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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

[2023] EWCA Crim 1708



Case No: 2023/01363/A3

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Friday 8<sup>th</sup> December 2023

**B e f o r e:**

**LORD JUSTICE DINGEMANS**

**MRS JUSTICE STACEY DBE**

**HIS HONOUR JUDGE DREW KC**

**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

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**S S H**

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**Miss G Goring** appeared on behalf of the Appellant

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

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Friday 8<sup>th</sup> December 2023

**LORD JUSTICE DINGEMANS:** I shall ask Mrs Justice Stacey to give the judgment of the court.

**MRS JUSTICE STACEY:**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. No waiver or lifting has occurred.

2. On 15<sup>th</sup> February 2023, following a trial in the Crown Court at Leeds before Mr Recorder Khan KC and a jury, the appellant (then aged 57) was convicted of eight offences of sexual activity with a child family member, contrary to section 25(1) of the Sexual Offences Act 2003 who was aged between 14-17 years old; and one offence of sexual assault, contrary to section 3 of the Sexual Offences Act 2003, when the family member was 18 years old. The family member was the appellant's stepdaughter and the offences occurred between August 2012 and August 2019 when she was a teenager.

3. On 3<sup>rd</sup> April 2023, the appellant (by then aged 58), was sentenced by Mr Recorder Khan to a total of eight years' imprisonment made up of consecutive and concurrent sentences. On counts 4 and 7 (which involved touching up to and underneath the line of the complainant's underpants), he received sentences of four years' imprisonment, to run concurrently with each other. On each of counts 5, 6 and 10 (which involved the touching of the complainant's naked breasts), he was sentenced to two years' imprisonment, to run concurrently with each

other, but consecutively to the sentences on counts 4 and 7. On each of counts 1, 2 and 3 (which involved massaging the complainant's thighs) and count 9 (which involved the touching of her bottom), he received concurrent sentences of two years' imprisonment, to run consecutively to the sentences on the other counts. A Sexual Harm Prevention Order was made until further order.

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

### **Summary of the Facts**

5. The appellant had been in a relationship with the complainant's mother since the complainant had been around the age of 13. The complainant had known the appellant before his relationship with her mother began as he had been a teacher at the complainant's school when she was around 9 years old where the complainant's mother was a teaching assistant. When the complainant was around 14 years old, the appellant began to act inappropriately towards her. He would ask her to sit with her legs across his lap and he began by massaging the bottom of the complainant's legs. He then worked his way up and progressed to massaging her upper thighs above her knees. Counts 1, 2 and 3 referred to occasions when the appellant massaged the complainant's bare upper legs. Count 4 referred to an occasion when the complainant was around 16 years of age and the appellant touched her upper thighs, going up to and underneath the elastic of her pants.

6. Counts 5, 6 and 10 referred to occasions when he began to massage the complainant's shoulders, but then went down her top and touched her naked breasts towards the area of her nipples.

7. Count 9 referred to an occasion when the complainant (who was by then 17 or 18 years old) was watching television in bed with her mother. The appellant also got into the bed and

groped the complainant's bottom under her pants.

8. The appellant subjected the complainant to controlling and manipulating behaviour and had threatened suicide and self-harm if the complainant were to report the abuse.

9. In a moving Victim Personal Statement the complainant describes the emotional impact the offending has had on her. She cannot erase it from her mind. It has affected her ability to form relationships and has left her with feelings of low self-esteem and self-blame. She is now on anti-depressant medication and sometimes requires sleeping pills. She found giving evidence a particularly traumatic experience.

10. The prosecution submitted that under the Sentencing Council guidelines all the offences fell within the category of culpability A, given the significant disparity in age between the appellant and the complainant. Counts 5, 6 and 10, which involved the touching of naked breasts, were category 2 harm, with a starting point of four years' custody and a range of two to six years for a single offence under section 25. Count 10, charged under section 3 of the Sexual Offences Act, which took place when the complainant was over 18, was a category 2A offence, with a starting point of two years' custody. The remaining counts were submitted by the prosecution to be category 3, with a starting point of 12 months' custody, and a range from a high level community order to three years' custody for a single offence.

### **The Sentence**

11. The Recorder did not state whether he accepted the prosecution submission as to where the offences fell under the guideline, but it would appear from his sentence that he concluded that counts 4 and 7 fell within category 2 harm, and that the remaining offences were category 3. He did not state the starting point for each of the offences, what upward and downward adjustments he had made, or why he had made them, although he referred to the

aggravating feature of the offending taking place over a seven year period. He said that he considered that the abuse of the appellant's position of trust was an aggravating factor.

12. The Recorder noted that he could give no credit for plea as the appellant was convicted after a trial. He treated the appellant as a man of effective good character, which he took "very much into account" in his favour. He noted that the appellant had longstanding depression issues, and that he had a 13 year old daughter by another relationship who would be impacted by a custodial sentence. He also took into account that the time the appellant had spent in custody post-conviction had been used constructively.

13. There was a very detailed and helpful pre-sentence report which highlighted both aggravating and mitigating factors. The appellant had had a very difficult childhood and suffered physical abuse from his stepfather to the extent that he was taken into care aged 7 and raised by foster parents. He had struggled with significant alcohol issues which he had now largely conquered.

14. The Recorder did not refer to the Sentencing Council offence guidelines in his sentencing remarks, but he had received the prosecution sentencing note which made reference to them. He stated that he had had regard to the totality principle, but did not explain how he had applied it to the sentences he passed. Nor did the Recorder explain the effect of the sentence to the appellant, or how long he would serve, in accordance with section 52 of the Sentencing Act 2020 and the guidance in the Crown Court Compendium Part 2. Nor did he read out the terms of the Sexual Harm Prevention Order, or satisfy himself that the terms were understood by the appellant.

### **The Appeal**

16. In clear and helpful written and oral submissions, Miss Goring argued that the sentence

was both wrong in principle and manifestly excessive. The Recorder was wrong to conclude that counts 4 and 7 fell within category 2, as they did not constitute the touching of naked genitalia and were therefore wrong in principle. The starting point for counts 5, 6 and 10, which was agreed between the prosecution and the defence, should have had a downward adjustment. The Recorder should have imposed an uplift for the remaining counts, rather than to have imposed consecutive sentences. There was also a failure to differentiate between the seriousness of massaging the complainant's thighs (counts 1, 2 and 3) and massaging her breasts (counts 5 and 6), contrary to the Sentencing Council guidelines.

### **Analysis and Conclusions**

17. The Recorder was required by section 52 of the Sentencing Act 2020 to give an explanation for both the reasons for passing the sentence he arrived at, and its effect. It was necessary to identify the category in which he placed the offence under the guidelines. If he was considering a category higher than that proposed by the prosecution and agreed with the defence for a particular count, he should have informed defence counsel so that she could make submissions.

18. We agree with Miss Goring that counts 4 and 7 did not fall within category 2, but rather at the top end of category 3. With all due respect to the Recorder, who was the trial judge and would have had the facts firmly in his mind, we are forced to conclude that it was wrong in principle to conclude that counts 4 and 7 fell within category 2. Counts 5 and 6 (touching of a naked breast) did however fall within category 2 albeit at the lower end.

19. As to culpability, it is accepted that all the offences are culpability A offending, given the significant disparity of age, but it is right to note that other high culpability factors were not identified as being present.

20. The Recorder correctly noted that the offences were aggravated by having occurred over a seven year period. However, the abuse of trust inherent in sexual activity with a family member is built into the offence and to avoid double counting should not have been treated as an additional aggravating feature.

21. The totality principle is that the overall sentence should reflect all of the offending behaviour for which an offender is being sentenced and it must be just and proportionate. There is no inflexible rule as to how a sentence should be structured – whether by way of a lead offence, with an upward adjustment to reflect the overall criminality and shorter concurrent sentences for the lesser offences, or with consecutive sentences which have been proportionately reduced, or, where there are three or more offences, a combination of concurrent and consecutive sentences. There is nothing wrong in principle with the way in which the Recorder structured his sentence, if the total sentence was just and proportionate to the offending as a whole.

22. Looking at the total offending, and noting the error made in relation to categorisation, we conclude that an overall sentence of eight years is manifestly excessive on the facts of this case. The overall sentence should have been a total of six years' imprisonment.

23. We therefore quash the sentence imposed and replace with the following. We take counts 5 and 6 as the lead offences. They are both category 2A offences under the guidelines. Although they fall at the bottom end, they require a significant upward adjustment to reflect totality in light of the other offences, and since we will be imposing concurrent sentences for the remaining offences. For each of counts 5 and 6, we impose a sentence of six years' imprisonment concurrent with each other. For each of counts 4 and 7, we impose terms of two years' imprisonment to run concurrently with each other and with the sentences on counts 5 and 6. For each of counts 1, 2, 3, 9 and 10, we impose concurrent

terms of one year's imprisonment, making a total of six years' imprisonment.

25. Accordingly, and to that extent, the appeal is allowed.

26. There is another matter that we need to address. The Recorder purported to impose a Victim Surcharge Order but the Criminal Justice Act 2003 (Surcharge) (No. 2) Order 2007 (SI 2007 No. 1079) applies to offences committed between 1<sup>st</sup> April 2007 and 30<sup>th</sup> September 2012. A victim surcharge must be made but **only** if the sentence imposed includes a fine (Article 3(2)), in which case the surcharge is a fixed sum of £15 (Article 4). In this case the offences charged in counts 1, 2 and 3 were committed between dates commencing on 3<sup>rd</sup> August 2012 and no fine was imposed. The entire Victim Surcharge Order is therefore unlawful, as some of the offending predated the date on which the surcharge provisions came into force. Accordingly, we quash the Victim Surcharge Order of £120.

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