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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 57

No. 202103627 A1

Royal Courts of Justice

Friday, 14 January 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE JOHNSON
HIS HONOUR JUDGE PAUL WATSON QC

IN THE MATTER OF A REFERENCE BY HER MAJESTY'S SOLICITOR GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

REGINA
V
DP

REPORTING RESTRICTIONS APPLY: THE SEXUAL OFFENCES (AMENDMENT) ACT 1992

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MS S. HOBSON appeared on behalf of the Offender.
MS J. LEDWARD appeared on behalf of the Solicitor-General.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences with which we are concerned. No matter relating to the person against whom the offences were committed shall during her life time be included in any publication if it is likely to lead members of the public to identify that person as a victim of the offences. Given the relationship between the offender and the person to whom the 1992 Act gives protection, we shall refer to the offender throughout as DP.

Introduction

2 On 21 October 2021 DP was sentenced by HHJ Seely in the Crown Court at Cambridge to total special custodial sentence for an offender of particular concern of 12 years and four months, i.e. a custodial term of 11 years and four months and an extended licence period of 12 months. That was the sentence imposed concurrently in respect of Counts 5, 6 and 7 on the indictment which charged rape of a child under the age of 13. A concurrent special custodial sentence of eight years (consisting of a custodial term of seven years and an extended licence period of 12 months) was imposed on Count 12 which charged assault by penetration. Concurrent determinate sentences of six years and five years were imposed on Counts 1, 8, 9 and 11 which charged sexual assault of a child under the age of 13 and causing a child under the age of 13 to engage in sexual activity.

3 DP made his first appearance at the Magistrates' Court on 31 May 2021. At the Plea and Trial Preparation Hearing on 28 June 2021 DP was arraigned and pleaded not guilty to all counts. A timetable was set: ground rules hearing on 6 September 2021; a pre-recorded cross-examination of the complainant on 13 September 2021; the full trial to commence on 17 January 2022. On 3 September 2021 the case was listed for mention. Shortly before that hearing those representing DP had informed the prosecution of the final proposed pleas of guilty. On that date the pleas of guilty were tendered to the counts we have identified and the case was adjourned for sentence.

4 The Solicitor General seeks leave pursuant to s.36 of the Criminal Justice Act 1988 to refer the sentence to this court as unduly lenient. We grant leave.

The Facts

5 DP is now 43. Until the matters with which we are concerned he was of good character. He was born on 28 December 1978. He is married with two daughters. His elder daughter (to whom we shall refer as "EP") was born on 11 June 2009. Until 2019 the family lived in South Africa. They then came to the UK and they lived in St Ives in Cambridgeshire. For a period of at least 12 months between the early part of 2020 and May of 2021 DP repeatedly sexually assaulted EP when she was 10 and 11 years old, the offending beginning when she was 10. The sexual assaults consisted of DP licking his daughter's vagina. The sexual activity in which he made her engage was licking his penis. The abuse escalated to vaginal and oral rape on at least four occasions. The abuse came to an end on 29 May 2021 when the mother of the family came home. When she went into the marital bedroom she interrupted DP as he was licking his daughter's vagina. She called the police immediately. DP was arrested the same day.

6 On 6 June 2021 EP gave a full account of what had happened to her in the course of an ABE interview. She began by explaining what had happened on 29 May up to the point at which her mother had come home. DP had asked her to get undressed. She did so because "if I didn't give him his way I won't get what I want." He then shaved her pubic hair before licking her vagina. She said that DP had licked her vagina on many occasions since she had

been ten. On those occasions her mother was either out of the house or was asleep. If the mother was out, the assaults would take place on the bed. When the mother was asleep, they would happen downstairs on a settee. When EP was 11 she was forced to lick his penis.

7 EP went on to tell the police that her father put his penis into her mouth a few times. The first instance of this occurred in 2020 when she was still aged 10. There was at least one further instance after her eleventh birthday. In addition, there were occasions on which he put his penis into her vagina. There was at least some penetration. EP told him that it was painful but he would force his penis in. This first occurred after November 2020, a date identifiable because it was when the mother had begun to work at a local hotel. Counts 6 and 7 identified separate occasions of oral rape, Count 6 relating to when EP was 10 and Count 7 when she was 11. Count 5 was a multiple incident count of vaginal rape charging at least two occasions when EP was aged 11.

8 The assault by penetration charged in Count 12 had occurred on 28 May 2021. Whilst the mother was out of the house, EP and DP had taken a bath together in the course of which he had penetrated her vagina with his fingers.

9 The police examined EP's mobile telephone. Only parts of the text conversation were recovered. Nothing prior to 9 May 2021 was recoverable. Hundreds of messages had been deleted. EP had done this on the instruction of DP. Such messages as did remain included DP asking "Can I lick you later?" and "Can I finger you?" and saying "Let's go bath and play." EP sent messages of love to DP. On the day of his arrest he sent a message referring to giving "mom sleeping tablets." The inference to be drawn was that this was how DP would ensure that his wife, if she were in the house when he was abusing his daughter, would not wake up and disturb his activity.

10 When interviewed DP said that he had not been interrupted by his wife in the middle of a sexual assault on EP. Rather, he had been walking downstairs when she had come home. He denied any sexual activity involving EP at any time. He said he had not sent the texts which indicated a sexual interest on his part in EP.

Material Considered by the Judge

11 Both EP and her mother made victim personal statements. EP spoke of her family having been broken by what her father had done. She said that she was now trying to make friends "as you (DP) always wanted me with you or home." She spoke of being unable to think of anything other than what he had done to her and of requiring counselling. She concluded "I am very angry and get frustrated and now take it out on the whole family as I was cross and upset... "

12 Her mother read her statement in court at the sentencing hearing. She also spoke of the family having been broken by what DP had done. The behaviour of both daughters now was unpredictable and erratic. Neighbours were ostracising the family. The mother said that she was distraught and heartbroken.

13 The sentencing judge had a pre-sentence report in relation to DP. The author of the report set out that DP had moved to the United Kingdom at his wife's behest so that she could be nearer to her mother and sister. DP told the probation officer that his wife had prioritised the needs of her family over his. He had become frustrated and had suffered some kind of mental breakdown. Because he had no proper relationship with his wife he had started "to lean towards" EP. He could offer no explanation for crossing the proper boundary of

a father/daughter relationship into exploiting his daughter sexually. DP told the probation officer that he felt shame, remorse and regret.

14 The author of the pre-sentence report assessed whether DP was dangerous for the purposes of s.280 of the Sentencing Act 2020. The outcome of that assessment was not clearly expressed. However, there was sufficient material to allow the conclusion that at the very least a sentence pursuant to s.280 was not necessary to protect the public.

The Sentence

15 In his sentencing remarks the judge began by explaining that he would take the conventional course of imposing concurrent sentences in relation to all counts and reflecting the totality of the offending by an uplift in relation to the sentences in respect of the most serious offences, i.e. rape of a child under 13. The judge then turned to the relevant guidelines in the Sexual Offences Definitive Guideline. In relation to the offences of rape and the offence of assault by penetration, he concluded that there was no harm factor which justified a finding that harm fell into Category 2 within the guideline. The prosecution had argued that there was evidence of severe psychological harm (coming from EP's victim personal statement) and that EP was particularly vulnerable due to her personal circumstances. The judge rejected those arguments. He concluded that culpability was in the higher band because of the abuse of trust.

16 For an offence of rape of a child under 13 in Category 3A the guideline indicated a starting point of 10 years with a category range of 8 to 13 years. Assault by penetration of a child under 13 falling within Category 3A had a starting point of six years with a category range of four to nine years.

17 Having referred to the content of the victim personal statement the judge said that, even without any aggravating factors, the sentence for the offences of rape had to be at the top of the category range. The judge identified the aggravating factors: sexual assaults in the victim's own home at times with her mother and sister elsewhere in the house, namely in a place and in circumstances where EP ought to have felt safe; concealment of evidence, ie deleting texts. Taking into account the number of rapes committed and the commission of other sexual offences, the overall sentence before taking account of mitigation and before any credit for plea had to be 15 years' custody.

18 Of the three matters of mitigation argued before him, the judge declined to take account of two of those matters. He found that the disruption to DP's life arising from the move from South Africa had no mitigating effect. By reference to the footnote in the relevant guidelines he concluded that DP's good character could not be given any significant weight. The judge did take account of the remorse and shame to which reference had been made in the pre-sentence report. He decided that this could and should have some mitigating effect, namely a reduction of 10 months from the sentence of 15 years' custody.

19 From the resulting total sentence of 14 years and two months the judge discounted 20 per cent to give credit for the pleas of guilty. So it was that the sentences we have set out were imposed.

Discussion

20 The Solicitor General argues that the sentences were unduly lenient and that the undue leniency arose due to a combination of errors made by the judge. First, the judge was wrong to conclude that EP was not particularly vulnerable due to her personal circumstances. The judge should have found the offences of rape and assault by penetration fell into

Category 2A. Second, even if the judge was correct in finding that the offences were within Category 3A, he failed to give sufficient weight to the vulnerability of EP and to the other aggravating factors. Third, he should have identified multiple culpability factors which elevated the offences to the higher band, together with other aggravating factors. Fourth, the judge gave excessive weight to the remorse supposedly demonstrated by DP.

21 In relation to the categorisation of harm, the Solicitor General relies on the analysis of this court as set out in *KC* [2021] Crim App R (S) 41 at paragraphs 43 to 45. In relation to the part of the guideline with which we are concerned, Green LJ said this at paragraph 45:

> "It is not sensible to seek to construe the Guidelines as if they were a statute. They cannot predict every permutation of circumstances that might arise and there must be a degree of elasticity in the terminology used, and to this extent there is a degree of flexibility in how the Guidelines operate. In this case the combination of the factors applicable to this offending are, broadly, within the rubric 'Child is particularly vulnerable due to … personal circumstances'. But even if this were not correct and, technically, the facts fell into Category 3, the combination of all the facts identified would still have warranted a sentence of the order imposed by the Judge. This could have been done in a number of different ways, for instance by consecutive sentences ... or simply moving outside of the Category 3 range in the Guidelines."

22 The combination of factors in the case of *KC* to which Green LJ was referring was almost exactly the same as applied in this case.

23 In respect of culpability the Solicitor General submits that there was grooming behaviour used by DP towards his daughter and that DP deliberately isolated EP from friends of her own age.

24 On behalf of the offender Ms Hobson, who appeared for him at the court below, submits that the judge was correct when he concluded that EP was not particularly vulnerable. She relies on the following: EP was in mainstream schooling; she suffered from no relevant disability; she lived with her mother and sister and her grandmother and aunt lived nearby. Ms Hobson goes on to argue that the judge was in the best position to judge the degree of remorse shown by DP. He was able to observe DP throughout a lengthy sentencing hearing. She says that the sentence imposed was substantial. It was not unduly lenient.

25 We remind ourselves of what was said by the then Lord Chief Justice in the *Attorney-General's Reference No 4* of 1989 [1990] 1 WLR 41 when s.36 of the 1988 Act was in its infancy:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice."

26 Save that this court now must consider and apply the guidelines issued from time to time by the Sentencing Council rather than have regard to reported cases, what was said by the then Lord Chief Justice in 1989 holds good today. We have to ask whether the sentences imposed by this judge fell outside the reasonable range of sentences open to him. We must give due regard to the fact that the judge was well-placed to assess the competing

considerations though we note that in this instance the judge did not sentence after a trial. In that context, his ability to asset the competing considerations could not be said to be significantly greater than ours. Applying those criteria, we are satisfied the overall sentence imposed by this judge was unduly lenient.

27 Our reasoning is as follows:

1. The judge should have determined that EP was particularly vulnerable due to her personal circumstances. Unfortunately, he was not referred to the case of *KC* notwithstanding the fact that it had been widely reported by the time of the sentence hearing. Had he been shown *KC*, he would have concluded that a child of ten who was in a familial relationship with her abuser and who was subjected to grooming and thereafter to sustained abuse over many months was particularly vulnerable. We consider that the matters relied on by Ms Hobson do not affect that vulnerability and the reason for it. EP's access to other members of the family and/or to people at her school could not overcome the position that she was in in so far as her father was concerned. The consequence of EP's particular vulnerability is to elevate the offences of rape and assault by penetration to Category 2A with starting points of 13 and 11 years respectively.

2. There was more than one culpability factor which took the offending into the higher band. As well as the grooming behaviour and the deliberate isolation relied on by the Solicitor General, we consider that the judge should have found that the DP's offending involved significant planning. We reject the proposition that this was opportunistic offending. The existence of multiple culpability factors should have led to a movement up the category range in relation to each offence.

3. The starting points within each guideline are intended to relate to a single offence. In this case there were at least four separate offences of rape committed at intervals over a period of months. That factor ought to have led to a significant uplift in the sentence.

4. The offences of rape occurred against a background of repeated sexual assaults over a period of about 12 months. The sentences imposed in respect of the offences of rape had to reflect that background. There should have been a further significant uplift in the lead sentence.

5. Although the judge was entitled to take into account an element of remorse as expressed by DP to the author of the pre-sentence report, this remorse was not demonstrated by an early indication of plea. The pleas of guilty were only tendered shortly before EP was due to be cross-examined. The author of the pre-sentence report simply reported the expression of remorse. She went on to observe that DP had "no real understanding of the scale of hurt and harm he has caused." For the judge to discount the term of custody by almost a year in relation to remorse was excessive.

28 The Solicitor General does not argue that affording the offender 20 per cent credit for plea was unduly lenient. Thus, we do not depart from the discount for plea as given by the judge, but we do make these observations. In this case the first day of the trial was the day on which EP was to attend for cross-examination, namely 13 September 2021. The pleas were tendered on 3 September 2021. As we have said, the judge reduced the sentence by 20 per cent. He took into account the fact that those representing DP had had difficulties in seeing him in conference during the summer of 2021. That approach in our view did not give proper recognition to the fact that in this case DP was fully aware of what he had done yet he withheld his pleas of guilty until a matter of days before the point at which EP was to give evidence. At the Plea and Trial Preparation Hearing he had indicated that there had been no incidents of sexual abuse of any kind. The pleas tendered on 3 September were not

indicated until shortly before that hearing and until then EP was facing the prospect of being cross-examined. In our view in a case such as this the discount for representing credit for plea should not have exceeded 15 per cent. However, in view of the position adopted by the Solicitor General, we do no more than make those observations.

29 Returning to the sentence that should have been imposed, taking all the matters together to which we have referred, we consider that the sentences for the offences of rape on Counts 5, 6 and 7 should have been based on a starting point of 13 years with an uplift for multiple culpability factors and further uplifts to take account of the number of rapes committed by DP and his other sexual offending. The combination of those matters should have led to a sentence before allowance for mitigation and credit for plea of 18 years' custody. That period should have been custody reduced by six months and no more to allow for mitigation. The resulting custodial term of 17 and a half years then must be discounted by 20 per cent to take account of the pleas of guilty, giving a custodial term of 14 years.

30 Applying the same logic to the categorisation of harm and multiple culpability factors to the offence of assault by penetration, the proper sentence before mitigation and credit for plea should have been 12 years' custody. After taking account of mitigation and credit for plea, the resulting custodial term is nine years and seven months.

31 The sentences in relation to sexual assault and causing EP to engage in sexual activity were determinate and concurrent to the longer sentences. We are not asked to and we take no step in relation to those sentences.

32 In taking the view we have we recognise that the judge conducted a very careful sentencing hearing after which he took time to consider the sentences he imposed. However, having had the benefit of submissions which, frankly, the judge did not, we are satisfied that the sentences he imposed failed adequately to reflect the gravity of the offending in this case. As such the sentences were unduly lenient.

Conclusion

33 We have granted leave to the Solicitor General to make a reference to this court. In consequence, we quash the special custodial sentences of 11 years and four months' custody and 12 months' extended licence imposed on Counts 5, 6 and 7 and of seven years' custody and 12 months' extended licence imposed on Count 12.

34 In relation to Counts 5, 4 and 6 we substitute special custodial sentences of 15 years, namely 14 years' imprisonment with an extended licence of 12 months. In relation to Count 12 we substitute a special custodial sentence of 10 years 7 months, namely 9 years and 7 months imprisonment with an extended licence of 12 months. All those sentences will run concurrently with each other and with the determinate sentences with which we have not interfered.

35 The effect of the substituted sentences is that the offender will serve two thirds of that custodial term of 14 years before he is eligible for release. Whether he will be released at that point will be a matter for the Parole Board to decide, who will only release him if they consider it safe to do so. Whenever he is released, he will remain on licence for any remaining part of the custodial term and for a further 12 months thereafter.

CERTIFICATE

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