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[2022] EWCA Crim 1790

IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 202203255 A1

Royal Courts of Justice

Friday, 16 December 2022

Before:

LADY JUSTICE CARR  
MRS JUSTICE CUTTS  
HIS HONOUR JUDGE JEREMY RICHARDSON KC  
(RECORDER OF SHEFFIELD)

**REFERENCE BY THE ATTORNEY GENERAL UNDER  
Section 36 Of The Criminal Justice Act 1988**

REX  
V  
SA

**REPORTING RESTRICTIONS APPLY:  
Section 45 of The Youth Justice and Criminal Evidence Act 1999**

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5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
[CACD.ACO@opus2.digital](mailto:CACD.ACO@opus2.digital)

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MR B LLOYD appeared on behalf of the Solicitor General.

MS N CARTER appeared on behalf of the Offender.

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**J U D G M E N T**

## LADY JUSTICE CARR:

### Introduction

1. This is an application by His Majesty's Solicitor General for leave to refer a sentence imposed in the Crown Court at Woolwich which he regards as being unduly lenient. We give leave.
2. The Reference arises out of the physical abuse of a nine-year-old by his father in circumstances which we shall come to explain. It is not clear to us what precise consideration was given at the Crown Court to the necessity or otherwise of an order under sections 45 or 45A of the Youth Justice and Criminal Evidence Act 1999. At the outset of the hearing before us we made an order under section 45 granting anonymity to the boy and his siblings who gave evidence in the trial, to whom reference has been made in the course of this hearing and to which reference will be made in our judgment. The order will apply until the children's eighteenth birthdays.
3. In consequence, the boy victim will be described by us as E, and his siblings by other letters as appropriate. The welfare of the children demands that they be not named. They are of school age and the emotional harm likely to be caused to them by naming them in a case of this kind is plain and obvious. So nothing may be reported which may lead to the identification of any of the children. We specifically prohibit the naming of the area of London where this crime occurred, although the fact that the case was heard in the Crown Court at Woolwich may be reported. In consequence of this order, the name of the offender will also have to be anonymised.
4. We emphasise the importance of clarity in terms of considering and/or the making of any order under sections 45 or 45A that the outset of proceedings in the Crown Court, usually at the PTPH, and at the latest at the commencement of the trial. We do not seek to set out any principles as to when it is appropriate to make an order, but there is a statutory regime to be followed.
5. The offender is now 66 years old. On 10 June 2022, the sixth day of his trial before His Honour Judge Mann KC ("the Judge"), he pleaded guilty to cruelty to a person under 16 years, contrary to section 1(1) of the Children and Young Persons Act 1933. As we have indicated, the victim of the offence was his son, then aged nine.
6. On 12 October 2022 the offender was sentenced to a suspended sentence order, comprising a custodial term of 22 months, suspended for 12 months, with a two-month electronic curfew between the hours of 7.00 p.m. and 7.00 a.m. The offender was also ordered to pay £500 in compensation to E and costs in the sum of £250. A victim surcharge was applied.
7. On 22 January 2021 the offender had assaulted E by repeatedly striking him with metal rods and a belt. After the physical assault was over, the offender told E to stand in a corner in the living room with his arms raised above him in what is known as a "stress position". The incident took place at the family home and lasted for several hours. It was witnessed directly by one of E's siblings (Y); another sibling (Z) was upstairs at the time but heard E's cries of pain. When E's mother ("the mother") returned home, she took E to hospital and the matter was reported to the police.
8. Police subsequently conducted a video-recorded interview with E, Y, Z and the mother. The offender was charged with offences of child cruelty in respect of each child. The cross-examination of the children was pre-recorded, pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999.

9. As indicated, the offender pleaded guilty child cruelty in respect of E (count 2). The counts in relation to the other children were directed to lie on the file.
10. For the Solicitor General it is submitted that the Judge fell into error by concluding that the adjusted term fell within the range of sentences where the question of suspension became relevant and/or in deciding to suspend that sentence.

### The facts

11. The offender was born in Lagos, Nigeria, and moved to the United Kingdom in 1990. At the relevant time he was living in London with the mother, his stepdaughter (Z), aged 17, and his two biological children, E and Y. The mother also had two adult sons who did not live with them. On 22 January 2021 and during a period of national lockdown, E was at home with his sisters during the day. The mother had been informed by E's school that E had not been attending his online school classes for the last two days. This resulted in E being told that he would not be allowed to play computer games for some time. The mother then left the home to visit her eldest son.
12. The offender came home from work to find E using the computer. The mother telephoned him and told him about E's non-attendance at school. The offender then repeatedly struck E across the back using metal sticks or rods which he retrieved from a basket next to the television in the living room. He also used his belt repeatedly to strike E on the back, arms and shoulders. E cried very loudly. Y witnessed the assault. Z was upstairs at the time and heard his cries. When the physical assault had come to an end, the offender told E to hold a metal stick above his head and face the garden. E remained in this stress position for some two hours.
13. The mother came home on 24 January 2021 to find E still in pain. She saw the marks on his body. She confronted the offender who admitted what he had done at that stage but did not accept that his actions were wrong.
14. The mother took E to hospital where he was found to have multiple horizontal bruises across his back and arms, linear in appearance and consistent with the use of a metal stick-like implement. He also had bruising to his shoulders and his head, as well as cuts to his hands. The metal sticks that had been used by the offender were provided to the police subsequently.
15. The offender was arrested on 25 January 2021. He said at that stage that he felt very remorseful but, when interviewed, denied assaulting E or any of his children with a stick or belt and denied putting E in a stress position. Instead, he blamed his wife. He said that E and the siblings had fabricated these allegations, orchestrated and encouraged to do so by his wife. He said that his wife was upset with him over citizenship and the entry of her family into this country.
16. Having been charged, the offender was remanded on bail with conditions which included a qualifying (electronically-monitored) curfew. He pleaded not guilty throughout the pre-trial period, and the trial commenced on 10 June 2021 with cross-examination of the children under section 28 procedures. The case was then listed for further hearing between 6 and 10 June 2022. The recorded evidence of the children was played to the jury and the mother gave live evidence. After the prosecution had closed its case, the mother discovered text messages that the offender had sent to her in January 2021 in which he had warned her and E not to say anything about what had happened to E. The offender then offered a guilty plea to Count 2 on a full facts basis. On the sixth day of trial he was re-arraigned on Count 2, and pleaded guilty.

### The sentencing process

17. The case was adjourned for sentence and came before the Judge for sentence on 12 October 2022. The material or information before the Judge included the following.
18. In terms of antecedents, the offender had only one previous conviction for common assault, dating back to 1996, but we note that that conviction was for an assault in respect of his first wife. He received a community order with a requirement to carry out 80 hours unpaid work.
19. Further, there was a Pre-Sentence Report dated 27 July 2022 in which it was recorded that the offender maintained his innocence. He had only pleaded guilty, he said, to save his job. He denied assaulting E. He denied using a belt. He had only gently tapped E twice on the shoulder and the injuries had in fact been caused by the mother. He stated that his wife had instructed the children to manufacture false accounts against him. He demonstrated no empathy or concern for the welfare of his children, nor any remorse.
20. There was also a Victim Personal Statement prepared by the mother. In that statement she set out the impact of the offending and the court proceedings on her. She described the negative impact on her health and on her emotional state, her difficulties sleeping, the fact that she had been physically sick from stress and was crying a lot. She could not believe that the offender had made up a story about her. She referred to her past relationship with the offender, but also how her bond with her children had become stronger and that the children were now much happier with the offender not living with them.
21. The Judge sentenced the offender on a full facts basis, noting the fact that the suggestion of innocence made by the offender to the probation officer had not been maintained at the sentencing hearing. He said there would be no credit for the offender's guilty plea, that plea having been entered two thirds of the way through trial. As for impact on the victim, the Judge recorded that he had been informed that E did not wish to describe the impact on him because he was still too traumatised. The Judge stated:

"[...] There is nothing to say the extent to which, if at all, E had any sort of psychological damage, but just common sense that he must have been very upset about it and those sorts of feelings against one's parents can be very long-standing and can affect the rest of your life, and so you must bear responsible for that [...]"
22. The Judge placed culpability in Category A of the Sentencing Council Guideline on Child Cruelty. The offender had used a weapon to strike E multiple times and it was a prolonged incident that went on for hours, with another form of cruelty involving the requirement for E to stand in the stress position. Harm was placed as falling between categories 1 and 3.
23. The Judge went on to state this:

"This offending can be rightly regarded as one-off and out of character for you and unlikely to ever be repeated because the children are not with you now. So you have also your good character and you [...] have no access to your children. That may change in the future. I recognise that. I have to bear in mind that there is no suggestion that you are generally a danger to children. This offence occurred within the home circumstances and on the evidence is unlikely to be repeated. There was evidence during the trial that you were assaulting other children in your family and generally being abusive, but you are not charged/you have not been convicted of those, but I say that because you must recognise, that as you probably do now, that is not the way to behave within the context of your family or at all. I accept that this was not done because you are a bad person or that you were trying to be malicious but because you were

concerned about the welfare of your children, and I also accept that in all other respects E was looked after well, well-educated and very well brought up. I have to put all of that in the equation."

24. The Judge did not specifically refer to any aggravating factors when passing sentence, but did refer to mitigating factors, which he identified as the offender's age, his previous good character, the fact this was an isolated incident, that there was no evidence that E had suffered prolonged psychological damage and that the incident had been born out of concern for E's welfare.
25. The Judge concluded that the custody threshold was passed but that a custodial sentence was capable of suspension, particularly in light of the curfew under which the offender had been placed. He had, as we have indicated, been on bail with a qualifying curfew throughout the proceedings. Specifically in this regard, the Judge said this:

"I also have to take into account the amount of time you have spent on curfew because –qualifying curfew, because you have done the equivalent of two years. So if I were to sentence you today to two years' imprisonment, you would almost certainly walk straight out. I need to bear that in mind. I cannot sentence you twice. I cannot give you a double sentence just to make sure you go to prison. That would be quite wrong. I have to look at the sentence I would have passed.

So how do I approach this? Well, first of all, does this pass the custody threshold irrespective of all the other factors? Yes, of course it does. So I start with the conclusion that this passes the custody threshold. I am going to have to consider other matters, such as your age and previous good character, whether or not this offence is ever likely to be repeated and I have to consider the guidelines for dealing with these sorts of offences (pleas), and whether there is a possibility of rehabilitation.

Given the isolated nature of the offence, it seems to me that it would be wrong to conclude [that this] is not a sentence which is capable of being suspended, and I pause there because I add, and I add for the second time in case anyone was considering this-- reading about this sentence and why I have taken the decision I have. I also have to take into account the amount of time the defendant has spent on qualifying curfew and so because of that I-- I conclude that the most appropriate way to deal with you is as follows [...]"

26. The Judge went on to impose the suspended sentence order to which we have already referred.

#### The Solicitor General's submission

27. Mr Lloyd for the Solicitor General recognises that the Judge correctly determined that the offending fell within Category 2A of the relevant Guideline, but submits that a term significantly longer than 22 months' imprisonment was merited. The starting point for a Category 2 offence is 3 years' custody, with a range of 2 to 6 years' custody. The Judge did not specifically refer to any aggravating factors increasing the seriousness of the offence. Those factors merited, in Mr Lloyd's submission, a significant uplift from the starting point of 3 years.
28. So far as mitigating factors were concerned, the fact that this was an isolated incident born out of concern for the welfare of E was not properly to be treated as a positive mitigating factor. The Judge himself recognised that there was evidence during trial of assault or general

abusive behaviour involving other children in the family. So far as motivation was concerned, this was merely a question of an absence of a further aggravating feature, as opposed to positive mitigation. In the alternative, Mr Lloyd submits that too much weight was given to these factors by the Judge.

29. In short, it is said that the downward adjustment to 22 months, taking into account all aggravating and mitigating factors, was simply far too great. It did not reflect the overall seriousness of this offending.
30. For the offender, Miss Carter submits that the Judge, who was well placed to sentence the offender having observed him over the course of a six-day trial, followed a considered and balanced approach and that the final sentence that he imposed could not properly be described as unduly lenient. She submits that he was entitled to accept her submissions at the time to the effect that this offence could be distinguished from other culpability A offending. It was said that the offender did not have deliberate disregard for E's welfare but rather wanted to instil in him proper standards. His offending was not of a sadistic or cruel nature. E and his siblings were clearly otherwise well looked after and provided for. All of this, coupled with the offender's good character, justified the custodial term of 22 months.
31. It was then well within the judge's discretion, submits Miss Carter, to impose a suspended sentence, bearing in mind at this stage additionally the significant amount of time spent by the offender on curfew. If we were to conclude that the sentence below was unduly lenient, Miss Carter invites us to give anxious consideration to maintaining a suspended sentence but with more onerous conditions.

### Discussion

32. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence, to the preservation of public confidence in cases where a Judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type (see *Attorney General's Reference No. 132 of 2001 (R v Johnson)* [2002] EWCA Crim 1418; [2003] 1 Cr App R (S) 41 at [25]). We remind ourselves that the hurdle is a high one for appellate interference to be justified. The sentence in question must be not only lenient, but unduly so.
33. There is rightly no criticism made of the Judge's assessment of this offending as Category 2A offending, carrying a starting point of 3 years' custody with a range of 2 to 6 years.
34. There were, however, multiple aggravating factors which, in our judgment, appear to have been overlooked. First, and significantly, there was the presence of other children. This was a significant factor on the facts here, given that one eight-year-old sibling was actually in the room when the offending took place and another in a position to hear E's distress. This was to witness the punishment of one child, instilling fear in others of similar treatment so far as they were concerned.
35. Additionally, there was the failure to seek medical help, and also significantly, the fact that the offender wrongly sought to blame others. There was also his attempt to conceal his offending in the form of the text messages sent to the mother.
36. By way of mitigation there was the offender's limited previous offending history and the fact that this was an isolated incident, albeit that we accept Mr Lloyd's submission that in reality this was not a question of a positive mitigating factor but at best neutral. It is, beyond that,

difficult to see what significant, if any, further mitigation there was by reference to the offender's age or the lack of offending on other children or the offender's motivation.

37. In terms of lack of evidence of long-term psychological damage to E, as the Judge commented, as a matter of common sense, real trauma to E must have been caused. The level of harm was, in any event, addressed in the question of categorisation of harm, as opposed to being a question of mitigation.
38. On the face of his sentencing remarks, the Judge appears to have been concerned as to how to recognise the time spent by the offender on curfew. The Judge should not have been distracted by that factor, at least at the outset; it was not relevant to the question of determining the correct length of custodial sentence. It would be a question of credit under section 325 of the Sentencing Act 2020, in due course, subject to the question of suspension.
39. The starting point of three years for this Category 2A offending, thus, fell to be increased significantly to take account of the aggravating factors that we have identified. These factors merited an increase of up to at least three and a half years. With mitigation, that term could not be reduced, in our judgment, to a term of less than 3 years. The potency of mitigation available generally was, in our judgment, reduced materially by the offender's denial of guilt until so late in the day and, for example, his repeated denial of guilt to the author of the Pre-Sentence Report.
40. In our judgment, the offending warranted a custodial term of not less than three years. There was no proper basis for the Judge to have reached a custodial term outside the range for Category 2A offending. In such circumstances, suspension was not an option.
41. For all these reasons, and seen in this light, the term that the Judge imposed was not only lenient, but unduly so.

### Conclusion

42. For these reasons, we allow the Reference. The sentence of 22 months' imprisonment will be quashed and replaced by a sentence of three years' imprisonment. The offender will receive full credit for half the time that he has spent under curfew if that curfew, as we understand it did, did qualify under the provisions of section 325 of the Sentencing Act 2020. On the information before us, the relevant total period is 340 days. If this period is mistaken, the court will order an amendment of the record for the correct period to be recorded.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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*Tel: 020 7831 5627 Fax: 020 7831 7737*

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