IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2021 03756 A2

[2022] EWCA CRIM 776

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 10 May 2022

Before:

LADY JUSTICE SIMLER

MR JUSTICE DOVE

RECORDER OF WESTMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR

REGINA
v
MC

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MR MICHAEL MAGARIAN QC appeared on behalf of the Appellant

LADY JUSTICE SIMLER:

Introduction

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions where a sexual offence has been committed against a person no matter relating to that person shall during their 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. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 26 June 2020, in the Crown Court at Bradford, the applicant pleaded guilty to sending a malicious communication (count 10) on indictment T20217308 (the 'Bradford indictment'). Subsequently, on 4 December 2020 he pleaded guilty on re-arraignment to five counts of sexual activity with a child aged 15 (counts 1, 2, 7, 8 and 9 on the Bradford indictment).

3. On 2 June 2021, in the Crown Court at Leeds before His Honour Judge Clark and a jury, the applicant was convicted of nine offences on indictment T20207612 (the 'Leeds indictment'). He was sentenced on 9 July by His Honour Judge Clark on both indictments.

4. So far as the Leeds indictment is concerned, he was sentenced for offences involving Child 1, who was then aged six or seven, for offending that took place between 1996 and 1998, when the applicant was aged between 14 and 16. For counts 1, 2 and 6, reflecting multiple vaginal rapes contrary to section 1(1) of the Sexual Offences Act 1956, there was a sentence of six years on each count to run concurrently. Counts 4 and 5 were oral rapes contrary to section 14(1) of the 1956 Act, and concurrent sentences of four years on each were passed. Count 3 was an indecent assault, also contrary to section 14 of the 1956 Act, which involved the applicant putting his tongue in Child 1's mouth. A concurrent sentence of three months was passed on that count. Count 7 was an offence of vaginal rape, contrary to section 1(1) of the 1956 Act, committed against a girl we shall refer to as Child 2. She was then aged between five and six and the offence occurred between 2001 and 2003. The applicant was around 19 years old. He was sentenced to a consecutive sentence under section 278, with a custodial term of nine years and an extension period of one year. Counts 8 and 9 were

offences of anal and oral rape of a child under 13, contrary to section 5(1) of the Sexual Offences Act 2003. These offences were committed against a boy we shall refer to as Child 3, then aged around six. The offences took place between 2014 and 2016 when the applicant was in his early 30s. The applicant was sentenced to a custodial term of ten years under section 278 with an extension period of one year on each count. The sentences were concurrent with one another but consecutive to the earlier sentences.

5. So far as the Bradford indictment is concerned, on counts 1, 2, 7, 8 and 9, which were offences of sexual activity with a child contrary to section 9(1) of the Sexual Offences Act 2003 and were all committed against a girl we will refer to as Child 4, involving full penetration of her vagina, when she was aged 15, there was a sentence of three years imprisonment, concurrent to each other but consecutive to the earlier sentences. For count 10, the malicious communication, there was a further concurrent sentence of four months imprisonment.

6. Accordingly, on the Leeds indictment there was a standard determinate sentence totalling six years imprisonment for counts 1 to 6 and a sentence under section 278 of the Sentencing Act 2020. The sentence totalled 21 years and comprised custodial terms aggregating to 19 years with licence extension periods of two years. For the Bradford indictment there was a standard determinate sentence totalling three years imprisonment, to run consecutively to the Leeds indictment.

7. Other orders were made, a Surcharge Order, a Sexual Harm Prevention Order together with a Restraining Order, to last indefinitely or until further order.

8. We are grateful to the Registrar for drawing to our attention to a number of errors which we deal with here. First, the Crown Court system had not been updated to reflect changes that were brought about by the Sentencing Act 2020, so that the record sheet records that the sentence and related orders were made under repealed provisions of the Criminal Justice Act 2003 in respect of an Offender of Particular Concern and the Sexual Offences Act 2003 in respect of the Sexual Harm Prevention Order, and so far as the Restraining Order is concerned references were made to the Protection from Harassment Act 1997. That

misrecording does not invalidate any of the orders made as there were powers available to and intended to be exercised by the Crown Court in all those regards. Nonetheless, for the avoidance of doubt, we make clear that the repealed provisions to which reference was made are deemed to be references to the corresponding provisions in the Sentencing Act 2020, pursuant to the transitional provisions in paragraph (4) of Schedule 27 of that Act, and we so declare. Secondly, the Surcharge Order imposed on the applicant was unlawful. No Surcharge Order should have been made because the earliest offence was committed in 1997, which predates the implementation of the relevant legislation. We therefore quash the Surcharge Order, again for the avoidance of doubt.

9. The applicant seeks leave to challenge the sentence passed by Judge Clark as manifestly excessive. His application has been referred to the full court, together with an application for an extension of time, and we are grateful to Mr Magarian QC who has appeared on his behalf with a representation order limited to junior counsel only.

10. While there was a delay in this case, the delay has been fully explained and it is clear that new solicitors, instructed relatively promptly after the sentence was passed, acted with diligence in pursuing documents and funding in order to settle grounds of appeal. In the circumstances we grant the extension of time sought and give leave.

<u>The facts</u>

11. The appellant is the stepbrother of the mother of Child 1 and Child 2 - in effect their step-uncle. The offences against Child 1 occurred between 1997 and 1999 when she was somewhere between six and eight and he was between 14 and 16. Child 2 was her younger sister. There was a single rape in her case committed between 2001 and 2003 when she was between five and six and he was around 19. Child 3 was the appellant's natural son. He sexually abused Child 3 between 2014 and 2016 when Child 3 was between six and eight and he was in his early 30s.

12. The offences against Child 3 came to light on 21 June 2018 when Child 3's younger brother disclosed to his mother that Child 3 had asked him to touch his private parts and "suck his balls". His mother and her partner were worried about this and the sexualised chat. They

spoke to Child 3, who told them that the appellant had put his penis in his bottom and his mouth when they had been on their own. The matter was reported to the police and Child 3 gave an account to the police consistent with that. In a video recorded interview he explained that his father had orally and anally raped him on a number of occasions and he was able to recall a specific incident when the appellant had got him out of bed and had taken him downstairs, before both anally and orally raping him on the dining room sofa.

13. The appellant was arrested on 18 January 2019. In interview he said he did not know why Child 3 would make such allegations, which he described as "a load of rubbish". Police enquiries then revealed historic investigations in relation to other allegations of sexual offences by Child 1 and Child 2 against the appellant.

14. So far as Child 1 is concerned, in 2004, when she was 13, she reported to her mother that she had been vaginally raped when she was around seven or eight by the appellant. There was a police investigation but no prosecution at the time. Child 1's account in 2004 was that the vaginal rapes took place in his bedroom and at her home. On the last occasion when it was happening her mother had walked in and shouted at the appellant.

15. As part of the new police investigation in 2020 Child 1 (then aged 28) provided a video interview detailing that when she was around six or seven, she had been vaginally raped on multiple occasions in his bedroom at her aunt's home and in her own home (count 2). The first time it happened was in the appellant's bedroom. He removed her clothes, he got on top of her and he penetrated her (count 1). There was also an occasion where he insisted on french kissing her (count 3). He told her to suck his penis like a lollypop and he required her to perform oral sex upon him at his house (count 4). He had Child 1 perform oral sex on him on a number of other occasions (count 5). The final vaginal rape, when the appellant's mother interrupted him, was count 6. Thereafter Child 1's mother asked her what had happened, and she told Child 1 not to tell anyone when she was told what had occurred.

16. Count 7, involved Child 2. In May 2008, when Child 2 was aged 12, she reported to both her sister and her mother that the appellant had sexually abused her. The police were contacted but again no prosecution followed. Child 2's account in 2008 was that she was being babysat

by the appellant. He had given her and her cousin, who was also there, chocolate biscuits and locked them in a bedroom. He then told her cousin to go outside. He sat Child 2 on the bed, pushed her shoulders back, took her clothes off and vaginally raped her. Afterwards he told her to be quiet and not to tell her mother. She was about six when it happened at her aunt's house. When video interviewed in 2020 Child 2 (who was then in her mid-20s) was unable to recall the detail of the rape, explaining that over the years she had deliberately done her best to forget the attack as a way of coping with what had happened to her.

17. In interview in 2004 the appellant described Child 1's allegations as "bollocks". When interviewed in July 2020 he denied committing any offences against any of the three children to whom we have referred. He said Child 1 would not have been allowed in his bedroom as she would not be safe, so others kept her downstairs.

18. The Bradford indictment concerned Child 4. In January 2020, when the appellant was 37, he commenced a relationship with her. She was15 at the time. He was aware of her age but told her to pretend she was 16. In February 2020 he invited her to his home address after he had visited her at her house. He began kissing her. This escalated to full intercourse (count 1). On another occasion Child 4 and a friend had gone to his address to dry some of their wet clothes. He and the two girls were on a mattress in the living room when he began having sex with Child 4 while her friend lay next to them (count 2). On 21 February 2020 Child 4 was reported missing by her mother. Police were informed by one of her friends that she was involved in a sexual relationship with the appellant. She in fact returned home on 22 February and the police were called. She was asked questions but denied being in a relationship with the appellant or being with him while she was missing. During a conversation with her mother that evening she disclosed that she was in fact having a sexual relationship with him. Officers spoke to her again and in a video recorded interview she said that she and the appellant had had sexual intercourse on multiple occasions (count 9).

19. The appellant was arrested and in interview confirmed that he was aware that Child 4 was 15 years old and that they had engaged in a sexual relationship. When asked if a condom was used, he said Child 4 had said they did not need to use one and she had an implant. He

admitted that he ejaculated inside her. During a police escort back to his home address he made comments, including, "This is not a crime like you call it, she wanted it, she was on top of me and she was telling me what to do". He also said, "It is not rape though. She gets what she wants. She laid down and opened her legs."

20. The appellant was bailed on 23 February with conditions not to contact Child 4, but, notwithstanding that, he was messaging her again by the beginning of March and each time she went out she would see him and stay at his address. The two began to have a sexual relationship again. The first sexual engagement occurred on some stairs outside, during which the appellant removed the condom midway through intercourse as he did not like it (count 7). He then performed oral sex on Child 4 (count 8).

21. On 15 April 2020 Child 4's mother made contact with police, reporting various concerning messages she had found on Child 4's telephone from the appellant. The police attended and Child 4 disclosed that she had started to message the appellant two weeks after he was released on bail and that they had then started to meet and to have sexual intercourse again. The appellant had asked Child 4 to have children with him and to move into his home address. He said that her 11-year-old sister could also move in.

22. Child 4 subsequently began a relationship with a new boyfriend and ended the relationship with the appellant. The appellant tried to persuade her to change her mind, but then became threatening towards her and her new boyfriend. He began to send threatening messages to the boyfriend. Those messages started on 14 April 2020 and continued the following day. He also rang the boyfriend 46 times on 15 April 2020.

23. The appellant was arrested on 15 April 2020. When cautioned he commented, "I know I should have waited six months for her to turn 16 ... It just happened. We both wanted it." In interview he gave mostly no comment answers but said that sexual attraction to children involved children of 12 years and under, and that underage sex was 13 to 16, but consensual sex was 16 to 18.

24. The appellant was 39 at the date of sentence, having been born in 1982. He had twelve previous convictions for fifteen offences, including low level violence, dishonesty, a Public

Order Act offence and breaches of bail and court orders, but no sexual offences on his record of any kind. The sentencing judge had a pre-sentence report, which we have read. The report author assessed the appellant as posing a high risk of serious harm to children, whether they were male or female. That meant that he had the capacity to cause serious harm and the event could happen at any time with a serious impact. The risk was both physical and emotional harm, and the report author went on to say that family sexual abusers, once caught and convicted, are unlikely to reoffend, but in this case the appellant had also offended against those outside the family. The report author also assessed him as posing a medium risk of serious harm to the public, specifically future partners, with the risk being domestic abuse, and it identified risk factors that needed to be addressed in order to reduce the risk of reoffending, including his sexual interests, his self-management and his beliefs about sex and relationships.

25. The judge also had victim impact statements from all four child victims (grown-ups by this time) and from the mother of Child 3. Each of those statements speaks of the profound and lasting psychological harm each has suffered and continues to suffer as a result of this offending and the impact it has had on all their lives.

The appeal

26. There is a single overall ground of appeal that the sentence of 28 years custody in this case was manifestly excessive. Mr Magarian QC submitted that the total 15 year custodial sentence in respect of Child 1 and Child 2 was too long. The appellant was then a teenage boy and the sentence as a whole failed to have regard to the principle of totality and to the prevailing approach to sentencing of young people. Further, he contended that if the appellant had been arrested and prosecuted for the matters relating to Child 1 and imprisoned then and there and then committed the later offences, it would not have been open to him to complain about the sentence that he described as "crushingly long". The position, however, was different. The appellant was not arrested and prosecuted, and the sentence is too long by reference to that also.

28. Thirdly, he submitted that the judge should have reflected more favourably on the fact that

there was a period of 2003 to 2014 where no offending took place at all. Finally, Mr Magarian referred us to a passage in the judge's sentencing remarks at page 8A where the judge said the following, directing himself to the victims:

> "I do mean it when I say you don't want to look at individual sentences, you've got to look at the whole here because I've had to try and work out, using the law, what is about the right whole within the law. So, each person should just think, 'I contributed to the overall sentence.' That's probably the best way to look at that."

Mr Magarian submitted that those remarks reflected an error of approach. Totality is not to be deployed to satisfy the victims in a criminal sentencing situation. The principle of totality can only work one way and that is to reduce the length of the sentence. Here, as the remarks indicate, the judge fell into the trap of considering the victims' interests and not the interests of the appellant, and for that reason too the principle of totality was misapplied.

30. Mr Magarian accepted that none of the sentences standing alone can be subjected to any meaningful criticism, and indeed some might be regarded as lenient, but his overall submission is that the agglomeration of them all has resulted in what he described as a gargantuan sentence, which infringes disproportionately the principle of totality and is an unjust and crushingly long sentence.

Analysis

31. We have reflected with care on these submissions and on the sentence as a whole, particularly given its length. This was a significant sentence, but having regard to the overall criminality, involving four victims, with multiple offending over three decades, we have concluded that the sentence cannot be impugned as disproportionate or unjust and is not a sentence that is manifestly excessive. Before explaining our reasons for that conclusion there are two further corrections we need to make in relation to the structure of the sentence and some of the remarks made by the judge.

32. First, in his sentencing remarks the judge appears to have passed concurrent standard determinate sentences to be served consecutively to the sentences passed pursuant to section 278 of the 2020 Act on counts 7-9 of the Leeds indictment. That is contrary to the

approach identified in R v Francis and Lawrence [2014] EWCA Crim 631 at paragraphs 50-57 that the determinate sentences should have been imposed first with any extended sentence to run consecutively thereafter. We reorder the sentences so that the determinate sentences will be served first, with the section 278 sentences to run consecutively to those sentences.

33. Secondly, having amalgamated the custodial sentence for the standard determinate sentences and the sentences pursuant to section 278 to identify a total custodial term of 28 years, the judge announced that the appellant would be required to serve at least two-thirds of that sentence and could ultimately serve a term of 28 years. In fact that is incorrect. He would be eligible for release from the standard determinate sentences having served four and a half years of the custodial term imposed for those offences. With regards to the sentences pursuant to section 278 of the 2020 Act, the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 does not apply, albeit it does apply to the determinate sentences. It would be the duty of the Secretary of State to release the appellant on licence as soon as he had served nine and a half years, half the total custodial term of 19 years in respect of the section 278 sentences and the Parole Board was satisfied that it was not necessary for the protection of the public that the appellant should be confined (see section 244A subsections (2)-(4) Criminal Justice Act 2003). If the Parole Board could not be so satisfied, either on the initial reference by the Secretary of State or subsequent references, they would ultimately release the appellant at the expiry of the full 19 years and he would then be on licence for a period of two years. Accordingly, we make those corrections and now return to the overall length of the sentence and explain our reasons for rejecting the submissions advanced on the appellant's behalf.

35. Returning to the appeal, the overall sentence was made up, as we have already explained, of four elements. So far as Child 1 is concerned, a total of six years custody was imposed in respect of activity that took place when she was aged between six and seven and he was 14 to 16. She was, as the judge remarked, scared and disgusted by what was happening and did not understand it. The judge described the offences against her as a “campaign of rape”.

Whether the term *campaign* is an appropriate one, what is clear is that there were multiple rapes. The appellant ejaculated inside this little girl and the rapes only stopped when the appellant was caught in her bedroom committing a sexual offence. The judge regarded the rapes as category 2 because of her vulnerability in terms of age and the psychological effect of the offending upon her, which continues to affect her to this day. It was culpability A or the top of B because he isolated her because of the family relationship. Furthermore, there was aggravation in his efforts to prevent reporting and in the fact that many of the rapes took place in her home where she should have felt safe. For an adult under today's guidelines the starting point for a single offence of this kind would be 13 years and the guidelines refer to periods of upwards of 20 years for multiple offences. The judge reflected the appellant's age and he faithfully reflected the principle of totality by reducing what would have been a very substantial sentence to an overall sentence of six years in Child 1's case.

36. In Child 2's case there was a single rape. Again it was category 2A for similar reasons. But the offence was committed on a slightly younger child (aged around five or six) and by this time the appellant was 19. For an adult the starting point would again have been one of 13 years. The judge reflected totality and the other circumstances by passing a nine year custodial sentence, with the extension period to which we have referred.

37. For Child 3 there was again what might be termed a campaign of oral and anal rape against a boy aged around six. The appellant was now 34. Again this was category 2A or the top of B for similar reasons. The judge concluded that standing alone the overall criminality against Child 3 warranted a sentence of 15 years. He reduced that to a custodial element of ten years to reflect totality.

38. Finally, in Child 4's case she was 15 and he was 37. She was vulnerable and had been reported missing. The appellant involved himself in a full-blown sexual relationship with her and, following his arrest and interview and being on bail, he continued to have intercourse with her, thereby committing further offences in relation to her. The sexual offences were category 1, with culpability just below A. There was aggravation in the commission of the offences while on bail. The judge started at four and a half years within the relevant

guideline bracket to reflect the number of offences and reduced that to three years, which gave generous credit for the guilty pleas entered in relation to Child 4. There was also a short concurrent sentence for the threatening communication.

39. As Mr Magarian readily accepted, looked at on its own, the sentences relating to each victim cannot possibly be described as excessive. Indeed, they could, and in our judgment should be regarded as lenient. It seems to us that the judge made careful allowance for totality by reducing the sentences in each group of sentences relating to a particular victim. There were four separate victims. Three were particularly vulnerable given their age and the fourth was vulnerable given her circumstances. In relation to Child 1 and Child 3 there were, as we have emphasised, multiple rapes extending over a period. True it is that there was a decade where there was no offending, but it appears from the evidence and indeed what the appellant himself said that the family were policing him and keeping him away from other children in that time.

40. It seems to us, contrary to the arguments advanced by Mr Magarian, that the judge had the principle of totality well in mind. He deployed it, not to satisfy the victims, but to reduce the length of the sentence to reach a sentence that was just and proportionate having regard to the overall criminality. The judge dealt with each group of sentences by imposing concurrent sentences in respect of each victim, with consecutive sentences as between each victim, and again that reflects an entirely orthodox approach.

41. Finally, the comments in the sentencing remarks emphasised by Mr Magarian disclose no arguable error of principle. To the contrary, the remarks were made at the end of the sentence. The appellant had been asked to leave the dock and to go downstairs with the dock officer. The judge had thanked the members of the jury for returning and simply turned to the victims to explain that he had had to calibrate the sentence in such a way as to ensure that the whole sentence was a just and proportionate one. We do not see anything in the sentencing remarks to suggest that the judge took into account irrelevant or inappropriate considerations or took an approach where he considered the victims' interests first.

42. This was a difficult overall sentence to pass. The judge dealt with it carefully and

comprehensively and did not fall into error. The sentence ultimately passed cannot be impugned as manifestly excessive for those reasons. We are grateful to Mr Magarian, who has said all he could possibly have said on the appellant's behalf, but for all those reasons the appeal is dismissed.