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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



Neutral Citation No: [2023] EWCA Crim 783

CASE NO 202300026/A2

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday 22 June 2023

Before:

LORD JUSTICE LEWIS  
MR JUSTICE MORRIS  
SIR NIGEL DAVIS

REX  
V  
TG

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MR E MIDDLETON appeared on behalf of the Appellant

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## J U D G M E N T

### **LORD JUSTICE LEWIS:**

1. The provisions of the Sexual Offences (Amendment) 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 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.
2. On 8 December 2022 in the Crown Court at Worcester, the appellant, whom I shall refer to as TG, was sentenced to an extended determinate sentence of 23 years and nine months, comprising a custodial element of 15 years and nine months and an extension period of eight years, for an offence of rape of a child under 13. The appellant was also sentenced to three years to be served concurrently for an offence of distributing indecent images of a child. No separate penalty was imposed in respect of four other offences involving the distribution of indecent images of a child and three offences of making indecent images of a child. The appellant appeals against sentence with the leave of the single judge.
3. The facts can be stated shortly. The appellant raped his own five-year old daughter. He drugged her, he carried her upstairs to her bedroom and he raped her vaginally. He filmed the rape. He ejaculated as he withdrew his penis from the child's vagina. The appellant had experimented with different drugs in order to decide which drug to use to sedate and relax his five-year old daughter. That was count 1 on the indictment.
4. Count 2 was an offence of distributing seven indecent video clips, that is seven clips of the rape. He did that for the following reasons. The appellant wanted to be admitted to an internet group of people interested in extreme sexual abuse of young children and to

gain access to a website depicting extreme images of sexual abuse of children. In order to be admitted he had to provide original images of an extreme nature. The appellant therefore filmed the rape of his daughter. He put a piece of paper with his internet user name on the child's chest during the rape to identify him as the rapist. He then sent the video clips of the rape of his daughter to the person running the website. Count 3 involved distributing a Category B indecent image of his daughter. Counts 4, 5 and 6 involved the possession of indecent images of other children. The appellant had downloaded to his telephone 655 Category A images of children, of which 43 were moving images. That was count 6. Count 4 involved 536 Category B images, of which 19 were moving images. Count 5 involved 2,460 Category C images, of which 15 were moving images. The average age of the children in the images appeared to be between three and seven years old. They also included images of a baby and a one-year-old. One of the Category A images was of the anal rape of an 18-month-old baby. Another was of the vaginal rape of an eight-year-old and another the vaginal rape of a 10-year-old.

5. Counts 7 to 9 related to the distribution of some of those images. In total 61 images were distributed, including 41 Category A images (40 of which were moving images). Two of those images involved a child under the age of two who was showing clear signs of distress. The images were sent to six individual users and two groups, one with 84 and one with 211 participants respectively.
6. The appellant had no previous convictions but had cautions for battery in 2001 and assault occasioning actual bodily harm in 2015. There was a pre-sentence report. That assessed the appellant as presenting a very high risk of serious harm. The author said that the appellant gave no impression of any ability to empathise with the feelings of the victims in the photographs or even his own daughter.

7. The sentencing judge in his remarks described how the appellant had drugged and then raped his daughter and how he had circulated a video of the rape on the internet. He explained why the appellant had done that, in order to gain access to a specific group who were into extreme child abuse. The judge said that the appellant had sacrificed his own daughter in order to gain acceptance into this group of people. The judge referred to the fact that the appellant had used file sharing accounts to exchange indecent images of children. He noted the physical pain and distress of some of the victims, as that was obvious from the images involved. He said that the psychological harm would only be fully known about in future years as the appellant's daughter and the other children inevitably came to realise that there were images of them on the internet.
8. In terms of the Sentencing Council guidelines for rape of a child under 13, the judge considered that the case fell into Category A in terms of culpability because of the significant degree of planning and the use of drugs to sedate the victim. The harm, the judge considered, fell at least into Category 2 because the child was particularly vulnerable due to her personal circumstances. The starting point for a 2A offence would be 13 years with a sentencing range of 11 to 17 years' imprisonment.
9. The sentencing judge considered however that the offence could be put into Category 1A because of the extreme impact caused by a combination of the Category 2 harm factors. Those other factors included the extreme psychological or physical harm, the additional degradation and the fact that the incident was probably sustained. The starting point for a Category 1A offence is 16 years with a range of 13 to 19 years' custody. In any event, the judge said, even if this was treated as a Category 2 offence, there were aggravating factors which would require a significant upward adjustment and would result in a sentence equivalent to a Category 1A sentence. The distribution of the video clips of the

appellant raping his daughter were separately indicted and would itself merit a starting point of six years with a range of four to nine years within the guideline for that offence. The circumstances of the distribution of the video would be an aggravating factor and that would push the sentence for that offence towards the upper end of the range, that is nine years.

10. So on either basis the judge considered that the appropriate sentence would fall within the range of sentences for a Category 1A offence even before other aggravating factors were considered. These other factors included the fact that the appellant had specifically targeted a vulnerable victim, the location of the offence - she was raped in her own home where she should have been safe - and the fact that the appellant ejaculated over her. Those would push the sentence to the top end of the range for a Category 1A offence which would be 19 years. There was little mitigation. The lack of previous convictions for sexual offences carried little weight bearing in mind the circumstances. There was no remorse. The sentencing judge concluded that the appropriate custodial element, taking into account the aggravating factors and the limited mitigation would be one of 18 years for count 1 and as counts 2 and 3 had been taken into account in fixing that sentence no separate penalty would be imposed for those offences.
11. The other offences however involved different children. The most serious offence was count 7. The images distributed included those of a child under the age of two. Those images were sent to a number of individuals and the two groups with the 84 and the 211 participants. The judge said that the starting point for that offence would be three years' imprisonment with a range of two to five years' imprisonment. Some of the victims exhibited pain and distress which was an aggravating factor which would require an upward adjustment for that offence to four years. The sentences for the other offences in

two to nine would be commensurately lower.

12. The sentencing judge then decided that he would treat count 1 as the lead offence and impose a sentence which reflected the offending for that count, counts 2 and 3 and the other offences and to impose concurrent sentences or no separate penalty for all the other offences. That would result in a custodial element before reduction for the guilty plea of 21 years. As the appellant had pleaded guilty at the pre-trial and preparation hearing the custodial element of the sentence would be reduced by 25 % to 15 years and nine months. He found that the appellant was a dangerous offender within the meaning of the relevant provisions of the Sentencing Act 2020 as he posed a high risk of serious harm to members of the public by the commission of further offences. He considered that an appropriate extended licence period would be eight years. He therefore imposed a sentence of 23 years and nine months, comprising a custodial term of 15 years nine months and an extension period of eight years in relation to count 1.
13. Mr Middleton, in his written and oral submissions on behalf of the appellant, submitted that the judge was wrong to treat this as a Category 1A offence. He submitted that the judge was wrong to regard the situation as one where there was an extreme impact caused by a combination of Category 2 factors; there was no evidence of severe psychological harm at present and future psychological harm is unknown; the placing of the label of the appellant's internet user name did not amount to additional degradation as the child was asleep having been sedated and was unaware of what had happened. Further, there was no evidential basis for concluding that the incident was sustained. The only evidence was the video clips. They only showed the incident lasting 44 seconds and there was no evidence as to whether or not the offence lasted longer than that and, if so, how much

longer. He therefore submitted the judge was wrong to treat this as a Category 1A offence. He should have treated this as a Category 2A offence with a starting point of 13 years and a range of 11 to 17 years. He submitted that the fact that the rape had been filmed should properly be treated as a factor making it culpability A and did not justify raising it to Category 1A. Further, and in any event, he submitted that the custodial element before the reduction for the guilty plea of 21 years was four years above the top of the sentencing range for a Category 2A offence and two years above the top of the range for a Category 1A offence. In all the circumstances, submitted Mr Middleton, the sentence was manifestly excessive.

14. First, it is right to consider how the judge reached the sentence. The judge considered that the appropriate custodial element for count 1 before a reduction for guilty plea and taking account of counts 2 and 3 would be 18 years. He reached that figure by one of two routes. The first was that the offence fell within Category 1A, because of the extreme impact of the combination of harm factors; the second route was the need to reflect the offending on counts 2 and 3, together with the aggravating features, which would result in a sentence equivalent to the upper end of the sentencing range for a Category 1A offence. We recognise that there is scope for doubt as to whether or not on the evidence the extreme impact of the combination of harm factors would justify moving the offence from Category 2A to Category 1A. We have no doubt whatsoever that the alternative second way of approaching the sentence was correct and cannot be criticised. If this were a Category 2A offence the starting point would be 13 years with a range of 11 to 17 years' custody. There would have to be a very significant upward adjustment to reflect three other sets of factors. First, there were a number of culpability factors and, as the guideline recognises, in a case of particular gravity reflected by multiple features of

culpability that would result in an upward adjustment from the starting point. Here there were multiple factors: the significant planning, the use of drugs to sedate the victim and the abuse of trust. The appellant raped his own daughter.

15. Secondly, there were aggravating factors: the specific targeting of a child, the location (the rape took place in the child's own home) and thirdly, the appellant ejaculated. Those aggravating factors would have required a further upward adjustment from the starting point.

16. Thirdly, the sentence was fixed to reflect not only the offending in count 1 and the rape, but also the offending contained in counts 2 and 3. We do not consider that the judge was required to deal with the distribution of the video clips of the rape of his daughter as if that was simply a factor going to culpability under count 1 as it involved the recording and sharing of the images of the rape. The offence had been separately indicted. It reflected a distinct course of conduct, the filming of the rape of the child and the distribution of that image to others and it was a means of gaining access to a group and a website for those with an interest in extreme sexual abuse of children. Any sentence would have to reflect that separate offending behaviour.

17. In the circumstances therefore the judge was entitled to consider that the custodial element of the sentence for the rape of a child under 13 must reflect those three sets of factors. The judge was entitled to conclude that a sentence equivalent to the top of the range for a Category 1A offence was appropriate. That was a custodial element of 18 years for the offending in counts 1, 2 and 3 - 19 years reduced by one year to reflect the mitigation.

18. The additional three years reflected the very different and very serious offending on counts 4 to 9 and count 7 in particular. That involved the distribution of a large number



of images, including Category A images, of other children. The judge was entitled to approach that by imposing a longer custodial element for count 1 and imposing concurrent sentences or no separate penalty for counts 4 to 9. That resulted in a custodial element of 21 years which, reduced by 25 % to reflect the early guilty plea, resulted in a custodial element of 15 years and nine months. That was proportionate and justified in relation to the overall offending which included the rape of his five-year old daughter with a number of aggravating features, the production and distribution of a film of the rape and the offending involving the images of the other children. The judge was entitled, given the nature of the offending and having regard to the views of the author of the pre-sentence report, to find that the appellant was dangerous within the meaning of the relevant sentencing provisions and to impose an eight-year extended licence period.

19. In all the circumstances, therefore, the sentence for count 1 of 23 years and nine months comprising a custodial element of 15 years and nine months and an extension period of eight years is not manifestly excessive. We dismiss this appeal.

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