Neutral Citation Number: [2016] EWCA Crim 572
No: 201601023 A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justic6
Strand
London, WC2A 2LL

Thursday, 7th April 2016

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LADY JUSTICE HALLETT DBE

MR JUSTICE SAUNDERS

MR JUSTICE SOOLE

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

ATTORNEY-GENERAL'S REFERENCE NO 32 OF 2016

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(Official Shorthand Writers to the Court)

Mr P Jarvis appeared on behalf of the **Attorney General**
Mr J Lamb appeared on behalf of the **Offender**

J U D G M E N T
(As approved by the Court)

1. THE VICE PRESIDENT:

2. Background

3. This reference raises yet again the vexed question of the appropriate level of sentence for sexual offences on children committed many years ago by an offender who was himself a child at the time.

4. On 22nd January 2016, after a contested trial, the offender was convicted of two counts of indecent assault on a male person, one of whom we shall call "X" and the other we shall call "Y". The offence on X was committed between April 1979 and April 1981 and the offence on Y between March 1982 and January 1987. Both offences were contrary to section 15(1) of the Sexual Offences Act 1956. The parties at trial agreed, and informed the trial judge, that in the light of the likely dates of the commission of the offences, the offences attracted a maximum penalty of five years' imprisonment. The parties now agree the maximum penalty for both offences was ten years' imprisonment.

5. On 5th February 2016 His Honour Judge Rennie, the trial judge, having received notes on sentencing from the advocates, a number of testimonials for the offender and personal impact statements from the complainants, sentenced the offender to a term of imprisonment of two years on each count suspended for two years. The sentences were ordered to run concurrently. Her Majesty's Solicitor General, represented by Mr Jarvis, has sought the leave of the court to refer the sentences to us on the basis they are unduly lenient.

6. The facts are, in summary, that the offender and his parents lived close to X and his family in Sussex. The families were good friends and X was also friends with a boy called Y; they sometimes played together in a nearby Wendy House. X claimed that the offender, who was a number of years older than X, sexually assaulted him twice. However, the offender was only convicted of the one offence, and it is to that offence we now turn.

7. In 1979/1980 X said he was visiting the offender's home and he asked to go upstairs with the offender to see his pet gerbils. X sat on the corner of the bed with the offender standing in front of him. The offender took down his pants and his trousers, exposing his penis. The offender said, "It's all right to touch it if you like". At this, X grabbed the offender's penis. The offender then said, "It's all right to kiss it", so X did. The offender then put his penis into X's mouth and held his head. X said he was frightened and tried to struggle. He felt something go into his mouth and thought that the offender had urinated. The offender pulled down X's shorts and pants so his genitals were exposed.

8. Fortunately, X's mother was outside. She shouted for him to come home. The offender held X up to the window in a way that X's mother could not see he was naked from the waist down and told X, "Tell her you'll be back in a few minutes or I'll drop you". X told his mother to go home and he would be back soon. He was too frightened to say

anything else. The judge sentenced on the basis that the evidence indicated the victim was three and the offender eleven at the time of this offence.

9. Y described an occasion when he felt pressure from the offender and X to go into the Wendy House with the offender. X said, "I've been in the Wendy House. Why don't you go in? It's cool". Y went in but X stayed outside. Once inside, Y's trousers were taken down and the offender played with Y's penis before placing it into his, the offender's, mouth. According to Y, it felt 'weird'. Afterwards he did not tell anyone what had happened because he was too ashamed. He never went into the Wendy House again. The judge sentenced on the basis that the evidence revealed that the offender was fourteen at the time of the offence and Y was five.

10. X and Y remained friends but drifted apart as teenagers. Some years later X told his mother what had happened to him namely that the offender had had oral sex and threatened to throw him out of a window. He also told her that "things had gone on" in the Wendy House.

11. In 2006, Y became involved with the Landmark Forum, which helps people cope with trauma from their past. He decided to meet with X so they could talk about their experiences as children. Their accounts differ of what was said at that meeting, but there was no report to the police.

12. In 2007, X saw the offender speaking to a group of teenage boys. This made his angry and he decided to report what had happened. He made a witness statement to the police. For reasons that are not clear, that did not lead to the offender's arrest or prosecution.

13. It was not until 2013 that Y decided to report the offender to the police. The offender was interviewed and he denied any sexual abuse, and he continues to do so.

14. At the time of sentencing, the offender had no criminal convictions on his record; he had just one caution for an offence of common assault committed in 2004.

15. In his victim personal statement of January 2016, X wrote that as a result of the offence he started to self-harm from the age of thirteen and he suffered flashbacks to what the offender had done. This caused him to experience sleeplessness, a lack of concentration and his studies suffered. He became suicidal and had to be treated in hospital and in the community for mental health problems. He continues to receive counselling. He also said that he was unable to maintain relationships. X feels that the offender's actions have "ruined" him.

16. In his victim personal statement, dated 28th January 2016, Y states that the offence did not impact on his life as he grew up, it was only after he received counselling that he decided he wanted to press charges against the offender. Looking back, he believes that the offence may have made him distrustful of people, but otherwise makes no comment as to any long-term consequences.

17. Discussion

18. Mr Jarvis submitted there were a number of aggravating factors to the offences:

i. 19. the grooming of X on a previous occasion

ii. 20. ejaculation in respect of the offence on X;

iii. 21. the location of the offence in respect of the offence on Y;

iv. 22. the presence of another child, in respect of the offence on Y;

v. 23. steps taken to prevent X reporting an incident;

vi. 24. the use of X to recruit Y.

25. During the course of submissions this morning, we pressed Mr Jarvis on whether all these factors were a. proved and b. could all be described as aggravating features. No finding of fact was recorded in respect of the grooming incident, there was no evidence X was present when Y was assaulted and X did not accept he was used to recruit Y. Further, we failed to see the significance of the location of the offences as an aggravating feature.

26. The following mitigating factors appeared to HM Solicitor General to be present: the offender has no relevant previous convictions, the age and lack of maturity of the offender at the time of the commission of the offences, and the age of the allegations.

27. Balancing all those factors, Mr Jarvis criticised the overall length of the sentence and the judge's decision to suspend it. It was his contention that the sentences should have been ordered to run consecutively, and not concurrently, to reflect the fact that they were committed against different victims and at different times, some years apart. Alternatively, if the sentences were properly ordered to run concurrently, he submitted the sentence for the offence on X should have been longer given its nature and seriousness and because it was aggravated by the offence on Y.

28. Finally, if those arguments failed, Mr Jarvis' fall back submission was that the sentence should not have been suspended. The judge explained his rationale for suspension in this way:

> "... I'm also persuaded that because of the passage of time, your age at the time, your good character and all that I have heard, the just sentence to pass is a suspended sentence."

No-one reminded the judge, as Mr Jarvis reminded us, that where offences were committed before 4th April 2005, the power to suspend a term of imprisonment was governed by the Powers of Criminal Courts (Sentencing) Act 2000 and not the Criminal Justice Act 2003, as the judge may have believed. Section 118(4) of the PCC(S)A 2000 states that a sentence of imprisonment can only be suspended where there are exceptional circumstances to justify such a course. Placing reliance on Attorney General's Reference No 61 of 2014 [2015] Cr App R (S) 25, Mr Jarvis submitted that the passage of time is not *per se* an exceptional circumstance. Further, he maintained that the offender's age at the time the offences were committed and his good character were not sufficient, in isolation or cumulatively, to amount to exceptional

circumstances so as to justify suspension of the sentence.

29. Mr Jarvis took us to the various sentencing guidelines of potential relevance namely: the Sexual Offences Definitive Guideline of 2014, the Overarching Principles - Sentencing Youths Guideline and the Offences Taken Into Consideration and Totality Definitive Guidelines.

30. Having regard to Annex B of the Sexual Offences Definitive Guideline, Mr Jarvis argues that the modern equivalent of the offence on X is rape of a child under the age of 13, contrary to section 5 of the Sexual Offences Act 2003 with a maximum sentence of life imprisonment. He invited the court to place the offence into category 2: X was particularly vulnerable due to his extreme youth and he has suffered severe psychological harm. Further, he suggested that this is culpability A because of the deliberate isolation of X from his mother and or because of the element of grooming. If that categorisation is correct, the starting point for an adult offender after a trial would be one of 13 years' imprisonment, with a range of 11 to 17 years (all beyond the actual maximum for this offence).

31. However, Mr Jarvis fully and fairly acknowledged that one must bear very much in mind the overarching principles in sentencing youths. Many of those principles (such as considerations of the welfare of the child) will not be relevant because the court is sentencing an adult not a youth; but age and maturity at the time of the offence are relevant to the issue of culpability. At page 24 of the guideline the Sentencing Guidelines Council states:

> "where the offender is aged 15, 16 or 17, the court will need to consider the maturity of the offender as well as chronological age. Where there is no offence specific guideline, it may be appropriate, depending on maturity, to consider a starting point from half to three quarters of that which would have been identified for an adult offender ...
>
> where the offender is aged 14 or less ... the length of a custodial sentence will normally be shorter than for an offender aged 15–17 convicted of the same offence."

32. In relation to the offence committed against X, Mr Jarvis contended that an 18 year old committing such an offence today could expect the sentencing court to take a starting point of term of 13 years' detention and that this gives an indication of just how serious Parliament, and therefore the courts, view offending of this type. If one then factored in the mitigation available to the offender and applied a reduction of 75 per cent, he maintained the sentence should have been at least three years for offending of this gravity.

33. As far as the offence against Y is concerned, the modern equivalent, is said to be sexual assault of a child under 13 contrary to section 7, which carries a maximum sentence of 14 years. Mr Jarvis placed the level of harm into category 2 because the offender touched Y's naked genitalia and the level of culpability at A because he deliberately isolated him by coaxing him into the Wendy House. This would mean a starting point

for an adult offender after trial of four years' imprisonment, with a range of three to seven years. Given the offender's age at the time of the offence, namely 14, there would be a further substantial discount to be afforded to him. On that basis Mr Jarvis accepted that a sentence of two years custody could not be described as unduly lenient in itself. It is the combination of the two offences and the overall level of offending that he claims have not be properly reflected in the sentence passed.

34. Conclusion

35. All parties acknowledge that this was an extraordinarily difficult sentencing exercise for the judge. Sentencing for offences committed decades ago is never easy, let alone when the offender was a child at the time. It is therefore worth reminding oneself of the guidance provided by the court and Lord Judge CJ in R v Hall and others [2012] 1 WLR 1416, [2012] 2 Cr App R (S) 21, in which the court conducted a comprehensive review of all the relevant sentencing principles governing historic offences. Lord Judge stated at paragraph 46:

> "In the search for principle it is impossible to reconcile them all. We suggest that with the exception of Millberry and Others, and the definitive sentencing guideline (used in the measured way we shall suggest) that the following considerations should be treated as guidance. We further suggest that reference to earlier decisions is unlikely to be helpful, and, again dealing with it generally, to be discouraged. Subsequent decisions of this court which do not expressly state that they are intended to amend or amplify this guidance should also be treated as fact specific decisions, and therefore unlikely to be of assistance to [the] court."

36. We are unaware of any subsequent decisions in which the court has expressly stated that it intended to amend or amplify the guidance provided and accordingly, H remains the leading authority. The guidance is to be found at paragraph 47:

(a) 37. "Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established facts.

(b) 38. Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, for example theft, they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.

(c) 39. As always, the particular circumstances in which the offence was committed and its seriousness must be the main focus. Due allowance for the passage of time may be appropriate. The date may have a considerable bearing on the offender's culpability. If, for example, the offender was very young and immature at the time when the case was committed, that remains a continuing feature of the sentencing decision. Similarly

if the allegations had come to light many years earlier, and when confronted with them, the defendant had admitted them, but for whatever reason, the complaint had not been drawn to the attention of, or investigated by, the police, or had been investigated and not then pursued to trial, these too would be relevant features.

(d) 40. In some cases it may be safe to assume that the fact that, notwithstanding the passage of years, the victim has chosen spontaneously to report what happened to him or her in his or her childhood or younger years would be an indication of continuing inner turmoil. However the circumstances in which the facts come to light varies, and careful judgment of the harm done to the victim is always a critical feature of the sentencing decision. Simultaneously, equal care needs to be taken to assess the true extent of the defendant's criminality by reference to what he actually did and the circumstances in which he did it.

(e) 41. The passing of the years may demonstrate aggravating features if, for example, the defendant has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.

(f) 42. Early admissions and a guilty plea are of particular importance in historic cases. Just because they relate to facts which are long passed, the defendant will inevitably be tempted to lie his way out of the allegations. It is greatly to his credit if he makes early admissions. Even more powerful mitigation is available to the offender who out of a sense of guilt and remorse reports himself to the authorities. Considerations like these provide the victim with vindication, often a feature of great importance to them."

43. We apply those principles to the present application, noting as we do the reference to using the current Definitive Guideline on Sexual Offences in a "measured" fashion and the prohibition on conducting the "wholly unrealistic exercise" of attempting to assess what the sentence would have been, had the offence come to light shortly after it was committed.

44. Our focus must be on the seriousness of the offences, the harm caused and on the offender's culpability. We note that, not only was the judge misled as to the maximum sentence available, no one invited the judge to make findings as to whether the grooming incident occurred in respect of X, whether X was present at the assault of Y (the evidence suggests he was not) and whether X was used to recruit Y. Given their potential significance, it would be wrong to allow such factors to play a part in the categorisation of the offence or as an aggravating feature, absent a sound evidential basis. In any event, we have our doubts as to whether it is apt to describe what may have occurred between an eleven year boy and a three year old boy as 'grooming' and to describe the offender as having 'deliberately isolated' the victims. The evidence suggests an eleven year old boy and then a fourteen year old boy taking advantage of opportunities that presented themselves when playing with younger boys, rather than any act of grooming or deliberate isolation of the kind the Sentencing Council had in mind. As we have already observed, the location of the offences seems to us to be

irrelevant. We accept the other aggravating factors were present, albeit in the context of offending by a young boy.

45. On that basis, using the current guideline, the correct category for the offences on X and on Y would be 2 B and the categorisation itself takes account of most of the aggravating features. Had these offences been committed by an adult today, the guideline indicates the overall sentence would be lengthy.

46. For the offence on X, category 2B has a starting point of ten years and a range of eight to thirteen years (beyond the maximum available for the offence committed). However, the offender was very young and immature at the time he assaulted the two complainants. Any sentence would therefore have to be reduced very significantly to reflect the much lower level of culpability of an eleven year old (arguably by more than 75%) and to reflect the substantial mitigation available. On that basis we do not accept that the figure of 2 years determined by the judge was outside the appropriate range.

47. We turn to the length of the sentence for the offence on Y. Having placed the offence on Y in category 2B, the starting point for a section 7 offence is two years with a range of one to four years. There are no particular aggravating features present and much mitigation. Further there must be a substantial reduction to reflect the offender's lower level of culpability as a fourteen year old. Had the judge ordered the sentences to be served consecutively, as would be the normal practice where there is more than one victim, he may well have reduced the sentence for the offence on Y still further to reflect the principle of totality.

48. On that basis, one might well reach a total sentence for the offences on X and Y at, or a little above, the level of sentence that can in law be suspended.

49. Finally, we address the question of suspension. Firstly, it is unfortunate that the judge was not informed of the relevant statutory provision. He should have been. Secondly and, in any event, we reject the argument that the judge would not have been entitled to suspend the sentence on the basis of exceptional circumstances. The court, in Attorney General's Reference No 61 of 2014, did not, in our view, intend to lay down any general principle that the passage of time can never amount to an exceptional circumstance. The judgment makes clear that the facts of that case were unusual. The offender had committed a further sexual offence as an adult, and the overall circumstances were not so exceptional as to justify suspension.

50. If, as the judgment in H makes clear, the passage of time since an offence, the age of an offender at the time he committed an offence, and the fact an offender has not been convicted of any offence since the offending, are all factors to be considered when assessing sentence generally, we see no good reason why they may not be relevant to the question of suspension. It will be for the sentencing judge to make a judgment on all the facts before him or her. We have not rehearsed the detail of the mitigation available to the offender but it was considerable.

51. There is no principle of sentencing that all offences of this kind must be met by immediate terms of imprisonment, whatever the circumstances. As the Definitive

Guideline makes clear, as serious as these offences were, there may be exceptional cases where a non-custodial sentence is appropriate. It is clear to us from the transcript of the sentencing hearing that the judge was acutely conscious of the seriousness of the offences, the impact of the offences on the victims and the relevant guidelines. He did not take the decision to suspend the sentence lightly. He took a measured and balanced approach with which we do not intend to interfere.

52. We should like to express our hope that the complainants, both of whom have had to struggle to come to terms with their abuse, will find some form of closure in the fact that these proceedings are now at an end and that their abuser has been brought to justice in public, albeit he may not have received the severe kind of punishment that some may have wished upon him.

53. We refuse leave.