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Case No: 201803412 A1, 201803615 A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Friday, 25 January 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

HIS HONOUR JUDGE BURBIDGE QC
(Sitting as a Judge of the CACD)

R E G I N A

v

MARINA SMYTHE
MICHAEL OSBOURNE

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2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr R Barraclough QC and Ms T Robinson appeared on behalf of the **Appellant SMYTHE**
Mr D Moore appeared on behalf of the **Appellant OSBOURNE**
Ms J Knight appeared on behalf of the **Crown**

J U D G M E N T

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LORD JUSTICE SIMON:

1. This is an appeal against sentences passed in the Crown Court at Maidstone by Her Honour Judge Williams. On 25 July 2018, the appellants, Marina Smythe and Michael Osbourne, were each convicted on counts charging an offence of causing or allowing serious physical harm to a child, contrary to section 5 of the Domestic Violence, Crime and Victims Act 2014. On the same day they were each sentenced by the judge to terms of 8 years' imprisonment. They appeal against those sentences with the limited leave of the single judge.
2. Shortly before 10.50 on the morning of 5 December 2016, Kent Police received a call from the local ambulance service informing them that a 3-week-old male baby, Bailey Smythe-Osbourne, was not breathing. The call to the ambulance service had come from one of the appellants, Marina Smythe. Medical staff and police officers attended the appellants' home in Tonbridge, and a critical care paramedic pronounced the baby dead at 11.15 am.
3. The body was subsequently examined by a consultant paediatrician at Pembury Hospital at 11.44 on the same day.

4. Following his birth on 16 November, Bailey had developed a slight cough and had been later prescribed drops to treat oral thrush. Subsequent health care visits noted that he had good weight gain. However, he sometimes had trouble feeding and this had been reported to a GP, who advised that this was due to a sore throat from a throat infection. In fact, it turned out that he had an upper respiratory tract infection which developed in bilateral bronchopneumonia and sepsis, from which he died.
5. The consultant paediatrician at Pembury Hospital, Dr Kumar, spoke to the appellants at the hospital before his examination. They told him that Bailey had not been waking up for his feeds but that a GP had reassured them about this.
6. A postmortem examination was conducted by a pathologist, Dr Nat Cary, on 8 December and his report noted that Bailey had died from pneumonia. However, Dr Cary made other and altogether more sinister discoveries. There was a fracture to the lower left leg near the ankle; a small bruise on the right heel; bruising at the base of the penis on the pubic bone suggesting an impact; bruising to the penis, suggesting a pinch injury; and bruising to the back of the fingers on the left hand across three knuckles, suggesting pinching or an impact. There were also areas of impact-type injuries to his head and a small bruise to the right cheek. In addition, there was a bruise to the left elbow and a small scratch to the bridge of the nose.
7. In the light of these findings, the police began a murder inquiry and the appellants were subsequently arrested. Marina Smythe answered questions in her interview. Michael Osbourne gave a prepared statement and answered some questions but with no

comment answers to other questions. Both appellants denied knowledge of how the injuries had been caused.

8. Marina Smythe was 21 at the date of sentence and of previous good character. Michael Osbourne was 22. He too was of previous good character.
9. The judge sentenced without a pre-sentence report. In passing sentence she noted the facts as we have outlined them. Bailey Smythe-Osbourne had died of pneumonia at 19 days old, and it had been a postmortem examination that had revealed the catalogue of horrifying injuries. These included a fractured leg and associated bruising around the Achilles tendon; bleeding on the top of his head on the fontanel; bruising to the side of his head; bruising to his penis and to the surrounding area; bruising to his face; and bruising to the knuckles of his left hand.
10. The judge said that they had both been convicted on compelling evidence of causing or allowing significant harm to their baby. The expert evidence had revealed that the injuries had been caused by the infliction of significant force. The experts had agreed that the fracture of Bailey's leg had been caused by the pulling, yanking or twisting of the leg. Either he had been picked up by his feet or he had been swung by his feet. The fracture had been so severe that it had traversed the whole of the bone. The head injuries had been caused by blunt force trauma, the penis injury by pinching, and the bruising to the baby's face and knuckles by gripping. Those injuries, in the judge's view, would have caused great pain and suffering and continuing discomfort. He would have been screaming and crying.

11. The judge reminded herself that the injuries did not contribute to Bailey's death. However, she was sure on the evidence she had heard that there had been more than one event during which the injuries had been inflicted. According to the pathologist, there could have been as many as four. The baby should have been loved, cared for and protected by his parents; instead of which, he had been injured and had been caused suffering. It had been cruelty of a high degree.

12. The judge could not be sure which of them had inflicted the injuries, although the evidence had pointed towards it being Osbourne. However, whoever had inflicted the injuries, both of them had to bear equal responsibility and blame for causing or having allowed the injuries to occur. She had seen both appellants give evidence and was sure that they had lied about what had happened from the start. Both of them had said that they did not wake up until 10.00 am on 5 December, but that could not have been true. Rigor mortis had already set in when the paramedics arrived at 10.45 am. The circumstances in which each of them had described finding Bailey was simply unbelievable. The judge was sure that the appellants had delayed calling for an ambulance as they feared the authorities would discover the injuries, and because each of them believed that they had caused his death.

13. The judge said she had taken into account the mitigation advanced on behalf of both of them. Neither had any previous convictions. During the trial each had blamed the other and in the judge's view neither had shown any remorse. She was sure that they had sought to deceive the authorities, and ultimately the court, by devising explanations about how some of the injuries had been caused.

14. Marina Smythe had decided to abandon Michael Osbourne and had recorded him on her mobile phone purporting to make admissions which could not possibly account for the injuries and were not the whole truth or any part of it.

15. The judge had been referred to the draft sentencing guidelines that were not in force, adding, "The draft sentencing guidelines inform the court". She reminded herself that the maximum sentence for the offence was one of 10 years' imprisonment. She stated that the offence would fall within category 2A: category 2 harm because the physical harm had been substantial; and category A, higher culpability, because the judge was sure that there had been multiple incidents of serious cruelty and some degree of gratuitous degradation by injuring Bailey's penis. There had also been the deliberate concealment and covering up of the offence, and the victim had been particularly vulnerable at 3 weeks old.

16. The draft guidelines for category 2A offending had a starting point of 7 years' imprisonment with a sentencing range of 5 to 9 years' imprisonment. She regarded this case as being at the top of the range and therefore the sentence of the court in respect of each was a term of 8 years' imprisonment.

17. For Marina Smythe, Mr Barraclough QC and Ms Robinson raise three broad points. First, they submit that the term of 8 years was manifestly excessive. The maximum sentence is a term of 10 years' imprisonment and this did not justify the sentence coming so close to the maximum. The judge had failed adequately to reflect the mitigating factors present: her youth, aged 19 at the date of the offence. She was described as a caring mother of her two children and someone who was reported to have engaged well with health visitors and

doctors in relation to her younger child, Bailey. She had taken him to her GP twice because of a medical condition, which, as it turned out, underlay the ultimate cause of his death. She was of previous good character and this would be her first sentence of imprisonment.

18. Reference was made to a number of cases which provide examples of the sentencing approach on the particular facts: *R v Ikram* [2008] 2 Cr App R (S) 648 and *R v Vestutu* [2010] 2 Cr App R (S) 682. These are cases where the conduct or omission caused or allowed a child to die where the maximum sentence is 14 years.

19. In our view, for that reason alone, they provided no great assistance, but in any event these types of cases are very much fact specific.

20. Secondly, Mr Barraclough submits that the judge was wrong to have applied draft guidelines that were not in force at the date of sentence.

21. The third point is that the judge was wrong not to distinguish between the culpability of the two parents. The single judge refused leave to appeal on this ground and in our view he was right to do so. This offence is designed to avoid the jury or the sentencing judge being drawn into a debate about who caused the serious physical harm to the child and who allowed it. The offence is "causing or allowing" and an offence is committed even where it remains uncertain who caused the visible harm, provided the jury are sure that a defendant either caused or allowed the harm to occur.

22. For Michael Osbourne, Mr Moore submitted that the judge's starting point of 7 years was

too high and that the sentence of 8 years was manifestly excessive. In any event, she failed properly to reflect the mitigation available to his client: he was 21 at the date of sentence and was a man of previous good character, and there was no evidence of a propensity to lose his temper. He submitted that the judge's starting point must have been above 8 years if these matters had properly been taken into account.

23. In our view, the judge was plainly in error in sentencing by reference to the child cruelty definitive guideline. The guideline came into effect on 1 January 2019 and applied to all offenders over 18 who were sentenced after that date regardless of the date of offence. They did not apply to those who were sentenced before that date. The judge's reference to the categorisation in the guidelines, albeit it she described them as draft guidelines, indicated error.

24. We should add that both prosecution and defence in their sentencing note invited the judge to have regard to the categorisation in the draft guidelines. The prosecution submitted that it was category 2A offending, as the judge found; and the defence that it was category 3A offending.

25. In the circumstances, it is unnecessary and perhaps undesirable to express a view as to whether this offending would have fallen into category 2A if sentenced after 1 January. We are certainly not to be taken as concluding that it would.

26. The sentences for these offences had to be determined by reference to their seriousness, and this involved considering the culpability in committing the offence and the harm that

the offence caused, was intended to cause or might foreseeably have caused, see section 143 of the Criminal Justice Act 2003.

27. Although the court could not adopt the 2019 guidelines, other than as a means of identifying harm and culpability factors, it might have had regard to the 2008 guidelines: Overarching Principles - Assaults on Children and Cruelty to a Child. Although these guidelines applied to offences contrary to section 1(1) of the Children and Young Persons Act 1933, the court might have had regard to these guidelines when considering offences under section 5 of the 2004 Act since the two offences have the same maximum sentence, 10 years imprisonment, other than cases of death.

28. The 2008 guidelines adopt an approach to sentence consonant with section 143 of the Criminal Justice Act 2003 and includes within each sentencing bracket "failure to protect" from the harm in question. However, as this court observed in *R v Challis* [2016] EWCA Crim 526 at paragraph 20, any assistance is limited because the three categories of seriousness in the 2008 guidelines do not apply easily to the facts of an offence under the 2004 Act.

29. It is clear that significant force was used and was allowed to be used; but it was not prolonged criminal conduct and it would not have had a permanent effect on the baby.

30. In our view, these crimes, serious as they were, did not justify sentences of 8 years when the maximum was 10 years in the circumstances we have described. The sentences were wrong in principle because they were imposed by reference to categorisation in guidelines that were not in force and they were also manifestly excessive.

31. The judge, having heard the trial, did not accept that there was in distinction to be drawn between them in terms of their culpability, neither did the single judge and nor do we.

32. Taking into account the seriousness of the offending, the good character and the relative youth of these appellants, we have concluded that the sentence should have been a term of 6 years in the case of each appellant.

33. Accordingly, we quash the sentences and substitute sentences of 6 years on count 1 in the case of Marina Smythe and 6 years on count 2 in the case of Michael Osbourne.