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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202300929/A5

[2023] EWCA Crim 1345



Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday, 31 October 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE HOLGATE
HER HONOUR JUDGE DE BERTODANO
(Sitting as a Judge of the CACD)

REX

V

A.J.

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MR J AKIN-OLUGBADE appeared on behalf of the Applicant

J U D G M E N T

1. MR JUSTICE HOLGATE: 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 their lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. We will refer to the victims as C1, C2, C3 and C4.
2. On 17 October 2022 in the Crown Court at Snaresbrook, before His Honour Judge Greene, the applicant was convicted of four counts of sexual activity with a child family member (C1), contrary to section 25 of the Sexual Offences Act 2003 (counts 1 to 4), four counts of sexual activity with a child family member (C2) (counts 5 to 8), two assaults by penetration of a child under 13 (C3), contrary to section 6 of the 2003 Act (counts 9 and 10), two sexual assaults of a child under 13 (C3), contrary to section 7 of the 2003 Act (counts 11 and 12) and two offences of sexual activity with a child (C4), contrary to section 9 of the 2003 Act (counts 18 and 19). He was acquitted of counts 14, 15 and 17. Counts 13 and 16 were replaced by counts 18 and 19.
3. On 20 February 2023 before the same judge, the applicant, then aged 48, was sentenced concurrently on counts 2 and 10 to extended determinate sentences of 14 years, comprising a custodial term of 12 years and an extended licence period of two years. In relation to the other counts, concurrent determinate sentences of imprisonment were passed as follows: six years on counts 1, 4, 6, 8, 9 and 12, four years on counts 3, 5, 7 and 11 and three years on counts 18 and 19.
4. The applicant renews his application for leave to appeal against sentence following refusal by the single judge. We are grateful to Mr Akin-Olugbade for appearing *pro bono* today in order to make submissions on the applicant's behalf.

5. The applicant married in 2003. The couple's first daughter, C1, was born in 2005 and their second, C2, in 2006. Between 2014 and 2021 the applicant committed a number of sexual offences against four female children, including C1 and C2.

Offences against C1

6. Between January 2014 and October 2019 the applicant committed sexual offences against C1 when she was aged between nine and 14. Both he and his wife used physical violence as a form of discipline and there was a period of six months when the children were placed in foster care. The applicant was excluded from the family home before eventually returning.
7. C1 said that the applicant used to visit and stay over from 2014 onwards. She shared a bunk bed with her younger sister with her on the bottom bunk and her sister on the top. The applicant would lie with C1 on the bed and touch her breasts and vagina. She would tell him that she needed to go to the bathroom in order to get away from him. She said this happen countless times.
8. Counts 1 and 2 dealt with the digital penetration of C1's vagina as a single incident and multiple-incident counts respectively. Counts 3 and 4 dealt with the touching of C1's breast as a single incident and multiple-incident counts respectively. The applicant fell to be sentenced for digital penetration of C1 on six occasions.

Offences against C2

9. Between March 2017 and October 2019 the applicant committed sexual offences against C2 when she was aged between 11 and 13. By 2017 the applicant was back living in the family home. Between 2017 and 2019 he would get into C2's bed, staying for up to an hour, and touch her vagina inside her pyjamas. These were non-penetrative offences. Count 5 related to a single incident and count 6 related to multiple incidents. Counts 7

and 8, respectively single incident and multiple-incident counts, concerned the touching of C2's breasts. The applicant was sentenced for six occasions overall.

Offences against C3

10. C3 was born in 2008. Her father was a long-time friend of the applicant who would go to the family home to perform odd jobs and to pray. The applicant assaulted C3 whilst she was in the house between December 2016 and December 2020 when she was aged between eight and 11. He digitally penetrated her vagina (a single incident in count 9 and multiple incidents in count 10). He sexually assaulted C3 by touching her breasts (a single incident in count 11 and multiple incidents in count 12). The assaults took place on at least six occasions.

Offences against C4

11. C4 was the older sister of C3 and was born in 2006. She described one incident between 2017 and 2012 when she was aged between 11 and 15. The applicant attempted to penetrate her vagina but she was able to move and leave the room. He was convicted instead of touching her vagina and breasts (single incident counts 18 and 19). Her younger sister was present at the time.

12. We have read the victim impact statements from C3, C4 and their mother. They describe the serious harm they have suffered because of the applicant's offending.

13. The applicant had two convictions for five offences between 2005 and 2009. He had no relevant previous convictions and no prior experience of custody. The author of the pre-sentence report assessed the applicant as posing a high risk of committing a further contact sexual offence. The applicant's commission of these offences demonstrated his capacity to cause serious harm to children. The offending took place over many years and the applicant exploited his position of trust to target four different vulnerable

children. The risk he posed to the victims and to all female children aged eight to 16 with whom he has unsupervised access is high. The risk to other children is high given the potential to form new trust-based relationships in the future. The applicant could be assessed by the court as being dangerous within the meaning of the 2003 Act.

14. We have noted the two psychiatric reports on the applicant but the proposed grounds of appeal do not rely upon this material.
15. In his sentencing remarks the judge placed counts 1, 2, 5 and 6 in Category 1A for section 25 offences because of the digital penetration, the disparity in age and the particular vulnerability of the victims. He placed the offences in counts 3, 4, 7 and 8 in Category 2A.
16. The judge treated the digital penetration offences under section 6 against C3 as involving culpability A because there was abuse of trust. He assessed the harm as Category 3 because the offences in this instance were relatively short-lived and the victim was not vulnerable by reason of "extreme youth". This resulted in the same level of sentence on count 9 as for count 1. The judge treated the section 7 offences against C3 as falling within Category 2A. The judge concluded that the single incident section 9 offences against C4 fell within Category 2A.
17. The judge explained why the applicant should be treated as dangerous, relying upon the pre-sentence and psychiatric reports and said that it was necessary in his judgment to pass an extended determinate sentence. He passed the 14-year sentence and the determinate sentences to which we have referred.
18. A transcript of the judge's sentencing remarks is not available because there was a technical problem at the time. But counsel have helpfully agreed a note of the judge's remarks and the applicant is content for his application to be dealt with on this basis.

19. In summary, counsel submits that the sentence was manifestly excessive and wrong in principle for the following reasons:

1. The judge did not make an appropriate reduction for the applicant's lack of relevant previous convictions.
2. The judge double-counted or took into account unjustified aggravating features. This complaint relates to three aspects. First, the individual incidents were "sustained by cumulative occurrence over a long period of time"; secondly, the basis upon which the applicant was said to have abused a position of trust was also relied upon by the judge as a feature rendering the victims vulnerable; and thirdly, the judge's relied upon vulnerability because the applicant was the father of C1 and C2, as well as disparity of age.
3. The judge made a finding of dangerousness where one was not merited.

20. When refusing leave to appeal, the single judge said this:

"I have considered the papers in your case and your grounds of appeal. The sentencing Judge, who, as the trial Judge, was best placed to assess both your culpability and the level of harm caused by your offending, meticulously considered and applied the relevant guidelines in this difficult sentencing exercise. He correctly identified the many aggravating features, as well as being careful not to double count for the features that were intrinsic to the offences themselves.

As to the lack of relevant previous convictions as the guidelines and case law make clear, these may be of minimal significance in cases of this type and were insignificant in your case, especially given the scale of your offending. He was entitled to increase the terms for counts 2 and 10 as he did under the totality principle and make all the sentences concurrent. Although harsh, the sentence was not arguably manifestly excessive.

The finding of dangerousness was open to the Judge on the basis of the evidence and the pre-sentence report which specifically addressed the question. The extended sentence was therefore

available to the Judge, but he ordered only half the extension term available."

21. In addition, counsel has provided the court this morning with a speaking note which has formed the basis for his oral submissions.
22. First, he submitted that the court below was wrong to conflate the lack of prior relevant convictions with good character or exemplary conduct and he referred to the way in which both matters are treated separately in the definitive guideline. In our judgment, there is no merit in this complaint. This was a case where the absence of previous relevant convictions could not have been a significant mitigating factor when sentencing the applicant for the serious series of offences involved.
23. The second part of the submissions criticises the judge for the way in which he dealt with what are described as "aggravating features" giving rise to double-counting. In fact the criticisms relate to factors which the judge addressed when deciding how to categorise the various offences on the indictment. We will primarily to some of the arguments by way of example. First, it is said that it was wrong for the judge to find that there had been specific targeting of a particularly vulnerable child and also abuse of trust, whether the applicant was to be viewed as the father of C1 and C2 or as a trusted adult in relation to C3 and C4.
24. But it is plain that the judge did not rely upon abuse of trust for the section 25 offences in relation to C1 and C2. In our judgment he was entitled to treat the offending as involving the targeting of a particularly vulnerable child. But in any event, under the sentencing guidelines there was also a significant disparity of age, so that this was a case which qualified as culpability A in any event. With respect to counsel, this is an example of how several of the submissions which have been advanced to the court do not accurately reflect what was actually said by the judge. Abuse of trust was only mentioned

specifically by him in relation to counts 11 and 12 and that was appropriate.

25. Secondly, the judge did not find that any of the children were particularly vulnerable because of extreme youth. That is a harm factor which is capable of being relevant to offences under section 6 and section 7 but the judge expressly made it clear that he was not proceeding on that basis.
26. Next, it is suggested in relation to C1 and C2, the father of whom was the applicant, that the judge should not have relied upon disparity of age and breach of trust also because they are intrinsic feature of the offence itself. But as we have observed already, the judge did not rely upon breach of trust in relation to counts 1 to 8. It is plain from the sentencing guideline for section 25 offences that categorisation does not depend upon whether somebody is, for example, a father. The offence is capable of being committed, for example by a relatively young sibling. Therefore, the judge was perfectly entitled to treat these offences as falling within Category A because of the disparity of age between the applicant and these very young children.
27. Next, we do not see any merit in the suggestion that the judge double-counted in relation to multiple incidents.
28. So far as the detailed submissions which have been made to us this morning on the subject of the finding of dangerousness, it must be borne in mind that this was essentially a matter of judgment for the trial judge who heard the evidence in the case. We cannot detect any error of principle in his sentencing remarks and we see no arguable basis for saying that he erred in any material way in the judgment at which he arrived. In saying that we also take into account the criticisms which have been levelled at the pre-sentence report.
29. Despite the assistance that we have received from counsel this morning in his sustained

oral submissions, we agree with the single judge. However we should say that there is one respect in which we would depart from her comments. In our judgment this sentence was neither harsh nor severe for repeat offending as serious as this against several young children over a substantial period of time. The applicant could have had no legitimate complaint if the overall sentence had been higher.

30. This renewed application is entirely without merit and is refused for the reasons we have given.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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