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No. 2019/01267/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION Royal Courts of Justice

The Strand

London

WC2A 2LL

Friday 17th May 2019

B e f o r e:

LORD JUSTICE DAVIS

MRS JUSTICE SIMLER DBE

and

THE RECORDER OF LONDON

(His Honour Judge Hilliard QC)

(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

the CRIMINAL JUSTICE ACT 1988

R E G I N A

- v -

KB

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Mr Joel Smith appeared on behalf of the Attorney General

Miss Trina Little appeared on behalf of the Offender

J U D G M E N T

(Approved)

Friday 17th May 2019

LORD JUSTICE DAVIS:

1. This is an application brought on behalf of Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which he regards to be unduly lenient. We grant leave.

2. The offender is KB. He is 48 years old, having been born in 1971.

3. On 6th March 2019, following a trial in the Crown Court at Guildford before a Recorder and a jury, the offender was sentenced to a total of five years' imprisonment as follows: counts 1 and 2 (sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003); and counts 3, 4 and 5 (sexual activity with a child family

member, contrary to section 25 of the Sexual Offences Act 2003). Count 5, it may be noted, was expressly charged as a multiple incident count involving at least five occasions. Also on the indictment were five other counts, counts 6, 7, 8, 9 and 10, which charged offences of rape; counts 7, 8, 9 and 10 involved a separate complainant. It suffices to say that on those counts the offender was acquitted and, therefore, they had no part whatsoever to play in the sentence which fell to be imposed upon him.

4. The Recorder ordered all of the sentences to run concurrently. On count 1, the sentence was one of five months' imprisonment; on count 2, the sentence was four years' imprisonment; and on counts 3, 4 and 5, the sentences were five years' imprisonment. A Sexual Harm Prevention Order was also made.

5. Put shortly, the offending for which the offender fell to be sentenced reflected sexual misconduct on his part towards his, in effect, stepdaughter, "S", who had been born in 1997. Count 6 was an allegation of rape against S. The other four allegations of rape related to S's mother, who had at the relevant time been the offender's partner.

6. The offender had been in a relationship with S's mother between 2000 and early 2014. S also lived in the home during that period. The evidence was that when S was aged around 12, she and the offender would, in effect, playfight. On one such occasion, S unintentionally touched his penis over his clothing. This then appeared to become part of a routine between the two whilst engaging in playfighting. That conduct was reflected in the one incident count contained in count 1 of the indictment.

7. At some time in 2011 or 2012, when S was aged around 13 or 14, she and the offender were watching a film which contained some sexual scenes. They were alone together in the house. S had a blanket covering her and she started to touch her vagina by way of masturbation under the blanket. The offender asked her what she was doing and removed the blanket. He then inserted his own fingers inside her vagina and kept them there for some time. That conduct was reflected in count 2 of the indictment. S told the offender that what had happened was wrong because of her age and sexualised behaviour between the two then ceased for a while.

8. However, after S turned 16, the offender's sexual contact with her resumed. One evening she and the offender had had a meal together and alcohol was drunk. S was to say that she was "quite drunk". There was then sexual intercourse between the two in the living room of the home. S was to say that she could not remember how she thereafter got to bed that night. At all events, that conduct was reflected in count 3 on the indictment.

9. Thereafter, the two had penetrative sex on numerous occasions. On Father's Day of 2014, the offender had booked a room at an hotel where he and S drank alcohol and then had sex. In fact, lies had to be told to S's mother to explain their absence from the home on that day. That conduct was reflected on count 4 of the indictment.

10. S was to say that she had sex with the offender on (as she said) over a hundred occasions. At all events, as we have indicated, count 5 of the indictment was a multiple incident count reflecting at least five further occasions on which the offender had sex with S. She was to say that she always drank alcohol before sex. In effect, she said that she felt obliged to have sex with the offender and she felt "sexualised". On occasions, the offender bought S presents in exchange for sex. Through this period S was aged either 16 or 17. No contraception was used by the offender during the course of this sexual activity. Furthermore, he also took photographs of S posing in underwear which he had purchased for her.

11. In October 2014, a relative of S contacted the police and the offender was arrested. When he was interviewed, he made no comment.

12. There was then an appalling and inexplicable delay involving no fault on the part of the offender. Charges were not brought until 2017. In the result, the effective trial did not take place until early 2019. A previous trial, which had been listed for September 2018, had to be abandoned because of want of adequate disclosure of Social Services' records.

13. This court has been given no explanation for this delay, and it appears that there is no possible explanation. We have directed that enquiries should be made into the circumstances of the delay to ensure that such a situation does not arise again. The delay was wholly unacceptable. It was utterly unfair to the offender who had the prospect of charges hanging over him for many years; and indeed, it was utterly unfair to the complainant as well. It was also entirely contrary to the good administration of justice. It is understandable that, in due course, in passing sentence the Recorder attached considerable weight to the delay which had occurred in deciding on the appropriate sentence to be imposed.

14. At his trial the offender said that there had been no sexual contact between him and S before she reached the age of 16. Consequently, there was an entire denial of the matters said to constitute counts 1 and 2 on the indictment. He fully accepted that after S had reached the age of 16 there had been a sexual relationship between the two, which he described as consensual. His defence at trial appears to have been to the effect that he was not to be regarded as S's stepfather and was not to be regarded as in a family relationship with her. Perhaps unsurprisingly, the jury rejected that argument and consequently the convictions on counts 3, 4 and 5 inevitably followed.

15. There was a Victim Personal Statement before the court made by S. She describes how in her teens she had become dependent on alcohol because, she says, the offender had given her considerable quantities of alcohol. She says that she suffered at school in consequence. Furthermore, she says that her experiences with the offender had affected all her relationships thereafter, until she managed to find a regular partner. She says this:

"... I was unable to commit to a long-term relationship, trusting a man who was not impending for me. In regard to sexual activity and intercourse, I had no foundation into a healthy standard of sex and went on to a rampage of

sex to normalise my experiences. I associated sex and drinking as a hobby to overwhelm my self-loathing, not as an act of love and joy until I met my current partner ...”

She also went on to refer to the mental health problems which she had had as a consequence of her experiences. It may be that there were other experiences in her background which had had a contributory effect in her subsequent behaviour. In this regard, nevertheless, she placed considerable emphasis on what the offender had done to her.

16. The relevant sentencing guidelines were fully discussed before the Recorder. Indeed, categorisation was agreed before him. It was accepted, so far as count 2 was concerned, that under the guideline the starting point was one of five years’ imprisonment, with a range of four to ten years. So far as counts 3, 4 and 5 were concerned, the starting point under the guideline was six years’ imprisonment, with a range of four to ten years. Those starting points apply, it should be noted, to one offence.

17. The relevant categorisation category 1A with regard to each such matter was justified by virtue of the fact that there had been penetration of the vagina so far as harm was concerned; and, amongst other things, in the significant disparity in age, grooming behaviour, the use of alcohol, the degree of planning and the recording of images so far as culpability was concerned. Furthermore, in the circumstances relating to counts 1 and 2, there was a significant abuse of trust. Count 1 was accepted to fall within category 3A of the relevant guideline, with a starting point of 26 weeks’ imprisonment after a contested trial.

18. The offender is a man of previous good character. He has no convictions or cautions of any kind relating to sexual or other offending. Furthermore, character evidence was before the court testifying to him being a good and kind man.

19. The Recorder refused an application to adjourn for the preparation of a pre-sentence report. He was, in fact, pressed by counsel then appearing to pass a sentence which could be suspended. But, inevitably, the Recorder rejected that argument. It is quite plain that, on any view, a sentence of immediate custody of some significant length was required, having regard to the guidelines.

20. In his sentencing remarks the Recorder, quite rightly, said this at the outset:

"The law on counts 3 to 5 is there not just to protect young people from people like you but also to protect young people from themselves. The effect of your behaviour towards [S] was to make her utterly sexualised. ..."

Those points were rightly emphasised by the Recorder. It simply is no answer at all for a defendant in a position such as this to say that the victim "consented". One point of the law in this regard is to protect them from themselves.

21. Nevertheless, so far as counts 3, 4 and 5 are concerned, at an earlier stage in discussions with counsel the Recorder had indicated that the position was that the offender had not appreciated that it was an offence because S was by now 16. The offender was, of course, wrong in that; but that at least appears to have been his state of mind, as the Recorder had found.

22. The Recorder went on to refer in detail, and correctly, to the appropriate categorisation under the sentencing guideline, which indeed had been agreed by both counsel before him. The Recorder indicated that he could not understand how so great a delay had occurred and had accordingly reduced the sentence by "at least a year" to reflect the delay. The Recorder then announced his conclusion with regard to each count, as we have indicated. He said that all of the sentences would run concurrently, albeit he did not expressly indicate that he had "loaded" the sentence on any one count in order to reflect the totality of the offending.

23. It is that latter aspect which causes Mr Smith, on behalf of the Solicitor General, to complain that this sentence was unduly lenient. Mr Smith drew attention to the various factors which were present in the offending, some of which go to categorisation, others of which can be regarded as further aggravating factors; first, and (as Mr Smith would say) foremost, there were the multiple incidents of offending against S; second, there was the lengthy period over which the offending took place; third, alcohol had been used at least to facilitate the offending; fourth, gifts were given, in effect in exchange for sex on occasion; fifth, there was a significant discrepancy of age; sixth, images had been recorded of S; seventh, there had been ejaculation and no contraception had been used by the offender; and, finally, there was the inevitable impact upon S.

24. The factors in mitigation were essentially the offender's previous good character, although, as the sentencing guideline indicates, that may not necessarily always count for so very much in such a context, and, above all, the very great delay that had occurred between arrest and trial. There was also, as we have said, the point that the offender had not appreciated that what he was doing after S reached the age of 16 was illegal.

25. The Recorder does not set out any specific reasons for deliberately adopting a lenient course. On the contrary, all his sentencing remarks are focused on the sentencing guideline and on the counts. But nowhere in his sentencing remarks does he, in terms, spell out that the offender had to be sentenced not just for one count, but for five counts (and count 5 was charged as a multiple incident count). The ultimate sentence which the Recorder imposed was a sentence of the order which might perhaps be expected for just one incident of sexual activity with a family member, especially when regard is had to the additional aggravating factors involved in this case. Consequently, we see considerable force in Mr Smith's complaint that the Recorder had failed to have regard to the totality of the offending, coupled with the presence of the numerous aggravating factors. Mr Smith submitted that, in effect, there was a radical departure from the guideline in terms which were, in effect, inexplicable.

26. On behalf of the offender, Miss Little, understandably, stressed the very great delay that had occurred. We see much force in all that she said in that regard and the effect on the offender in the very long period he had to endure before the matter finally came on for trial. However, as against that, the Recorder himself had explicitly had regard to that point and indeed had deducted "at least one year" from the sentence he otherwise would have imposed in alighting upon a final sentence of five years.

27. Miss Little further emphasised that this was a very experienced Recorder, as indeed he was. Furthermore, she emphasised that the Recorder had had the benefit of conducting the trial and would have had a good feel of the case. That again is so; but that does not of itself mean that there could be no criticism of a sentence simply because it is passed by a judge who has had the benefit of conducting a trial.

28. Ultimately, we have to ask ourselves, by reference to the sentencing guideline and by reference to the number of incidents that were involved, whether this sentence was not just lenient, but was unduly lenient. We are in no doubt but that this was an unduly lenient sentence for the reasons we have outlined. The sheer number of incidents that occurred and the gravity of the conduct clearly pushed the matter well above the starting point indicated in the guideline relating to the relevant offences. Indeed, it is to be noted that the activity between the offender and S had started whilst S was under 16. Thereafter, it was resurrected once she reached the age of 16 in the circumstances we have recounted. This was, viewed overall, a very serious matter.

29. Having concluded that this was an unduly lenient sentence, we see no reason not to interfere. We think we should interfere and increase the sentence in order to ensure justice and proper compliance with the guideline. In ordinary circumstances, one might well have expected a sentence of not less than nine years' imprisonment for all this offending and perhaps a sentence approaching ten years. However, we have full regard to the mitigation available to the offender, and we certainly attach the strongest possible weight to the grave delay that occurred before he faced trial and which, unquestionably, required a significant reduction from the sentence otherwise appropriate.

30. In our view, the least sentence that can properly be passed in this case is one of seven and a half years' imprisonment. We achieve that result by quashing the sentence on count 5 and substituting for that a sentence of seven and a half years' imprisonment. All the other sentences will stand and will run concurrently.

31. The Reference succeeds to that extent.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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