IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BRISTOL

HER HONOUR JUDGE MOIRA MACMILLAN

CP Nos: 52SE0121022 & 52SB0234623

CASE NO 202401510/A1

[2024] EWCA Crim 1394

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 25 October 2024

Before:

LORD JUSTICE HOLGATE
MRS JUSTICE STACEY DBE
SIR NIGEL DAVIS

REX
V
KAYDON HALL

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MISS J TALLENTIRE 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 appellant appeals against sentence with leave of the single judge. On 22 March 2024 in the Crown Court at Bristol the appellant, then aged 20, was sentenced for a number of matters to which he had pleaded guilty arising out of three separate incidents and two different sets of proceedings. He received a sentence of five years' detention in a young offender institution for the offence of rape, contrary to section 1(1) of the Sexual Offences Act 2003 (count 1). He received a consecutive sentence of 14 months' detention in a young offender institution for sexual activity with a child, contrary to section 9(1) of the Act (in respect of a different complainant) and a concurrent sentence of one month for sexual activity with a child committed against the same complainant (counts 6 and 9). On a committal for sentence for threatening another with an article with a blade or a point, contrary to section 139AA of the Criminal Justice Act 1988, he was sentenced to a concurrent sentence of 12 months' detention in a young offender institution. He therefore received a total of 74 months' detention.
3. We confirm and clarify that 74 months translates into a sentence of six years and two months, which is the total sentence that was passed, which means that he will be eligible for release after serving half of his sentence. A reference in the sentencing remarks to a sentence of seven years two months and of his being required to serve two-thirds of his sentence before being considered for release was incorrect and an arithmetical mistake.

4. A Sexual Harm Prevention Order and a restraining order was made and the appellant was informed that the notification provisions of Part 2 of the Sexual Offences Act 2003 applied and he may be included in the relevant list by the Disclosure and Barring Service.

5. The facts

   The complainant in count 1, who we shall refer to as C1, was 17 years old and had been in a relationship with the appellant for a period of some six months. There had been occasions when C1 became concerned about the position she had been in when she had woken up after the appellant had stayed over and the state of her nightwear. She discussed it with a friend who had suggested that she leave a baby monitor that she used for babysitting and set it up to record any movements during the night. C1 was someone who had trouble sleeping and as was known to the appellant had been prescribed Melatonin which meant that she slept very soundly indeed. She took her friend's advice on the night of 23 August 2022.

6. On the morning of 24 August 2022 the complainant woke up with a burning sensation in her vagina and found a fertility cup inside her that had not been there when she had gone to bed the night before. When she viewed the baby monitor footage she discovered that she had been raped from behind by the appellant in her sleep. The footage was subsequently provided to the police and showed the appellant engaging in sexual intercourse with her whilst she had been asleep on two separate occasions during the night and that he had subsequently inserted the fertility cup into her vagina.

7. When asked by the complainant the appellant denied that he had done anything while she was asleep and that he would never do such a thing. After his arrest he denied the allegations of rape. He said he been in the complainant's home on the night in question but denied any sexual activity had taken place even after he was shown a still image from

the video from the baby monitor.

8. Counts 6 and 9 concerned a complainant who we shall refer to as C2, who was 14 years old when the appellant, now aged 19, committed two offences against her in 2023. C2 considered that the appellant had been her boyfriend since January 2023 and he had known her age.
9. Sometime in March 2023 the appellant and the complainant had been out in Bristol in the stairwell of the Galleries Shopping Centre when the appellant touched the complainant's vagina over clothing (count 6).
10. On 3 April 2023 the appellant came to the complainant's home and they watched TV together in the afternoon. The appellant had brought a bottle of vodka with him which he encouraged the complainant to drink and they had smoked weed together. The appellant put his penis in the complainant's mouth for a brief period of time (count 9). The appellant was later driven home by the complainant's parents. She contracted a sexually transmitted disease from him in the encounter.
11. The appellant denied having committed the offence and thereafter answered no comment to further questions in his interview after his arrest.
12. Two days later on 5 April 2023 at around 7.00 pm, a different complainant, Mr Samson had been out with his wife and daughter and as they left Hotel Chocolat in Bristol. Mr Samson felt some liquid on his back and saw a cup fall to the floor and then saw the appellant wearing a Balaclava and a verbal exchange took place. The appellant told Mr Samson that he had a knife and an accomplice with the appellant pulled a knife from his trouser pocket. The appellant and his accomplice were intercepted by security staff and made off from the scene. The weapon was not recovered.
13. The appellant was arrested for the offence and answered no comment to questions asked

by the police in interview.

14. The appellant was born on 5 January 2004 and was eighteen-and-a-half at the time of the first offence and 19 at the date of the later offences. He had no previous convictions.

15. A psychologist's report concluded that the appellant had slightly uneven intellectual ability with a significantly low working memory but some strengths in verbal, non-verbal and speed of reasoning and he was not within the learning disability range. He had been diagnosed with ADHD at eight years old. He had a long history of severely disruptive and challenging behaviours at home and at school which Dr Broderick did not consider were fully explained by his ADHD diagnosis. He considered it to be indicative of a significant and complex neuro-diversity difficulty outside the diagnostic criteria of a formal developmental disorder or syndrome. There was however no evidence of a major mental illness or major mood disorder. He was fit to plead and an intermediary was recommended and appointed to assist the appellant at trial.

16. Dr Broderick concluded that the appellant had difficulties in being able to form age-appropriate social and intimate relationships but also noted that prior to commencing a relationship with C1 in April 2022, which lasted for nearly six months, he had also been able to sustain a previous long-term relationship, seemingly without complaint.

17. The report was somewhat tentative in its conclusions as it was prepared in advance of any pleas or trial. It suggested a further report may be necessary if the appellant were to be convicted of any offences and because Dr Broderick had only had two-and-a-half hours to interview the appellant. In answer to the question: "How would these difficulties affect the appellant?" Dr Broderick stated in his report that:

> "... his offending behaviours ... are likely primarily associated with deficits with his social understanding, developmental delays and

> poor impulse control, rather than a deliberate disregard of other peoples' rights and preferences, or that he holds a disregard for the law."

18. There was a pre-sentence report before the judge before sentencing that found that the appellant had very little insight into his offending and he posed a considerable risk of sexual harm to others.
19. The first complainant's victim personal statement was taken a year after the offence against her was committed. She has had to move out of the family home as she felt she could no longer live there after what had happened. It has forced her to become independent earlier than planned which has been very stressful for her. She has flashbacks and is still preoccupied with what has happened to her. She has lost trust in other people and no longer feels safe to leave her house alone. She had pre-existing trauma issues from other life events and this offence has made it harder for her to work through her other issues. She is having weekly therapy which she finds hard.
20. C2's victim personal statement describes the depths of the psychological damage and trauma caused by the incident to her which remained as acute in March 2024 (in her second statement a year later) as it had in her first statement dated much closer to the time. She has been unable to sleep in her own bedroom since the incident and now sleeps on a mattress on the floor in a small spare room in her parents' house. Her mental health was also already fragile.She had previously been diagnosed with PTSD, anxiety and depression, as was known to the appellant, and it has further deteriorated significantly because of these offences.
21. C2 was already under the care of the Community and Adolescent Mental Health Services Team and is taught outside mainstream education. She is now very scared of any

unfamiliar men including her teachers and male doctors and the police support officer. The run up to the trial was very difficult for her and she was unable to complete her evidence during the trial resulting in the crown offering no further evidence on some of the counts on the indictment. She found the treatment for the sexually transmitted disease which she caught from the appellant and the precautionary Hepatitis C injections painful and intrusive.

22. The sentence

In her sentencing remarks the judge set out the facts of the offences and the impact on the complainants. For count 1 she concluded that the harm fell in Category 2 because it was a prolonged or sustained incident. There were two acts of vaginal penetration separated by 19 minutes. C1 was vulnerable because she was asleep at the time and she has suffered severe psychological damage. The location of the offence in her own bed was an aggravating factor and the appellant took advantage of her knowing that she was heavily medicated. The fact that she had learned of what had happened to her by watching the footage from the baby monitor was also a significantly aggravating feature, as was the fact that she was unable to continue living at home because of what had happened to her.

23. The judge took into account that the appellant had no previous convictions and had never been in trouble with the police before. She accepted everything that she knew of the appellant from the proceedings and that he was immature for his age, which was eighteen-and-a-half at the time. She also accepted the contents of Dr Broderick's psychological report that he has cognitive processing difficulties and significant delays with his emotional and social development. Whilst she concluded that those issues did not relate directly to his culpability, they were relevant mitigation as they limited his

perspective and understanding about the seriousness of his behaviour. She also considered it a mitigating factor that the appellant's mental health issues would make detention harder for him than might otherwise be the case.

24. The judge concluded that having regard to all the aggravating features, the appropriate sentence after trial would be nine years, the top of the sentencing range for 2B offences. The judge then reduced the sentence by 18 months to seven years and six months to reflect mitigation, immaturity and the difficulties he would face in custody because of his developmental issues. She then gave a full one-third credit for his guilty plea which she considered had been entered at the earliest opportunity, given his mental disorder and understanding of event and initial issues around his fitness to plead. The final sentence was 60 months for count 1.

25. For the sexual activity with a child offence (count 9, the appellant's penetration of C2's mouth with his penis), the appellant accepted that he had given C2 half a bottle of vodka when they were in her bedroom at her parents' house and that she had become intoxicated but did not accept it had been to the point of blacking out. He took advantage of her intoxication. After the event she was immediately very unhappy about what had happened and wanted her parents to drive him home early. The judge considered the offence as a 1B offence under the section 9 guidelines with a starting point of one year's imprisonment and a sentencing range from a community order to two years. The less serious earlier offence (count 6) which took place in the shopping mall stairwell fell within category 3B under the guidelines.

26. The appellant had caused severe psychological harm to C2 and the offences were aggravated by the fact that the appellant was already being investigated by the police for the rape of C1. The judge concluded that count 9 was particularly serious because of the

transmission of the sexual disease and the very serious harm caused. The judge considered that after trial the sentence would have been 22 months, which should be reduced by four months to reflect personal mitigation, taking it down to 18 months, and that 20 per cent should be deducted for his guilty plea because there was confusion about the nature of the charges he faced. The final sentence was thus 14 months to be served consecutively to count 1.

27. The judge considered that the possession of the bladed article offence was a Category 1A offence: the knife was brandished and caused serious distress to the victim who thought the knife would be used and was in fear of his and his family's safety and the incident took place in front of his 14-year-old child. The offence had a starting point of two years with a range of one-and-a-half to three years. The aggravating features were that the appellant was on police bail at the time and it was a group activity which made it yet more frightening. The judge did not consider it necessary to make an upward adjustment to the starting point and reduced the sentence by five months to reflect personal mitigation and one-third credit for his early guilty plea. The final sentence was 12 months. For reasons of totality she ordered the sentence to be served concurrently to the other sentences imposed, even though it had arisen out of a different set of facts, in order for the sentence to reflect the appellant's overall criminality.

28. Two grounds of appeal are advanced. First, that the judge's upward adjustment for count 1 was too high and the judge did not sufficiently reduce the sentence to reflect the appellant's strong mitigation. Secondly, when sentencing on count 9 the judge fell into error by making an upward adjustment for aggravating features that did not form part of the agreed basis of plea or the evidence and that she failed to give the appellant full credit for his guilty plea but instead limited it to 20 per cent.

29. Analysis and conclusions

In count 1 there were a considerable number of aggravating features relevant to both culpability and harm that took the offence to the top, if not beyond, the range of nine years. The victim was asleep and vulnerable and particularly soundly asleep because of her Melatonin medication that the appellant knew she took. It was a sustained incident involving two rapes over 19-minutes as he had stopped briefly when C1 may have been stirring from her sleep and then started again when he thought she was fully back to sleep. There is also the very troubling fact that after he had ejaculated he inserted a fertility cup into C1 for some unknown reason.

30. This was a domestic offence and the victim had to move home. The victim had to watch the baby monitor to find out what had happened. We do not accept that there had been an element of double-counting by the judge in treating the distress caused by C1 viewing the footage as additional to the severe psychological harm caused. It is a separate element and it is to be remembered that if C1 had not set the baby monitor to record herself sleeping she would not have known for sure what had been happening to her during the night. It was necessary for her to set up the baby monitor in order to be aware of the offending against her. Nor was the judge wrong to treat the domestic setting as an aggravating feature when the offence occurred within her own bedroom in the family home, a place intended as a sanctuary and a safe place and it caused the complainant to move out of her home. She was also vulnerable and had been under the care of CAMHS.

31. There can therefore be no criticism of the judge's decision to make an upward adjustment from the starting point to nine years. Indeed, given the number of aggravating features a sentence within 1B of 10 years would have been open to the judge.

32. It is submitted that the appellant should have received a greater discount than 18 months,

representing 16.6 per cent for his personal mitigation, especially his youth, lack of previous convictions and the report and conclusions of Dr Broderick.

33. Taking the last point first, the sentencing guidelines on sentencing offenders with mental disorders, developmental disorders or neurological impairments makes clear in section 2 that culpability may be reduced if at the time of the offence an offender is suffering from an impairment or disorder. But it will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour (see paragraph 11). Dr Broderick's report did not provide sufficient evidence to establish such a link. We understand that prior to conviction it was not appropriate for Dr Broderick to assess the appellant's mental functioning and culpability by reference to the facts of the case, as it would be premature to do so, but no post-conviction follow-up report was obtained that engaged with the evidence in the case and the appellant's neuro-diversity difficulties. As Dr Broderick had indicated, it would have been necessary for a follow-up report if the matter was to be pursued.

34. As for the appellant's lack of previous convictions at eighteen-and-a-half years old it is not so much a mitigating factor but more of a lack of aggravating factor. But the judge gave him some credit, nonetheless. Regard was had to his immaturity and age and the Children and Young Persons Sentencing Guideline acknowledges that the transition from child to adult is not a cliff edge. The judge gave full credit for the early guilty plea to arrive at 60 months or five years.

35. In all the circumstances of the case the judge made a sufficient downward adjustment for mitigation.

36. In order to understand ground 2 of the grounds of appeal it is first necessary to set out a little of the procedural history of the case. At the Magistrates' Court on 5 July 2023 the

Better Case Management Form records that no indication of pleas were given since there were fitness to plead issues and expert evidence was being obtained. At that stage the appellant faced counts of the rape of three complainants: of C1 for both incidents on the night of 24 August; one count of vaginal rape on 28 February 2023 of a third complainant (C3); and the oral and also vaginal rape of C2 on 3 April 2023, plus the count of the sexual touching of the vagina of C2 under clothing the previous month in the shopping centre stairwell.

37. Following receipt of Dr Broderick's report of 3 December 2023 which found the appellant fit to plead and after taking instructions, a defence note was prepared without delay and served on 7 December 2023 which admitted the rape of C1 on one occasion and admitted the oral and digital penetration of C2 and knowledge of her age but denied that it was rape. The offences alleged in relation to C3 were denied outright. A defence statement served on 4 January 2024 confirmed the position in a little more detail and an addendum defence case statement also admitted vaginal touching in the shopping centre but that it had been over, and not under, clothing.

38. The appellant accepted that his digital penetration of C2 had caused her to bleed and he also accepted that she had contracted a sexually transmitted disease (oral gonorrhoea) from him but not the other parts of the prosecution evidence. The charges concerning C3 were dropped shortly before trial and the prosecution did not proceed with the second rape count in relation to C1.

39. The trial commenced on 22 January 2024 on two counts of rape of C2. Part way through her cross-examination on day five of the trial, C2 felt unable to continue. The next day the prosecution offered no evidence on the two rape allegations and accepted the appellant's guilty plea to the oral penetration as a section 9 offence (count 9). The judge

accepted the basis of plea in the two defence case statements and the 7 December note from defence counsel, as is recorded in the side bar, and agreed to sentence on that basis after preparation of the pre-sentence report.

40. On sentence the judge was criticised for making an upward adjustment to the top of the 1B range to two years for count 9, relying a fact that was not accepted by the appellant, namely that he had ejaculated onto C2's chest. The judge was also criticised for concluding that the appellant caused severe psychological harm to C2 when there were other contributing factors to her mental health. We disagree. The fact of C2's poor mental health is illustrative of her vulnerability and fragility and there is no doubt that this was an aggravating feature justifying a significant uplift. The psychological harm described in both her victim personal statements is directly attributable to these offences. The evidential basis is established.
41. There was a five-year age gap between C2 and the appellant. It was also a significant aggravating feature that he gave her a sexually transmitted disease requiring unpleasant treatment. The fact the offence was committed when he was already under investigation regarding C1 and was by now a year older than he was when he committed those offences are further aggravating features. The judge would have been entitled to go to the very top of the range and beyond. He was merciful in arriving at 22 months and deducting four months for personal mitigation.
42. However, we agree that the appellant had accepted the sexual activity in both counts 6 and 9 on the basis that was accepted by the prosecution on 26 January 2024 and that he had done so at the earliest opportunity. He was entitled to the same level of discount for this offence as for the count 1. Accordingly, the appellant should have received one-third

credit for this offence. It was therefore wrong in principle for the judge not to have deducted the full one-third credit. The difference between 20 per cent and one-third represents two months in this case. The other aspects of the sentence cannot be said to be manifestly excessive.

43. It is necessary in accordance with the totality principle to stand back and consider if overall a sentence reflects all the offending behaviour with reference to the overall harm and culpability, together with aggravating and mitigating factors relating to the offences and those personal to the offender. The judge had regard to totality by ordering the sentence for threatening with a bladed article to be served concurrently, which could have been a consecutive sentence.

44. Standing back and looking at the overall sentence of six years and two months for four offences including serious offences of rape and sexual activity with a child, both committed against respectively a very vulnerable young woman and a very vulnerable girl and an incident with a knife being used to threaten members of the public arising from three unconnected incidents and complainants is not manifestly excessive, having regard to all the circumstances of the case.

45. However, the sentence was wrong in principle since the appellant was entitled to a one-third reduction in credit for count 9 because of his early admittance of the facts of the case which were ultimately accepted by the prosecution. To that extent the appeal is allowed. We therefore quash the sentence on count 9 of 14 months consecutive detention in a young offender institution and replace it with a sentence of 12 months. The other aspects of the sentence are unaffected. The overall sentence is thus six years and the same conditions and ancillary orders remain in place.

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

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