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IN THE COURT OF APPEAL
CRIMINAL DIVISION



No. 202104036 B2
202200420 B2

NCN: [2022] EWCA Crim 1582
Royal Courts of Justice

Friday, 11 November 2022

Before:

LADY JUSTICE WHIPPLE
MR JUSTICE JAY
MR JUSTICE HENSHAW

REX
V
FREDDIE ELLIOT MILLIS

**REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992**

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MS S FORSHAW KC appeared on behalf of the Applicant.

MS Z DICKINSON appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE WHIPPLE:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this matter. 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 members of the public to identify that person as the victim of that offence.

Introduction

- 2 On 13 December 2021, following a trial at Guildford Crown Court before Her Honour Judge Lees, the applicant was convicted of one count of rape of a child under 13, two counts of causing or inciting a child under 13 to engage in sexual activity, one count of sexual assault on a child under 13, and one count of assaulting a child under 13 by penetration. He was sentenced by the same judge on 31 January 2022 to an extended sentence of 18 years, comprising a custodial period of 11 years and an extended licence period of 7 years on the lead count of rape of a child under 13, which was Count 1. Concurrent sentences were imposed for the other counts. He now renews his application for leave to appeal against conviction. He applies for leave to appeal against sentence following referral to the full court by the single judge.

Facts

- 3 The facts in brief are as follows. The applicant was friends with the complainant's family and worked for them as a teenager. The prosecution case was that between 2008 and 2009, when the applicant was between 16 and 17 years old and the complainant between 5 and 6 years old, the applicant sexually assaulted the complainant on three occasions. The first relates to Count 1, rape of a child under 13. The applicant invited the complainant to sit on his lap while he was parked on a parked digger on farmland. She sat down and he produced his penis from his trousers. He then told her to put his penis in her mouth before pushing her head down and forcing his penis into her mouth. He then told her she must keep this all a secret. Counts 2 and 3 of causing or inciting a child under 13 to engage in sexual activity

and sexual assault of a child related to events whilst watching television with the complainant and her young brother. The applicant told the complainant to sit on his lap. He then stroked her thighs and vagina under her clothing before telling her to play with his penis while he masturbated. Counts 4 and 5, assault of a child under 13 by penetration and causing or inciting a child under 13 to engage in sexual activity. The applicant approached the complainant while she was watching television. She moved away but he sat beside her and inserted his fingers into her vagina before undoing his trousers and telling her to masturbate his penis.

4 The applicant stopped working on the farm after the incidents occurred. However, in 2018, when the complainant was 14, he sent her messages on social media and left a sexual drawing in her room. She reported the incidents to the police shortly after.

5 To prove the case the prosecution relied on, first, evidence from the complainant. She provided two video recorded interviews which were admitted as her evidence-in-chief; evidence from the applicant's mobile phone. Following his arrest, the applicant's mobile phone was interrogated and it was found that he had conducted internet searches that suggested an interest in underage girls. This matter will be discussed below. Third, evidence from the complainant's mother and friends. The complainant reported sexual assaults to them prior to reporting the matter to the police.

6 The defence case was that the sexual assaults did not happen. The applicant gave evidence. He stated that he considered himself part of the complainant's family and would play with the complainant. However, he stated he never sexually assaulted her. The issue for the jury was whether the applicant sexually assaulted the complainant.

Ruling on the applicant's mobile phone searches

7 Following the applicant's arrest, his digital devices were seized and interrogated. Their browser history contained web titles that suggested an interest in underage girls, including

"new pictures of young nudists", "nude petite teenies", "young tiny vaginas", and "our forbidden love sweet 15." He had also conducted internet searches for similar topics, including "young forbidden pussy", "young nude girl pussy", and "young fuck". He had also searched for "how to clear history on phone", and "what do child molesters get in jail", and bookmarked web pages that suggested a sexual interest in underage girls and in girls who resembled the complainant.

8 Counsel for the prosecution applied to admit this evidence as bad character evidence pursuant to section 101(1)(d) of the Criminal Justice Act 2003. The Crown's case was that it demonstrated sexual interest in children, particularly young girls. Some of the searches were conducted at the same time that he had sought to reconnect with the complainant. The evidence also suggested that he was aware that the material was illegal and he was interested in concealing incriminating evidence. Counsel for the defence opposed the application, submitting that the material related to acts that had occurred over ten years after the alleged offending which was not relevant to an important matter in issue. His case was that he did not go so far as to say that he has no interest in children, and this material was not capable of suggesting an interest in prepubescent girls, as the complainant was at the time of the allegations. Moreover, the material would simply bolster a weak case. It had not led to further charges and the admission of the evidence would necessitate the instruction of experts, which would lead to unnecessary satellite issues. Finally, it was said that the admission of the material would significantly prejudice the applicant.

9 The judge ruled that this material was admissible pursuant to section 101(1)(d). It was capable of demonstrating a sexual interest in young children and girls, that being a matter in issue. Moreover, the material contained references that suggested a sexual interest in this complainant, as she matched certain descriptions in the search terms. Admitting the evidence did not bolster a weak case, would not lead to satellite litigation and did not prejudice the applicant.

10 In her legal directions to the jury, the judge directed the jury on their approach to this bad character evidence.

Application for leave against conviction

Grounds of appeal

11 Ms Forshaw KC, newly instructed counsel for the applicant, who did not appear at trial, renews the application to appeal against conviction, having been refused by the single judge. She has redrafted grounds of appeal and those are the grounds of appeal that we have considered today.

12 She challenges the judge's handling of the bad character evidence in the following three ways. First, the judge was wrong to admit the evidence of bad character. Second, having been admitted, the jury were inadvertently misled as to the content of what had been found and were left with the false impression that the applicant had visited and bookmarked websites containing indecent images of children, especially a website called TinkeyTyler.org, whereas in fact there was no evidence at all about that website and no reason to think that it contained any content which was objectionable. Third, the judge inadequately summed up the bad character evidence because the judge did not sufficiently identify the legitimate issue to which the evidence related and she failed to provide sufficient directions to guard against the risk of unfair prejudice, given the nature of the material the applicant is said to have viewed. Ms Forshaw places particular reliance on the case of *R v D* [2012] 1 Cr App R 8, an authority to which the judge referred in her ruling.

13 By perfected grounds of opposition, the Crown resists these grounds.

Discussion

14 Despite the skillful advocacy of Ms Forshaw, we are not persuaded that there is an arguable basis for challenging this conviction, and we refuse leave.

15 As to the first ground: the evidence of previous internet searches was relevant to the matter in issue, namely the applicant's sexual interest in young girls or in the complainant specifically. Section 101(1)(d) provided the relevant gateway. The judge was correct to conclude that this material did have the potential to demonstrate that the applicant had a sexual interest in children and underage girls, whether teens or prepubescent. Specifically, we do not accept Miss Forshaw's submission that it was necessary for the judge to distinguish between those two categories of underage girls, noting that paragraphs 8 and 29 of *D* suggest that the characteristic in question can extend to all underage girls. In any event, on the facts of this case, the evidence of the previous internet searches was relevant to both age groups. At the time when the applicant was said to have offended against the complainant, she was very young, only six or seven years old, but the searches in question were undertaken in or around 2018, when the applicant had tried to get back in touch with the complainant, and they were capable of showing he had a sexual interest in young girls of about that age (she was by then around 14), and in her specifically, given the content of some of the searches.

16 The judge dealt with the application on the third day of trial after the complainant had given evidence and after her mother and other witnesses had also given evidence. The judge was well placed to consider the relevance of this material and was entitled to conclude that this was not a weak case which the Crown was seeking to bolster.

17 The judge considered the prejudicial effect of the material, but in the end concluded that the probative value of it was strong and that Section 101(3) did not require the material to be excluded. Thus, the jury was entitled to know about the applicant's sexual interest in underage girls. We see no reasonable basis to criticise the judge's ruling in this respect.

18 As to the second ground, we do not accept that the exchange in evidence about the

TinkeTyler website was capable of seriously misleading the jury (this being the point on which Ms Forshaw focussed in her oral submissions). The point stressed in cross-examination of the applicant at trial was that the applicant had got to that website following a search for “young nudist kids pics”. When he was called to give evidence, he suggested that that search term was a mistake caused by Siri or caused by his mumbling and that he had never meant to search for that. It was in that context that questions about the fact that he had bookmarked the TinkeyTyler website became relevant. Bookmarking was suggestive of a deliberate act and not simply stumbling across that website by accident. The importance of this exchange was how the applicant had got to that website and the fact that he had bookmarked that website. Ms Forshaw is correct to say that there was no evidence at trial as to the content of that website. But the jury were told, as the standard direction requires, that they could only decide the case on the evidence. We see no error in this sequence of evidence and nothing which gives us cause to consider that there may have been a mistake made by the trial judge or some basis for doubting the safety of conviction.

19 We further note that this exchange in cross examination was but a tiny fragment of the evidence at trial. This exchange played no part in the Crown’s speech and was not referred to in the judge’s summing-up. Defence counsel at trial made no submission to the judge that she should mention this exchange to the jury in her summing up of the evidence. There was no suggested agreed fact about the nature of or content on the TinkeyTyler website. This suggests that the matter was not considered by those present at trial to have any real significance in the context of the trial.

20 We move then to the applicant’s third ground which deals with the judge’s directions. The judge directed the jury on the relevance of these internet searches. The judge plainly had the principles in *D* well in mind, and she tailored her directions accordingly. She directed the jury that the evidence could help them to decide whether or not the applicant had a sexual interest in young girls and in this complainant in particular. If the jury was not sure

that he was searching for images of young girls – his case of course had been that this was a mistake or possibly a mis-spelling – she directed the jury that they should ignore this evidence completely. If they were sure that he was searching for images of young girls, then she stressed that did not in and of itself prove that the applicant was guilty of the offences. She said, “Don’t jump to conclusions or allow your minds to be prejudiced by the fact of him making the searches.”

21 She directed the jury that if they were sure that the applicant had a sexual interest in young girls and the complainant in particular, then this could be evidence to show that it is more likely than not that he committed the offences against her. This last point was augmented by a direction given at the outset of her summing-up, when she warned the jury not to be swayed by their distaste for this material, inviting them instead to “[...] apply a clinical approach to your assessment of the evidence”.

22 In the course of submissions Miss Forshaw has laid some emphasis on the judge’s direction that the jury should consider whether this evidence showed that it was “more likely than not” that the applicant committed the charged offence. We conclude that there is a risk of over analysis here. Taking the judge’s summing-up in the round and considering what the jury would have understood from it, we have no doubt that the jury would have understood that they could not move directly from the fact of these internet searches to deciding that the applicant was guilty of these offences. In summary, we see no arguable criticism of the judge’s summing-up as to how the jury should approach the evidence on these internet searches and how it might be useful to them.

23 We dismiss the application for permission to appeal against conviction.

Appeal against Sentence

24 We turn to the application for leave against sentence which has been referred to this court, and as we have already indicated, we grant leave to pursue the sentence appeal.

- 25 In her sentencing remarks the judge concluded that Count 1 fell into Category 2B because the complainant was vulnerable by virtue of the close relationship between the applicant and the complainant's family. It attracted a starting point of 10 years' imprisonment and a range of 8 to 13 years.
- 26 The judge had regard to the victim impact statement which demonstrated the serious impact of this offending. The offending, she said, was aggravated by the length of the offending period, the presence of the complainant's brother on at least one occasion, and the applicant instructing the complainant that she must not tell anyone about the assault. A further aggravating factor was the fact that the applicant tried to get back in touch with the applicant both in person and by social media when he was an adult man in 2018.
- 27 The offending was mitigated by the applicant's age, lack of previous convictions and positive character references. The Judge also noted that the applicant's father had died when he was young and that the applicant now had a daughter who would be affected by his imprisonment. Moreover, he was aged 16 to 17 at the time of the offending, he suffered from dyslexia which was relevant to the assessment of his maturity.
- 28 It is not necessary for us to rehearse the judge's careful analysis of the appropriate sentences on the other counts, all of which resulted in lesser and concurrent sentences. No complaint is made about her workings or conclusions on those other counts.
- 29 The judge considered whether the applicant was dangerous. The assessment in the Pre-sentence Report was based on the applicant's continued denial of offending against the complainant. The author noted that the applicant made light of the evidence which had caused him to be convicted. She assessed him as posing a high risk of serious harm towards young girls. The judge did not think the identified risk could be met by the imposition of a protective order alone or such an order coupled with licence provisions attached to the

determinate sentence. She concluded that the applicant was dangerous, and an extended sentence was necessary for the protection of others.

- 30 As to the determinate element of the sentence, she said that if the applicant had been an adult at the time of offending, the sentence would have been one of 14 years' imprisonment. She reduced that to 11 years because of the applicant's age and maturity at the time, and imposed a 7-year extension period to make a total term of 18 years.

Grounds of appeal

- 31 Miss Forshaw advances two grounds of appeal. First, she argues that the judge was wrong to find the applicant dangerous. Secondly, she says that the judge had insufficient regard to the applicant's age at the time of the offences and his personal mitigation. She reminds the court of *R v Lang* on dangerousness and the case of *R v Ghafoor* on the significance of becoming an adult since the date of the offending.

Dangerousness

- 32 We accept that the applicant was of effective good character. He had not committed any offences before these offences when he was 16 or 17 years old. By the time of sentence he was a man of 29 years old. Twelve years had passed and he had been free of offending during that time. What is more, his circumstances had completely changed. He now had his own family, a young daughter. He was separated from the child's mother, but remained in contact with his child, social services having investigated and been satisfied that that was safe. He was in a long-term and stable relationship, in work and financially secure. Further, we accept that the offending was against a single complaint and there is no track record of offending against any other person.

- 33 The judge had to consider dangerousness within the framework of section 308 of the Sentencing Act 2020, taking into account all of the information available to the court about

the offender and the nature and circumstances of the offence. In this context the conclusions of the Pre-sentence Report were very significant. The author noted the applicant's lack of insight into his offending and its consequences and considered the risk he posed:

"In conclusion, I assess that Mr Millis has a predilection for sexual offending, with his actions shaped by power, entitlement and control. Notwithstanding his charismatic and externally pleasant presentation, he holds attitudes that are supportive of this type of criminality and demonstrates little understanding of quite how serious this situation is. His conduct appears indicative of a prolonged strategy to gratify his own wants and needs with scant regard to the exploitation of his young victim. Mr Millis remains a high risk individual who will require robust and consistent intervention by the relevant agencies on his eventual release."

- 34 The author of the PSR went on to note that he posed a high risk of serious harm to children, specifically females that are known to him, based on the nature of his conviction. The risk would be that of serious sexual and physical harm that may occur during the commission of a sexual assault, as well as the psychological and emotional harm caused by being the victim of such events.
- 35 In addition, the judge knew of the material found on the applicant's electronic devices which indicated a sexual interest in underage girls. Those searches were conducted in 2018, when the appellant had tried to get back in touch with the complainant when she was still only 14. He left an overtly sexual drawing in her bedroom that year, a clear indication of on-going sexual interest in her. It could not be said with any degree of confidence that this applicant in growing up had lost his sexual interest in young girls. The question for the judge was whether the information before her demonstrated a significant risk of serious harm to members of the public by the commission of further specified offences. It was open

to the judge to find that it did so demonstrate.

36 We do not interfere with her finding of dangerousness. We consider that finding for to have been justified.

Length of sentence

37 The judge sentenced the applicant on the basis that he was 16 or 17 at the time of these offences. She referred to the guidelines for sentencing children and young people and to the appellant's chronological age, as well as his developmental maturity at the time of offending. The guidelines are a "rough guide", not to be applied mechanistically, but they do suggest that a child of 16 or 17 should receive a sentence of between half and two thirds of the applicable adult sentence. The court in *Ghafoor* confirmed the usual starting point in such cases should be the sentence which the defendant would have been likely to receive if sentenced at the date of commission of the offence. That approach has been confirmed in the recent case of *R v Limon* [2022] EWCA Crim 39.

38 No issue is taken with the judge's starting point of 14 years. Although the offence category suggests a starting point of 10 years and a range of 8 to 13 years, the sentence had to reflect the totality of offending in this case, and a substantial uplift was warranted to reflect the other offences. There were other aggravating features to take into account as well, balanced against the mitigating features which the judge had identified.

39 The judge reduced the term by three years, "because of age and maturity", to arrive at the 11-year determinate term. Although the applicant was 18 for some of the indictment period, the judge had already indicated that she would treat him as being 16 or 17 for the purposes of sentence. That reduction for age was roughly 20 per cent. We have been shown no evidence to suggest that the applicant was more than usually mature or immature for his age. The judge did not make any finding to that effect. We have therefore approached this case on the base that at the age of 16 or 17 the applicant demonstrated an ordinary level

of maturity commensurate with that age. We note that he had additional difficulties in the form of his dyslexia, but there is nothing to suggest that his learning disability was material to developmental maturity in the context of assessing culpability for these offences.

40 We conclude, having considered all the material before us, that the adult sentence should have been reduced by around one third. Rounding down a little, we arrive at a sentence of nine years as the appropriate term to reflect the applicant's age and maturity at the date of the commission of these offences. Based on a sentence of that length, the appropriate extension period would have been one of five years.

41 It follows that in our judgment the sentence of 18 years, comprising a term of imprisonment of eleven years and an extension period of seven years and was manifestly excessive.

Conclusion

42 The application for leave to appeal against conviction is dismissed.

43 Permission to appeal against sentence is granted. The appeal against sentence is allowed. The original sentence is quashed and in its place we impose a total sentence of fourteen years, comprising a term of imprisonment of nine years and an extension period of five years.

CERTIFICATE

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