IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BRADFORD
HHJ BURN 13BD0965423
[2024] EWCA Crim 1401

CASE NO 202403242/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 1 November 2024

Before:

LADY JUSTICE MACUR

MRS JUSTICE STACEY

SIR NIGEL DAVIS

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REX
V
CH

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MR B LLOYD appeared on behalf of the Solicitor General.
MR P CANFIELD appeared on behalf of the Offender.

J U D G M E N T

LADY JUSTICE MACUR:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, no matter relating to the victim in this case shall, during her lifetime, be included in any publication, if it is likely to lead members of the public to identify her as a victim of these offences. For this reason we anonymise the name of the offender. This prohibition will apply unless waived or lifted in accordance with section 3 of the Act.

2. On 9 August 2024, CH ("the offender"), who had previously pleaded guilty to serious sexual offences against a victim "C1" (from the age of 9 years to when she was 13 years old) was sentenced to a total of 9 years 6 months' imprisonment. This was made up as follows: for sexual assault of a child under the age of 13, 3 years 6 months concurrent; for attempted rape, when the child was 13, 9 years 4 months concurrent; for sexual assault, assault by penetration, and rape), 3 years 6 months, 6 years 9 months and 9 years 6 months respectively, all to run concurrently with each other. Finally, for sexual assault (which occurred after the rape), 4 years 3 months concurrent.

3. This is an application by His Majesty's Solicitor General, appearing by Mr Lloyd, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the sentence which she regards as unduly lenient. We grant leave.

4. In summary Mr Lloyd submits that the judge failed to pass a sentence that reflected all of the offending behaviour and erred in awarding credit of 15 per cent given that the pleas of guilty were entered some time after the video recorded cross-examination of the victim

had taken place.

The Facts

5. The offences were committed between 2019 and 2023 against C1 (a family member of the offender). She was 9 years old when she was first sexually abused by the offender, who was then around 35 years old. The victim did not tell anybody that she was being sexually abused. She was scared to do so because the offender had warned her that if she ever told anybody, she would be disbelieved.

6. The offender was reported to the police on 19 November 2023, the day after the commission of the offence which was to become the final count on the indictment (count 18). The victim's younger brother had walked into the living room to see the offender performing cunnilingus on the complainant (then aged 13).

7. In an Achieving Best Evidence interview, C indicated that for 4 years she had been groomed, sexually abused and silenced by the offender.

8. On 18 November 2023, the offender went to the shops to purchase vodka for C and her friend. He mixed vodka with a soft drink and poured C a glass and then made a large bottle of the same for C and her friend to take out with them. C felt intoxicated when she returned home. The offender made some hot chocolate and called C downstairs. He grabbed her waist, bent her over her table, pulled down her pyjamas and moved her underwear to one side and began to masturbate his penis against her whilst standing behind her: count 15. The offender then tried to grab her hand and force it onto his penis.

She pulled her hand away and then he rubbed his fingers against her vagina before forcing his fingers inside her; count 16. Whilst the victim was bent over, the offender held onto her waist and attempted to insert his penis inside her vagina. C described how she could feel his penis going in more and more. She told him that it hurt. He told her that it would sting for just a second but she complained of pain again and eventually he withdrew: count 17. The victim continued to resist and eventually she was able to reorganise her clothes, collect the hot chocolate and return to her friend who was waiting in the bedroom.

9. The offender then began to send messages to the victim on Snapchat. He asked her to go downstairs and she said "no". He asked if they would be able to "do it". She said "no". The offender sent further text seeking for her to change her mind. Eventually C succumbed and went downstairs to the living room leaving her friend in bed upstairs. Once she was downstairs he asked her to sit on the settee. He positioned himself on his knees as she sat there and began to use his tongue to kiss down the side of her legs before beginning to lick her vagina. They were disturbed by the victim's younger brother. The offender stopped what he was doing, C was able to escape and her brother, with great presence of mind, rang his mother to tell her what he had seen.

10. C's mother immediately returned home and spoke to the offender, who denied any wrongdoing. He asked C to support him. He told her, unless she backed him up he would go to prison and asked: "Do you want your little brother to not have a dad?" When the mother tried to speak to her son about what he had seen, the offender interrupted with threats such as: "If you carry on spitting out lies, I'll beat you up".

11. In her ABE interview C described feeling insecure when she was aged 9 or 10. The offender would come into her bed almost every night. At first he would join her in bed under the covers and hug her around the waist from behind. He then started to touch her chest before moving on to licking her nipples when she was aged between 9 and 11: count 1. It became clear that the offender was rewarding C with cash and other gifts in return for her co-operation and he would pester her for sex, repeatedly asking if he could "fuck her" and telling her how sexy she was. The offender would often text the victim at night when she was in bed to see if she was asleep. If she didn't respond, he would often come into her bedroom to see if she was asleep and, if not, he would "pester" her.

12. The offender had attempted to rape the victim on at least three previous occasions in the period between May 2023 and November 2023: count 14. The victim was aged 13. It was clear from the sentencing remarks that the judge regarded the failure to complete the full act as being due to the physical incapacity of the complainant to entertain a tumescent adult male penis.

The Proceedings

13. The offender first appeared at Magistrates' Court on 21 November 2023 and his case was sent to the Crown Court. The indication was that he would enter a not guilty plea. A video recorded cross-examination of the victim took place, pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999, on 12 February 2024. We are unsure as to why, at this stage, the offender had not been arraigned but are assured by Mr Canfield, who appears on his behalf, that this did not take place until 20 May.

14. The 20 May was the first day of trial. An application for a *Goodyear* indication was uploaded on to the DCS system at 11.34 am that day. The judge indicated that 15 per cent credit for pleas of guilty would be appropriate and, on the basis that this was a category 2A case, indicated that the maximum custodial sentence would be 9 years 6 months after plea. The offender offered pleas of guilty to counts 1, 14 – 18 which were acceptable to the prosecution.

15. The offender has previous convictions, but none that are relevant to this sexual offending.

16. C's victim personal statement describes the offender to have taken her childhood away and ruined her life. She said it affected her in school and she remembered feeling sick in her stomach even thinking about it. The offender had ensured her silence and used her little brother against her. He was demanding. She felt she had no control over her body at all. She eventually told her mother everything. After that she had been struggling. She could not go to school, she could not get out of bed most days, she never left her house and had not been able to speak to anyone until after court. Hearing the offender's name made her feel violently sick.

17. A pre-sentence report was prepared dated August 2024. It indicated that it could give little insight into why the offending had occurred. The offender had been unable to provide any explanation or insight into his behaviour, saying, "It just happened". He indicated that he was heavily into steroid and cocaine use and this "messed up" his hormones. He said, "I regret it and it shouldn't have happened", "It must have been

difficult for her. I'm sorry."

18. The author of the pre-sentence report noted that whatever moral inhibitions the offender possessed had been overcome with some ease. He had no concern for the harm he was causing to a vulnerable child and was motivated only by the prospect of satisfying his own sexual urges. The offender was identified as posing a high risk of serious harm by rape, grooming and sexual touching of prepubescent female children with consequent significant emotional and psychological trauma for any victim.

The Sentencing Hearing

19. The prosecution submitted that the offences fell within category 2A harm and culpability of the applicable guidelines on the basis of grooming, planning and abuse of trust. In mitigation, defence counsel relied upon the absence of similar previous convictions. Mr Canfield submitted that there was no evidence of *dangerousness* and the offending was against an individual rather than a series of individuals. The risk would be addressed whilst the offender served his sentence. The offender regretted his actions and had shown remorse.

20. In his sentencing remarks, the judge noted that the offender pleaded guilty on the day of trial. That the case did not go to trial meant there would be a modest reduction in sentence. The guilty pleas were also felt to be relevant to the issue of *dangerousness*. The judge noted the offender had, over a period of some significant time, wreaked terrible psychological damage on the victim. It was entirely obvious that in circumstances where someone, either as a father or a stepfather is supposed to be caring

and protecting for a child and they were abusing them instead, that it would cause very long-term, if not, indefinite psychological damage. This was abuse that took place in the victim's own home. The offender had tried to either bluff or lie his way out of it.

21. The judge said that he would remain true nevertheless to the *Goodyear* indication that he had given previously. As regards *dangerousness*, there was an assessment of high risk albeit not in the top category a very high risk. There was no satisfactory explanation of the offender's motivation for committing these offences. The eventual admissions were a powerful factor in considering at least limited degree of insight. He was therefore able to draw back from dealing with the offender as a *dangerous* offender.

22. The judge indicated that there would be some adjustments to the original indication having considered the guidelines but that the overall sentence would not be affected. Count 1, he said, would ordinarily attract a sentence of 4 years. That was reduced to 3 years 6 months to reflect the guilty plea. In relation to count 14, the judge noted that it was a repetitious offence which occurred on at least three occasions. It was only the disparity in age that meant that the full offence was not achieved. The starting point, after trial, would have been 11 years. This was reduced to 9 years 4 months to reflect the plea. Count 15 would have been 4 years after trial, reduced to 3 years 6 months to reflect plea. Count 16 would have been 8 years reduced to 6 years 9 month to reflect plea. The judge noted that count 17 was the most serious offence. It was clearly painful as well as psychologically horrifying. After trial, the sentence would have been 11 years 3 months, which was reduced to 9 years 6 months to reflect plea. On count 18, after trial, the sentence would have been 5 years, which was reduced to 4 years 3 years for plea. The

total sentence, therefore, since all sentences were to be served concurrently, was 9 years 6 months' imprisonment.

23. Mr Lloyd submits that, whilst the judge was entitled to place the individual offences within category 2A of the respective Sentencing Guidelines, the judge erred in relation to totality. He failed to pass a sentence that reflected all of the offending behaviour. The offence of rape on 18 November 2023, alone carried a starting point of 10 years' imprisonment, which should have been increased to reflect the aggravating features, in particular, the offender having taken steps to prevent the victim from reporting the offending. If the judge rightly was to take Count 17 as the lead offence, then it should reflect all the offending. The offender had attempted to rape the victim on at least three previous occasions in the period May 2023 and November 2023. He had sexually assaulted C from the age of 9 to 10 years of age. The mitigation, such as it was, was limited in the context of the index offending. Further, he submitted there was no basis to reduce the sentences by 15 per cent. The trial had already commenced with the video recorded cross-examination of the victim and he refers to the Reduction in Sentence for a Guilty Plea overarching sentencing guideline.

24. Mr Canfield responds that the sentence is within the range reasonably open to the sentencing judge, and whilst he concedes it is lenient, he submits it is not unduly so. The judge had appropriate regard to the fact that in addition to sentencing the offender for one rape, the other rape offences were attempts and at a time when C was over 13. The offender's timely plea avoided a trial and undermines the prospect of a finding of *dangerousness*. As to credit for plea, the offender had had a change of counsel and only

met the defendant three days before his trial on 17 May. During a conference the relative complexity of the allegations contained within the indictment were explored. There was a risk that the trial would need to be adjourned as disclosure of the offender's phone downloaded messages was only received in May 2024, despite being requested in December. It was also said that the judge noted that the defendant had not been arraigned at any stage previous. Mr Canfield cites *R v Caley & Ors* [2012] EWCA Crim at [28] in support of the judge's discretion in terms of discount for plea.

Discussion and Conclusion

25. The provision of a sentencing indication by a judge, pursuant to the decision in *R v Goodyear* [2005] EWCA Crim 888, does not preclude a reference by the law officers to the Court of Appeal (see paragraph 65 and 71 of that authority). The application for the *Goodyear* indication was, as we have indicated previously, uploaded very late in the day. As best we can assess the timeline of the hearing on 20 May, it appears that it was listed within minutes of the judge convening the court. Recognising the judge's desire to assist in the efficacious dispatch of court business and to avoid what would have been a traumatic trial, we nevertheless think that it was unwise for the judge to have acceded to the defence invitation, made so late in the day and indeed, in this case, after the section 28 cross-examination had taken place.

26. Nevertheless, it is not that matter with which we need to deal. We have no hesitation in concluding that the overall sentence of 9 years 6 months was unduly lenient. Whilst we agree with the judge's assessment of the level of culpability and harm in relation to the respective counts, that is category 2A, the Sentencing Guidelines make clear that a case

of particular gravity reflected by multiple features of culpability or harm in step 1 could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features. This was certainly true in the circumstances of this case.

27. We consider that the judge correctly identified the rape on 18 November 2023 as the most serious of offences. There were multiple features of harm, namely severe psychological damage, the vulnerability of the victim by reason of her age and domestic circumstances, the sustained incident which took place amidst associated sexual assaults and followed sequentially shortly afterward by another.

28. Arguably the offences reflected in counts 15 and 16 involved additional degradation to the victim. The assessment of culpability should have included the planning of the assaults, the use of alcohol to facilitate the offences and the abuse of trust. There were further aggravating features, location, timing, steps taken to prevent reporting and the presence of others. C's younger brother himself would have been corrupted by what he saw and was subsequently threatened by the offender. C's friend was asleep upstairs. Reasonably, we think counts 15, 16 and 18 could be sentenced concurrently with count 17 but it does not appear to us that the sentence of 9½ years, after discount for plea, adequately reflects the totality of that offending let alone the separate incidents of attempted rape on at least three occasions and sexual assault when C was but 9 years old. There had been three separate and different occasions on which the offender attempted to rape C in the 6 months before the completed offence. As we have indicated, we take the judge's reference to the age disparity, preventing the full offence, as referring to the

physical difficulty in an adult male being able to achieve penetration of a prepubescent 13-year-old girl.

29. This Court has recognised that it is unusual for an inchoate offence, that is an attempt, to receive the same penalty as would be imposed for the completed offence. However, much will depend on the circumstances, the stage at which the attempt failed and reasons for non-completion of the full offence (see, for example, *Attorney-General's Reference No 92 of 2015 (R v Silva)* [2015] EWCA Crim 1965. The judge indicated that the attempts were not offences desisted in voluntarily. The reduction in sentence should have been minimal. It should either have been an aggravating feature of the later rape and led to an increase in the sentence or else be made consecutive and, if necessary, reduced to an appropriate term to honour the principle of totality overall. This principle also applies in respect of the sexual assault when C was 9 years old.

30. Quite simply, overall, the sentence failed to reflect the corruption of a 9-year-old girl and the persistent adverse attentions paid to her in the form of sexual assault and penetration by the offender, that is the sentence failed significantly to reflect the offending and the minimum possible sentence bearing in mind the principle of totality and, prior to reduction for plea, would have been in excess of 16 years.

31. We do not find it necessary to determine the question of precisely what discount was appropriate in this case, although we indicate that we are dubious as regards some of Mr Canfield's submissions to the judge justifying the same as he repeats before us. However, the reduction of 15 per cent of the sentence, after trial, would by itself be

unlikely to lead to this sentence having been referred to this Court. In the circumstances, we intend to make a reduction in the sentence that would otherwise be appropriate.

32. Ultimately we arrive at the sure conclusion that the sentence that does reflect the totality of the offending. We quash the 9 year 6 month sentence passed on count 17 and substitute one of 15 years' imprisonment. The other sentences will remain as before and be served concurrently.

33. At the time of sentencing the judge made ancillary orders, none of which concern us here. Subsequently, an ancillary order was made administratively relating to the victim surcharge. That was unlawful and the order will be quashed. We do not intend to resentence in that regard.

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