IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 799

No. 201904566 A3

Royal Courts of Justice

Wednesday, 13 May 2020

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE GOOSE
MR JUSTICE MARTIN SPENCER

REGINA
V
KEVIN BARRY SPENCER

REPORTING RESTRICTION APPLIES:
SEXUAL OFFENCES (AMENDMENT) ACT 1992 APPLY

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MS F. PENCHEON appeared on behalf of the Appellant.

The Crown were not represented.

J U D G M E N T

MR JUSTICE MARTIN SPENCER:

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 that offence. This prohibition will apply unless waived or lifted in accordance with section 3 of the Act.

2 The applicant Kevin Barry Spencer seeks leave to appeal against a sentence of five years' imprisonment imposed by his Honour Judge Khokhar in the Crown Court at Leeds on 22 November 2019 in respect of five offences of indecent assault committed in the early 1990s.

3 The facts relating to these offences are as follows. The complainants were two sisters, G and H. Counts 1, 2 and 3 related to offences against G. Counts 5 and 6 related to H. At the time, G was around eight years of age and H was around six. The applicant was aged around 23 at the time. The girls' father was a church minister, and the applicant befriended the family when he visited the church. He became a frequent visitor to their home and would play with the girls in their bedroom. The applicant indecently assaulted both girls in the family home. On multiple occasions he touched G and H on their vaginal areas, both over and under their clothing, and these were the facts that accounted for counts 1, 2, 5 and 6. On one specific occasion he kissed G's naked vagina in the bathroom, and that was count 3. The applicant told G not to tell her parents about what he had been doing.

4 As the learned judge remarked when sentencing the applicant, the abuse of G only stopped when she learned through sex education at school that what the applicant had been doing was abuse and informed her mother. What she did not know at the time was that H, who was only six years of age, was also being abused. By reason of their age the children were very vulnerable. There was grooming to the extent that the applicant had suggested to both girls that he would be their boyfriend and he had tried to dissuade them from reporting him to their parents. This was offending over a period of time against two very young girls.

5 Sentencing the applicant, the learned judge referred to the difficulties which the applicant had faced from being born with the congenital defect of spina bifida with associated hydrocephalus and also to his having fallen when a child which had caused some damage to his brain and a loss of eyesight in his right eye.

6 The applicant became a frequent visitor to the girls' father and his family, and he was trusted with their young daughters. He betrayed that trust, said the sentencing judge, by committing these indecent assaults. The learned judge appropriately adopted the approach of imposing a lead sentence for the most serious offence, which was count 3 on the indictment, a sentence which was intended to reflect the overall offending, and he then imposed lesser concurrent sentences in relation to the other counts. Nevertheless, the lead sentence of five years' imprisonment was within the modern Sentencing Guideline which gives a starting point of four years and a sentencing range of three to seven years' imprisonment for a single offence.

7 On behalf of the applicant, Miss Pencheon, for whose submissions we are very grateful, has renewed the application for leave to appeal, submitting that the sentence of five years' imprisonment was manifestly excessive. She relies on three matters: firstly, the age of the offences; secondly, the immaturity of the appellant at the time of the offending; thirdly, the effect that a custodial sentence would have on the appellant, given his personal

circumstances and his on-going health issues. She further submits that the learned judge had been wrong in principle to pass a deterrent sentence.

8 The applicant's mental health issues are referred to in the pre-sentence report where the author states his assessment that various features of the applicant's physical health, emotional well-being, learning difficulties, traumatic experiences and upbringing have contributed to his offending behaviour, the applicant viewing himself as a "person to be worth nothing", who has clear attachment and abandonment issues. The applicant has never held any type of employment. He attended a specialist school due to his physical health issues and learning difficulties and has never had a proper family relationship. Dr Waheed, the consultant psychiatrist instructed, has expressed the opinion that a custodial sentence will lead to worsening of the applicant's mental state, specifically depression of mood, lowering of self-esteem, leading to hopelessness and worsening of mood and negative cognitions, with an increased risk of suicide.

9 In addition, we take account of the fact that with his physical and mental disabilities the applicant will be a misfit in prison. That will make the effect of imprisonment upon him more severe than it would on somebody who did not have those disabilities, and that does go, to some extent, to the length of sentence.

10 So far as deterrence is concerned, this is a reference to the following remark made by the learned judge when sentencing the applicant. He said:

> "I have to balance your interests against what you have done, because the elements of punishment are not simply to punish you, but it is also to deter others from doing anything like this."

11 This was, however, said in the context of submissions being advanced by Miss Pencheon that the effect of prison on the applicant would be greater than it would be on an able-bodied person or someone without the difficulties suffered by the applicant. The judge was not, in our view, passing a deterrent sentence as such.

12 Despite the submissions made on the applicant's behalf, we take the view that it is not reasonably arguable that the sentence of imprisonment was manifestly excessive. The learned judge had full regard to the mitigating factors and to the appropriate Sentencing Guidelines and he kept within the Guidelines for a single offence, even though he was sentencing for multiple offending against two different victims. In our judgment, the sentence could reasonably have been longer.

13 Refusing leave to appeal, the single judge stated that the fact this was part of a five-count indictment involving two victims alone justified the final sentence of five years. He referred to the fact that historic offending is not treated more leniently than current offending, subject to consideration of any difference in the maximum sentences. He remarked that custody was inevitable for this sort of offending against two very young victims over a period of time and it was inconceivable to reduce the sentence to two years or less so that suspension of the sentence could be considered. He pointed to the fact that in the pre-sentence report the applicant was unwilling to engage in any work or interventions to address his cognitive deficit in the light of his continued denial of the offences. The single judge referred to the fact that the author of the pre-sentence report was of the opinion that the applicant posed a high risk of serious harm to children and vulnerable known adults, if not in his existing care home setting.

14 We agree with all these points made by the single judge in refusing leave to appeal, and for

all the above reasons, in our view this application must be dismissed.

CERTIFICATE

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This transcript has been approved by the Judge.