[2019] EWCA Crim 1676
2019/01252/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 25 September 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE SPENCER

and

MR JUSTICE EDIS

R E G I N A

- v -

TOM STEVEN WILKES

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Miss R Tanner (Solicitor Advocate) appeared on behalf of the Appellant

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J U D G M E N T
(Approved)

Wednesday 25 September 2019

LADY JUSTICE NICOLA DAVIES:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offence with which this judgment is concerned. No matter relating to any complainant 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.

2. Following a plea of guilty on 28 February 2019, on 6 March 2019, in the Crown Court at Sheffield, the appellant was sentenced to five years' imprisonment for the offence of assault by penetration. This sentence was ordered to run consecutively to an existing sentence of ten years' imprisonment imposed on 28 November 2015. The appellant was subject to indefinite notification requirements and a Sexual Harm Prevention Order following the earlier sentence.

3. He now appeals against sentence with the leave of the single judge.

The facts

4. The sentence imposed upon the appellant in November 2015 related to offences involving three young girls aged 15, 12 and 11. Those offences comprised sexual assault, inciting a child under 13 to engage in sexual activity, causing a child to watch a sexual act, further acts of inciting a child to engage in sexual activity, and possession of extreme pornography. The index offence was part of the original investigation. The appellant was interviewed in respect of this offence and others on 19 November 2015, at which he maintained his right to silence. However, he was not charged with the offence until 27 November 2018, by which time he was a serving prisoner.

5. We are grateful to Miss Tanner who has ably represented the appellant today. She has placed before the court the reasons provided by the Crown for the delay. We have considered them but are bound to say that they do not fully explain the length of the delay which occurred between 2015 and the court hearing in 2019.

6. The appellant used social media as a means of pursuing his offending. The complainant was aged 13 at the time of the index offence. The appellant contacted her through his Skype account in December 2014, Facebook was also used. She initially declined contact, but he persisted. The complainant told the appellant how old she was, he tried to persuade her that he was only 16, but she discovered that he was aged 22. Their conversation progressed to matters of a sexual nature, he asked her to send him photographs of her breasts. She refused. Following repeated messaging and suggestions of a sexual nature from the appellant, the complainant agreed to meet him.

7. They met in the afternoon, walked to a nearby wood and there the appellant attempted to unzip the trousers of the complainant. He touched her over the groin area. She told him that she did not like it and said "No". Despite her protests, he persisted. He grabbed hold of her hands to try and make her touch his groin area, but she was able to resist. He placed his hand down the front of her trousers, inside her underwear, and inserted his fingers into her vagina. The complainant pulled away from him and told him that she was going home. She began to walk away, the appellant walked up to her, kissed her on the cheek and said that he would see her later.

8. When at home, the complainant realised that what had happened was wrong. She sent the appellant a text saying that she no longer wanted to see him and that she knew how old he was. The appellant continued to text her, as a result she blocked him. Such was the appellant's persistence that he set up another Facebook account in order to try to contact the complainant, to the extent that she reported the matter to Facebook. She finally spoke to a friend (the complainant in counts 2 and 3 on the original indictment). Her friend told the complainant what the appellant had done to her. The complainant was interviewed by the police on 11 November 2015.

9. At the hearing in 2015 relating to the three complainants, the sentencing judge observed that the appellant was relentless in his pursuit of vulnerable young women. He described him as a predator. The appellant had refused to engage with the Probation Service. Such were the judge's concerns that he considered the issue of dangerousness, but the appellant's age and the stringent Sexual Harm Prevention Order, with no limit as to time, prevented the judge from arriving at such an assessment. Taking account of the issue of totality, the judge allowed a discount of 25 to 30 per cent for the guilty pleas and passed a total sentence of ten years' imprisonment.

10. In sentencing in 2019 for the index offence, the judge noted that had the appellant been before the original sentencing judge, the offence would have been the most serious of the offending. The appellant had relentlessly pursued the complainant who was vulnerable by reason of her age. He sexually assaulted her, despite her protests. Even after he had committed the offence, and despite her protests, the appellant still pursued the complainant by means of social media. Victim Impact Statements from the complainant and her father were before the court. They identified the impact the offending had had upon her and her relationship with her father.

11. The judge took account of the need to consider the previous sentences in deciding upon the appropriate punishment for the index offence. It was undisputed that it was a Category 2A offence: the victim was particularly vulnerable due to her age; and the appellant's culpability involved serious planning, remorseless and persistent targeting and grooming of the complainant. After trial, the nominal starting point would have been eight years' custody, with a range of five to thirteen years. Aggravating the offending was the fact that the appellant was on bail at the time of this offence. He knew that the police were investigating him for similar offences, notwithstanding that he went on to offend. There was a ten-year disparity in age between the complainant and the appellant. The judge did not accept that the appellant's vulnerabilities identified in a psychologist's report, in particular his low IQ, should deflect from the gravity of his offending. Full credit of one-third was given for the guilty plea. The judge took account of the factors set out in *R v Green* [2019] EWCA Crim 196, namely, how recently the previous sentence was imposed, the similarity of the previous offending, the overlap in terms of time as to when the offences were committed, and whether on the previous occasion the appellant could have realistically cleared the slate. The latter was clearly a factor of which account was taken by the judge.

The grounds of appeal

12. The grounds of appeal are directed to the imposition of the consecutive term of five years' imprisonment. In essence, the point is made that in sentencing the judge failed to reflect the principle of totality. Had the appellant been dealt with on 23 November 2015, it is submitted that, following his pleas of guilty, he would not have received a total sentence of fifteen years' imprisonment. Reliance is placed upon the age of the appellant, his guilty plea, and the level of his intellect and functioning. Further, the delay in prosecuting the offence was

not the fault of the appellant, and the sentence passed by the judge failed adequately to reflect the delay.

Discussion and conclusion

13. This was a difficult sentencing exercise for the judge who gave it careful consideration. We take no issue with the judge's conclusion that this offence was the most serious offence committed by the appellant. Had it been before the original court, the total sentence would have been more than ten years' imprisonment. Indeed, both points were sensibly conceded by Miss Tanner in her clear submissions to the court today. That said, it is of concern that there was real delay in bringing the matter before the second court. That was a fact of which account should have been taken.

14. The starting point taken by the judge was one of seven years and six months' custody, reduced by one-third to reflect the appellant's early guilty plea. It follows that the totality of the sentences passed for the appellant's offending would be in the order of 21 years, following a trial. In the view of this court, such a sentence would be appropriate in a case involving a campaign of rape, which this was not. However, there is nothing in this judgment which should be construed as minimising the appellant's offending, nor of its impact upon the young and vulnerable complainant.

15. Following the Sentencing Council's Guidelines on sexual offending, we accept that the sentence for the index offence would have a starting point of eight years' custody, with a range of five to thirteen years. However, we also have to take account of the totality guideline issued by the Sentencing Council which states that in respect of concurrent and consecutive sentences, the overriding principle is that the overall sentence must be just and proportionate. A sentence of seven and a half years' custody, discounted for the guilty plea, does not, in our judgment, adequately reflect this principle, nor does it properly reflect the delay which occurred which resulted in the appellant being sentenced for an offence which could, and should, have been before a judge some years earlier.

16. In order to reflect the principle of totality and the issue of delay, we have concluded that the appropriate sentence for the offence of assault by penetration, following as it does an earlier sentence of ten years' imprisonment, would be one of two years' imprisonment, to run consecutively to the sentence of ten years' imprisonment imposed on 28 November 2015.

17. Accordingly, we quash the sentence of five years' imprisonment and substitute for it a sentence of two years' imprisonment, to run consecutively to the existing sentence of ten years' imprisonment. We also quash the victim surcharge order in the sum of £140 and substitute for it a victim surcharge order in the sum of £120. To this extent the appeal is allowed.
