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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 805



No. 202201129 A2

Royal Courts of Justice

Tuesday, 24 May 2022

Before:

LORD JUSTICE COULSON

MRS JUSTICE MCGOWAN

MR JUSTICE BOURNE

REGINA

V

BAI

**REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992 and
THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999**

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Ms. E. Leonard appeared on behalf of the Applicant.

Mr T. Stanford appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE COULSON:

Introductory matters

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those 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 to members of the public identifying that person as the victim of the offence. We shall refer to the victim in this case throughout this judgment as Z.
- 2 In addition, the provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 are engaged in this case, because the applicant, whom we shall call BAI throughout, is currently 16. He was 14 when he raped Z. Accordingly, no matter relating to BAI shall, whilst he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person concerned in these proceedings.
- 3 On 7 January 2022 in the Crown Court at Lincoln, before HHJ Knight ("the judge"), BAI, then aged 15, changed his plea to guilty to the offence of rape of a child under 13, contrary to 5(1) of the Sexual Offences Act 2003. On 1 April 2022, when BAI was aged 16, he was sentenced by the judge to 28 months' detention under section 250 of the Sentencing Act 2020. His application for permission to appeal against that sentence has been referred to the full court by the Registrar of Criminal Appeals. We grant permission to appeal and move on to consider the merits of the appeal itself.

The Circumstances of the Offence

- 4 It hardly needs to be said that this is a very sad case for a number of reasons, primarily because of the consequences that BAI's offence caused for his victim Z, his family and himself.
- 5 BAI was born on 8 February 2006. He grew up with his parents and four siblings. In late 2010, when he was about four and a half, his cousin Z, who had been born on 26 February 2020, came to live with BAI's family. BAI's mum and dad effectively became Z's mum and dad. Despite that, it does not appear that BAI ever thought of Z as a sister. It seems that Z was not always easy or comfortable in the home and was sometimes a source of tension. It appears that on more than one occasion BAI and Z played what Z called "the breathing or the not breathing game". This involved BAI putting a pillow over Z's face so that she could not breathe. The ramifications of that game appear on their face rather troubling, but it is not something that is referred to in the report of Dr James Lang, the clinical psychologist.
- 6 On 6 October 2020, when BAI was 14 and Z was 10, BAI wanted to play a computer game in his room. Z kept distracting him. They then played the breathing or not breathing game, but as the judge put it, "something very different happened" on this occasion. BAI took down Z's pyjama bottoms and put his penis in her vagina. In her video interview conducted the following day, Z described BAI rocking back and forth, and that it really hurt her. She said, "Ouch", and asked BAI to stop. He replied, "10 more seconds. 10 more seconds." She said, "No, it's rude". After BAI stopped, he tried to persuade Z not to tell anyone, saying that they would both get into trouble and that they would both be locked up. It appears that Z went to her room, trying to hold back her tears. BAI again sought to persuade her not to tell because otherwise they would both be locked up.

- 7 A little later Z approached BAI's parents to say she did not want to live there anymore. That

was not uncommon. However, she then went on to say that BAI had pulled her trousers down, and, "put his thing in me". BAI's parents confronted him. He said that he had not done anything, but was crying and distraught. He ran out of the back door wearing a t-shirt and shorts, but without any shoes. The police were called and attended. BAI subsequently returned and was arrested. Even at this early stage, Z was now concerned that she would be taken away from the house.

8 The police interviewed BAI about what had happened. He denied the offence. Although Z's DNA was subsequently found in his pants, he continued to deny rape. During Z's video interview the day after the rape, she explained the breathing or not breathing game, and how the previous day, out of nowhere, she felt something, her trousers got pulled down and BAI, "did something that he should not have done." She then described the rape. BAI was subsequently charged with rape.

9 At the PTPH in August 2021, he pleaded not guilty. On 7 January 2022, by which time BAI was 15, he was re-arraigned and pleaded guilty. Reports were ordered. The sentencing hearing took place on 1 April 2022, by which time BAI was 16.

The Reports

10 There were two relevant reports for the purposes of the sentencing exercise. There was a detailed Pre-Sentence Report prepared by Lincolnshire's Children's Services team ("the PSR"). The writer had interviewed BAI on a number of occasions. In dealing with the offence itself, the writer noted at paragraph 2.2 of the PSR that, on the day of the rape BAI thought Z was being annoying. BAI also said that Z had climbed on top of him, and described her as "coming on to him". BAI claimed that he continued to push Z off until Z pulled her pyjama bottoms down. At paragraph 2.5 of the PSR, the writer noted that:

"There is an element of him not taking complete responsibility for what happened as he feels that she was coming on from him, so in some way he may have perceived that she wanted sexual activity to take place."

11 In the same paragraph, there was a reference to the views of BAI's parents:

"I feel that to process what has happened they may have apportioned some of the blame on to the victim, citing that because she often displayed a difficult behaviour. This is then partly what led to the offence."

12 BAI was assessed as presenting a medium risk of serious harm to others. He was assessed as posing a low risk of reoffending. It was noted that he internalised his feelings and had experienced social isolation because of previous bullying. The PSR recommended a Youth Rehabilitation Order ("YRO") as the most appropriate disposal proportionate to the offence committed.

13 As we have said, there was also a psychological assessment report prepared by Dr James Lang. This noted at paragraph 4.4 that BAI, "expressed anger and resentment about the victim. He explained that her behaviour had been difficult for years within the family and he stated that, 'I resent her.' He elaborated about her, stating that, 'She tried to get us into trouble', implying that she made up stories about all his siblings that were not true".

14 At paragraph 5.7 of his report, Dr Lang noted that although Z was not a stranger to BAI and was, therefore, not an indiscriminate choice as victim:

"His actions may have been a function of his inter-personal anger. Indeed, he acknowledged that he got frustrated by her behaviour within the family and resentful of the impact she had on family relationships".

The Judge's Sentencing Remarks

- 15 The judge set out the facts. She then went on to address what BAI had told the writer of the PSR to the effect that Z had taken her own pyjama trousers down, and that, in addition, he had not mentioned to the writer of the PSR that he had told Z not to tell anyone about what had happened. As to those aspects of the PSR, the judge said this:

"Now, I have read what Z said. I have read what you said, and I have given you the opportunity to give evidence in front of me. You have chosen not to do that. I do not believe what you said in the Pre-Sentence Report. I accept what Z said happened. You do say, as well, to both psychologists and to Harriet [the writer of the PSR] that you resented Z and you had been finding her annoying for a while. I do accept that, and I know that you know this. It is no excuse for what you did, but I add all of that together with how things were in the family, how you thought about her, and it tells me that what you were doing was not about sex, really. It was about hurting or punishing Z in that moment, because you knew what you were doing was wrong at the time. It was a single incident. There was nothing running up to it suggesting you were experimenting with sex and using Z for that."

- 16 The judge then went on to deal with the delay prior to BAI pleading guilty. She said:

"It took 16 months, as I say, from that incident through to you pleading guilty. Over that period, Z had to leave, really, the only home she has known to live with her grandparents, at least people that she knew and would stay with regularly, but she lost that contact with your family and your parents who had effectively been her parents too.

I have read her victim impact statement. That tells me how this has affected Z. It is in her own words and so it is quite understated. She struggles with what you did. She cannot talk to anyone but her mum about it. I have got a very detailed statement from her social worker... That makes clear what had seemed to me was behind Z's statement, that Z suffered profoundly from what you did. She feels responsible for losing the only home she knew and the contact with the only close family she had."

- 17 The judge referred to the various relevant sentencing guidelines, in particular, the main Sexual Offences guideline, and the Overarching Principles for Sentencing Children and Young People, which include what is called an offence specific guideline relating to sentencing children and young people for sexual offences. In view of its importance to the present appeal, we shall call that "the primary guideline." The judge recognised at page 4E of the transcript that the critical point was whether BAI should be detained or given a non-custodial sentence. The judge referred to the stated aims of the primary guideline to prevent offending, and the welfare of BAI. She went on to address the seriousness of the offence, the harm that was caused and how responsible BAI was for it, the effect on Z, BAI's history and welfare, including the bullying that he had suffered in year seven, and other mitigating factors relating to BAI's background.

- 18 The judge's conclusions on the critical issue as to detention were as follows:

"Because you forced yourself on Z you hurt her, knowing you were hurting her, and I find, meaning to hurt her, and she lost her home as a result of what you did and how you behaved afterwards. A custodial sentence is justified here.

I have considered carefully those reports and everything about you and your family, but they are not enough to mean that a non-custodial sentence is appropriate here. So following the specific guideline on sentencing young sex offenders, I do think that custody is my only option here, so I do need to look at the guideline for adults. If you were an adult, an offence like this would be harm level 3, culpability B, which gives a starting point of eight years and a range of between 6 to 11. The Children and Young Persons guidelines suggest that for older young people I should choose between half and two thirds as a starting point, but you were 14, and so I should go below that. I quite agree. So to reflect the fact that you were just under 15 and you are immature, I reduce the starting point to three years. So that is less than half what it would have been for an adult."

- 19 The judge identified a number of aggravating factors, such as BAI telling Z not to tell anyone because they would both get into trouble, the fact that the rape happened in her own home and the fact that Z had to leave that home, because amongst other reasons, BAI's mother and father thought she was lying. The mitigating factors included the fact that BAI had not committed any other offences before or since, his family background and the work BAI had done to rehabilitate himself. The judge decided that the aggravating and mitigating factors broadly cancelled each other out, and so came back to her 3-year starting point. The judge gave BAI a 20% discount to reflect his guilty plea. Given the time that had elapsed between the original arraignment and the guilty plea, that can be regarded as a relatively generous discount. That reduced the period of detention to one of 28 months. That was the sentence imposed.

The Grounds of Appeal

- 20 The principal complaint is that the judge erred in concluding that custody was the only appropriate option. That argument is put in a number of different ways by Ms Leonard on behalf of BAI. We have slightly re-ordered those points so as to deal with them in what we hope is a logical way. The complaints, therefore, are these: (1) the judge did not give adequate weight to a number of mitigating factors available to BAI; (2) The judge made findings of fact which were not justified; (3) The judge failed to follow the relevant Sentencing Guidelines.
- 21 We consider each of those arguments in turn.

Ground 1: The Failure to Take into Account Various Mitigating Factors

- 22 It is said that the judge failed to take into account properly or at all a number of specific mitigating factors available to BAI. First, it is said that the judge failed to give adequate consideration to the immaturity of BAI at the time of the offence. The written grounds suggest that although the judge found that he was immature at 16, "that did not mean that he was immature as a 14-year-old." With great respect to Ms Leonard, that submission is a little confused. All the evidence relating to BAI's maturity had been prepared for the purposes of the sentencing hearing. It therefore related to BAI as a 16-year-old. The evidence strongly indicated that he was, indeed, immature. That was what the judge found. (see the transcript

at 4E.) If BAI was immature as a 16-year-old, then it would follow, absent some unusual evidence to the contrary, that he was immature as a 14-year-old as well. We very much doubt that Miss Leonard wished to suggest the contrary. It appears, therefore, that the judge made an allowance for BAI's immaturity. That is what she said.

23 Secondly, it is submitted that the judge did not give adequate consideration to the bullying which BAI had experienced in year seven, 2 or 3 years before the rape. We disagree. The judge expressly dealt with that event at 4F, 4H and 5C of the transcript of her sentencing remarks.

24 Thirdly, it is said that the judge did not give adequate consideration to the effect of BAI's isolation. Again, we consider that to be wrong as a matter of fact. The judge expressly referred to both reports which dealt with BAI's isolation, and expressly concluded in her sentencing remarks that BAI was "a bit isolated" (see 4F of the transcript.) Again, she took that factor into account, although she noted at 5C that by the time of the rape, BAI was "... at a new school with friends."

25 Fourthly, although it was not a point made orally, the written grounds complain that the judge failed to give adequate consideration to BAI's welfare and the likelihood of him being bullied in a custodial environment and concerns that he might self-harm. Again, we reject that submission on the facts. All those matters were expressly identified in the reports in passages to which the judge made express reference (see in particular pages 4H to 5A of the transcript.)

26 In her oral submissions Ms Leonard appeared to accept that the judge had, indeed, taken all those mitigating factors into account. Her complaint instead was that she had not accorded them sufficient weight. That is always a difficult submission for an advocate. The weight to be accorded to the different elements of the material relevant to any sentencing exercise is quintessentially a matter for the sentencing judge. It is not easy to see how the judge could be said to have erred in principle in passing this sentence in circumstances where she referred to all the mitigating factors relied on on behalf of BAI, and accorded them the weight which she considered appropriate.

27 Moreover, any question of weight immediately throws into relief those elements of the material before the judge which were less than helpful to BAI. Sentencing is not a one-way street. So for example, the potential consequences of detention upon a defendant who has pleaded guilty to a serious crime must be balanced against the risk of harm to the public generally if that defendant remains in the community, and the consequences of his offending for the victim. Here, BAI was assessed as posing a medium risk of serious harm to others. As to the consequences for Z, the judge made plain that they could not have been any more severe. She was clearly a troubled child who, through BAI's action, lost the only home she had ever known. The judge was duty bound to balance the weight to be accorded to the mitigating factors against both risk of harm and the consequences of the offending before reaching a conclusion on the crucial question of custody.

28 We therefore consider that the judge properly took into account all of the mitigating factors. The question of the weight to be attached to each was a matter for her. We, therefore, conclude there is nothing in ground 1 of the appeal.

Ground 2. Unjustified Findings of Fact

29 The second complaint made by Ms Leonard is that the judge made unjustified findings of fact, in particular, her conclusion that the rape had not been about sex but about hurting or punishing Z in that moment. Ms Leonard submits that there was no basis for such a finding.

30 We respectfully disagree with that submission. In the passages to which we have already referred, the PSR made plain BAI's anger and resentment of Z both generally and, in particular, on the day of the rape. More specifically, the consultant psychologist, Dr Lang, not only reiterated those feelings of anger and resentment, but suggested that the rape "may have been a function of his interpersonal anger." By contrast, there was no evidence to indicate that the rape had evolved out of adult experimentation with sex. In those circumstances, therefore, we consider that the judge was quite entitled to make that finding of fact.

31 The grounds of appeal also included a complaint that the judge erred in finding that BAI "repeatedly" warned Z not to say anything about what he had done. There is nothing in this point. According to Z, BAI warned her twice, immediately after the event, and then again shortly afterwards, when she went to her room. He, therefore, did it more than once. In her oral submissions Ms Leonard accepted that. There is, therefore, nothing in this second ground of appeal.

32 It is necessary to pause there and take stock. We have rejected Ms Leonard's two arguments based on the judge's factual findings and the weight which she said that the judge had failed to give to some of the mitigating factors. Since the detail of her argument that the judge failed to follow the relevant sentencing guidelines was based on those failures, it is difficult to see what remains in this appeal. However, we go on to deal with ground 3, which is concerned with the alleged failure on the part of the judge to follow the Sentencing Guidelines, because we consider that there is an important point to be made both about this appeal and more widely.

Ground 3. The Alleged Failure to Follow the Sentencing Guidelines

33 The first question is whether or not the judge failed to follow the applicable sentencing guidelines. If she followed them, then that is a complete answer to the third and final ground of appeal, and this appeal must fail. If, on the other hand, she failed to follow them, it may be necessary for this court to remake her sentencing exercise and to see what such a remaking produces.

a) Did the Judge follow the Sentencing Guidelines?

34 The judge clearly had the primary guideline in front of her when sentencing the appellant. For example, at 4E to 4F, and again at 5H to 6A of the transcript, she expressly considered both the mitigating factors in step 2 and the mitigating factors in step 3 of the primary guideline. She expressly said that BAI was immature, but had no mental illness or learning disability, and no trauma beyond the bullying suffered in year seven. Those are some of the most important factors expressly listed in step 3.

35 Moreover, on the key question as to whether the offence was so serious that only a custodial sentence was required, the judge concluded in the passage that we have already cited that BAI meant to hurt Z and that as a result she lost her home, and those were the principal reasons why she concluded that only a custodial sentence was appropriate. She went on to say at 5D to 5E of the transcript that, even when making every allowance for both the reports and what she knew about BAI and his family, those matters "are not enough to mean that a non-custodial sentence is appropriate here."

36 In our view, therefore, no criticism of principle can be made of the judge's decision. Whilst we quite accept that some judges might have come to a different conclusion, the judge in this case was entitled to conclude that this offence was so serious that only a custodial sentence

was justified, and that all the mitigating factors, even when taken together, were not enough to lead to a different result. Furthermore, we consider that the judge reached that view having generally followed the steps in the primary guideline, although we accept that she did not expressly refer to or necessarily engage fully with each step in the process.

37 Accordingly, since we found that the judge followed the primary guideline, at least in general terms, the third ground of appeal must fail. However, in the light of the importance of this case, both to BAI and to Z and their family, it is appropriate to assume that we may be wrong in that conclusion, and that the sentencing exercise ought to be remade by adhering more closely to the primary guideline, remaking the exercise by reference to it.

38 We make two observations at the outset. The first is that the primary guideline refers to all sexual offences, without differentiation between them. The rape of a child is one of the most serious sexual offences identified in the Sexual Offences Act 2003. That is why for an adult it has a maximum term of life imprisonment, and the adult sentencing guidelines recommend a range of starting points, depending on the facts, between 6 to 18 years' imprisonment. Of course, this case concerned the rape of a younger child by an older child, which makes a difference, but the question is whether it makes such a difference that an offence that carries with it a term of life imprisonment for an adult should, in principle, when perpetrated by a boy of 14, be met with a non-custodial term.

39 The second general observation comes from the first page of the primary guideline, which sets out what it describes as a "non-exhaustive list of factors that illustrate the type of background factors that may have played a part in leading a child or young person to commit an offence of this kind." The list includes references to neglect or abuse, exposure to pornography, involvement in gangs, association with child sexual exploitation, unstable living or educational arrangements, communication or learning disabilities, or mental health concerns, part of a peer group where harmful sexual norms go unchallenged, or a trigger event, such as the death of a close relative.

40 None of those factors applied here. BAI came from a stable and supportive home, and was never exposed to peer pressure of the kind described. Although he changed schools after the bullying in year seven, that was over two years before the rape of Z, and it was accepted that he had friends at his new school. There was no indication that the appellant had any mental health issues. Some of the illness in his family, to which reference was made at the hearing, post-dated the rape. Accordingly, this is not a case where the appellant's offending can directly be linked to his background. On the contrary, he does not fit into any obvious offending pattern.

41 Step one of the primary guideline requires the judge to take a view as to the seriousness of the offence. Any penetrative activity, it is said, may justify a custodial sentence. We are in no doubt, for the reasons that we have given, that the rape of Z was a very serious offence.

42 Step 2 considers aggravating and mitigating factors. In our view, there were four aggravating factors. First, we take the view that, although BAI and Z were both children, a difference of age between a 10-year-old girl and 14-year-old boy was a significant disparity. Secondly, Z was particularly vulnerable because she was in her own home. Thirdly, BAI twice told Z not to tell anyone. Fourthly, the events which occurred after the rape might also be regarded as aggravating factors. These include BAI's denial of the offence when his parents confronted him, leading them to think that Z was lying, and resulting in her having to leave what had been the only home she had ever known; his denial at the police station; his plea of not guilty when he was arraigned; and, following his change of plea, his attempts to pass at least some of the blame to Z by suggesting wrongly to the writer of the PSR that she had taken off her

bottoms and that she, his 10-year-old cousin had "come on to him".

- 43 However, in respect of the post-rape events, we have to bear in mind not only the age of BAI at the time of the rape but also his immaturity. It seems to us that at least some of those actions are explained by that immaturity. Accordingly, whilst we consider his post-rape conduct should be regarded as a fourth aggravating factor, it should not be overstated.
- 44 Against those four aggravating factors the only relevant mitigating factor at step 2 was BAI's good character. Pausing there, therefore, it might be said that the aggravating factors outweigh the mitigating factors. Step 3 is a consideration of BAI's personal mitigation. By reference to the checklist there, we note that BAI was not very young. He was 14 at the time of the rape, and 16 when sentenced. But we accept that he was immature. Although there were no mental health concerns or learning disabilities, BAI was something of a loner and therefore, to an extent isolated, as the judge identified. Significantly, as we have said, there is no element of unstable upbringing or family background.
- 45 Just pausing there, what does all that mean in terms of an appropriate sentence. The judge is required to consider the relevant sentencing guidelines for an adult, and then in a case where a custodial sentence is unavoidable, the court should consider applying a sentence of half to two thirds of the appropriate adult sentence for those aged 15 to 17, and a greater reduction for those under 15. Where there is the least harm and the lowest culpability, the relevant starting point for an adult in relation to the rape of a child under 13 is 8 years. For the reasons noted above, that was capable in the present case of potentially being increased to, say, 9 years, because of step 2, where the aggravating factors outweigh the mitigating factors. But moving to stage 3, the age of BAI, his immaturity and all his other personal mitigation, would bring the starting point tumbling down. The judge brought it down to 3 years, that is to say about a third of what the starting point would otherwise have been for an adult. That significant reduction was in accordance with the primary sentencing guideline. Ms Leonard at no time suggested that, if a custodial term was appropriate, 3 years was too high a starting point.
- 46 As to step 4, the judge gave credit of 20% to reflect the guilty plea. It has not been suggested that there was anything wrong with that reduction. That reduces the 3 year starting point to 28 months.
- 47 Accordingly, therefore, redoing the sentencing exercise with a closer adherence to the first four steps of the primary guideline, we arrive at the same figure as the judge.
- 48 In many ways, the critical step is step 5. The sentencing judge is there required to state the reasons for being satisfied that the offence is so serious that no other sanction would be appropriate, and why a YRO could not be justified. Although we consider that the judge addressed these issues in the passages from her sentencing remarks which we have already set out, her language was not quite in the definitive terms required by step 5, leaving her open to the potential criticism that she did not have full regard to the exercise required.
- 49 However, we consider that, in substance, the judge did follow step 5. It is there that the likelihood of reoffending and the risk of causing serious harm become relevant. As we have said, BAI was assessed as posing a low risk of reoffending but a medium risk of causing serious harm, and whilst a YRO was open to the judge in this case, that is because, in accordance with the primary guideline, it is available for all sexual offences committed by a child or young person, no matter the seriousness of the offence. Whether a YRO is in fact appropriate depends on the particular circumstances of the particular case.

50 As we have explained, the rape of any child, even by a child of four years older, is a very serious offence. It was found by the judge to have been an act of violence. It was borne out of anger and resentment against an innocent victim, for whom it has had catastrophic consequences, by an offender who poses a medium risk of harm to the public. Notwithstanding BAI's age, we consider that in all the circumstances the judge was entitled to reject the option of a YRO, even a YRO with intensive scrutiny. She was entitled to conclude that only custody was appropriate.

Conclusions

51 In one way, the arguments developed by Ms Leonard suggested that the single fact that BAI was an immature 14-year-old at the time of the offence meant that the appropriate disposal was some form of non-custodial order. But it can never be said that, in a case involving the rape of a child, the mere fact that a defendant was only 14 should automatically lead to a non-custodial sentence. As we have said, and repeat, it must always depend on the particular facts of the case. We have explained why, on the facts of this case, a custodial sentence was the only appropriate sentence.

52 We conclude that the judge made no error of law or principle, and the sentence she imposed was not manifestly excessive. We note that no complaint has ever been made about the calculation of the 28 months in any event.

53 We repeat what we said at the outset. This is a very sad case on all sides. We acknowledge the difficulties it created when the judge came to sentence BAI, but for the reasons that we have given, we consider that she dealt properly with those difficulties and arrived at an unimpeachable sentence.

54 BAI's appeal against that sentence must, therefore, be dismissed.

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