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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1798

No. 202100443 A1
202100445 A1

Royal Courts of Justice

Friday, 5 November 2021

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE SPENCER
HIS HONOUR JUDGE KEARL QC RECORDER OF LEEDS

REGINA

v

BNR
BBJ

REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992

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MR M. LEVY appeared on behalf of the Appellants.

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J U D G M E N T

MR JUSTICE SPENCER:

1 These appeals against sentence are brought by leave of the single judge. The appellants are husband and wife.

2 This is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead to the identification of the victims of these offences. That prohibition applies unless waived or lifted in accordance with s.3 of the Act. In view of the fact that the victims of the offences are the children (or stepchildren) of the appellants, it follows that the names of the appellants will also have to be anonymised in this judgment. We shall simply refer to them as the husband and the wife respectively.

3 The husband is now aged 57. The wife is now aged 53.

4 On 16 October 2020, in the Crown Court at Stafford, they each pleaded guilty at the Plea and Trial Preparation Hearing (PTPH) to a series of sexual offences committed against the two children of the family between 2008 and 2014. The case was adjourned for the preparation of pre-sentence reports.

5 On 18 January 2021 the appellants were sentenced by His Honour Judge Hurst. We shall explain the computation of the sentences in due course. The total sentence passed on the husband was 16 ½ years' imprisonment. The total sentence passed on the wife was exactly half that, 8 years 3 months' imprisonment. The judge made a restraining order in the case of the husband and sexual harm prevention orders in the case of each appellant.

6 The grounds of appeal, in short, are that the judge wrongly categorised the most serious of the offences and that, in any event, the sentences were manifestly excessive having regard to totality. The judge allowed 25 per cent credit for plea. It follows that for the husband the sentence before credit for plea was 22 years and for the wife 11 years. In the grounds of appeal, it was contended that the judge should have allowed full credit of one-third for the guilty pleas, but that ground is no longer pursued. It is, however, also contended that the judge was wrong to make a restraining order and to make the sexual harm prevention orders.

7 Both appellants are represented before us today by Mr Levy, who, with his solicitors, has represented both appellants throughout the proceedings. We are grateful to Mr Levy for his written submissions and succinct oral submissions.

The facts of the offences

8 The victims of the offences were the wife's two children, a son and daughter by her previous marriage. The husband became their stepfather. M (the son) was born in December 1997. The offences against him spanned the period December 2008 to December 2012, when he would have been 11 to 14 years old. K (the daughter) was born in May 2002. The offences against her spanned the period May 2009 to May 2014, when she would have been between 7 and 11 years old. The son, M, is now 24. The daughter, K, is 19.

9 The offences came to light in the autumn of 2019. A striking and significant feature of the case is that neither of the children had been aware until then that the other had also been sexually abused by their mother and stepfather all those years earlier.

10 The appellants began their relationship when the son, M, was about 9 years old and the daughter, K, about 4 years old. The offending started some two years after that, when M was about 11. The offences against him were causing a child to watch a sexual act, contrary

to s.12(1) of the Sexual Offences Act 2003 (Counts 1 and 2); engaging in sexual activity in the presence of a child, contrary to s.11(1) of the Act (Counts 3, 5 and 6); and causing or inciting a child to engage in sexual activity, contrary to s.10(1) of the Act (Counts 7 and 8).

11 The offending began with the husband making his stepson watch pornographic videos on a laptop. The boy would have been about 11 at the time. This happened on many occasions. Count 2 was a multiple incident count. M, the boy, realised that some of the images he had been viewing were of his own mother naked. In some of those images she had been inserting objects into her vagina. M's bewildered reaction was that he felt his stepfather was cheating on his mother. His stepfather told him to make a note of the website address. Doubtless that was to encourage the child to access such pornography himself. The judge described this as the beginning of the husband's corruption of his stepson.

12 It moved on to the husband masturbating while sitting next to M when he was watching pornography. That was Count 3, engaging in sexual activity in the presence of a child. Count 5 was a similar offence, but committed by both appellants together. M was made to watch his mother and stepfather having sexual intercourse naked on the sofa in the lounge. His mother would be blindfolded. There was also a multiple incident count for this offending (Count 6). M was told on one occasion to go and watch through a crack in the door and his stepfather suggested that M should himself masturbate and ejaculate into a glass, the contents of which M or his stepfather could then pour onto his mother's chest.

13 On another occasion (Count 7) the stepfather encouraged M to join him in feeling his mother's naked breasts, kneeling in front of her on the sofa when she was blindfolded. His mother told him he did not have to do it if he did not want to, but he did reach over and feel her breast.

14 Count 8 involved M being required to use a video camera to film his mother and stepfather having sex on the sofa naked, with his mother blindfolded. The boy filmed this for about ten minutes, resting the camera on the arm of the sofa pointing it at them whilst he himself watched the television, trying to ignore what was happening.

15 The abuse towards M petered out when he began having sex education instruction at school and realised that what had been happening was completely wrong. He never told anybody what had happened until October 2019, some seven years after the abuse ended.

16 We note that the judge observed in his sentencing remarks that it was clear where the power lay in the relationship between husband and wife and that it was his stepfather who was driving this "grotesque depravity", as the judge rightly described it. Effectively, he had been instructing M how to behave sexually with his own mother at the age of 11 to 14, something, as the judge said, that most people would find impossible to comprehend.

17 The offences against the daughter, K, began when she was 7 years old, although she thinks most of the abuse was when she was 9 or 10. Again, it started with making her watch pornography and masturbating in her presence (Counts 9, 10, 11 and 21). Some of the offending took place in the family home in Staffordshire. Some happened at an address in the south of England when the husband was working away from home in the summer holiday at a house owned by a friend when K was staying there.

18 In Counts 9 and 10 the offence was causing a child to watch a sexual act, contrary to s.12 of the Act. Count 10 was a multiple incident count. The appellant would sit next to his stepdaughter and masturbate his exposed penis whilst they watched pornography. On several occasions he ejaculated. This progressed to making her masturbate him to the point of ejaculation. That was repeated on a number of occasions at the other address (Count 23),

but also at the home address in Staffordshire (Counts 12 and 13). On one occasion the pornography he made her watch was two females and a male having sex together. He told her that this was what he wanted her and her mother to do for him eventually.

19 Count 24 was an offence of causing or inciting her to masturbate him by giving him oral sex. This took place at the other address when she was having to share the same room as her stepfather, sleeping on an airbed at the foot of his bed. She did put her mouth close to his penis, but, as she put it, "wimped out". He said he would not make her do something she did not want to. The judge in his sentencing remarks described it as "tragic" that she felt she was somehow to blame for not doing what he asked, so appallingly corrupted was she by then.

20 As with the son, there were also offences committed by the appellants jointly against the daughter, K. They engaged in sexual activity in her presence (Counts 14 and 15). This started when K was about eight years old. It progressed from inappropriate sexual familiarity between them in her presence to having full sexual intercourse in front of her on the sofa in the lounge with both appellants naked. On one occasion he fetched a carrot from the kitchen and used it as a dildo to penetrate his wife. He called K to sit on the floor next to them during this incident to watch at close quarters. He then stood up and masturbated, ejaculating onto to his wife and also onto K, who recalls having to wipe semen from her face with toilet paper.

21 K's involvement in the sexual acts increased thereafter. She recalls being naked or nearly naked on several occasions, wearing only her knickers, whilst her mother masturbated her stepfather's penis and played with one of his nipples. He asked K to caress and suck his other nipple. This led to him ejaculating onto his wife's naked chest and sometimes ejaculating onto both mother and daughter (Counts 16 and 17). K was then aged 9 or 10.

22 In another incident when she was aged 10, she was called over whilst her parents were engaging in sexual acts. She was required not only to suck one of her stepfather's nipples but also to caress his testicles whilst her mother continued to masturbate him. K was required to suck and lick his testicles, as she had seen her mother doing. It seems that this episode ended with oral sex between the adults, with him ejaculating into his wife's mouth in K's presence (Count 18).

23 As we have already observed, remarkably, neither child was aware at the time or for many years afterwards that the other had also been the subject of similar abuse. It all finally came to light following an incident in September 2019 when K, then aged 17, left home after a family argument. She went to stay with her brother, M, who was studying at university in the south of England. For the first time, they talked about their experiences of abuse. On 3 and 4 October 2019 they attended a police station, separately, to report the abuse.

24 The appellants were both arrested and interviewed. They both gave no comment interviews. The prosecution was commenced by postal requisition served in June 2020 for the first hearing in the magistrates' court on 21 August 2020. The charges at that stage were not identical to those on the indictment. The Better Case Management form confirms that no indication of any plea, guilty or not guilty, was given at that hearing. The appellants were sent for trial to the Crown Court. Thereafter, there was communication between the prosecution and defence. An assurance was given that there would be no trial and that the victims would not be required to give evidence. However, the guilty pleas were not entered until the PCMH at the Crown Court on 16 October 2020.

25 There were impact statements from both the victims. We agree with the judge's assessment in his sentencing remarks that the extent of the true psychological impact of the offending

has yet to reveal itself for either of the victims. Both of them express continuing fondness for their mother, whom they regard as having been exploited by their stepfather. They have both written to their mother in affectionate terms while she has been in prison serving her sentence.

The mitigation

26 There was a pre-sentence report for each appellant, although lengthy custodial sentences were quite inevitable. The husband had no previous convictions apart from one very old offence of common assault for which he had been conditionally discharged. He explained to the probation officer that the offending in the present case took place at a time when he had been in "a very dark place" and drinking a lot, having suffered from depression for many years. He asserted that his actions towards the children had not been sexual. He had been sexually abused himself as a child by a family friend. He had never reported this to the police and had never received any help for it. He said he had snapped out of the abuse of the children when he realised that what he was doing was exactly what had happened to him as a child. He said his wife meant everything to him. He accepted that she had been unaware of the abuse that the daughter had suffered at his hands when he had been working away in the south of England.

27 The wife had no previous convictions. She told the probation officer that her first marriage had been loveless. Her husband had left her when she was pregnant with her second child, K. By contrast, she described her second marriage to the appellant as happy and secure. They had stayed together in spite of the current circumstances and she would not be without him. She said she had been raped herself some years ago at an office party, from which she had never really recovered. She said she knew that what she was doing with the children felt wrong, but she just went along with it at her husband's suggestion. At no stage had she been pressured or coerced by her husband into taking part in the activity. She confirmed that she had been unaware of the abuse of her daughter that had taken place away from the matrimonial home. She was angry and devastated by that. She identified her husband as her only source of support. She did not seem to the probation officer to understand or grasp the level of the long-term psychological harm that her children had been caused.

The sentencing hearing

28 Several weeks before the sentencing hearing, prosecuting counsel provided a sentencing note in accordance with directions given when sentence was adjourned. At that stage, there was no application for a restraining order or for sexual harm prevention orders. However, we note that draft orders were subsequently uploaded to the Digital Case System on 6 November 2020, many weeks before the sentencing hearing.

29 There was also before the judge a sentencing note from defence counsel, Mr Levy, who took no issue with the prosecution's categorisation of the offences under the Sentencing Council Guidelines, save in one respect. For the s.8 offences of causing or inciting a child under 13 to engage in sexual activity against the daughter, K, (Counts 12, 13, 16, 17, 18, 22, 23 and 24) he submitted that K should not be regarded as a "child particularly vulnerable due to extreme youth and/or personal circumstances" such as to put the offences into category 2A rather than 3A under the Guideline. In his sentencing note Mr Leavy also submitted that the appellants should receive full credit of one-third for their guilty pleas. Even though guilty pleas had not been indicated at the magistrates' court, there had never been any question of a trial and, therefore, no question of the children having to give evidence.

30 At the conclusion of his opening of the facts, prosecuting counsel indicated to the judge that there was an application for a restraining order against the husband and for sexual harm

prevention orders against both defendants. The judge referred to this in an exchange with Mr Levy at the very beginning of his sentencing remarks. It is clear from that exchange that Mr Levy had not made any submissions about these ancillary orders. Even when invited by the judge to do so, he made no submissions and raised no objection. Mr Levy has told us quite frankly that this was an omission on his part. In view of fact that he now challenges those orders, plainly he should have made representations at the time.

The judge's sentencing remarks

31 In his sentencing remarks, the judge summarised the facts and identified the Sentencing Council Guideline for each offence. The only issue related to the s.8 offences against the daughter, K, as we have indicated. The judge was satisfied that they were properly to be regarded as category 2A offences, because the girl, K, was particularly vulnerable. She was a child aged 7, 8, 9 or in the end 10 years, but the two people who were abusing her were her mother and her stepfather, the only two adults in the home, leaving her nowhere to turn except perhaps to her teachers at school. The judge said that where a mother herself engages in this sort of abuse of a child, it makes a child of that age particularly vulnerable. There was category A culpability, because there was grooming throughout and the most appalling breach of trust imaginable.

32 For the s.8 offences that gave a starting point for each offence of 8 years, with a range of 5 to 10 years. There were aggravating features. First, ejaculation routinely took place. Second, there was a degree of planning and the parents had ensured that the abuse only ever happened to one child at a time, making them all the more vulnerable and all the more isolated because they could not confide in each other.

33 The judge concluded that the s.10 offences, causing or inciting a child to engage in sexual activity (Count 7), requiring M to touch his mother's naked breast, was a category 2A offence with a starting point of 3 years and a range up to 6 years. M's vulnerability and the disparity in age were aggravating factors.

34 In relation to credit for plea, the judge pointed out that full credit was reserved for those who indicate guilty pleas in the magistrates' court. Here there had been no comment interviews. The defendants had known about the charges for a considerable time before their appearance at the magistrates' court. They could have indicated guilty pleas, with a caveat that fine-tuning would be required as to precisely which charges they would admit. The judge therefore concluded that they would receive standard credit of 25 per cent for a plea entered at the first hearing at the Crown Court.

35 The judge accepted that the offending had come to an end because the appellants stopped it of their own volition. He accepted that both the appellants had been the victims of abuse themselves: the husband when he was a child, the wife when she had been raped at an office party as an adult; but that could not explain, let alone excuse, this offending.

36 The judge made reference to the impact of the pandemic and pointed out that in view of the length of these sentences the hardship was likely to be considerably reduced as the sentences were served.

37 Reliance was placed on character references from the husband's sister and from his niece. The judge accepted there was little risk of repetition of the offences, unless and until the appellants were living with children again.

38 In the case of the husband, the judge took as the lead offences: Count 7, causing or inciting M to touch his mother's breast; Count 12, the offence of making K masturbate him; and

Count 16, the joint offence of making K take part in sexual activity between her mother and stepfather, culminating in ejaculating onto her and her mother. After credit in each case of 25 per cent for guilty pleas, the sentence on Count 7 for the s.10 offence was 3 years; for the s.8 offence (Count 12), 6 years consecutive; and for the s.8 offence (Count 16), 7 ½ years consecutive, making a total of 16 ½ years. The remaining sentences were all made concurrent: on Counts 1, 2, 9 and 10 (s.12 offences), 27 months' imprisonment; on Counts 3, 5, 6, 11, 14, 15 and 21 (the s.11 offences), 27 months' imprisonment; on Count 8 (another s.10 offence), 3 years; on Counts 13, 22, 23, and 24 (all s.8 offences), 6 years; and on Counts 17 and 18 (more serious examples of the s.8 offence), 7 ½ years.

39 In relation to the wife, the judge said that the fact that she had stood by her husband even though he was the driving force in this offending against her children, would seem wholly incomprehensible to many people. She had chosen to put the interests of her husband above the interests of her children. There had been a degree of planning in the offending by separating the two children when the abuse was taking place, which made them even more vulnerable. The husband had played the leading role. He started all the abuse of both children and did so alone with each of them before involving his wife. He was effectively taking the role towards his two stepchildren of an instructor in sexual activity. The judge accepted that the wife had generally been blindfolded and would drink beforehand, to an extent to numb her but also to liberate herself for what was to come. As the children's mother, she should have been their source of affection and succour. Instead, she had taken part in offending of the utmost depravity.

40 In the wife's case, the judge took as the lead offences Count 7, inciting M to touch her breast (the s.10 offence) and Count 16, the s.8 offence of causing or inciting K to take part in sexual activity culminating in ejaculation upon her and her daughter. After 25 per cent credit for plea, the sentence on Count 7 was 27 months' imprisonment; the sentence on count 16 was 6 years' imprisonment consecutive, making a total of 8 years 3months. There were concurrent sentences of 18 months on Counts 5 and 6 (s.11 offences against her son). There was a concurrent sentence of 27 months on Count 8 (another s.10 offence against her son). There were concurrent sentences of 18 months on Counts 14 and 15 (the s.11 offences against her daughter) and concurrent sentences of 6 years on Counts 17 and 18 (the most serious of the s.8 offences).

41 The judge made an indefinite restraining order against the husband, preventing him from contacting either of the victims directly or indirectly by any means, including phone, email, letter, electronic or social networking sites.

42 The judge also made sexual harm prevention orders. In the case of the husband, the order was in conventional terms, following the draft submitted by the prosecution. In essence, first the prohibition was of any unsupervised contact by any means with a child under the age of 16, or living in the same household as any child under 16, or being in any other accommodation or a vehicle with any child under the age of 16. Second, there was a prohibition on using any device capable of accessing the internet, unless it had capacity to retain or display the history of internet use, subject to the usual provisos. Third, there was a prohibition on using a device capable of accessing the internet to contact any child under 16 via social media without the approval of social services or the child's parent or guardian. We need not set out the precise terms of the prohibitions. It is the principle of making these orders that is challenged, not the precise detail.

43 In the case of the wife, only the first prohibition was considered appropriate: that is unsupervised contact with children under 16 or living in the same household as a child under 16, with the usual provisos.

44 The judge expressed some concern and surprise that Mr Levy and his solicitors were representing both appellants, despite the scope for a conflict of interest between them, but Mr Levy assured the judge that there was no such conflict.

The appellants' submissions

45 In relation to the length of the custodial sentences, the grounds are essentially threefold, as already indicated. First, Mr Levy submits that the daughter, K, was not particularly vulnerable within the meaning of the guideline for the s.8 offences. By definition, as he rightly points out, the child in such an offence will be under 13. K was aged 7, 8, 9 or 10 at the time of the s.8 offences. Mr Levy further submits that to the extent that she was reliant entirely on her mother, who was also an abuser jointly with her stepfather, that was a factor which was reflected rather in culpability as a gross abuse of trust.

46 Second, in his grounds of appeal Mr Levy developed the argument that full credit of one-third should have been allowed. As we have already explained, Mr Levy has, we think sensibly, abandoned that ground of appeal. It is quite clear from recent authority in this court in the case of *R v Plaku* [2021] EWCA Crim 568 that in circumstances such as these where no indication of plea was given in the magistrates' court there cannot be any more than 25 per cent credit when pleas are entered only at the PTPH in the Crown Court.

47 Third, and we think most significantly and with greatest force, Mr Levy submits that the totality of the sentence for each appellant was manifestly excessive. For the husband, the sentence before credit for plea must have been 22 years. For the wife, before credit for plea the sentence must have been 11 years. Although recognising the seriousness of this offending, Mr Levy submits that these sentences were simply too long and the resulting sentences after credit for plea are, therefore, manifestly excessive.

48 We have considered these submissions very carefully. We address each in turn. First, we think the judge was perfectly entitled to regard this young girl, K, as a child who was particularly vulnerable due to the combination of her youth and her personal circumstances. We note that the Guideline uses the phrase " and/or "; one or other or both can be sufficient, extreme youth or vulnerability due to personal circumstances. We accept that she was not as young as some children who are sexually abused, although this abuse began at the age of seven. Age alone would not have made her particularly vulnerable for the purpose of the Guideline. However, as the judge rightly analysed, her age was only part of the circumstances which created her particular vulnerability. She found herself being abused by both her mother and her stepfather in circumstances where she had no one to turn to. Moreover, by ensuring that the children were abused separately and by creating in this young girl the belief that she was somehow to blame for not participating fully as requested, her vulnerability was heightened and exploited.

49 As to credit for plea, we need say no more in view of Mr Levy's concession.

The husband's appeal

50 As to totality, we think there is force in Mr Levy's submissions. So far as the husband is concerned, a sentence of 22 years before credit for plea was, we think, significantly too long. We note, for example, there was no offence of penetration of the victims themselves. The closest to it was K being asked to give her step-father oral sex, which would have involved penetration of the mouth, but she declined to do so. Having said that, she was asked to and did lick his testicles.

51 Standing back and looking at the offences in the round, we think the appropriate sentence here for the husband before credit for plea was 18 years rather than 22 years. With credit of 25 per cent for plea, the sentence should therefore have been 13 ½ years' imprisonment, rather than 16 ½ years.

52 We shall achieve that by reducing two of the three consecutive sentences. The consecutive sentence of 6 years on Count 12 will be reduced to 4 ½ years. The consecutive sentence of 7 ½ years on Count 16 will be reduced to 6 years. The concurrent sentences of 6 years on Counts 13, 22, 23 and 24 will likewise be reduced to 4 ½ years. The concurrent sentences of 7 ½ years on Counts 17 and 18 will likewise be reduced to 6 years. The other sentences remain intact.

The wife's appeal

53 We turn to the wife. Her total sentence was 11 years before credit for plea: one half of her husband's sentence. That was an appropriate reflection of her culpability compared with his. In the circumstances, we shall therefore make a proportionate reduction in her sentence. Rather than a total sentence of 11 years before credit for plea, we think the appropriate total sentence should have been 9 years; so with 25 per cent credit for plea, 6 years 9 months.

54 We shall achieve that by reducing her two consecutive sentences. On Count 7 we shall reduce the sentence from 27 months to 21 months' imprisonment. On Count 16 we shall reduce the sentence of 6 years to 5 years. We also make the same reductions in the concurrent sentences. On Count 8 the sentence will be reduced from 27 months to 21 months. On Counts 17 and 18 the sentence will be reduced from 6 years to 5 years.

Time to be served

55 We should add that the judge fell into error in explaining the effect of the custodial sentences. He was under the impression that the appellants would have to serve two-thirds of the sentence before release on licence, and that is what he said in his sentencing remarks. No doubt he had in mind the change in the law from 1 April 2020 effected by the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020. However, those provisions apply only where there is an individual qualifying offence carrying life imprisonment for which the sentence imposed is seven years or more. It is not the total sentence that qualifies. As none of the individual offences here fulfilled the relevant statutory requirements, the Order had no application and the period to be served before release on licence was and will be one half and not two-thirds. The only offences which might have qualified was Count 23 which carried life imprisonment, but the sentence on that count was 6 years and is now 4 ½ years.

The restraining order

56 We turn to the restraining order made against the husband. The two victims are now adults. It is plain from their victim personal statements that they have no wish whatsoever to have any further contact with him, even though they would like to keep in touch with their mother. We see no reason why there should not be a restraining order in the terms the judge made. We think it was entirely appropriate. We have considered whether it needed to be expressed as an indefinite order, but we are not persuaded that this was wrong in principle in the circumstances.

The sexual harm prevention orders

57 As to the sexual harm prevention orders, there is no immediate risk to the children of the family, the victims of these offences, as they are now adults. However, the nature of the

offences and the attitude of the appellants towards their offending makes it appropriate, in our judgment, for there to be orders in the terms that were made by the judge. No objection was raised by Mr Levy at the time. In his submissions today, he has suggested that the orders were not necessary, nor were they proportionate. However, we take the view that the requirements are not unreasonably onerous and that the orders were necessary to meet the continuing risk. We also observe that there is always the opportunity to apply to the court to vary or discharge the order in due course, should circumstances warrant it. Accordingly, we do not propose to interfere with those orders.

Conclusion

58 We therefore allow the appeal of each appellant. We quash the sentences as we have indicated and substitute the individual sentences we have announced.

59 The overall effect of our decision, therefore, is that the husband's appeal is allowed and his total sentence is now 13 years 6 months' imprisonment. The wife's appeal is allowed and her total sentence is now 6 years 9 months' imprisonment.

CERTIFICATE

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This transcript has been approved by the Judge.