sentence before reduction for the guilty plea was 9 years' imprisonment. The judge reduced the sentence by one third, in light of the early indication of a guilty plea, to six years' imprisonment made up as follows:

- i. Count 1: four years' imprisonment
 - ii. Count 2: two years' imprisonment concurrent
 - iii. Counts 4,5,6,7: six years' imprisonment on each concurrent
 - iv. Counts 8,9,10: six years' imprisonment on each concurrent
 - v. Count 11: two years' imprisonment concurrent
 - vi. Count 12 eight months' imprisonment concurrent.
11. The judge also imposed a victim surcharge order and a Sexual Harm Prevention Order.
 12. Both respondents will be included in the relevant list by the Independent Safeguarding Authority as a result of the operation of the provisions of the Safeguarding Vulnerable Groups Act 2006 (prescribed criteria and miscellaneous provisions) Regulations 2009. Both offenders are required to comply with the provisions of part two of the Sexual Offences Act 2003 namely notification to the police indefinitely.

Ancillary matters

13. Before turning to the substance of the reference we deal with two matters. First, the court record shows that sentences were passed in respect of count 3 on the indictment against both respondents. This is an error; the indictment had been amended to remove Barker's name from count three (the same criminality being reflected in offences to which he had pleaded guilty in the magistrates) and Count 3 was not proceeded with against YZ. There are no convictions and therefore no sentences. We direct that the court record and the respondents' records of convictions be amended accordingly.
14. The Victim Surcharge Order in respect of Barker did not receive close attention. Some of Barker's offending was pleaded as occurring between 1 January 2011 and 13 June 2017. The overwhelming likelihood is therefore that some of it took place before 1 October 2012. For the reasons set out in **R v Bailey [2014]** 1 Cr.App.R. (S) 59 it was not open to the court to impose a victim surcharge order in this case. Accordingly, we quash the order against Barker.
15. The case qualifies for review under section 36 of the Criminal Justice Act 1988 because of the offences that appear in counts 4 to 10 on the indictment and charges 7 and 8 in the committal for sentence. We give leave.

Facts

16. Barker was addicted to online pornography. He watched it obsessively for long periods at night and during the day. He began to watch more and more extreme material, seeking images of children and adolescents.
17. YZ, a Brazilian national, had lived in this country for some time. In 2012, aged 22, she was working in a lap dancing club. She met Barker who was a customer. Over the next two years they developed a sexual relationship. Barker gave generous

presents and money to YZ. She said she believed he cared for her and she was glad to have the money. She sent him texts with sexual content which he reciprocated. On occasion she photographed or filmed herself in sexual activity and sent the images to Barker. He sent money in return.

18. In 2014 Barker saw X in an image of YZ. She was then about two years old. He and YZ then agreed that X would be included in sexual activity with her mother, photographed and the photographs sent to Barker for his sexual gratification. Each respondent suggests the other first thought of this. X was used for sexual purposes, her mother took photographs and sent them to Barker on at least 8 occasions between 24 October 2014 and 1 May 2016.
19. Count 1 reflected occasions when YZ recorded the abuse of X which was reflected in other counts on the indictment and count 2 represented the occasions when she sent images to Barker. There were 15 level B images and 5 level B movies.
20. Count 4 reflected an occasion when X masturbated YZ. Count 5 to reflect occasions when X licked her mother's nipples and was made to touch her mother's vagina. Count 6 was an occasion when X kissed her mother's vagina. Count 7, the most serious offence, where X's fingers penetrated her mother's vagina. Count 8 YZ rubbed X's vagina. Count 9 X's head was between her mother's legs, next to her vagina. In Count 10 YZ spread X's legs apart and spread open her vagina.
21. Charges 7 and 8 on the committal charges involved Barker arranging for YZ to sexually abuse X.
22. Throughout this time Barker sent money to YZ, sometimes as payment for the images. In one exchange YZ asked Barker what she needed to do for him to settle her credit card bill and pay for X's nursery fees. She said, "I'm pretty much open to anything haha". He replied that she would either have to have sex with him at his house or a "really naughty video with [X] tomorrow during the day."
23. Counts 11 and 12, converting criminal property, reflect the fact that the second defendant spent the money she received from Barker. The total sum is over £60,000, not all of it was sent in response to the receipt of images. It was spent on items she would not otherwise have been able to afford including handbags and clothes, as well as household expenses. Some of it was paid into her mother's bank account because her boyfriend was becoming suspicious as to where money was coming from. It was an aggravating factor of the offences that YZ committed them for money. It was not necessary to add money laundering counts to the indictment.
24. Matters came to light on 13 June 2016 when the police executed a search warrant at Barker's home because they believed he was accessing indecent images of children online. At that stage Barker said he may have accessed indecent images online in the past. He was arrested and taken into custody while his computer and other devices were taken for examination. In interview he made no comment and gave a prepared statement which said that in the past he had been sent unsolicited indecent images of children which he had then deleted.
25. When his computer was examined the police found the indecent images of children, mostly adolescent boys but the search history on his iPad revealed visits to a website

called motherless.com with search terms “most underage lookin girls on motherless” and “preteens”. The online chatlog between the two respondents revealed their offending. YZ’s home was then searched, designer clothing and her computers were removed and examined.

26. When she was interviewed, YZ initially underplayed her involvement with Barker and said she may have sent photographs of herself and X naked in the shower. She said he gave her money now and again to help her buy clothes and pay the rent. Later she admitted her involvement in the sending of the texts and the sexual fantasies expressed there. From first to last she was adamant that she had not done it for sexual gratification, but for the money. She said it gave her and her daughter a better life. She had broken off contact with Barker when he had asked to meet X and YZ believed he was becoming more interested in her daughter than her.
27. Barker was interviewed again on 3 January 2018. He provided another prepared statement in which he said he had developed a severe addiction to online pornography in 2010. This led him to search the internet for indecent images of children. He downloaded the material on memory sticks and stored them after he made a decision in 2015 to stop viewing such material online. He had met YZ in 2012 and he had provided financial support to her.
28. Neither respondent had previous convictions. In the course of a lengthy sentencing hearing the judge heard detailed submissions on the appropriate sentence from all parties. He had the benefit of pre-sentence reports, a victim impact statement from the YZ’s father, a psychologist’s report on Barker, letters from his family, a psychologist’s report on YZ and a letter from YZ’s mother who wrote to the court speaking of the support that she had received over the years from her daughter. She explained that abhorrence of her daughter’s actions had caused her to break off all contact with her for some time, but she had re-established contact and recognised her daughter’s profound remorse. Barker’s two sons had written to the court, describing their shock and horror at the offences and explaining why they supported their father who had been a good and loving father. YZ had written to the judge expressing deep remorse and shame. She feared the loss of her daughter as a result of these offences and the risk of deportation.
29. Barker was assessed as at moderate risk of reoffending. YZ was assessed as at low risk of reoffending.
30. Barker said that it was a relief when the police came to his home. Since his arrest he had undergone an online course produced by the Lucy Faithful Foundation. He had undergone counselling, for which he had paid. He had some insight into his conduct and had demonstrated a desire to rid himself of his addiction to online illegal pornography.
31. Until he was arrested for these offences Barker, who was highly educated, had very well paid, high status employment. His marriage was not happy and he and his wife had lived separate lives. They had property in this country and in Japan, her home country. When these offences came to light she began divorce proceedings, having moved to Japan some time ago.

32. Having heard submissions the judge adjourned sentence over the weekend. On the following Monday he explained that he intended to pass a sentence on the most serious count (count 7) to reflect the totality of the offending and to mark the other offences with concurrent sentences. We shall return to his sentencing remarks later in this judgment.

The submissions on behalf of the Attorney General

33. We received written submissions which were refined in focussed and succinct oral submissions from Mr Jarvis to whom we are grateful. Having observed correctly that some judges would have passed consecutive sentences for the offence to which Barker had pleaded guilty in the magistrates' court, he took no issue with the judge's approach, sentencing for the totality of the offending through the sentence on count 7 and imposing concurrent sentences on all other counts and charges. He acknowledged that the judge had conducted a very careful sentencing exercise in which he appeared to take account of almost all relevant matters but, he submitted, the resulting sentence was well outside the range of permissible sentences. His central point was: if the starting point is 8 years for the offence at count 7, it cannot be right that the totality of the offending results only in an additional year's imprisonment.
34. On behalf of YZ Mr Kelly accepted that the sentence was lenient but, together with Ms Goodall, submitted that there was no flaw in the judge's approach which led him to sentences which are not outside the permissible range. Both pointed to the complex and nuanced approach that was required in a difficult exercise rather than what they described as the tick box approach advocated on behalf of the Attorney General.
35. All counsel and the judge agreed in the course of argument that count 7 was a category 2 case. Within the range of seriousness of offences involving penetration (and they are all serious) this was at the lowest level, but X was a very young child – between 2 and 4 (over a period of 18 months). We have read the victim impact statement from her father with whom she now lives full time with very little contact with her mother. X is very bewildered and is showing great distress at being separated from her mother, a situation for which her mother is wholly responsible. There was no psychological evidence on X and we assume that any specific effects of the abuse upon her are yet to emerge.
36. The judge considered the two respondents equally culpable. YZ's central culpability lay in her relationship with her daughter. Barker's in the multiplicity of offences over a relatively long period. Mr Jarvis, rightly, did not seek to persuade us otherwise. We agree with the judge's approach.
37. All counsel submitted, and the judge found that harm was at level A. We agree. Mr Jarvis took us through each of the culpability factors in argument and submitted that given the number of elements this was a case which could properly have gone into category 1A. He pointed to two culpability factors listed in the guideline to which he said the judge should have referred but did not: namely grooming and commercial exploitation.

38. In our judgment, as the judge found, YZ's culpability lay in the grave betrayal of trust. This very young child did what her mother asked without question. No grooming was necessary but in any event to add it as a culpability factor would be to double count.
39. That the photographs/films were taken and sent to Barker was a culpability factor – and was the purpose of the offences under Section 8. We reject the submission that there was an additional culpability factor namely commercial exploitation or motivation. Barker gave YZ money in exchange for photographs and films but there was no commercial exploitation as envisaged in the guideline namely the distribution of the material for money beyond the two people directly involved.
40. The judge referred in terms to abuse of trust, repeat offending, age of the child, the degree of planning, recording, two offenders acting together and offending for gain. He acknowledged that Barker had not committed any contact sexual offence against X and that YZ had not penetrated her daughter. He then stepped back and looking at the offending as a whole. On the facts here, this was a wise approach since it avoided the risk of double counting and an over emphasis on factors that did not feature to any great extent. The offences were not spontaneous but the planning was minimal. There were a number of joint offences, as we have described but we accept the submission that in this context the culpability factor “offender acts with another to commit the offence” – is directed at the situation where two or more people are involved in the sexual abuse of the victim leading to increased distress and harm. That was not the case here. Barker was not present.
41. We reject the submission that this could have been a Category 1A case. The Crown's submission at the sentencing hearing was correct, as was the judge. This was category 2A.
42. In the written reference the Attorney General pointed out that all counsel and the judge worked on the basis that the maximum sentence for the offence at count 7 was 14 years when, because penetration was involved, the maximum is life imprisonment. It was submitted in writing that this had led to the judge starting (and therefore ending) in the wrong place. We reject that submission – which Mr Jarvis did not seek to develop orally. The starting point in the guideline is 8 years whether the maximum sentence is 14 years or life imprisonment. This did not affect the sentence.
43. This was not a case where the judge started at 8 years and added a year. It is plain that having started at 8 years he moved down below 8 years to reflect that count 7 was at the lowest end of this type of offending and then moved upwards to reflect X's age, the culpability factors to which we have referred and the number of offences committed by each respondent. He then moved down to reflect the mitigating factors in the guideline: no previous convictions and remorse. The judge accepted that the deep remorse expressed by both respondents was genuine.
44. Given his ultimate sentence the judge's view as to the correct sentence before reduction for mitigation must have been in excess of 10 years' imprisonment, outside the range for the most serious offence of this type, as a result of the factors to which we have referred. Having reduced the sentence to reflect the mitigating factors in accordance with the guideline he concluded that the sentence after a trial would have

been 9 years. He then applied the reductions for the pleas of guilty as the law requires.

45. Mr Jarvis submits that YZ was not entitled to a full one third credit since she did not indicate plea at an early stage. He drew our attention to the forms completed in the Magistrates' Court which say no plea was indicated. Mr Kelly points to correspondence from his solicitors to the CPS at a very early stage saying there would be guilty pleas. This was never in doubt. It is clear that the judge accepted this. There is no basis for interfering with the reduction of one third.
46. Ms Goodall developed a short argument that the proper reduction for the guilty pleas in Barker's case was one third for all offences. We disagree. The judge's approach was correct. Barker was entitled to one third credit in respect of all the offences to which he had pleaded in the magistrates and to those to which he had immediately indicated he would plead guilty in the Crown Court. There was a gap in the evidence which was filled in respect of several charges shortly before the application to dismiss was listed. As to those charges, the appellant knew what he had done, he was able to plead guilty at any stage. An application to dismiss the remaining three charges was heard and refused. The appellant was entitled to have the matter argued but he cannot then have the benefit of the full credit for guilty plea. There is no error in a conclusion that the overall reduction should be 25%.
47. These were lenient sentences. The question is were they unduly lenient? In our judgment they were not. The fact that other judges may have reached a higher sentence before reduction for the pleas of guilty is not the issue. This experienced judge had spent several days considering the case, including dealing with the application to dismiss. He was in a very good position to determine culpability and we see no flaw in his approach to it. The procedure for referring cases under section 36 is to deal with cases where judges have fallen into gross error and an unduly lenient sentence is the result. Notwithstanding admirably focussed submissions on behalf of the Attorney General no error of principle has been identified. He omitted nothing that should have been included and plainly had the question of totality well in mind. These sentences were not outside the range of permissible sentences.
48. Accordingly, we do not interfere with the sentences.