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**Neutral Citation Number: [2024] EWCA Crim 1011**

Case No: 2024/02098/A5

IN THE COURT OF APPEAL  
CRIMINAL DIVISION



On appeal from the Crown Court at Truro  
(Mr Recorder Kenefick)

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Wednesday 24<sup>th</sup> July 2024

**B e f o r e:**

**LORD JUSTICE SINGH**

**SIR ROBIN SPENCER**

**HIS HONOUR JUDGE TIMOTHY SPENCER KC**  
**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v -**

**M J B**

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**Mr B Holt** appeared on behalf of the Attorney General

**Mr R Taylor** appeared on behalf of the Offender

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**J U D G M E N T**  
**(Approved)**

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Wednesday 24<sup>th</sup> July 2024

**LORD JUSTICE SINGH:**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

**Introduction**

2. This is an application on behalf of His Majesty's Solicitor General for leave to refer sentences to this court under section 36 of the Criminal Justice Act 1988 ("the 1988 Act") on the ground that they were unduly lenient.

3. On 22 March 2024 in the Crown Court at Truro the offender (then aged 38) was convicted of two sexual offences.

4. On 10 May 2024 he was sentenced (by now aged 39) by Mr Recorder Kenefick as follows: on count 1, an offence of causing or inciting a child under 13 to engage in sexual activity, contrary to section 8(1) of the Sexual Offences Act 2003 ("the 2003 Act"), four years' imprisonment; and on count 2, a similar offence pursuant to section 8(1) of the 2003 Act, a concurrent term of 40 months' imprisonment. That made a total sentence of four years' imprisonment. Other appropriate orders were made, including a Sexual Harm Prevention Order for ten years.

5. Having been convicted of an offence listed in Schedule 3 to the Sexual Offences Act 2003, the offender was required to comply indefinitely with the provisions of Part 2 of that

Act (notification to the police).

6. Having been convicted of an offence specified in the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, the offender will or may be included in the relevant list by the Disclosure and Barring Service.

### **The Facts**

7. The facts are not in dispute and can be taken for present purposes from the Final Reference submitted by the Solicitor General. In summary, as set out at paragraph 7, the offender was convicted of two counts of inciting his six year old biological daughter to engage in sexual activity with him. Count 1 related to oral sex which did not in fact take place; count 2 related to sexual activity more generally which did. The offending took place when the victim was at home alone with the offender. He made her watch pornography videos and offered her cigarettes. Having made the victim watch pornography, the offender incited her to give him oral sex. He dressed up himself in female clothing. He made the victim dress up in adult female clothing, including a dress that had adult breasts stitched onto it. He placed a vibrator in her hand.

8. The facts are set out in more detail in the Final Reference at paragraphs 11 to 29. It is, however, unnecessary for the purposes of this judgment to set those out here.

9. The offender was arrested on 27 August 2020. When interviewed he denied the allegations.

10. He was interviewed again on 14 October 2021. In due course he was charged by postal requisition on 14 February 2023, at that time with a single offence of causing or inciting a girl

under the age of 13 to engage in sexual activity. He attended Truro Magistrates' Court on 27 March 2023. No indication of plea was given and the case was sent to the Crown Court at Truro for trial. He was remanded on unconditional bail.

11. In due course he was arraigned on a two count indictment, the original charge having been split into two allegations at a plea and trial preparation hearing on 4 April 2023. Pre-recorded cross-examination of the victim was ordered to take place. The victim was cross-examined on 11 August 2023. The trial took place between 18 and 22 March 2024. As we have mentioned, the offender was convicted on both counts.

### **The Sentencing Process**

12. The maximum sentence for an offence such as is alleged in count 1 is life imprisonment because penetration is involved. The maximum sentence in relation to an offence of the type alleged under count 2 is 14 years' custody.

13. There is a definitive guideline published by the Sentencing Council in relation to offences of this kind.

14. The offender was born on 31 March 1985. He had no previous convictions, cautions, warnings or reprimands recorded against him.

15. The sentencing court had the advantage, as do we, of a pre-sentence report which was dated 9 May 2024. Its author observed that the offender continued to deny the offences and did not display any remorse. The offender was assessed as posing a low risk of general re-offending and a low risk of serious harm. This was upgraded to a medium risk on the assessment of the author of the report.

16. The sentencing court also had before it, as do we, a letter from a friend of the offender in which it was said that the offender was more of a brother than a friend to her; he had always provided and cared for his family; the case had brought pain to the offender and those close to him. She said: "We believe this is all fabricated".

17. There was also a short victim personal statement from the victim. She said that she was made to feel "uncomfortable". She felt nervous when going over matters with the police. She was now untrusting around men. She said: "I don't want to understand why he would want to hurt his own daughter".

18. The victim's mother also provided a statement which concluded by saying that she was unable to put into words the anguish the entire family had felt. She had trusted the victim's biological father to look after her and he had done the worst thing imaginable. The impact would stay with them for the rest of their lives.

19. We have mentioned the definitive guideline issued by the Sentencing Council in relation to offences of this kind. Our attention has been particularly drawn on behalf of the Solicitor General to the following passage, which reflects what this court has previously said:

"In section 8 cases where activity is incited but does not take place the court should identify the category of harm on the basis of the sexual activity the offender intended, and then apply a downward adjustment at step two to reflect the fact that no or lesser harm actually resulted.

The extent of downward adjustment will be specific to the facts of the case. Where an offender is only prevented by the police or others from carrying out the offence at a late stage, or in attempts where a child victim does not exist and, but for this fact, the offender would have carried out the offence, only a very small reduction within the category range will usually be appropriate. No additional reduction should be made for the fact that the offending is an attempt.

Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range."

20. There was and remains no issue in relation to the appropriate categorisation of the two offences. So far as a category 2A offence is concerned, the definitive guideline recommends a starting point of eight years' custody, with a category range of five to ten years' custody. So far as a category 3A offence is concerned, the guideline recommends a starting point of five years' custody, with a category range of three to eight years.

21. In passing sentence, the Recorder said that he had to sentence in accordance with the definitive guideline. He said that he had to bear in mind that under that guideline, where the sexual activity in question is incited but does not actually take place, the approach he had to take was to consider the level of harm that would have arisen if the intended activity had taken place and then make a reduction to reflect the fact that it did not. This he proposed to do in relation to count 1. He agreed that the harm under count 1 fell into category 2 because it involved inciting the victim to perform oral sex. As far as culpability was concerned, the Recorder said that there was clearly one category A factor here, namely the abuse of trust. In his view, the offending clearly fell into category 2A. He noted, as we have mentioned, the starting point therefore is eight years' custody, and the range is five to nine years. He said that he would apply a downwards adjustment to reflect the fact that the incited activity did not actually take place. It seemed to him that the appropriate adjustment was to bring the starting point under count 1 down to six years, rather than the usual starting point of eight years.

22. The Recorder then turned to count 2. He said that this required extreme youth or extreme vulnerability due to personal circumstances. He did not see it as falling into category 2 on grounds of the victim's age. He said that he would treat it as a category 3 offence. So

far as culpability was concerned, he stated that the offending fell into category A because it involved an abuse of the trust that the victim should have been able to place in the offender as her father. He observed, as we have mentioned, that the starting point recommended for a category 3A case is five years' custody with a range of three to eight years. He correctly observed that there was no downwards adjustment because under count 2 the activity did in fact take place.

23. The Recorder observed that there were some aggravating features: the victim was in the offender's care for the weekend and he was supposed to be looking after her; and the offence took place in his flat, where he had taken her. The prosecution had suggested that the offender took her there in order to commit the offences, but the Recorder was not convinced of that. He was not satisfied to the necessary standard that the offender deliberately took the victim there for that reason. In any event, he said that she was there in a domestic setting where she was "undoubtedly very vulnerable".

24. The Recorder then went on to state that on the other side of the fence there were a number of important mitigating factors: the offender had no previous convictions for anything, let alone anything of this type. There was some evidence of positive character in other respects. He referred to character references and the offender's hard-working ethic and the support he had given to friends. The offender was in stable employment. Undoubtedly his other children, and no doubt his partner, would be affected by the sentence which had to be passed. Through no fault of his, this had been hanging over the offender's head for some time.

25. The Recorder went on to consider the issue of dangerousness and decided that this was not a case of dangerousness, but nevertheless he concluded that only an immediate sentence of custody could be justified.



26. So far as count 1 was concerned, having taken his reduced starting point of six years' custody, the Recorder then applied a further reduction for the mitigating factors he had just outlined. He concluded that the minimum sentence he could impose on count 1 was four years' custody.

27. Turning to count 2, the Recorder said that he would impose a concurrent sentence, but taking the same approach, he had used a starting point of five years' custody (60 months), he applied the same percentage discount for mitigation (one third), and that resulted in a sentence of 40 months' imprisonment (three years and four months).

#### **Submissions on behalf of the Solicitor General**

28. On behalf of the Solicitor General, Mr Holt takes no issue with the Recorder's finding that the offender was not dangerous in statutory terms, or to his approach to the structure of the sentence. Further, Mr Holt acknowledges that the categorisation of the lead offence was an appropriate one.

29. Mr Holt does submit, however, that the Recorder erred in departing as much as he did from his initial starting point of eight years' custody, to arrive at a final sentence of half of that term (four years), after making two reductions: first, an initial reduction of two years to reflect the fact that the sexual activity did not in fact take place (this was relevant on count 1); and secondly, a further reduction of two years to reflect mitigation and delay.

30. Turning to harm, Mr Holt submits that there were a number of category 2 harm factors present in this case: (1) penile penetration of the mouth by or of the victim; (2) additional humiliation, in particular that the victim was made to dress up in adult clothing; and (3) the child was particularly vulnerable due to extreme youth and/or personal circumstances. Mr

Holt also emphasises that there was a significant disparity in age between the offender and his victim (approximately 30 years). Mr Holt reminds this court that the guideline does not speak, as the Recorder apparently thought it did, of "extreme youth or extreme vulnerability due to personal circumstances". The Recorder went on to refer to the victim as being "very vulnerable". Mr Holt submits that although this may have been a slip of the tongue, it was a misdirection.

31. Turning to culpability, Mr Holt submits that this was plainly a category A case, because there was a breach of trust. But he submits that there was also some grooming behaviour and it could be argued that there was planning in that there was the buying of clothing. He submits that the combination of these features should have resulted in "upward travel" from the notional starting point for a category 2A offence.

32. Mr Holt also reminds us of what was said by this court in *R v Reed* [2021] EWCA Crim 572; [2021] 1 WLR 5429, in particular at [23] to [25]. We will return to that judgment later.

33. Mr Holt submits that *Reed* was a case where there was no victim at all; whereas in the present case there was an actual victim and harm was caused to her. The offender did not desist at an early stage. It was simply that his request for oral sex was turned down by the victim. Had the victim agreed to the course of conduct, the sexual activity would have taken place. It is also noted that the offender made contact with the victim the following weekend and attempted to have further contact with her. In those circumstances Mr Holt submits that the Recorder erred by reducing the sentence by two years at this stage of the sentencing exercise. In doing so, the Recorder placed too great an emphasis on the fact that more serious sexual activity did not in fact take place and ignored the factors of increased harm and culpability. Further, Mr Holt submits that the Recorder was overly generous in reducing the sentence by another two years to reflect mitigation and delay. He submits that there was, in

truth, little mitigation. He also reminds this court of what is said in the definitive guideline:

"In the context of this offence previous good character/exemplary conduct should not normally be given any significant weight and would not normally justify a reduction in what would otherwise be the appropriate sentence."

34. So far as delay is concerned, Mr Holt acknowledges that there was a delay of some 30 months between the offender's first arrest and charge, and that the case could have been dealt with more expeditiously. However, this was plainly a matter that needed to be investigated thoroughly. Further, the delay would not have occurred had the offender admitted his guilt in police interview.

35. Mr Holt submits that there was also a lack of remorse. Finally, it could be suggested that there was a further aggravating feature in that there was an exploitation of contact arrangements with a child to commit an offence, although quite properly Mr Holt advises this court to guard against double counting.

36. In all the circumstances, therefore, Mr Holt submits that the total sentence of four years' imprisonment was unduly lenient.

#### **Submissions on behalf of the Offender**

37. On behalf of the offender, Mr Taylor accepts that the sentence could be described as lenient, but submits that it was not unduly so. He makes the following specific submissions in writing, which he has succinctly and helpfully developed in oral submissions today. He submits that: (a) the Recorder presided over the trial and was best placed to determine the sentence; (b) the Recorder is an experienced tribunal and criminal practitioner; (c) concurrent sentences were appropriate on the facts of this case; the Recorder expressly and correctly

considered the sentencing principle of totality; (d) the Recorder considered the appropriate current sentencing guidelines; (e) the chronology of the proceedings, as set out in the Solicitor General's application, is accepted; (f) the Recorder correctly reduced the starting point for the offending in count 1 to reflect the fact that no physical sexual activity took place; (g) the Recorder correctly reduced the overall sentence to reflect the offender's extensive personal mitigation; (h) the Recorder correctly considered the offender's good character as he had no convictions, etc; and (i) the Recorder correctly considered the fact that the offender was facing incarceration at a time when the Prison Estate is under unprecedented pressures and is overcrowded.

38. Mr Taylor submits that there were no statutory aggravating features in the present case, although he accepts that there was a gross breach of trust and the offences were serious because they occurred during a contact visit.

39. Further, Mr Taylor submits that there were the following mitigating features: (1) the offender is a mature man of good character with a strong work ethic; (2) at the time of sentence he was employed as a mobile emergency HGV tyre fitter; (3) he has a wife and young family; (4) he no longer indulges in any sexual fantasies or role play; (5) there was some delay in the prosecution of his case, although it is accepted that the offender contested these matters to trial; (6) the offender had the benefit of a supportive character reference; (7) he had the benefit of a positive pre-sentence report; and (8) he can generally be considered to pose a low risk of causing harm to the public.

### **Our Assessment**

40. The principles to be applied on an application under section 36 of the 1988 Act are well established and were summarised in *Attorney General's Reference (R v Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10, at [72], in a judgment given by the Chancellor of the

High Court, as follows:

- "1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
  2. A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.
  3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.
  4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'.
- ...."

41. In giving the judgment of this court in the seminal case of *Attorney General's Reference (No 4 of 1989)* (1990) 90 Cr App R 366, at 371, Lord Lane CJ emphasised, as this court has done ever since, that its role is not simply to retake the sentencing decision as if it were the sentencing court; that mercy is a virtue and does not necessarily mean that a sentence was unduly lenient.

42. We remind ourselves that it is not the function of this court on an application such as this to resentence the offender. The question is not what one or more members of this court might have done had we been sentencing in the first instance. Nevertheless, we have reached the conclusion, accepting Mr Holt's essential submissions, that the Recorder did fall into error and so the resulting sentence at which he arrived was outside the range that was reasonably open. In particular, in our judgment, the Recorder made two material errors. First, he gave too much reduction to reflect the fact that on count 1 the offender's efforts to have oral sex performed on him were unsuccessful. As is common ground before us, the guideline on this topic reflects what was said by this court in material terms in *Reed*, where the judgment was given by Fulford LJ. In relevant part he said:

"23. ... This decision will end the rigid distinction between those cases where particular sexual activity takes place and those cases where the defendant, for instance, does everything he is able to bring that sexual activity about but for reasons beyond his control it does not materialise. The sentencing judge should make an appropriate downward adjustment to recognise the fact that no sexual activity occurred ... Furthermore, we consider this approach should apply to all of the offences set out in [5] above when the defendant attempts to commit these offences or incites a child to engage in certain activity, but the activity does not take place. [We interpose that one of the offences mentioned in [5] of the judgment is an offence under section 8 of the 2003 Act.] The harm should always be assessed in the first instance by reference to his or her intentions, followed by a downward movement from the starting point to reflect the fact that the sexual act did not occur, either because there was no real child or for any other reason.

24. The extent of downward adjustment will depend on the facts of the case. Where an offender is only prevented from carrying out the offence at a late stage, or when the child victim did not exist and otherwise the offender would have carried out the offence, a small reduction within the category range will usually be appropriate. Where relevant, no additional reduction should be made for the fact that the offending is an attempt.

25. But when an offender voluntarily desisted at an early stage, and particularly if the offending has been short-lived, a larger reduction is likely to be appropriate, potentially going outside the category range.

..."

43. In the light of that statement of principle, as reflected in the definitive guideline to which the Recorder had regard, we accept that the Recorder was entitled to give some reduction to reflect the fact that oral sex did not in fact take place, even though there was a victim in this case and not, for example, a decoy, as in *Reed*. Nevertheless, we have concluded that a reduction of two years from a starting point of eight years was excessive in the circumstances, especially since the offender would have continued to commit the offence if he had not been impeded by the victim herself.

44. Secondly, in our judgment, the Recorder erred in giving too great a reduction for the mitigation that was to some extent available to the offender. We also bear in mind that there were two offences for which sentence had to be passed, although the Recorder was right to pass concurrent sentences, and the principle of totality must be respected.

45. Standing back, in our assessment a reduction in the total sentence from eight years to four years was simply too much and led to an unduly lenient sentence.

46. Applying the logic of the approach which we think should reasonably have been taken, when it comes to count 2 we have concluded that the reduction should not have been as high as 20 months, from a starting point of 60 months, to 40 months. In our judgment, the total sentence should have been one of six years' imprisonment. That should have been made up as follows: on count 1 there should have been a sentence of six years' imprisonment; and on count 2 there should have been a concurrent term of 50 months' imprisonment (four years two months). That would lead to a total sentence of six years' imprisonment.

### **Conclusion**

47. For the reasons we have given, the Solicitor General's application for leave under section 36 of the 1988 Act is granted. On the Reference we quash the sentences imposed and substitute sentences of six years' imprisonment on count 1 and four years two months' imprisonment on count 2, to run concurrently. The total sentence is, therefore, six years' imprisonment.

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