Neutral Citation Number: [2019] EWCA Crim 196

Case No: 201804271 A4

IN THE COURT OF APPEAL
(CRIMINAL DIVISION)
ON APPEAL FROM THE LEWES CROWN COURT
MISS RECORDER SARAH ELLIOTT QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2019

Before :

LORD JUSTICE IRWIN
MR JUSTICE HOLGATE
and
MR JUSTICE MARTIN SPENCER

- -

Between :

MICHAEL GREEN	**Appellant**
- and -	
REGINA	**Respondent**

Mr Kevin Light (instructed by **Bishop & Light Solicitors**) for the **Appellant**
Mr Richard Cherrill (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 12 February 2019

Judgment
As Approved by the Court

MR JUSTICE MARTIN SPENCER :

1. By leave of the Single Judge, the Appellant appeals against his sentence of 12 years' imprisonment imposed at Lewes Crown Court on 21 September 2018 after a trial before Miss Recorder Sarah Elliott QC and a jury. At the trial, he was convicted of 17 counts of indecent assault. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences and no matter relating to the victims shall during their lifetime be included in any publication if it is likely to lead members of the public to identify those persons as the victims of these offences. This prohibition applies unless waived or lifted in accordance with Section 3 of the Act.

2. The convictions to which this appeal relates concern the Appellant's activities with seven victims to whom we shall refer as GP, SW, GW, SH, DR, TR and PE.

3. The Appellant was a coach in ice-hockey, motorcycle speedway and cricket and he abused his position as coach to carry out indecent assaults against the young boys in his charge. These assaults were perpetrated over a period exceeding a decade from about 1980.

4. Counts 1 to 4 related to GP. GP described how the Appellant would touch him in the groin area on the pretext of checking that his protective box was in the right place during ice-hockey practice. The Appellant would also hug him from behind unnecessarily when he was practising on the ice. GP described how makeshift beds were assembled for the boys in different parts of the Appellant's house in Hove, Sussex, prior to their setting off in a minibus for a hockey tournament. The Appellant told GP that he had run a bath for him in the attic. GP undressed, but the bath was too hot to get into so he stood by the bath with no clothes on and the Appellant took advantage of him to touch his penis. The Appellant took GP's hand, placed it on his own (the Appellant's) penis and made GP masturbate him. The Appellant also got into bed with GP and tried to masturbate him the next morning. He made GP masturbate him until ejaculation. At the relevant time GP was aged 13/14 and these offences form the basis of counts 1-4, for which the Appellant was sentenced to 3 ½ years' imprisonment concurrent with each other.

5. Count 5 related to SW who was aged 12. SW described being masturbated by the Appellant when involved in the ice-hockey team in Brighton of which the Appellant was coach at the time. He was invited to the Appellant's house and into the Appellant's bedroom where the Appellant started to rub his penis. He gave SW a pornographic magazine and played with SW's penis, masturbating him to ejaculation. For this offence the Appellant was sentenced to 2 ½ years' imprisonment consecutive to the 3 ½ years in relation to GP making a cumulative total of 6 years' imprisonment.

6. Count 6 related to GW, aged 15/16, again in association with the Appellant's position as head coach for Brighton Ice-hockey Club. The Appellant invited GW to his house to look at his ice-hockey equipment and whilst there the Appellant touched his genitals. For this offence he received a sentence of 6 months' imprisonment concurrent with the other sentences.

7. Counts 7, 8 and 10 (the Appellant was acquitted of count 9) related to SH, aged between 13 and 15 at the relevant time. These offences were in association with the Appellant's

role as speedway coach. SH described how the Appellant would routinely drive him to speedway events around the country and they would often stay overnight. He recalled how the Appellant would get into bed with him, take hold of his penis and start playing with him when he was 13 or 14 years old. He described other similar incidents when, after the Appellant had masturbated SH to ejaculation, he had put SH's hand on his own penis and caused SH to masturbate him in return. For the offences in relation to SH, the Appellant received sentences of 4 years' imprisonment concurrent with each other but consecutive to the sentences for counts 1-6 bringing the cumulative total to 10 years' imprisonment.

8. Counts 11 and 12 concerned DR aged about 12 years. These offences occurred when the victim was a boarder at Windlesham School between 1988 and 1990 and where the Appellant taught cricket. DR recalled the Appellant licking, biting and putting his tongue in his ear and conducting inappropriate conversations. The Appellant was sentenced to 15 months' imprisonment for these offences, concurrent with the other sentences.

9. Counts 13 and 14 related to TR, DR's younger brother aged between 9 and 12. TR described how he saw the Appellant routinely grab boys during coaching sessions when he sat them on his knee and proceeded to hug, grope, kiss and lick them. He did this to TR as well telling him he loved him and that he, TR, was "one of his favourites". On many occasions he would grab TR and put his tongue in his ear. He would also grope TR's genitals over his clothing, on three occasions he invited TR to look at pornographic magazines and on one occasion he touched TR's groin. For these offences the Appellant received 18 months' imprisonment concurrent to the other sentences.

10. Finally, counts 15-18 related to PE aged 12-14 years and who had been a boarder at Windlesham Preparatory School from about the age of 8. PE described being sexually assaulted by the Appellant on three separate occasions. The school had mini weekend breaks when most pupils would return home but not those whose parents lived abroad. The Appellant took PE and two or three others to the cinema in a minibus, sat next to PE and asked him if he was aroused by what he was seeing. The Appellant then put PE's hand on his, the Appellant's crotch. On another occasion, also at the cinema, the Appellant took PE's hand and put it on his, the Appellant's crotch and then put his own hand on PE's crotch. On another occasion, as they walked back towards the school from the playing field, the Appellant hugged PE so tight that he could feel the Appellant's penis. For these offences the Appellant was sentenced to 2 years' imprisonment, concurrent with each other but consecutive to the sentences in relation to counts 1-14 bringing the cumulative total to 12 years' imprisonment.

11. The Appellant was arrested and interviewed on three separate occasions in 2014, 2016 and 2017 and denied the offences. He maintained his denials through to trial and was convicted by the jury after requiring his victims to give evidence.

12. In sentencing the Appellant, the learned Recorder described how, over a period of more than a decade between 1980 and 1994 the Appellant had used his status and popularity as a sports coach in three different sporting disciplines (speedway, ice-hockey and cricket) to commit sexual offences against children and thus commit a gross abuse of trust. He had employed a number of different methods to groom his victims including

giving them pornography, taking them to watch films with sex scenes in, getting into bed with them and subjecting them to requests for hugs, whilst kissing or licking their ears. The boys whom he abused were too frightened, confused and fearful of the consequences to complain at the time or, indeed, until many years later. At the time of sentencing, the Appellant was 75 years of age and he was sentenced in accordance with the Guidelines and the authorities dealing with historical sex abuse cases and older defendants. The Recorder recalled how many of the victims suffered distress when giving evidence and had had their lives substantially blighted by the Appellant's activities leading to difficulties in trusting people, in forming intimate relationships, in their self-esteem and mental well-being. For many of them the abuse had had a disastrous effect on their life, prospects and happiness. We have seen further evidence of the effect on victims in additional Victim Impact Statements served very recently. There can be no doubt as to the severe continuing impact of this offending.

13. As stated, the Appellant, shortly before his trial for these matters, had been released from prison after serving 4 ½ years of a 9 year sentence for more serious offences, including buggery, at a time which overlapped with the earlier of the offences now under consideration. The learned Recorder stated in this regard:

> "You have served a lengthy custodial sentence for offending against three victims in 2014, which overlap in time with the earlier of these offences, but these offences by themselves are of such gravity that, in my judgment, I should not take that sentence into account when considering the proper sentence for these offences. This is a serious repeated and widespread set of offences. Because I am sentencing you for a number of offences involving seven different victims, I must consider the total length of sentence as set out by the totality guideline. I must also consider whether the sentences should be consecutive or concurrent."

In this context, she reached the total of 12 years' imprisonment as described.

14. Had these offences stood alone, there could have been no complaint about the sentences imposed and the total length of 12 years' imprisonment and we can perceive no flaw in the approach of the learned Recorder both in terms of the individual sentences imposed for the offences in question, in the scheme of the sentence in terms of which sentences were made concurrent and which sentences were made consecutive and in the approach to the principle of totality. The grounds of appeal make no such criticism of these sentences. However, the complaint is that the sentence passed is manifestly excessive in the context of the previous sentence of 9 years and that the learned Recorder was wrong not to have had regard to that sentence when dealing with the present offences. Mr Light submits:

> "The offences for which he was being sentenced had taken place around the same time as the offences for which the defendant had been sentenced in 2014. The offences for which he was sentenced on 21 September 2018 were not more serious in their nature than the ones he had been sentenced for in February 2014. Had the offences all been sentenced at the same time it is submitted that the defendant would not have received a sentence as long as 21 years."

Thus, it is submitted that, contrary to her view when she sentenced the Appellant, the learned Recorder should have reduced the sentence further to take account of the fact

that the Appellant had been sentenced to 9 years' imprisonment in February 2014. Essentially, it is submitted that the learned Recorder should have considered the total sentence which would have been imposed by the court in February 2014 had it been seized of all the offences, not just those for which the Appellant was sentenced in February 2014 but also those for which he was sentenced in September 2018, and then deducted from that overall sentence the 9 years which had already been imposed so that the sentence on 21 September 2018 should have been the difference between the two.

15. In granting permission to appeal, the Single Judge, Sir Alistair MacDuff stated:

> "I consider that it is arguable that, if you had been sentenced for all your offences at the same time, the overall sentence would not have been so great as the sum of the two. The learned Recorder expressly took no account of the fact that you had been recently released and did not consider totality within the two groups of offences, which overlapped in time. It is arguable that that was not the correct approach and you should be allowed to argue your grounds."

16. In a Respondent's Notice, the Crown direct our attention to a number of previous decisions of the CACD in which the position which has arisen here was considered. We refer to two of them. In *Cosburn* [2013] EWCA Crim 1815, Simon J (as he then was) said this:

> "14. Having considered the submissions of counsel, including the very helpful written submissions of Mr Heptonstall who appears for the prosecution, and the cases to which we have been referred, we have come to the following conclusions. First, when considering its approach to sentencing where there have been previous sentences for similar historic criminality, the court should have in mind whether an allowance or adjustment should be made in the case before it. We would not necessarily describe this as the application of the totality principle because the court is not in a position to adjust all the sentences as it would on the application of the totality principle strictly so called. Secondly, the proper application of the approach, as we have described it, will vary from case to case. In some cases it may have an impact on the later sentence. In other cases it may have no impact at all. Thirdly, the judgment in this appeal is not the occasion to list the factors which may apply to widely differing cases. As the court made clear in AF the allowance that may be made will depend on the facts. In some cases it may be very difficult for the later court to put itself in the position of the earlier court in forming a view about the overall criminality of the defendant's conduct. It may indeed be difficult to form an overall view of the criminality when considering the later sentence. The present case illustrates the difficulty. The last offence was the first to be charged and sentenced. The court would have approached the sentence on the basis that the appellant was a man of good character, whereas it is now clear that he was at the time a practised and predatory paedophile. In other cases caution may need to be exercised not to erode the system of allowing further offences to be taken into consideration. Fourthly, the starting point and in many cases the end result will be the appropriate sentence for the instant offence."

17. In the later case of *R v McLean* [2017] EWCA Crim 170, Treacy LJ said this:

> "13. It seems to us however that this appellant must have made a conscious choice not to disclose the July 2014 matter in the hope that it would go

undetected. In those circumstances he cannot now claim to be sentenced as if both matters should have been dealt with together in January 2015. To permit that to happen at this stage would be unjust to the public interest in giving the appellant an undeserved, uncovenanted bonus. This case therefore is a salutary illustration of the benefits which can accrue to offenders from making voluntary admissions of additional offending and the risks that they run if they choose not to do so."

18. In our judgment, the learned Recorder, whilst adopting a thoughtful and careful approach to what was a difficult sentencing exercise, was nevertheless wrong to refuse to take into account the previous custodial sentence simply on the basis of the gravity of the instant offences (see her sentencing remarks cited at paragraph 13 above). We cannot see that this is a proper basis upon which so to refuse. Faced with a situation such as this, the judge sentencing in respect of the new offences, should consider all the circumstances in deciding what, if any, impact the previous sentence should have on the new sentence to be passed. Thus, we endorse the nuanced approach of Simon J in *Cosburn's case*. Without laying down an exhaustive list, those circumstances may include:

- how recently the previous sentence was imposed;
- the similarity of the previous offences to the instant offences: in this regard, we would remark that it will usually be helpful to obtain as much information as possible about the previous offences;
- whether the offences overlap in terms of the time they were committed;
- whether on the previous occasion the offender could realistically have "cleaned the slate" by bringing the further offences to the attention of the police and asking them to be taken into consideration (we can envisage cases of historical sex abuse against multiple victims many years previously where the offender might genuinely have forgotten some of his offending and have made a genuine but in fact incomplete effort to clean the slate);
- whether to take the previous sentence into account would, on the facts of the case, give the offender "an undeserved, uncovenanted bonus which would be contrary to the public interest" as referred to by Treacy LJ in *McLean*: this will particularly be the case where a technical rule of sentencing has been avoided or where, for example, the court has been denied the opportunity to consider totality in terms of dangerousness;
- The age and health of the offender, particularly if the latter has deteriorated significantly as a result of his incarceration and any other relevant circumstances including, for example, his conduct whilst in prison; and
- whether, if no account is taken of the previous sentence, the length of the two sentences is such that, had they been passed together to be served consecutively, that would have offended the totality principle.

Having considered such matters and any others relevant to the instant case, the judge, having reached the appropriate sentence for the instant offences (taking into account the totality principle in respect of the new offences alone), then has a <u>discretion</u> whether or not he or she should make some further allowance or reduction to take account of the previous sentence. As stated by Simon J the end result may well be the appropriate sentence for the instant offence(s) without any further reduction being necessary or desirable.

19. Thus, in our judgment, the exercise to be carried out is not simply to consider what overall sentence the court would have imposed had it been seized of all the matters on the first occasion and deduct from that figure the sentence already imposed. In the present case, it would have been open to the Appellant in February 2014, in being sentenced for the original offences, to have asked the court to take into account the other offences committed and of which he has now been convicted. He did not do so but has put his victims through the ordeal of giving evidence and, by not acknowledging and admitting to his offences, he has caused additional expense for the court system and has used up valuable resources. By failing to acknowledge his guilt in relation to the present offences, draw them to the attention of the police so that they could make appropriate enquiries and then either face additional charges or ask for the offences to be taken into consideration, but instead by staying silent in the hope they would go undetected and then by contesting them to trial in the hope that the victims would not give evidence or be believed, the Appellant deliberately ran the risk of the situation which now arises coming to pass. Had the learned Recorder given these matters appropriate consideration and exercised her discretion not to take into account the previous sentence accordingly, then in order for the Court of Appeal to interfere with that discretion it would have had to have been shown that she had exercised her discretion irrationally, for example by taking into account some matter she should not have one, or failing to take into account a matter she should have done, or otherwise in adopting an irrational approach. This could be a difficult hurdle to cross.

20. As it is, applying the criteria set out in paragraph 18 above to the present case, we take account of the following:

    i) The previous sentence was recent, the Appellant having been released from custody (Dartmoor prison) on 28 July 2018 before being sentenced on 21 September 2018;
    ii) The previous offences were similar in that they involved predatory targeting of young boys who were in his charge whether as a sports coach or as a schoolteacher, but were more serious as they included buggery;
    iii) There was an overlap in time between the previous offences and the earliest of the instant offences, but the new offences indicated that the Appellant's activities had carried on after the period over which the previous offences had been carried out for a significant further period of time;
    iv) The Appellant could and should have cleaned the slate by bringing the other offences to the attention of the police and giving them the opportunity to investigate them and, as appropriate, charge the Appellant in relation to them: far from doing so, when interviewed on three separate occasions in 104, 2016 and 2017, the Appellant denied the further offences and pleaded not guilty at his trial in September 2018;
    v) No undeserved, uncovenanted bonus contrary to the public interest would accrue to the Appellant by the previous sentence being taken into account;
    vi) The Appellant is aged 76 and in deteriorating health: he had been a "model" prisoner whilst serving his sentence;
    vii) In our view, a sentence of 21 years would have been manifestly excessive had that been the sentence imposed in February 2014 for all the offences covered by both trials.

21. Taking the above considerations into account, even given the Appellant's conduct in failing to bring these offences to the attention of the police and/or the court before being sentenced in 2014 and his further conduct in disputing the present offences and putting his victims through the ordeal of giving evidence, we consider that some further allowance should have been made in the present case to take into account the previous sentence. As stated, in our judgment, a total of 21 years on the previous occasion would have been manifestly excessive and we would reduce the sentence now being served by two years, making the overall sentence 10 years rather than 12. We do this by making the sentence for counts 15 - 18 concurrent rather than consecutive. To this extent, the appeal is allowed.