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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 5th July 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GREEN

and

SIR ANDREW SMITH

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v -

K R

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Mr P Jarvis appeared on behalf of the Attorney General

Mr B Gow appeared on behalf of the Offender

J U D G M E N T
(Approved)

Thursday 5th July 2018

LORD JUSTICE HOLROYDE:

1. On 21st March 2018, in the Crown Court at Warwick, the offender was convicted of an offence of sexual assault of a child aged under 13, contrary to section 7 of the Sexual Offences Act 2003. On 23rd April 2018 he was sentenced by the learned trial judge to two years' imprisonment suspended for two years. A Sexual Harm Prevention Order was made for a period of ten years.

2. Her Majesty's Attorney General regards the sentencing as unduly lenient. He therefore applies, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentence may be reviewed.

3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offence of which the offender was convicted. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of the offence. This prohibition continues unless waived or varied in accordance with section 3 of the Act. We will refer to the victim by the use of an initial.

4. The offender was born on 22nd August 1953. He is now 64 years old. He was 62 at the time of the offence. He is a married man, the parent of a number of adult children and grandparent. One of his grandchildren is "M", born on 7th June 2004 and therefore 12 years one month of age when the offence was committed. M's father is the offender's son.

5. At the time of the offending, the offender was living in the family home with his wife, his

wife's mother (who had the misfortune to suffer from dementia and in whose care the offender played a prominent and commendable role) and an adult son with, sadly, a drug addiction problem.

6. M lives with her mother. She attends a school at which at the relevant time the offender's wife was employed. On occasions M would stay overnight at her grandparents' home. The offence was committed on one such occasion.

7. The circumstances, in brief, were these. On the morning of Saturday 16th July 2016, M woke and came downstairs wearing just a T-shirt and knickers. She sat on the sofa watching the television. She covered herself with a blanket. The offender then came downstairs. He asked her if she would like a cuddle and she said yes. He sat on the sofa beside her. He cuddled her and then started to tickle her, which made her laugh. He then moved his hand up her leg, inside her knickers and touched the area at the entrance of her vagina. He started to play with her pubic hair by twirling it around his fingers. He asked M if she liked it. She replied "No". He asked if she wanted him to stop and she replied "Yes". He did stop. He left her on the sofa and went elsewhere. Later that evening he asked her if she wanted another cuddle and she said "No". He also asked whether she was going to tell anyone. She said "No". The evidence showed that that evening she slept wearing a pair of leggings in case her grandfather tried to touch her again.

8. M remained in her grandparents' home for the rest of the weekend. She went back to her mother's home on the Sunday evening. She told her mother what had happened about a week later, and so the matter came to the attention of the police.

9. The offender was arrested and interviewed. He denied that he had touched M in the way she

described. He was subsequently charged.

10. It is unfortunate that nearly two years passed before the trial took place. The offender gave evidence maintaining his denial. The jury found the allegation proved.

11. M's mother made a statement about the impact of the offence upon her daughter. She said that she has noticed a significant change in M, who was previously sociable and outgoing but had become quiet and withdrawn. She had started to wet the bed and to self-harm. She suffered from nightmares and had even tried to take her own life. Her behaviour at school had deteriorated significantly.

12. As a result of the events and the trial and conviction, there has been a complete split within the family, with one section of the family no longer communicating with the other section. The statement made by M's mother indicates that that in itself is a cause of great distress to M who, wrongly but understandably in these circumstances, feels it is in some way her fault that the split has occurred.

13. In further consequence of the family split, and adding to the overall sadness of the circumstances of the case, we understand that, shortly after the matter came to light, a report was made to the school attended by M, as a result of which the offender's wife was summarily dismissed from her employment there.

14. The offender had no previous convictions. More than that, he was a man of positive good character. That was spoken to in a body of testimonial letters which were before the learned judge and were clearly considered by her with great care. These letters from family, friends and other people who knew the offender well made it clear that he is and has been a hardworking

man focused on providing for and caring for his family over many years.

15. There was a pre-sentence report before the court. It noted that the offender continued to deny the offence. Principally for that reason he was assessed as having little insight into his motivation or into the triggers for his offending. The author of the report assessed him as presenting a low risk of reconviction; but because he was regarded as having no insight into his offending, he was assessed as possessing a high risk of sexual and/or psychological harm to children.

16. There was a letter from the offender's general practitioner speaking of certain physical problems. It suffices for present purposes for us to note that the offender suffers from back and shoulder pain. He has prostate problems and suffers moderate chronic obstructive pulmonary disease.

17. Also before the court was a detailed psychiatric report by a consultant forensic psychiatrist approved under section 12 of the Mental Health Act 1983. Mr Gow, then as now appearing on behalf of the offender, placed particular emphasis on this report before the judge below – an emphasis which he, understandably, repeats before this court. The principal features of the psychiatric report are these. It recorded that in 1990, when the offender was the proprietor of a business which had been badly hit by the recession and when there were other matters in his life which gave him good reason to feel anxious and troubled, the offender sought medical assistance for depression. He was at that stage prescribed Sertraline, an antidepressant medication, which, as we understand it, he has continued to take ever since. The consultant psychiatrist expressed the opinion that the offender suffers from recurrent depressive disorder (a recognised mental illness). He indicated that the initial depressive episode in 1990 had given rise to the need for antidepressant medication which has proved helpful in the years since then.

The psychiatrist found the offender to be a stoical man, disinclined to speak freely about his problems but, noted the psychiatrist, the offender outlined a number of symptoms suggestive of long-standing chronic depression. The psychiatrist expressed his opinion in these terms:

> "… upon careful evaluation of [the offender's] history, mental state and circumstance, he is an individual who is not likely to overtly complain of depressive symptoms but is likely to have been suffering from moderate depression at the time of the alleged offence that would have been appropriately managed with anti-depressant medication."

18. The psychiatrist also expressed his views as to risk assessment. He did so in these terms, which have been the subject of submissions both by Mr Jarvis on behalf of the Attorney General and by Mr Gow on behalf of the offender:

> "In my opinion, other than his conviction for the alleged offence, there is no indication that [the offender] presents with a risk of sexual offending. In my opinion, he does not present with a risk of sexual offending against members of the public. There is no indication that he presents with a risk of violent sexual offending. His risk of any further sexual offending can be further reduced by ensuring that he has appropriate accommodation, stable routines and ongoing support. He would also benefit from being prevented from having lone access to children particularly within his home."

Mr Jarvis submits that whilst that is no doubt an indication of low risk, it is not an indication of no risk.

19. It was before the sentencing judge, and is in this court, common ground between prosecution and defence that the case fell within category 2A of the relevant sentencing guideline, for which the definitive guideline indicates a starting point of four years' custody and a range from three to seven years. The learned judge agreed with that categorisation.

20. On the offender's behalf, Mr Gow submitted that the offence was an aberration – a description which, if we may say so, seems entirely justified. He emphasised that the offence was of brief duration and was wholly out of character.

21. The experienced judge, in her sentencing remarks, accepted that the offence lasted a very short time. She referred to the catastrophic consequences both for M and for the family as a whole – previously a very close-knit family but now entirely divided, as the evidence which she had heard during the trial had made clear. She emphasised that the offender was not only a man with no previous convictions, but also a man of positively good character. She said of him that the evidence before the court described him as "a family man who has effectively spent the whole of his life supporting and caring for his family, both through working hard to make sure that they had the things that they needed and by giving them the love that they needed". She expressed, understandably, her dismay at the loss of employment suffered by the offender's wife.

22. The learned judge referred to the psychiatric report and attached weight to the opinion of the psychiatrist that there is nothing to suggest that the offender has an improper interest in children. She then explained her sentencing decision in these terms (at page 16C of the transcript):

> "The starting point for an offence in this category is four years with a range of three to seven years. I take into account a number of factors in mitigation which I have taken the trouble to outline in some detail. That is: your otherwise exemplary good character over the years, your age, your medical condition, your mental health condition.
>
> I also take into account the fact that this offence itself – and I do not minimise it at all – the seriousness and the effects on [M] are very, very clear to me indeed, but nevertheless it would be unfair to you if I did not also say it was a matter of a moment of madness, never before or since, and no suggestion that there is any future risk. I also must take into account that this relates to

> any child under 13 of any age.
>
> And so, all those are factors which mitigate your case, and in your particular case there is a very large list of them. It clearly passes the custody threshold by some degree. It is however a case in which I can say that it falls unusually below the range in the guideline for all of the reasons I have given. So that, even after trial, the correct starting point it seems to me is one of two years' imprisonment.
>
> Now, that is a sentence that can be suspended. And very unusually, and I cannot think of another case in which I have done this – it is not something I do as a matter of course at all; people who touch children go to prison; that is very clear – but in your particular case, which is why I have taken such a lengthy time in outlining your mitigation, I consider that this is a sentence that I can suspend. And I do so for a period of two years.
>
> I do not want for a minute anyone to think that that is because I do not take what happened to [M] seriously. The entire family has suffered as a result of this, and it does not seem to me that it is going to help anyone at all if I send you to prison immediately today.
>
> You will still suffer very serious effects. You will be subject to the Sex Offenders Register for a period of ten years. There is a Sexual Harm Prevention Order, the effect of which, and you will have it in detail in writing, is that you will not be allowed to be with young children. And that will be for a period of ten years as well."

23. For the Attorney General, Mr Jarvis submits that the sentence was unduly lenient. He readily acknowledges that there was powerful mitigation such as to justify the judge moving down from the starting point in the sentencing guideline. But, he submits, the mitigation was not of such powerful effect that after a contested trial it could properly reduce the guideline starting point from four years to a sentence of two years, which could then be suspended. Mr Jarvis draws attention to the way in which the judge referred to some of the mitigating factors. He accepts that this was a case of a man of previous good character and/or exemplary conduct, but draws attention to a note in that respect in the guideline which says:

> "In the context of this offence previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence."

24. Next, as to the emphasis which the learned judge on the psychiatric evidence, Mr Jarvis questions whether that evidence brought the case squarely within the mitigating factor mentioned in the guideline of "mental disorder … particularly where linked to the commission of the offence". Mr Jarvis submits that in the passages which we have quoted from the report, the psychiatrist does not draw an explicit connection between the depressive illness and the conduct of the offender on this occasion.

25. Mr Jarvis goes on to submit that the judge was simply wrong on the evidence to say that no one suggested there was any risk for the future. Such a risk was suggested, albeit a low one.

26. On behalf of the offender, Mr Gow acknowledges that the sentence may well be regarded as lenient but submits that it was not unduly lenient. He says that whilst the offender continued to deny the offence and therefore could not show any remorse for his conduct, he did nonetheless show ample remorse for the dreadful consequences which have befallen the family. Mr Gow emphasises, rightly, that this case received the most careful consideration by a very experienced judge. He points out that she had presided over the trial and was therefore in the best position to assess the seriousness of the offending and the effects of it. He points out that, in contrast to so many sexual offences which come before the court, this was an isolated incident of very short duration and clearly shown on the evidence to be out of character. He draws attention to the pressurised circumstances obtaining within the house at that time, with a combination of caring responsibilities towards others in the family.

27. We have reflected on those submissions. It is a case which we have no doubt required the judge to make a difficult sentencing decision. We consider first the sentencing guideline. The offence involved category 2 harm because it involved the touching of M's naked genitalia. It involved level A culpability because it involved a breach of trust by a grandparent in whose home the child was staying overnight and who was at the material time *in loco parentis*. There is accordingly no doubt that the offence was correctly categorised as 2A. Moreover, it was fairly and squarely within category 2A. This is not a case in which it could be said that the offending lay on the border between 2A and a lower category. The starting point applicable to all offenders was therefore four years.

28. At step 2 of the process required by the sentencing guideline, the sentencer must consider the aggravating and mitigating features of the case with a view to adjusting the starting point upwards or downwards, as the case may require, in order to reach a sentence within the category range of three to seven years' custody. The guideline sets out a non-exhaustive list of potential aggravating and mitigating factors. It says:

> "In some cases, having considered these factors, it may be appropriate to move outside the identified category range."

29. We accept Mr Gow's submission, as did the judge below, that in the circumstances of this case it would not be appropriate to regard the location of the offence, namely, within the grand-parental home where M should have been safe from harm, as an aggravating feature, because to do so would involve an element of double counting with the feature of breach of trust which placed the case into category 2A. We also agree with Mr Gow's submission that none of the other aggravating features specifically mentioned in the guideline was present.

30. Three of the mitigating factors specifically mentioned in the guideline were present: no previous convictions; previous positive good character and exemplary conduct; and mental disorder which could be said to be linked, to some extent, to the commission of the offence in the terms expressed by the psychiatrist.

31. There were and are, therefore, powerful points to be made on the offender's behalf. We can well understand why the learned judge thought it an appropriate case to show leniency. Leniency in appropriate circumstances can be a virtue and nothing we say in this judgment should be taken as in any way inhibiting a judge from exercising leniency where thought appropriate.

32. We bear very much in mind that the learned judge had the benefit of hearing all the evidence at trial and we naturally hesitate to differ from her judgment as to the appropriate sentence. We recognise that she gave the matter very careful thought.

33. With all respect to the learned judge, however, we are driven to conclude that she fell into error. The sentencing guideline, which she was bound by section 125 of the Coroners and Justice Act 2009 to follow unless satisfied that it would be contrary to the interest of justice to do so, identified a starting point twice as long as the sentence which the judge imposed, and a range of sentences which starts at three years' custody and is therefore entirely outside the scope of the suspended sentencing provisions in the case of an offender who does not have the benefit of a guilty plea. These features of the guideline indicate that it is by its character a serious offence.

34. Here the victim was only 12 years of age. The abuse of trust by her grandfather has caused her serious harm. It is a very sad, though not uncommon feature, of her position that she wrongly blames herself for the consequences in terms of the family split of his offending.

35. There are indeed powerful reasons to view this case as a very sad one for all concerned – and there was indeed powerful mitigation available to the offender which undoubtedly justified the learned judge in adjusting downwards the guideline starting point. But the mitigation would have been all the more powerful had the offender pleaded guilty. He did not do so. He was convicted after a trial and he has shown no remorse for his offending because he continues to deny it. The risk of future offending, though low, exists. The serious harm caused to the victim is undeniable.

36. We take into account the psychiatric evidence; but in our view nothing in the detailed report casts doubt on the simple proposition that the offender must have known that it was seriously wrong to assault his granddaughter in the sexual way he did.

37. With every respect to the learned judge, it seems to us that in concluding that the guideline starting point should be reduced by such a substantial extent and thereby to engage the suspended sentence provisions did involve her losing sight of the seriousness of the offending.

38. Imprisonment is undoubtedly a heavy penalty for a man in the offender's position. We understand why the learned judge would have wished to avoid imposing such a sentence if she could properly do so. But in our judgment, after careful reflection upon all the circumstances of this difficult case, it cannot be said to be contrary to the interests of justice that this offender, convicted after trial of a serious sexual offence, should receive a sentence within the guideline category range.

39. We conclude that the mitigating features to which Mr Gow has rightly and, if we may say so, very skilfully drawn attention justified an adjustment of the starting point to the bottom of the

category range. But we conclude that to impose a sentence of only two years' imprisonment, suspended, went beyond the sentencing range properly open to the judge and was unduly lenient.

40. We therefore grant leave to refer. We quash the sentence imposed below. We substitute for it a sentence of three years' imprisonment, which must be served immediately.

41. Mr Gow, unless there is any compelling matter you wish to put before us, the offender must surrender to his local police station, Nuneaton Custody Suite, by 4pm today.
