IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LIVERPOOL

HIS HONOUR JUDGE TREVOR-JONES T20207609

CASE NOS 202301929/A2 & 202304462/A2

[2024] EWCA Crim 1349

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 24 October 2024

Before:

LORD JUSTICE HOLGATE
MRS JUSTICE STACEY DBE
SIR NIGEL DAVIS

REX
V
A.R.J

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MR C WITCHER appeared on behalf of the Appellant

J U D G M E N T

1. MRS JUSTICE STACEY: The provisions of the Sexual Offences (Amendment) Act 1992 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. The applicant's application for leave to appeal against sentence and for an extension of time in which to do so has been referred to the full court by the Registrar and a representation order granted. We are grateful to Mr Witcher for his submissions today.
3. The applicant, who is now aged 36, commenced a total sentence of eight years and six months' imprisonment on 18 December 2022 having been sentenced in his absence on 17 July 2022 by His Honour Judge Trevor-Jones in the Crown Court at Liverpool.
4. The background is as follows. On 21 December 2021 in the same court before the same judge on a 12-count indictment, the applicant pleaded guilty to six offences of indecent assault consisting of non-penetrative activity, contrary to section 14(1) of the Sexual Offences Act 1956, which had been committed against his younger sister then aged between 10 and 13 years old between 2000 and 2004 when the applicant was between the ages of 14 to 17. There is a three-and-a-half year age gap between them.
5. A trial date was fixed for the remaining six counts consisting of four further counts of penetrative indecent assault when his sister was under the age of 14 and two counts of rape when she was between the ages of 10 and 14.
6. The applicant failed to attend his trial on 6 June 2022 as he had absconded to Turkey and a bench warrant not backed for bail was issued against him.
7. The trial proceeded in his absence on 7 June 2022 and he was convicted of all the

remaining counts on 8 June 2022. He was sentenced in his absence on 12 July 2022 to sentences of 16 months for each of the indecent assault offences to which he had pleaded guilty, to three years for each of the indecent assault offences that he had been convicted of by the jury and an eight year sentence for each of the two counts of rape. All sentences were ordered to be served concurrently to each other.

8. On his return to England on 1 December 2022 the bench warrant was executed and after obtaining legal representation and admitting the breach of bail offence, the applicant was sentenced to serve a consecutive sentence of four months on 6 December 2022.

9. He requires an extension of time of 155 days for his application for leave to appeal against sentence for the offence of failure to surrender to the Crown Court and an extension of time of 302 days for his application to appeal against the remainder of his sentence.

10. His application to appeal was sent by post from HMP Liverpool on 10 January 2023 within time, but it was lost en route and never reached the Court of Appeal Office. After learning that the papers had not been received and obtaining and completing fresh forms, but before he had been able to resubmit them, all the applicant's property was lost on moving prison. It then took a further three months to once again obtain the necessary information and to complete and send the forms back, which he did on 3 August 2023. We are satisfied with the explanations given by the applicant for the lengthy delay because of circumstances outside his control and note that he had taken reasonable steps to lodge his appeal in time. We conclude that it is in the interests of justice to allow the application to extend time notwithstanding the length of the delay involved.

11. <u>The facts</u>

The applicant was born in 1986 and his sister, the complainant, in 1989. In June 2019 the complainant reported a number of allegations of sexual abuse by the applicant that had occurred in the late 1990s over a period of four years. It started when she was around 10 and he was around 14 and when a babysitter first started looking after them.

12. The complainant said that at first the applicant would enter her bedroom, remove her pants and touch the outside of her vagina (counts 1 and 2). He then began to digitally penetrate her vagina (counts 3 and 4). He also touched her lips and tongue with his penis (counts 5 and 6) and penetrated her mouth with his penis (counts 7 and 8). He simulated sexual intercourse by placing his penis in between her legs (counts 9 and 10).
13. At one point the complainant disclosed to a family member that her brother had kissed her. When it was reported back to the complainant's mother, the complainant was grounded for lying, which emboldened the applicant who had previously told his sister that nobody would believe her. At that point the abuse then progressed to full sexual intercourse (counts 11 and 12) which occurred on at least four occasions.
14. Since the applicant ejaculated without protection the complainant obtained the contraceptive pill when she was 13. The abuse continued most weekends until 2004 but it stopped after the complainant disclosed some of the less serious incidents to a teacher at her school and the matter was then reported to the social services. No further action was taken at that stage but the applicant stopped his behaviour.
15. The complainant finally decided to report the matter and the full extent of the abuse to the police in June 2019. The applicant was interviewed in August 2021 and answered no comment.
16. The start of the trial for the six contested counts was delayed by one day by the applicant having absconded. It proceeded the next day and he was convicted in his absence. In

advance of the trial his defence team had full instructions and had collated mitigation material and there was no obstacle to the sentence hearing proceeding in his absence.

17. This was a difficult and complex sentencing exercise for the judge who was ably assisted by written notes from both prosecution and defence counsel. The judge noted that the applicant had abused his sister from a very early age, gradually escalating the activity. The abuse of the complainant was sustained over a number of years. He threatened her not to tell anyone. In the case of each activity there was firstly a specific count but also a corresponding multiple count incident with not less than three occasions when each of the various activities occurred. In relation to the rapes he had ejaculated without protection.

18. The approach in such cases involving offences committed by a defendant as a youth many years before was identified by the judge as being that in R v Limon [2022] EWCA Crim 39. We would also mention that the more recent case of Ahmed [2023] 1 WLR 1858 is now the lead case and provides extremely helpful guidance.

19. The applicant would be sentenced within the minimum sentence prescribed at the time of the offending. Counts 1, 2, 5, 6, 9 and 10 were Category 2B offences. Counts 3, 4, 7 and 8 were Category 3B offences and the maximum sentence available at the time was 10 years. The counts of rape (counts 11 and 12) had the same maximum sentence under both the 1956 and 2003 Acts and were Category B2 offences under the guidelines.

20. The judge decided sensibly that the sentences on counts 11 and 12 would reflect all the offending, with the sentences on the other counts to run concurrently in accordance with the totality principle. The judge noted that the victim personal statement described how the effect of the abuse at the time had led to the complainant's indiscipline at school resulting in her exclusion. It had damaged relationships with other family members and caused clear and enduring serious emotional and psychological trauma. She had had

life-long nightmares, and in spite of trying to bury the memory of the abuse for over 20 years, her feelings of fear, guilt, isolation and pain have not left her.

21. The applicant had pleaded guilty to the non-penetrative offences, however had only done so after the initial trial listing had been adjourned for Covid and therefore attracted a 10 per cent discount. In respect of the remaining penetrative counts he was convicted after trial in his absence and was therefore not entitled to any credit.

22. The court had regard to the guidelines for the sentencing of children and young persons, in particular section 6 which involves the crossing of a significant age threshold between the commission of the offence and sentence and also the Sentencing Council Guidelines on Sexual Offences when Sentencing Children and Young People. The judge noted that the starting point for counts 11 and 12 was eight years for a single offence. However a substantial upward adjustment was needed to reflect the multiple incidents of rape and all the other offending. The appropriate uplift, he concluded, would take the sentence to 16 years. However the sentence would then be reduced by half to reflect the applicant's age at the time to arrive at a final figure of eight years. The sentences on counts 11 and 12 would be concurrent to each other and the other sentences. For the non -- penetrative counts 1, 2, 5, 6, 9 and 10, the judge increased the starting point of two years to three years, then reduced the sentence by half to take account of the age. There would be a further 10 per cent reduction for credit for the late guilty pleas.

23. Counts 3, 4, 7 and 8 had a starting point of four years for a single offence, reduced to three relative to the respective maximum sentence applicable at the time of the offending. Applying the same principles as he had applied to the other sentences, he made an upward adjustment to take account of the number of offences which he then reduced by half due to age to arrive at a final sentence of concurrent sentences of three years in

relation to each of those counts.

24. At the sentencing hearing for the breach of bail conditions and the failure to surrender on 6 December 2022 the judge found that the appellant (as he is in relation to this ground of appeal) had absconded and fled the jurisdiction to Turkey as a deliberate attempt to evade justice. It only delayed the trial by one day and he was arrested at Manchester Airport on his return to the country after being at large for six months. The judge considered that it was a serious offence and after giving full credit of three months for his early guilty plea, imposed a consecutive sentence of six months.

25. Three grounds of appeal are those advanced by counsel on behalf of the applicant which replace the handwritten grounds first submitted by the applicant as a litigant in person. First, that the upward adjustment to the starting point for counts 11 and 12 from eight to 16 years was considerably too great with the consequence that the final sentence after a 50 per cent reduction to reflect the applicant's young age at the time of the offending was manifestly excessive. Secondly, that the judge failed to take account of mitigation and make any downward adjustment. And thirdly, that the sentence for failure to surrender was also manifestly excessive.

26. At the sentencing hearing both the prosecution and defence counsel accepted that it was correct to consider the rape offence charged under section 1(1) of the 1956 Sexual Offences Act under the Sentencing Council Guidelines for Rape contrary to section 1 of the 2003 Act. The offences fell under Category 2B since there was severe psychological harm to the complainant. Therefore the judge had applied the correct starting point of eight years.

27. There were a number of aggravating features that are not provided for in the 2B categorisation that entitled the judge to make a significant upward adjustment to the

starting point. The most significant is the fact that the rapes took place on at least four occasions. Also extremely significant is the period of abuse that the complainant suffered of over four years. Other features included the threats made to the complainant to prevent her from revealing the abuse; the humiliation she endured from the applicant after she had disclosed a little of what was happening to a family member and was then disbelieved by her own family; the fact of the ejaculation was also an additional aggravating feature, made worse by it resulting in the complainant having to take contraceptive medication aged 13. In addition, some of the indecent assault counts were extremely serious of themselves. Counts 7 and 8 for example of oral penetration would now be classified as rape. It is correct that the severe psychological damage is already taken into account in the categorisation but the judge did not treat it as an additional aggravating feature and it was not double-counted by him. Nor did the judge double count the non-penetrative acts which were precursor offences to the penetrative counts. The uplift was justified on the basis of the three separate types of penetrative activity and the precursor events.

28. The applicant expressed remorse for some of the less serious incidents but his remorse sits uneasily with his absconding and attempt to evade justice. The judge gave credit for the guilty pleas on what had been intended to be the first day of trial for the less serious offences.

29. The applicant had minimal mitigation but his own immaturity and behavioural difficulties at school were taken into account to some extent in the 50 per cent reduction under the Children and Young Persons Sentencing Guidelines. The most serious offending occurred when the applicant was in his late teens and the judge was thus justified in considering that a discount of no greater than 50 per cent for his youth at the time and

behavioural issues was appropriate and consistent with the duty to impose the shortest term possible commensurate with the seriousness of the offences. His lack of offending since is to his credit but in offences of this type lack of previous or subsequent convictions carry less weight. Leave to appeal against the sentences on indictment T20207609 is therefore refused.

30. Failure to surrender

In sentencing the appellant's failure to surrender to bail the judge described it as a serious offence and considered that the starting point should be nine months reduced to six for his early guilty plea. The appellant's explanation for absconding was that he had felt unable to tell his partner of the impending trial and so he had fled the country.

31. Under the guideline the starting point for the most serious category of offences under 1A is six weeks' imprisonment with a range of 28 days to 26 weeks. This was clearly culpability A as it was a deliberate attempt to evade or delay justice. Thankfully the absconding did not result in either a substantial delay or interference with the administration of justice since the trial and sentence was able to proceed in the appellant's absence with a delay of only one day. However, that is to completely ignore the effect on the complainant of the applicant's attempt to avoid justice which must have inevitably been substantial and added significantly to her distress, placing it firmly in Category 1 harm. It is particularly serious in a case such as this, a highly charged case where all minds would have been focused on the build-up to the trial and for the complainant to turn up on the day to find that the appellant was not present would have been extraordinarily distressing. The facts of the offence went beyond the top of the range of the Sentencing Council Guidelines under 1A.

32. We find however that it was manifestly excessive for the judge to have gone so far

beyond the top of the range set out in the guidelines as he did, noting as we do that the maximum sentence for the offence is one of 12 months. We consider that it would have been appropriate to raise the starting point to beyond the category range to a custodial sentence of four months, which with a reduction for his early guilty plea, would have been a total sentence of 10 weeks.

33. We therefore allow the appeal on the failure to surrender offence. We quash the sentence and replace it with a consecutive sentence of 10 weeks. As stated earlier, the application for leave to appeal the remainder of the sentence is refused.

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

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