IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202201641/A1

[2023] EWCA Crim 329

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 23 February 2023

Before:

LADY JUSTICE MACUR DBE

MR JUSTICE FRASER

MR JUSTICE BUTCHER

REX
V
FARTUN JAMAL

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MS A LEWIS KC & MS E FENN appeared on behalf of the Appellant.

MR B FITZGRALD appeared on behalf of the Crown.

J U D G M E N T
(Draft for Approval)

ANONYMISATION AND REPORTING RESTRICTIONS APPLY:

s.45 Youth Justice and Criminal Justice Act 1999

1. MR JUSTICE FRASER: This is an appeal against sentence, leave having been granted by the Full Court on a renewed application on 27 October 2022. The Full Court also granted the necessary extension of time of five days. We start by reminding everyone in Court that reporting restrictions apply in this case due to the age of the victims. Section 45 of the Youth Justice and Criminal Evidence Act 1999 gives the Court power to prohibit the publication of matters identifying children and young persons who are concerned in criminal proceedings whether as victims, witnesses or defendants. Such an order has already been made in the Crown Court and we confirm that it applies to these proceedings too. Additionally to that, there are outstanding Family Court proceedings concerning both the appellant and her existing children. For that reason, we identify the victims only by the initials "A" and "B". No disrespect is intended thereby.

2. Given the case concerns a fatality, when the Full Court granted leave, the appeal was set down for a hearing where the prosecution could also be represented. The prosecution lodged a Respondent's Notice for that renewed leave application and when granting leave the Full Court gave the prosecution permission to lodge a further skeleton argument seven days before this hearing, if so advised. The prosecution did not avail themselves of that opportunity but we have had the benefit of the Respondent's Notice. The appellant has been represented before us by Ms Lewis KC together with Ms Fenn, who attended by CVP link, and the prosecution has been represented by Mr Fitzgerald. We are very grateful to them for their helpful submissions.

3. The Full Court also ordered an up-to-date prison report on the appellant and also a further report on the appellant's two children. The appellant now has two children, the youngest

of whom was born after these offences but before the appellant was sentenced. We have had regard to all the material provided to the Court for this appeal together with an update given in oral submissions by Ms Lewis of the appellant's existing family situation. The appellant has been in custody since 2021 when she was sentenced.

4. On 4 March 2022, following a trial, the appellant, who was then aged 25, was convicted of four offences. The first was causing the death of a child contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004. The child in question was her daughter, A, who was 11 months old at the time. She was sentenced on 29 April 2022 in the Crown Court at Harrow by the trial judge , HHJ Dean. Her sentence for the offence we have just described (which was count 1 on the indictment) was 5 years' imprisonment. The other three offences were all cruelty to a person under the age of 16, contrary to section 1(1) of the Children and Young Persons Act 1933. The first of these three offences, which was count 2 on the indictment, also related to her daughter A, with the jury directed that they should consider what occurred on a particular day, namely 13 March 2019. For that offence the appellant was sentenced to a period of imprisonment of 4 years and 6 months to run concurrently to the sentence for count 1.

5. The other two offences each related to the condition of the flat where the appellant lived with her daughter A who died, and also her small son (to whom we shall refer as "B"). The date range for each of those two offences was longer than that for the other counts and ran from 13 February 2019 onwards. For each of those latter two counts, she was sentenced to 6 months' imprisonment, those sentences to run currently to one another but consecutive to the sentence for her daughter on count 1. The aggregate term was

therefore one of imprisonment for 5 years and 6 months.

6. The facts of the offending are as follows. They relate to events in February and March 2019. Counts 1 and 2 concerning the appellant's daughter, whose death was caused by the appellant, both related to March 2019. At the time of the offending the appellant was 22 years old. The appellant had been living with her daughter A, and her son B who was two ¾ years of age, in a flat in London. Shortly before 12.00 pm on 13 March 2019 the emergency services were called to the address by the appellant who had been helped by neighbours. The appellant had raised the alarm when she had found A deceased in her cot. A had had a viral infection, namely bronchitis and a bacterial infection, namely broncho pneumonia. There had been a number of common viruses present in A's body with the flu virus deemed to be the most likely cause of the viral infection. The most likely cause for the bacterial infection was identified as staphylococcus aureus. These infections would have been very easily cured very promptly with a simple course of antibiotics had A been taken to a doctor at any point after she had fallen ill. However, the appellant had failed to obtain any medical intervention for her young daughter at all.

7. Text messages and web history evidence subsequently demonstrated that the appellant had been struggling to cope with her children as a single mother. A baby-sitter had referred Social Services to the appellant in February 2019 and had reported that the appellant's flat was in very poor condition. The appellant had cleaned the flat before the visit of Social Services who came to see her on 22 February 2019. She was described as subsequently engaging with Social Services and she had indeed, on that occasion, asked for help from the social worker and explained to her that she was struggling to cope as a

parent. The social worker had referred her to an organisation called "Home Start" which is an organisation which provides support for parents in caring for children. A referral was made to Home Start but no intervention had occurred as at the date of the death of A which occurred on 13 March, as we have explained.

8. There was also expert psychological evidence available that demonstrated that the appellant had suffered from depression previously, including being described antidepressants by her GP from April 2018 (the year before) onwards and into the following months that year.

9. Returning to 2019, text messages had been sent by the appellant from 4 March 2019 to her boyfriend raising concerns about A's health, and those messages were later relied upon to demonstrate A had been ill by this stage, and the appellant had been aware that she should have sought medical help for her but had failed to do so. Police had attended the appellant's property on 7 March 2019 after the appellant said she had accidentally dialled 999 and the appellant told the police officers that A had a cold. In the ambulance on 13 March 2019 the appellant had complained about never-ending visits to hospital for her children, and at the hospital immediately after she had arrived with the body of her daughter (her daughter at that stage being dead), was seen acting either strangely or inappropriately, being seen laughing and not particularly interested in her son but just wanting to be with her boyfriend.

10. In the lead up to the death of A it was clear from the evidence that both A and B had been living in disgusting conditions which were completely unsuitable for a baby and a 3-year

old child. The appellant was subsequently arrested by the police for the index offences. In interview she provided a prepared statement denying the offences and thereafter answered "no comment" to questions asked by the police. She gave evidence at her trial and was convicted.

11. For the purposes of sentencing her, the trial judge had both expert psychological reports prepared before the trial as to the appellant's mental state and also a pre-sentence report. By then the appellant had had another baby with her new partner. Her background was provided to the court which included her home circumstances. These were such that when she was just about to sit her GCSEs at about the age 16, she had been taken out of school by the adults responsible for her upbringing and sent firstly to Dubai, where she believed she was going on holiday, and then onwards to Somalia, which was where her parents originated. She found once she had arrived there that she was to participate in an arranged marriage with an older man, which she did, but she explained to the author of the report that he was abusive and ill-treated her. She therefore managed to leave him, and she returned to the United Kingdom where she lived with her two children. The children's biological father provided no support in bringing them up and she was their sole carer.

12. The sentencing judge proceeded to sentence her in the absence of a report from the independent social worker who was to have prepared a report, but which was not available at the date of the sentencing hearing. The sentencing judge observed that the appellant had been the sole carer of both A and B and that the GP's surgery was very close to where she lived. The evidence had been clear that A would have survived had

she been taken to a doctor prior to 12 March 2019. On 13 March A who, as we have observed, was a small baby, went downhill fast and stopped breathing and died at home, and it was only at this point that the appellant called for help for her from her neighbours. The sentencing judge noted bizarre behaviour on the part of the appellant in the immediate aftermath of her daughter's death and also described the disgusting and filthy condition of the flat in general including the actual cot itself. Two babysitters had found the flat to be in a very bad condition. One in February 2019 had contacted Social Services in this respect which had led to the visit to which we have referred which took place on 22 February 2019.

13. The judge noted that the appellant had met her children's medical needs in the past and had bonded with them. She accepted that the appellant was clearly suffering from depression and anxiety at the time and that this was well documented both in terms of the medical notes predating A's death and the internet searches in the days leading up to it. The judge also noted that that depression was long-standing.

14. The appellant had been very upset by the referral to Social Services which she had wrongly blamed as having being caused by a family member, and at times she was considering giving up the care of her children. She had only been living on her own for a couple months and she could not manage affairs upon her limited budget. She was in debt and did not know some of the basics of childcare such as which type of milk was appropriate for children of that age. Her intellectual ability was below average, and her IQ was only 70, which is in the lowest two percentile of the population. However, the judge found her depression did not reduce her culpability and placed the offence of

causing death of a child in B for medium culpability and it was undoubtedly category 1 harm due to the death. The starting point for such an offence is 5 years with a range of 3 to 8 years. For the neglect offence under count 2, relating to the daughter, the judge placed it in medium culpability B. The starting point for that is 3 years with a range of 2 to 7 years. The sentencing judge remained at the starting point for the offence of causing death of a child and moved upwards for count 2 to the figure of 4 years and 6 months. She therefore arrived at the sentences to which we have referred, namely 5 years on count 1 and 4 years and 6 months on count 2 respectively. She made the two sentences of 6 months each for the cruelty charges relating to the appellant's son concurrent with one another, but consecutive to those relating to the daughter. The overall resulting term of imprisonment was therefore 5 years and 6 months.

15. The grounds of appeal are three in number and are as follows. Firstly, the judge erred in concluding that count 1 should be given a starting point at the top end of category 1B and failed to give sufficient weight to the applicant's mitigation including her depression, anxiety and IQ, and the fact that the applicant had sought help from professionals prior to the offending and had also failed to give sufficient weight to the impact on the applicant's children and the 3-year delay in the proceedings. The second ground is that the judge erred in concluding that count 2 fell into category 1B and not category 2B and the sentence on this count was further manifestly excessive as the judge failed to give sufficient weight to the applicant's mitigation.

16. The sentences for counts 3 and 4, in the third ground of appeal, are said to be excessive as the judge sentenced her to a sentence in excess of the starting point for those offences,

failed to reflect the significant mitigating factors and, by imposing a consecutive sentence, failed properly to reflect the principle of totality.

17. We start by observing that in our judgment there is nothing manifestly excessive with the sentences for each of counts 3 and 4, namely the child neglect sentences relating to each child individually and for their living conditions. Nor is it wrong in principle to have ordered them to run consecutively to the sentences for the daughter A under counts 1 and 2, other than subject to the overriding principle of totality. If viewed in isolation, we are of the view that, individually, the separate sentences for counts 3 and 4 cannot be said to be manifestly excessive in all the circumstances of this case at 6 months' imprisonment for each. The real thrust of the appeal lies in the sentences for counts 1 and 2, and the overall total sentence, given that each of those two sentences which were ordered to run concurrently, were also ordered to be followed by consecutive sentences of 6 months each on counts 3 and 4.

18. We note that there is no mention in the sentencing remarks of the appropriate Guideline, Sentencing Offenders with Mental Disorder, Development Disorders or Neurological Impairments. Depression was accepted by the prosecution psychologist (Dr Halsey) at paragraph 3.10 of his report which had set out the medical notes of the appellant with the numerous references to depression. Although the subject of the delay in the case being dealt with is referred to by the sentencing judge, there is simply a passing reference to the lengthy delay between the offence committed in March 2019 and the convictions and sentences over 3 years later. All these matters have been addressed further this morning before us by counsel both for the appellant and for the prosecution.

19. There are the following mitigating factors which were accepted by the judge in her sentencing remarks, and we list them in short order here. They are firstly, the genuine remorse experienced by the appellant after the death of her daughter; the fact that she had bonded well with her children; and that her daughter who died, A, was otherwise well cared for, well-nourished and had a good level of hygiene; and that she had been previously observed to be clean and content. There was also a period during which this young mother was not coping with being a parent, but she had realised this and had expressly sought professional help when the social worker visited her flat on 22 February 2019. She was also of good character and had no previous convictions.

20. We are of the view that the sentencing judge did not give sufficient consideration in the sentencing exercise to the mitigating circumstances including the appellant's personal circumstances, and in particular to her depression, when considering where to move from the starting point set out in the Guidelines. The depression was long-standing and had been treated by medication previously. Her daughter A had been born in April 2018, and it is now well accepted that some young mothers who have difficulty in coping when they have another young child to care for and dealing with other difficult social conditions, do occasionally struggle. It is, however, also right to observe that there are many parents in difficult personal circumstances, including poverty, who manage to care for their children sufficiently carefully and well, where offences such as this are not committed. In this case the conduct of the appellant in looking after her son, but most particularly her daughter who died, fell so far short of what is required that it became criminal.

21. However, notwithstanding those observations, it is clear that a sufficient account has to be taken of all the mitigating features in this case, in particular taking into account the sentencing judge's observations in relation to the absence of aggravating characteristics or factors particularly as she had found that these were high culpability offences.

22. We remind ourselves, as did the sentencing judge, that when one sentences a carer of young children, one must pay attention to the warning in the Guidelines that the court should take a step back and review whether the sentence will be in the best interest of the victim, as well as other children in the offender's care. That however must be balanced with the seriousness of the offence. We remind ourselves also that this cautionary note in the Guidelines is of less weight when a substantial period of custody is appropriate.

23. Here, one of the victims of the offending had died, a tragic event which no sentence could remedy. The other victim was a young boy coming to terms with the impact of a lengthy term of custody for his mother. We are of the view that, in all the circumstances, the sentencing judge failed to give sufficient weight to the multiple mitigating factors, in particular the long-standing depression suffered by the appellant, the fact that she had sought help from the relevant agency, the fact that she has already suffered through the death of her daughter and the impact upon her surviving children, both the son of 3 years old and her baby daughter who was born after these offences were committed. The result of the sentencing exercise carried out below by the sentencing judge resulted, in our judgment, in a manifestly excessive sentence which needs reducing to meet the justice of the case and all of the circumstances.

24. We agree with the categorisation of both the offences concerning A under counts 1 and 2 by the sentencing judge. Count 1 is a category 1B offence with a starting point of 5 years and a range of 3 years to 8 years. For the neglect offence (count 2) the judge correctly placed that in category B for medium culpability. The starting point for that is 3 years with a range of 2 to 6 years (not 2 to 7 years as it was expressed below). However, we are of the view that for both offences, when the mitigation available is taken into account and the necessary adjustment done from that starting point, after consideration of those factors, the sentences should be towards, or at, the bottom of the category ranges in each case which, in our judgment, should be 3 years and 6 months for count 1, and 2 years for count 2. Those sentences should remain concurrent to one another.

25. We therefore turn to consider totality. It is important that overall criminality is borne in mind, and it is not wrong to make sentences consecutive to one another, subject always to the principle of totality being observed in the overall resulting sentence. The sentences for the child neglect offences which are related to each of the two children respectively should remain at 6 months' imprisonment, but for reasons of totality should be ordered to run concurrently both with one another and also with the offences under counts 1 and 2. The overall resulting sentence in the aggregate is therefore governed by the longest sentence of the four, which is 3 years 6 months on count 1. By structuring the sentences in this way, this also recognises that counts 3 and 4 were part and parcel of the scenario which h led to such tragic events.

26. In those circumstances therefore, we quash the sentence below of 5 years' imprisonment on count 1, and 4 years and 6 months on count 2. The sentence which we pass upon count

is 3 years 6 months' imprisonment, and the sentence upon count 2 is 2 years. The two sentences of 6 months' on each of counts 3 and 4 remain. We also order that all of the sentences are to be concurrent with one another, with the resulting sentence therefore being that of 3 years and 6 months' imprisonment. In those circumstances the appeal succeeds.

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