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[2023] EWCA Crim 545
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00673/A3

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 10th May 2023

B e f o r e:

LADY JUSTICE CARR DBE

MRS JUSTICE McGOWAN DBE

HIS HONOUR JUDGE BATE
(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v –

ANANDARAJAH BREMAKUMAR

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Mr N Hearn appeared on behalf of the Attorney General

Mr L Walker KC appeared on behalf of the Offender

J U D G M E N T

Wednesday 10th May 2023

LADY JUSTICE CARR:

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 the offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction

1. We have before us an application by His Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer a sentence which he regards as unduly lenient.

2. The offender, who is now 61 years of age, was convicted on 6th December 2022 following trial on four separate counts of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003. On three separate occasions over the course of three weeks, the offender sexually assaulted the 13 year old daughter of close friends. We identify her as "AB".

3. On 2nd February 2023, the offender was sentenced by His Honour Judge Aaronberg KC to 30 months' imprisonment on each count. The sentences on counts 1, 2 and 3 were ordered to run concurrently with the sentence on count 4. A ten year Sexual Harm Prevention Order under section 103 of the Sexual Offences Act 2003 was also imposed. prohibiting the offender from being in the company of girls under the age of 16 without the express permission of the parents or legal guardians who had to be aware of his convictions. A Restraining Order under section 5 of the Protection from Harassment Act 1997 was also imposed, prohibiting the offender from contacting AB or any member of her immediate family.

4. The gravamen of this application is that a sentence of three years' imprisonment for a single offence was justified. Having chosen not to impose consecutive sentences for the other offences, it was incumbent on the judge to increase the lead sentence to reflect the fact that the offending concerned four counts of sexual activity with AB. An appropriate uplift, it is suggested, would have been one of at least 12 months' imprisonment. The final overall sentence had to reflect all of the offending and in this case it failed to do so. We grant leave.

The Facts

5. The offender and his wife were close friends of AB's parents. They attended the same temple in North London and the offender was regarded as an "uncle" to AB. He held a responsible position as cultural secretary of their temple. Amongst other things in that capacity, he organised the young persons' singing activities, which involved AB.

6. The first sign of sexually inappropriate behaviour by the offender towards AB emerged in the summer of 2010, when the offender attended AB's home to give a temple offering to AB and her family. During that visit the offender proceeded to hug AB in a manner which AB later was to describe as "tight cuddles, squeezing cuddles" and "constant cuddles" which lasted for 15 minutes or more.

7. What followed occurred on three consecutive Thursdays during the school summer holidays, when the offender knew that AB's parents would be out of the house.

Count 1

8. Approximately a week after the first incident, the offender visited AB's home again. She was present at the address with her older sister. During the visit, the offender moved AB away from her sister to the living room of the property. He lay down on the sofa with her, touching her stomach under her clothing.

Count 2

9. On a further occasion, the offender attended AB's house and again sat on the sofa with AB in the living room. AB closed her eyes and the offender said "Oh, you're sleeping". He then started to kiss her and then to touch and squeeze her breasts over her clothing. She tried to push him away, but he continued to kiss her and to squeeze her breasts. He then moved her bra away and touched her breasts under her clothing, before then kissing and licking her nipples. He saw AB's father arrive and said "Oh, your dad's coming". He pulled her clothing back into place and moved away. He then spoke with AB's father as if nothing had happened.

Counts 3 and 4

10. On the third occasion, again the offender attended AB's house and ended up on the sofa with her. As previously, he kissed and licked her breasts. He then placed his hand underneath her trousers and into her underwear.

11. AB did not disclose this abuse during her childhood, but whilst studying at university she made disclosures to her parents, to her general practitioner and to a counsellor. By July 2020 she was ready to support a police investigation and gave a video-recorded interview.

Pre-Sentence Materials

12. The judge had before him a substantial amount of material relating to the offender for sentencing purposes. In terms of antecedents, the offender had two previous convictions for non-sexual offending: theft, dating back to 1993; and the sale of alcohol to a person under 18, dating back to 2011.

13. A pre-sentence report included the following information. The offender's behaviour was sexually motivated. He posed a very low risk of non-sexual offending, but a medium risk of serious harm to pre-teenage girls with whom he had unsupervised contact and held a position of trust, particularly within his community. A very large number of positive character references were provided, many of which focused on the offender's good work within the temple community. Medical records disclosed that the offender suffered from cervical spondylosis, diabetes, vertigo and that he required cataract surgery, which was still incomplete.

14. AB's Victim Personal Statement recorded her very severe distress and suffering as a result of this offending. She had been "torn apart" by what had happened. The offender and his family had been a huge part of her childhood. He had been someone whom she trusted. She considered him to be family. All that had changed. She would evade social events to avoid him. She struggled to form friendships and relationships with those around her. She could come across as awkward and silent. She suffered

from isolation as a result. She was now a doctor. Certain topics at work would trigger low mood and excessive sleeping, with a detrimental effect on her studies. She was angry at herself, as she was worried that her silence could have brought harm to other children. She had experienced intrusive thoughts, flashbacks and openly voiced thoughts of self-harm. This was highly distressing. Her mental health plummeted and she had to attend therapy sessions. Her mental health struggles affected her ability to find enjoyment in what were her passions. She was a semi-professional musician, but struggled to focus on music as it no longer gave her pleasure. She would turn down projects on the basis that she was too unwell to provide a recording. She was not able to commit to doing the work. Her whole family had been adversely affected. For her, London is now associated with the abuse. She said that she would never be able to regain the close relationship that she used to have with the community in which she grew up. She had lost close friendships and the abuse had ruined her relationship with the offender's wife and sons who had been so close to her as she grew up and such an important part of her childhood.

The Sentence

15. The judge adopted the following approach to sentence. He observed that there was agreement between the parties that the offending fell within category 2A of the relevant Sentencing Council Guideline. He confirmed that he agreed with that categorisation and went on to say this:

> "It is accepted that it is appropriate that I should sentence you for that offending and pass identical concurrent sentences in respect of the other counts."

16. The offences, said the judge, caused serious psychological harm. He identified various aggravating features, including the significant difference in age between the offender and AB, and the location of the offending, being the home of close family friends who had allowed the offender into their home. The judge indicated that he would also take as an aggravating factor the fact that the abuse had occurred on three separate occasions. He said that he took into account the offender's positive good character, as demonstrated by the character references provided by his family and members of the community. He observed that those references spoke of the valuable service that the offender had provided, to his kindness as a husband and a parent, and towards other family members, and all of the many other good deeds that the offender had done. He also indicated that he took into account the offender's age and what he described as his "modest" medical conditions.

17. The judge stated that he agreed with the conclusion of the author of the pre-sentence report that the offender did not meet the dangerousness criteria and went on to impose the sentences that we have already set out above.

Submissions

18. Mr Hearn, for the Solicitor General, submits in summary that the overall sentence passed was unduly lenient. It did not reflect the overall seriousness of the offences committed by the offender, which involved the repeated sexual assault of a 13 year old child of his close friends which has caused her serious and lasting psychological harm. It is submitted that an appropriate starting point for a single category 2A offence against AB would have been three years' imprisonment. An uplift was required to reflect the aggravating factor present which was not addressed at the harm or culpability stage, namely the causing of severe psychological harm. An uplift of six

months for this would have been appropriate, it is said. Then the offender would have been entitled to a reduction for his lack of relevant previous convictions and positive good character – a reduction of six months, which resulted in an appropriate sentence for a single offence of three years' imprisonment. Mr Hearn emphasises that this can be said to be a lenient approach, given the extent of the aggravating features present and the limited weight to be given by way of mitigation for good character in the context of sexual offending such as this.

19. Having chosen not to impose consecutive sentences, Mr Hearn submits that it was incumbent on the judge to increase the lead sentence to reflect the fact that the offending concerned four counts of sexual activity. It is suggested that an appropriate uplift of at least one year was required in this regard. In these circumstances, and for these reasons, Mr Hearn submits that an overall sentence of at least four years' imprisonment was merited, resulting in the conclusion that the overall sentence reached by the judge of only two years and six months' imprisonment was unduly lenient.

20. In answer to questions from the court, Mr Hearn emphasises that the criticism made of the judge is not so much the factors that he did and did not take into account, but rather his failure to follow the staged approach set out clearly in the relevant Sentencing Council Guideline, in particular the staged approach which requires, at step 6, that the judge take into account the totality principle.

21. For the offender, Mr Walker KC presses on us the fact that the judge presided over the offender's seven day trial and was best placed to balance out the particular aggravating and mitigating factors in the case. His categorisation of the offences was correct. The total sentence did not fall outside the range of sentences which the judge, properly applying his mind to all relevant factors, could reasonably have considered appropriate.

22. Mr Walker emphasises the stringent nature of the test justifying appellate interference on the basis of undue leniency. He outlines the pertinent facts of the case: for example, the low risk of general re-offending, and the multitude of positive references supporting the offender's good character, including from women of all ages who still speak highly of the offender, despite knowledge of this particular offending. He emphasises that References of this nature should be reserved for gross error and gross error alone. This ultimately was a sentence that could be said to be lenient, but not so obviously unacceptable as to merit intervention from this court.

23. With a suitably light touch, Mr Walker refers us to two cases said to be comparable: *R v Naish* [2010] EWCA Crim 1005, [2010] 2 Cr App R(S) 106; and *Attorney General's Reference (R v Ivan)* [2020] EWCA Crim 301, [2020] 2 Cr App R(S) 17.

Discussion

24. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence, and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type: see *Attorney General's Reference No 132 of 2001 (R v Johnson)* [2002] EWCA Crim 1418, [2003] 1 Cr App R(S) 41 at [25].

25. We remind ourselves that the hurdle is a high one. As was emphasised recently in *R v Mohammed Arfan* [2022] EWCA Crim 1416 at [34], sentencing is an art and not a science, and leniency itself is not a vice. The fact that other judges may have passed a higher sentence is not the issue. For appellate interference to be justified, the sentence in question must be not only lenient but unduly so.

26. The second and third occasions of offending (though not the first) involved category 2 harm, with the touching of AB's naked breasts; and culpability A, with the abuse of trust and the significant disparity in age. The abuse of trust in this case was gross. For a single offence after trial, category 2A offending carries a starting point of three years' imprisonment, with a range of two to six years.

27. There were then the following aggravating factors. AB was caused severe psychological harm in her own home. Further, the author of the pre-sentence report described this offending as involving a high degree of calculation, deviousness and risk- taking. The offender planned his sexual offending by targeting AB and assaulting her when she was alone and unsupervised – not necessarily a significant degree of planning for the purpose of categorisation, but an aggravating factor nonetheless.

28. By way of mitigation, as the judge identified, the offender suffers from poor health. He had no relevant previous convictions, and there was much evidence of good deeds in the local religious community and of kindnesses to his family and others. However, as the Sentencing Council Guideline makes clear, these latter factors can provide only limited mitigation in the context of this type of offending. This is particularly so when it was the building of his position within the community that created the trust that the offender went on to abuse. In other words, his status was used to facilitate the offending.

29. The judge chose to pass concurrent sentences. There was nothing wrong with that in principle. Indeed, it was entirely appropriate, given that the offending constituted a pattern of escalating conduct over a short period of time. But the final sentence then had to reflect the offender's overall criminality, as specifically identified in the staged approach clearly set out in the Sentencing Council Guideline.

30. Whether or not it did so is the real question for us. We do not consider that comparison with the outcomes of other cases on different facts to be helpful or persuasive. *Naish*, for example, involved sentencing under a different regime, on very different facts, including a guilty plea with a full one-third discount, and no severe psychological harm being caused to the victim. In *Ivan*, again the offender pleaded guilty, but he was also only 20 years old at the time of the offending, and the sentencing judge categorised the offending there as 1B offending, with a starting point of only one year's custody.

31. The Solicitor General accepts that a sentence of three years' imprisonment for a single offence was appropriate, taking into account the available aggravating and mitigating factors. Taking count 4 as the lead offence, that could, in our judgment, be said to be generous to the offender. The aggravation could be said to outweigh the relevant mitigation by some margin. Nevertheless, taking that term of three years' imprisonment for the offending in count 4, on any view an uplift was then necessary to reflect the additional offending in counts 1, 2 and 3. As set out in step 6 of the Sentencing Council Guideline, if sentencing an offender for more than one offence,

the judge has to consider whether the total sentence is just and proportionate to the offending behaviour.

32. Count 1 did not involve category 2A offending. In one sense, that assists the offender. But in another it serves to underline that this was a course of escalating criminality in which the offender was testing the limits of what he could achieve. Counts 2 and 3, of course, did involve category 2A offending, as the offender became increasingly emboldened with each new sexual assault.

33. Standing back, in our judgment a sentence of significantly more than 30 months' imprisonment overall was mandated in the light of the requirement to consider totality. In our judgment, an increase of not less than one year from a term of three years on the lead offence (count 4) was required.

34. In those circumstances it can be seen that a sentence of only 30 months' imprisonment – a sentence materially less than the starting point for a single category 2A offence – was unduly lenient.

Conclusion

35. For these reasons we allow the Reference. We quash the sentence on count 4 and we substitute for it a sentence of four years' imprisonment. All other elements remain undisturbed. Thus, the overall sentence is now one of four years' imprisonment.

36. A victim surcharge order was incorrectly made, given that the offending pre-dated the relevant victim surcharge provisions. We quash it as being unlawful.

37. We conclude by expressing our thanks to both Mr Hearn and Mr Walker for their assistance and helpful submissions.

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

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