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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300427/A2
[2023] EWCA Crim 595



Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 23 March 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(LORD JUSTICE HOLROYDE)

MR JUSTICE KERR

HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

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

REX

v

NICOLE LINES

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR P JARVIS appeared on behalf of the Attorney General.

MR J BURKE appeared on behalf of the Offender.

J U D G M E N T

(Approved)

1. THE VICE-PRESIDENT: This case concerns sexual offences against a teenage boy (to whom we shall refer as "C"). He is entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during his lifetime no matter may be included in any publication if it is likely to lead members of the public to identify him as the victim of these offences.
2. This offender, Nicole Lines, pleaded guilty at a plea and trial preparation hearing to two offences of sexual activity with a child, contrary to section 9 of the Sexual Offences Act 2003; three offences of possession of indecent photographs of a child, contrary to section 160(1) of the Criminal Justice Act 1988; and offences of supplying and possessing a controlled drug of Class B, namely cannabis. On 13 January 2023, in the Crown Court at Canterbury, she was sentenced by HHJ Lowe to a total of 2 years' imprisonment suspended for 2 years with a 60-day rehabilitation activity requirement. The judge made ancillary orders to which we need not refer further. His Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
3. The offender lived near to C. Between October 2020 and April 2021 they had a sexual relationship. At the start of the indictment period the offender was aged 25 and a single mother of three children. C was aged fifteen-and-a-half. He has been diagnosed with ASD and ADHD, has suffered from anxiety and depression and was a pupil at a school for children with special educational needs. The indictment period ended at his 16th birthday.
4. The offender accepted that although she had initially thought C was 16 or 17, she quickly learned that he was only 15, but nonetheless continued the relationship knowing that it

was wrong. The two counts of sexual activity with a child reflected their frequent sexual intercourse and oral sex. C often stayed overnight in the offender's home. His mother was aware of this but did not object. Using the offender's phone, C recorded himself receiving oral sex from the offender. When the offender found that recording she retained it. She also took and retained photographs of she and C kissing, and of C naked.

5. Before beginning their relationship, both the offender and C were cannabis smokers. The offender gave cannabis to C, on occasions asking him to contribute to the cost of it. She also gave him alcohol.
6. It was a loving relationship on both sides. However, C was sometimes physically abusive to the offender. He threatened to kill himself if she ended the relationship.
7. The offender was arrested in March 2021. She was found in possession of a small amount of cannabis for her personal use. Interviewed under caution, she admitted the activity which we have summarised.
8. Ten months passed. The offender had had no further contact with C after July 2021. In January 2022 she was interviewed for a second time. She told the police that she had wanted to end the relationship but had felt powerless to do so because she was scared of C.
9. A further 8 months passed before the offender was requisitioned to attend the Magistrates' Court in October 2022. Her case was sent to the Crown Court where she pleaded guilty, as we have indicated. She put forward a basis of plea, on which she was sentenced.
10. At the age of 14 the offender had received warnings for common assault and battery. Her only previous conviction was for travelling on the railway without paying her fare when she was 18.

11. At the sentencing hearing, the judge was assisted by a pre-sentence report. There was a victim personal statement by C, in which he acknowledged that he had initially been very happy to engage in sexual activity with the offender and to smoke cannabis and drink alcohol with her, but said that after the relationship ended he had come to feel that he had been exploited. He said his mental health had been affected by the quantity of cannabis to which he had been exposed, and said that the relationship had ruined his life.
12. The offender had the care of her 10-year-old daughter. They had been separated for a time, when the daughter was taken into care following the offender's arrest, but had then been reunited. They had subsequently been rehoused in a different area since her arrest, and were happy there. The offender's 6-year-old twin sons were at the time living with their father, but the offender was seeing them regularly.
13. The judge considered the Sentencing Council's relevant definitive guideline for offences of sexual activity with a child contrary to section 9 of the 2003 Act. The offences fell into category 1A, with a starting point of 5 years' custody and a range from 4 to 10 years. The judge treated the other offences as aggravating features of the section 9 offences.
14. In his perceptive sentencing remarks the judge said, referring initially to C:

"He blames you and rightly so because you were an adult ... but as I have observed in the course of argument, in the relationships between you and [C] and his mother it is easy after the event for everybody to blame everybody else 100% [but] in reality it was a complex set of relationships, in which I suspect everybody had their vulnerabilities and not everybody behaved or everybody did not behave as they should. But there is no doubt that he is the victim, he was a child and you were an adult and that is why you are in the dock."

15. The judge went on to say that a number of category A culpability features were present

but expressed the view that each of them was "relatively weak" in this particular case. Because they were present, the judge indicated that it would be wrong to categorise the case as one of culpability B, because that would suggest that none of the factors was present at all. He continued, however:

"An A1 case has a starting point of five years imprisonment with a range of four to 10, you would fall at the bottom end of that in my view."

16. We pause to note that, if the judge had not found any of the category A culpability features present and had put the case into category 1B, the starting point would have been 1 year's custody with a range from a high-level community order to 2 years' custody.
17. The judge then identified a number of "very significant matters of mitigation". First, the offender herself was vulnerable. She had been put into care by her mother when she was 14, had later become a young single mother, had been a victim of violence at the hands of men and had her own mental health and substance abuse difficulties. We note that she had also undergone major surgery in respect of a pulmonary disorder about a year before the offending began, and we understand that during the period covered by the indictment, or at any rate for some of that period, the offender was in weekly contact with a mental health team. Secondly, the judge went on to observe that C had been in the second half of his 16th year when the offences began: they would not have been offences if they had started a little later. Although there was a disparity of the age, he said, it was not a case of a middle-aged offender grooming a 13-year-old. Thirdly, the offender was almost of good character and had three children dependent on her as their mother.
18. The judge referred to section 59 of the Sentencing Code and found that this was "one of

those very rare cases" where he was satisfied that it would be contrary to the interests of justice to follow the guideline. He continued:

"These are serious offences which on their face have a starting point of four years' imprisonment but I am amply satisfied that in all the circumstances I have described and taking into account particularly your own vulnerability and the needs of your innocent children, and what it says in the pre-sentence report about the likely devastating effects of a custodial sentence upon you, that a suspended sentence is appropriate in this case, and I do so expressly departing from the guideline for the reasons which I have given. The sentence will therefore be a suspended sentence order, two years' imprisonment suspended for two years. It will be concurrent on all counts."

19. The judge then imposed the rehabilitation activity requirement which he said involved a high number of activity days to enable the offender to take advantage of particular services, with a view to helping her with her offending and her substance and alcohol misuse.

20. On behalf of the Solicitor General, Mr Jarvis submits that the sentence was unduly lenient. He points out that the guideline starting point is 5 years' custody and submits that there should have been upward adjustments to reflect the presence of multiple culpability A features, the duration of the offending and the aggravating feature of the provision of drugs and alcohol to a child.

21. In relation to the first of those matters, Mr Jarvis draws attention to wording which appears in the guideline at step two:

"A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below."

Relying on the absence of any comparable words as to a ground for adjustment downwards, Mr Jarvis submits that it was not open to the judge simply to reduce the starting point in the way he apparently did before considering aggravating and mitigating factors. In that respect and others, Mr Jarvis submits, the judge failed properly to follow the process required by the guideline and thereby led himself to a position where he fell into overall error.

22. Mr Jarvis acknowledges the presence of mitigating factors and the familiar principles stated in R v Petherick [2012] EWCA Crim 2214; [2013] 1 WLR 1102 but submits that the significance of the offender's role as sole carer for her daughter became less the further the case was from the cusp of custody. Balancing all relevant factors, Mr Jarvis submits an appropriate total sentence of imprisonment, after trial, would have been about 5 years or more, with the result that suspension would not have been possible even after giving credit for the guilty pleas. He submits that the judge was wrong to attach weight to the age and willing participation of C, because the law exists to protect children against their own inappropriate choices.
23. Mr Burke, representing the offender in this court as he did below, submits that the judge was entitled, and correct, to conclude that it would have been contrary to the interests of justice to follow the guideline in all the circumstances of this case. He submits that the judge carefully considered all relevant matters in a case which in many respects differs from the majority of section 9 offending which comes before the court, and he submits that the judge reached a just and fair sentence which was not unduly lenient. He submits that the total term of 2 years' imprisonment was proportionate to the offender's culpability and the level of harm, and that the interests of her children resolved any doubt there may have been in favour of suspension.

24. We are grateful to both counsel. We have summarised their arguments very briefly, but we have reflected on all their written and oral submissions.
25. The sexual offences plainly involved category 1 harm under the guideline because of the penetrative activity. The judge was entitled to find that a number of culpability A features were present. However, as he rightly said, they were relatively weak examples of their kind. We doubt that there can have been much grooming behaviour used against C: he and the offender very quickly embarked on their sexual activity in which he was a willing participant. The provision of alcohol and drugs, both of which C already used to some extent, was certainly an aggravating feature, but it does not appear to have been used to any significant degree to facilitate the offending. Although sexual images were recorded and retained, it was C himself who took the only one which was in category A, and the photographs which the offender took were in the course of a loving relationship. There was a significant disparity in age but, as the judge said, it was not as marked as the disparity in many other cases of section 9 offending.
26. In those circumstances, we reject the submission that the judge was required to make an upward adjustment of the guideline starting point to reflect the multiplicity of culpability A factors. We also reject the submission that a judge cannot, in a proper case, adjust the guideline starting point downwards before consideration of the aggravating and mitigating features. We do not regard the words which we have quoted from the beginning of step two of the guideline as amounting to a prohibition on a judge adjusting downwards in an appropriate case; particularly so, we would add, where there is such a stark difference in the guideline starting point between a case falling into category B culpability and a case falling into category A.
27. The judge was also justified in giving the weight he did to the substantial mitigation

which was available to the offender, and to the interests of her children. To those matters which the judge mentioned we would add a further point. It is a feature of the case that the offender admitted what she had done in March 2021, but was not brought before a court until 18 months later. During that period, she had been reunited with her daughter and had settled into a new home with her. The effect on her daughter of her now being sent to prison would therefore be even more severe than it would have been if it had been possible for the proceedings to progress more quickly.

28. Sexual offending of this kind is, of course, always serious. Mr Jarvis is right to emphasise the principle that a child who encourages sexual relationships with an adult needs more protection, not less. But the judge was plainly alive to the seriousness, and identified the case at a very early stage of the sentencing hearing as being a difficult one. We commend the clarity with which he explained his reasons for concluding that it would be contrary to the interests of justice to follow the guideline in the circumstances of this unusual case. We have no doubt that his conclusion was one which was properly open to him, for the reasons he gave. We do not accept the submission that he was required to impose a much longer, and immediate, term of imprisonment despite the features of the case to which he rightly referred.

29. For those reasons, we refuse leave to refer.

30. The effect of our decision, from the offender's point of view, is that she remains subject, as before, to the suspended sentences and rehabilitation activity requirement imposed by the judge. We are pleased to see that a helpful updating report prepared for this Court shows signs that she is able and willing to take advantage of the opportunity given to her by the judge's decision. We hope that she will continue to do so, and remind her of the very clear warning given by the judge as to the likely consequences of any failure to

comply with the requirements of the sentence.

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

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