IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Couts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT BURNLEY
(HER HONOUR JUDGE DODD) [T20200130]

Case No 2023/03138/B3

Friday 1 November 2024

NCN: **[2024] EWCA Crim 1429**

B e f o r e:

LORD JUSTICE HOLGATE

MR JUSTICE JOHNSON

MRS JUSTICE HEATHER WILLIAMS DBE

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Miss M Brannan appeared on behalf of the Appellant

J U D G M E N T

Friday 1 November 2024

LORD JUSTICE HOLGATE:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where an allegation has been made that 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 the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. For these reasons, and in the overall interests of justice, will refer to the two complainants as "C1" and "C2" respectively and the appellant as “BB”.

2. On 21 July 2023, following a trial in the Crown Court at Burnley before Her Honour Judge Sara Dodd and a jury, the appellant was convicted of a number of offences. In relation to C1 he was convicted of nine offences of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 (counts 1 to 6 and 10 to 12), and three offences of indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960 (counts 7 to 9). In relation to C2, he was convicted of five offences of indecent assault (counts 13 to 19) and one offence of indecency with a child (count 20).

3. On 18 August 2023, the appellant (then aged 67) was sentenced by the trial judge to an overall sentence of 16 years' imprisonment, comprising ten years' imprisonment in relation to C1 and six years' imprisonment in relation to C2. Regarding C1, the judge passed concurrent terms of five years' imprisonment on each of counts 2 and 3, and consecutive terms of two years' imprisonment on count 5, two years on count 6 and one year on count 8. She also passed concurrent terms of one year's imprisonment on each of counts 1, 7, 9, 10, 11 and 12, and a concurrent term of two years' imprisonment on count 4. In relation to C2, the judge passed consecutive terms of one year's imprisonment on count 13 and five years'

imprisonment on count 15, and concurrent terms of five years on count 14, two years on each of counts 16, 17, 18 and 19, and one year on count 20. The appellant appeals against sentence with the leave of the single judge.

4. The counts on the indictment distinguish between single offences and other offences of the same type which occurred additionally on at least three occasions. The indictment also stated where the child was aged under 13 at the time of the offence.

5. Under count 1, the appellant rubbed his erect penis on C1's back and bottom when she was aged 7. He touched C1's vagina on at least four occasions when she was aged 7 to 12 (counts 2 and 3), and on at least four occasions when she was aged 13 to 15 (counts 4 and 5). Under count 6, he digitally penetrated C1's vagina when she was aged 13 to 15. He caused C1 to massage the top of his legs on at least four occasions when she was aged 9 to 12 (counts 7 and 8) and on at least three occasions when she was aged 13 (count 9). He placed C1's hand on his penis when she was aged between 9 and 12 on at least four occasions (counts 10 and 11), and on at least there occasions when she was aged 13 to 15 (count 12).

6. Turning to C2, the appellant moved his hand to C2's groin area when she was aged 5 to 7 (count 13). He touched her thigh under bedclothes on at least four occasions when she was aged 5 to 12 (counts 14 and 15), on at least four occasions when she was aged 13 to 14 (counts 16 and 17), and on at least four occasions when she was aged 14 to 15 (counts 18 and 19). The appellant also caused C2 to massage the top of his legs, inviting her to massage his groin when she was aged between 7 and 13 (count 20).

7. C1 and C2 were the stepdaughters of the appellant at the time of the offences. He co-habited with and eventually married their mother when he was aged 21. They were together from around 1976 until they divorced in 1998. From early on in the relationship the appellant

sexually abused both of the complainants. The offences against C1 (born in 1969) took place between November 1976 and September 1985, when she was aged between 7 and 15. The offences against C2 (born in 1971) took place between March 1976 and March 1987, when she was aged between 5 and 14 or 15. The abuse was reported to the police in 2018.

8. The appellant showed a sexual interest in the girls from when they were young. Not only would he touch them in a sexual manner, he would also get them to touch him in ways that sexually excited him. He would deliberately put pornographic videos on the television in their presence and speak to them graphically about sex and using a vibrator. He would walk around the house naked and, even when wearing a dressing gown, would deliberately sit in such a way that they could see his naked genitals.

9. C1 said that the abuse started when she aged around 7. She and her sister, C2 (then aged around 5) were off school and their mother was at work. The appellant made the two girls go upstairs to have a nap. They both got into the same bed. The appellant undressed and got into the bed between them. C1 said that he rubbed his erect penis against her back and bottom (count 1). She said that from when she was about 9 the appellant would put a pornographic movie on the television and tell her that she could learn something from it. He would be upstairs in bed and call her to make him a cup of tea. When she took the tea up to him, he would move the bedclothes aside to reveal himself naked. He would ask her to massage his legs at the top (counts 7, 8 and 9). This would make him excited. On some occasions he would take her hand and place it on his erect penis (counts 10, 11 and 12).

10. C1 described how, despite her being only a child, the appellant bought her a sexy style nightie and pair of knickers. He would persistently try to get her to put them on and she would try anything she could not to do so. When she eventually did put them on for him he took her into his bedroom. He made sure that she could see the condoms under his pillow,

and he said "I've got protection", as she stood there crying.

11. The bulk of the abuse took place when C1 was aged between 12 and 15, from late 1981 to late 1984. The appellant would return home after he had been out drinking. He would go into her room naked when she was in bed. He would put his hand under the bedclothes and touch her genitals (counts 2 to 5). This happened repeatedly. On one occasion he digitally penetrated her vagina (count 6). C1 would try to prevent this by lying in a certain position and wrapping the duvet around herself tightly. Her brother was born in 1979. When he was old enough, she would take him into her bed to try to prevent the appellant touching her. The abuse eventually stopped around 1985 to 1986 when C1 became pregnant.

12. C2 reported abuse of a similar nature. She recalled that the first time the appellant touched her inappropriately was when she was in her mother's bed. He started to tickle the back of her legs and then moved his hand to her groin area (count 13). He would show her pornographic videos and make her go into his room and massage the upper part of his legs whilst he was naked. He also went into her room, naked, and would kneel down by her bed, put his hands under the bedcovers and touch her legs at the top of her thigh (counts 14 to 19). On one occasion he got her to rub cream on to his legs, and asked her to massage them at the top (count 20). He would often go into the bathroom when she was taking a bath. She would hunch up in the bath to hide her nakedness from him.

13. Neither of the complainants told their mother about the abuse because they did not want to cause problems. However, in May 2018, C2 went to see her brother. She told him about how the appellant had abused her. Her brother did not believe her and spoke to other family members. The police were then informed of the abuse. The appellant was interviewed in June 2018 and November 2019. He denied the allegations.

14. We have read the victim personal statements of both C1 and C2 which described the serious and long-term effects that the offending has had on each of them.

15. The appellant was aged 67 at sentence. He was born on 25 February 1956. He had six convictions for eight offences, spanning from 1977 to 2015, including criminal damage, non-dwelling burglary, threatening behaviour and driving offences. These were not relevant to sentence. No pre-sentence report was provided to the Crown Court. For the purposes of section 33 of the Sentencing Act 2020, we consider that no such report was necessary or is necessary now for this appeal. We have read the character references on the appellant and the letter from his partner. We are conscious of the effects which imprisonment are having and will have on both the appellant and his partner.

16. With the benefit of helpful submissions from counsel, the judge applied the principles in *R v Forbes* [2016] EWCA Crim 1388; [2017] 1 WLR 53. She had regard to the maximum sentences which could be imposed for each of the offences at he time they were committed and the definitive guidelines for modern equivalent offences under the Sexual Offences Act 2003.

17. The judge concluded that for offences against children under 13, neither complainant was vulnerable because of "extreme youth". But for other offences they should be treated as particularly vulnerable. C1 and C2 also qualified as particularly vulnerable, given that the offending took place when they were in their own beds at night. The judge concluded that both victims had suffered, and continued to suffer, severe psychological harm. There was also abuse of trust by the appellant as the stepfather of the victims. There was an element of grooming. But the judge said that she had taken care to avoid double counting in arriving at the sentences she imposed.

18. The judge then took into account mitigating circumstances. The appellant had no relevant previous convictions, and there had been no allegations of sexual offending since the appellant had left the family home. She also took into account the delays which had occurred in bringing the case to court and then to trial, and the impact of those delays on both the appellant and his partner. She had regard to the effect of imprisonment for the first time on someone of the appellant's age.

19. The judge said that if she had been dealing with the appellant for the offences against C1 under the current sentencing regime, the assault charged in count 6 was the most serious offence, with a starting point of eight years' imprisonment. To that, four years would have been added for all the other offending over many years, making 12 years' imprisonment for the totality of the offending against C1. The appellant had begun to abuse C2 when she was aged 5, and that abuse had continued for ten years. Under the current regime, the offending against her would have merited a sentence of eight years' imprisonment for the totality of the offending against C2. The judge then reduced those sentences to ten and six years' imprisonment respectively.

20. We are grateful to Miss Maria Brannan for her clear and helpful written and oral submissions on behalf of the appellant. In summary, she submits that the overall sentence was manifestly excessive for the following reasons.

(1) The judge was wrong to find that C2 had suffered severe psychological harm. This was largely based upon her victim personal statement, in which she said that the harm was significant, but not severe.

(2) The judge failed to reflect adequately the effects of delay in this case. The appellant was first interviewed under caution in June 2018. The police then

failed to make any progress for ten months. The appellant was charged and first appeared in the magistrates' court in August 2020. There were then successive delays for the holding of the trial in October 2021, March 2022 and September 2022. The trial began on 10 July 2023.

(3) The judge failed to make a "measured reference" to the current sentencing guidelines in accordance with *Forbes* and *R v Lamb* [2020] EWCA Crim 881; [2020] 4 WLR 118. Instead, sentences were passed at the maximum permissible under former legislation, so as to produce a sentence as close as possible to current guidelines. Specifically, Miss Brannan criticises the imposition of sentences on counts 2, 3, 4 and 5 in relation to C1, and counts 14 to 17 in relation to C2 at the respective historic maximum sentences. She also contrasts the nature of the offending charged in count 4, in comparison to that charged in counts 2 to 5 in relation to C1 to suggest that in the former case the offending was markedly less serious.

Discussion

21. The correct approach to the assessment of severe psychological harm was explained in *R v Chall* [2019] EWCA Crim 865; [2019] 4 WLR 102. This has been reflected in an amendment by the Sentencing Council to the definitive guideline. An assessment may be based not only on a victim personal statement, but also the trial judge's observations of the complainant when he or she gives evidence.

22. Here the trial judge was best placed to observe C2 when she gave evidence and to assess what she said in her victim personal statement in that context. In our judgment, there was ample evidence to support the judge's conclusion on severe psychological harm.

23. We turn to ground 2, which is concerned with delay and mitigating circumstances. The offending in this case took place against two young victims over a period of about eight years in the case of C1, when she was aged 7 to 15, and over a period of about ten years in the case of C2, when she was aged between 5 and 14 or 15. Miss Brannan rightly accepts that the identification of the modern equivalent offence is not contentious. There has been no criticism of categorisation.

24. As the judge said, applying the current guidelines in isolation, the starting point of 8 years could be justified for count 6 alone. The modest uplift of 4 years for the offences against C1 represented a substantial reduction in the sentence otherwise appropriate for all the other offending against that victim. That reduction, in our judgment, was more than sufficient to take into account all the mitigation available to the appellant for these offences, including the effects of long delay and the personal circumstances and reflect the overall criminality against C1. In saying this we have had regard to *R v Petherick* [2012] EWCA Crim 2214; [2013] 1 WLR 1102. Indeed, we consider that the sentence of 12 years' imprisonment in relation to C1 could have been slightly higher. Bearing that in mind, even if the view were to be taken that the notional sentence of eight years' imprisonment for all of the offending against C2 is relatively high, no complaint can be made in this appeal about the overall sentence at which the judge arrived of 20 years' imprisonment in relation to both victims.

25. The totality principle is designed to ensure that the overall sentence is proportionate to the overall criminality and other relevant circumstances. In this case it has been applied in more than one way. Most of the sentences were imposed so as to run concurrently. Again, taking into account totality, that had to aggravate some of the consecutive sentences, such as the sentences on counts 2 and 3, 5, 8 and 15. But the judge also ensured that the build-up of

the overall sentences in relation to first C1 and then C2 had been adjusted for proportionality..

26. The remaining issue is whether the judge's approach failed to make a "measured reference" to current guidelines which paid adequate regard to the lower maxima applicable when the offences were committed. We do not consider that the judge erred in this respect for a number of reasons.

27. First, sentences for this long history of sexual abuse involving many offences against two young victims could have been structured in different ways. This court may not intervene in response to the grounds of appeal for which leave has been granted unless satisfied that the overall sentence was manifestly excessive.

28. Second, although Miss Brannan has focused on certain sentences which were imposed at the same level as the historic maximum, several other sentences were imposed at levels substantially lower than the relevant maximum, for example those on counts 7 to 12.

29. Third, as this court said in *Lamb* at [24] "measured reference" does not prescribe a mathematical exercise. The previous maximum sentence is one part of an overall evaluative assessment. Indeed in *Lamb* the court made a single adjustment to the overall sentence. It did not apply "measured reference" to each individual sentence.

30. Fourth, it follows that the judge did not fail to comply with the "measured reference" criterion simply because she imposed some sentences at the level of the historic maximum. It is necessary for the court to look at the sentencing exercise as a whole.

31. Finally, the reduction in the overall sentence of 20 years to 16 years was substantial. This

also ensured that totality was sufficiently taken into account when making the total sentences in relation to C1 and C2 run consecutively.

32. Having reviewed the individual sentences and the overall sentence for this historic but long-term sexual abuse of two children, including abuse when they were young, we conclude that adequate allowance was made for "measured reference". Even if the overall sentence might be regarded as severe, we are unable to say that it was manifestly excessive.

33. For these reasons, the appeal must be dismissed.
