IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT

MS RECORDER HITCHCOCK KC

CP Nos: 47EH0601920 & 47EH1764922

CASE NO 202400458/A2 [2024] EWCA Crim 1303

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 16 October 2024

Before:

LORD JUSTICE JEREMY BAKER
MRS JUSTICE FARBEY DBE
THE RECORDER OF LEEDS
HIS HONOUR JUDGE KEARL KC
(Sitting as a Judge of the CACD)

REX
V
D.E.F.

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MR R REILLY appeared on behalf of the Appellant

J U D G M E N T

MRS JUSTICE FARBEY :

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the victim of the sexual offences in this case 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 a sexual offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. In order to protect the privacy rights of the victim, the appellant shall be known only as D.E.F. and there shall be no reporting of his name.

2. On 5 October 2022, having pleaded guilty before the Magistrates' Court, the appellant (then aged 39) was committed for sentence pursuant to section 14 of the Sentencing Act 2020 in respect of one offence of assault occasioning actual bodily harm. On 24 October 2023, in the Crown Court before Ms Recorder Hitchcock KC, the appellant (then aged 40) was convicted of two offences of sexual assault of a child under 13 (counts 1 and 3 on the indictment) and one offence of causing or inciting a child under 13 to engage in sexual activity (count 6 on the indictment). He was acquitted of other counts on the indictment which we need not describe.

3. On 8 January 2024, the Recorder sentenced the appellant as follows: on count 6, 14 years' imprisonment; on count 1, 8 years' imprisonment to run concurrently; on count 3, 8 years' imprisonment to run concurrently; on a charge of failure to surrender to bail contrary to section 6 of the Bail Act 1976 to which the appellant had pleaded guilty, 1 month imprisonment to run consecutively; and for the assault, 14 months' imprisonment to run consecutively. The total sentence was therefore 15 years and 3 months' imprisonment. Appropriate ancillary orders were made.

4. The appellant appeals against sentence by leave of the single judge.

The Facts

5. In relation to the sexual offences the appellant was the victim's father. When the victim was aged 5 her parents separated. The appellant went to live in another place. The victim would visit her father regularly. Count 1 involved the appellant touching the complainant’s vagina under clothing on one occasion when she was aged 5 or 6. Count 3 involved the appellant touching the victim's vagina under her clothing on another occasion, with the Recorder finding that she was the same age as count 1.

6. On another occasion the victim went for dinner at the home of other family members. The appellant went too. They both stayed overnight. The victim slept on the sofa in the living room. The appellant asked her to suck his penis. She refused but he persisted and asked her several more times. She continued to refuse and so the appellant ultimately desisted from penetrating her mouth. She was then aged 10 or 11 years old.

7. When the victim was aged 13, she sent her mother a text message saying that she was really upset and did not want to see her father again. Her mother went to talk to her and the victim disclosed that the appellant had sexually abused her when she was younger. It was a year later that the victim reported matters to the police.

8. We turn to the assault occasioning actual bodily harm. On 15 April 2022, two police officers stopped a car which the appellant was driving after a member of the public had reported a possible drink driver near to a public house in Bexhill. The appellant was uncooperative with the police to the extent that he had to be handcuffed to his front. The cuffs were not double locked so his hands retained a degree of movement. The appellant was put into the rear of the police car with PC David Fisher sitting next to him on the back seat on route to the Police station. During the journey the appellant was verbally abusive. He hit the windows of the car and then struck PC Fisher on the forehead with the metal part of the handcuffs. That assault caused a two-centimetre laceration which was treated in hospital.

9. The appellant was charged with the sexual offences by postal requisition on 24 November 2022, addressed to him at his home address. He was summonsed to attend the Magistrates' Court on 4 January 2023. He failed to attend on that date and a bench warrant not backed for bail was issued. The next appearance was on 28 January 2023 when he appeared in custody. The case was sent to the Crown Court for trial. The appellant was bailed.

10. On 6 March 2023, the appellant failed to appear at his plea and trial preparation hearing at the Crown Court and a bench warrant was issued. He was arrested on 28 September 2023, shortly before trial. He was remanded in custody the next day and charged with failure to surrender to bail.

Sentencing Remarks

11. In her sentencing remarks, the Recorder dealt first with the three sexual offences. After properly emphasising the seriousness of the offences, she applied the relevant sentencing guidelines in relation to each of the offences.

12. In relation to count 6, she found that the appellant had intended to penetrate the victim's mouth with his penis and that the victim had suffered severe psychological harm. Both of those factors supported her conclusion that the offence had involved Category 2 harm. In relation to culpability, it was common ground that the offence fell within level A (i.e. the higher level of culpability) because there had been a significant degree of planning as well as grooming behaviour and a significant abuse of trust. The starting point for a Category 2A offence was 8 years' custody. The category range was 5-10 years' custody.

13. Turning to the two sexual assaults (counts 1 and 3), the Recorder categorised both offences as involving Category 1 harm because of the severe psychological harm caused to the victim. They both involved level A culpability on the basis of the same factors as count 6. The starting point for a single Category 1A offence was 6 years and the category range was 4-9 years' custody.

14. The Recorder considered aggravating factors for all three offences together. She took into consideration that the appellant was – on his own account – drunk on each occasion. He had exploited child contact arrangements. He had taken steps to prevent the reporting of the incidents by telling the victim not to tell anyone and by deleting a WhatsApp message that she had sent him about the offences. He had targeted a particularly vulnerable child because she had lost him as a father but still loved him. The appellant had 7 previous convictions

which the Recorder treated as an aggravating factor, albeit that the appellant had not before been convicted of sexual offences.

15. The Recorder took into consideration that the appellant had voluntarily desisted in relation to count 6 as a factor warranting a downward adjustment to the sentence. By this, she meant that the appellant had not in the event penetrated the victim's mouth.

16. The Recorder had the benefit of a pre-sentence report. On the basis of the report and more generally, she concluded that the appellant did not meet the statutory criteria for an extended sentence and in any event a lengthy determinate sentence of imprisonment was sufficient for public protection.

17. Drawing the threads together, the Recorder essentially stated that she would apply the principle of totality by passing a total sentence that would reflect the overall seriousness of the appellant's offending. She stated that she would make an upward adjustment to the sentence for count 6, which she would treat as the lead sentence, to reflect the overall seriousness of the sexual offending with the sentences on counts 1 and 3 to run concurrently. In relation to count 6, she took a notional sentence of 10 years which she then reduced by 2 years as the appellant had voluntarily desisted in the sense we have described, reaching 8 years. She then raised the sentence by 6 years to reflect the overall seriousness of all three counts, reaching 14 years on count 6 and then imposing the 8 year concurrent sentences on counts 1 and 3.

18. Treating the assault occasioning actual bodily harm as a Category 1B offence under the relevant guideline, the Recorder stated that the notional sentence before discount for plea was 21 months which she reduced to 14 months to reflect a one-third reduction for the early guilty plea. As we have indicated, the sentence was to run consecutively to the sentence on count 6. She categorised the failure to surrender as a Category 3A offence under the relevant guideline, with a starting point of 14 days' custody and a category range of up to 6 weeks' custody. The sentence of 1 month (to run consecutively) fell within this range. In this way, the Recorder reached the total sentence of 15 years and 3 months as we have indicated.

Grounds of Appeal

19. On behalf of the appellant, Mr Reilly submits in essence that, on count 6, there was no proper basis to depart from the 8 year starting point for a Category 2A offence. The downward adjustment of 2 years, reflecting that no penetration occurred, was insufficient and did not adequately reflect the offending behaviour. The upward adjustment to 6 years to reflect the seriousness of the overall offending was disproportionate. The appellant's overall sentence was, as a consequence, manifestly excessive.

Discussion

20. We are in no doubt that the appellant's overall offending was serious, causing severe psychological harm to the victim of his sexual offences. A severe sentence was warranted. There can be no challenge to the categorisation of count 6 as a Category 2A offence. The sentencing guideline for causing or inciting a child under 13 to engage in sexual activity states that 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 to reflect the fact that no or lesser harm actually resulted. We discern from her sentencing remarks that the Recorder had in mind this aspect of the guideline and had in mind that she should make a downward adjustment to reflect that the appellant voluntarily desisted from penetrating the victim's mouth. The guideline states that the extent of downward adjustment will be specific to the facts of the case. We acknowledge that the Recorder was well placed to assess the extent of the reduction, given that she was familiar with the facts as she had conducted the trial. Her decision to treat count 6 as the lead offence warranting an upward adjustment to reflect the overall sexual offending cannot be, and is not, criticised. There is no challenge to the Recorder's approach to sentencing the assaults or the failure to surrender to bail.

21. That said, we agree with Mr Reilly that, on count 6, the Recorder ought to have applied a greater downward adjustment to reflect the appellant's desisting. More significantly, while recognising the seriousness of the impact on the victim, we consider that the upward adjustment of 6 years to reflect the other sexual offending was disproportionate and failed to respect the principle of totality. For these reasons, the overall sentence was manifestly excessive.

22. The result is that we quash the sentence of 14 years on count 6. We substitute a sentence of 11 years. The sentences for the other offences remain the same. The sentences on counts 1 and 3 remain concurrent. The sentences for the assault and the failure to surrender to bail remain consecutive to count 6. This means that the appellant's total sentence is 12 years and 3 months.

Victim surcharge

23. Finally, the Recorder ordered the appellant to pay the victim surcharge in the sum of £156. However, the charge is determined by the date of commission of the earliest offence dealt with. In this case the earliest offence dealt with (count 1) was committed between 3 April 2011 and 4 April 2012. Where any offence dealt with by the court was committed between 1 April 2007 and 30 September 2012 the Criminal Justice Act 2003 (Surcharge) (No. 2) Order 2007 applies such that a victim surcharge must be made but only if the sentence imposed includes a fine (Article 3(2)). Accordingly, no Victim Surcharge should have been made and the Order for £156 is quashed.

Conclusion

24. To this extent the appeal is allowed.