Case No: 202302085/B4
and 202303638/B4

Neutral Citation No [2024] EWCA (Crim) 805
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
HER HONOUR JUDGE KAMILL
T20217783
(Corrected version)

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 25 June 2024

Before:

LADY JUSTICE ANDREWS

MR JUSTICE GRIFFITHS

RECORDER OF MANCHESTER
HIS HONOUR JUDGE DEAN KC
(Sitting as a Judge of the CACD)

REX

V

ERNEST KALU OBI

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NON-COUNSEL APPLICATION

The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Accordingly, no matter relating to the complainant shall be included in any publication, if it is likely to lead members of the public to identify her as the victim of any of these offences.

This prohibition will continue throughout her lifetime unless it is waived or lifted in accordance with section 3 of that Act.

J U D G M E N T

LADY JUSTICE ANDREWS:

1. These are renewed applications for leave to appeal against conviction and sentence following refusal by the single judge.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Accordingly, no matter relating to the complainant shall be included in any publication if it is likely to lead members of the public to identify her as the victim of any of these offences. This prohibition will continue throughout her lifetime unless it is waived or lifted in accordance with section 3 of that Act.

3. On 15 June 2023, following a trial at Snaresbrook Crown Court before HHJ Kamill and a jury, the applicant (then aged 53) was convicted of two counts of sexual assault of a child under 13 (counts 1 and 2 on the indictment) and one count of assault by penetration of a child under 13 (count 3). The jury were unable to agree on a further count of sexual assault of a child under 13 (count 4), which was ordered to lie on the file.

4. On 20 September 2023, having considered the contents of the pre-sentence report, the trial judge decided that the applicant was not a *dangerous offender*. She sentenced him to 11 years' imprisonment on count 3 and 8 years' imprisonment concurrently on each of counts 1 and 2. The Registrar has drawn the attention of the Court to the fact that the determinate sentence passed on count 3 was wrong in principle because, if an extended determinate sentence was not passed on that count, the judge should have imposed a special custodial sentence for offenders of particular concern, pursuant to what is now section 278 of the Sentencing Act 2020. We will deal with the consequences of that error when addressing the proposed appeal against sentence.

5. The complainant was the 7-year-old daughter of a woman who knew the applicant socially. They had renewed their acquaintance at the applicant's instigation in 2021 after a gap of 7 years. In the intervening period, the applicant had been convicted, after trial in 2017, of one count of sexual activity with a child (a 14-year-old girl), contrary to section 9 of the Sexual Offences Act 2003. That assault had involved digital penetration. Despite being refused leave to appeal against his conviction on that occasion, the applicant denied that offence and he continued to maintain his innocence at the time of trial for the current offences.

6. The applicant was sentenced to 5 years' imprisonment for the 2017 offence. He was released on licence from that sentence in 2020, on conditions which prevented him from being alone with any girl under the age of 16 or allowing such a girl to visit his home without the consent of his supervising officer.

7. On 13 November 2021, the mother (who was unaware of the applicant's conviction and therefore of his licence conditions) visited him at his home and took her daughter with her. The little girl asked if she could play a game on his laptop and he took her upstairs to his

bedroom. Her mother came upstairs initially and then went back downstairs with the applicant. On a couple of occasions the applicant went back upstairs, ostensibly to help the child with the game that she was playing. The complainant said that, whilst in the bedroom, he tried to kiss her (count 1) and that despite her attempts to avoid his advances he had opened her shirt and started to kiss her chest (count 2). The complainant subsequently came back downstairs. Later she went into the kitchen with the applicant. Whilst they were in the kitchen, she said he had picked her up, put her on the counter, put his hand inside her trousers and penetrated her vagina digitally (count 3). She said that he also touched her bottom (count 4). On leaving the kitchen she disclosed all these incidents to her mother, who confronted the applicant. He denied any wrongdoing, claiming that he had simply lifted the child up. Mother and daughter then left the address. The mother subsequently contacted the police.

8. An Achieving Best Evidence ("ABE") interview was conducted with the complainant on 15 November 2021. Unfortunately, the child's mother was present throughout. That was, and is rightly conceded to be, a breach of the Memorandum of Good Practice Guidance. Moreover, despite being told not to intervene, the mother did so on multiple occasions without being prevented by the interviewing officer. The prosecution conceded that there were over 100 such interventions following the child's initial account of what happened.

9. The applicant was arrested on the following day, 16 November 2021. Following the caution, he replied: "Oh, this is embarrassing". In his police interview on the same date, he denied that he had been alone with the complainant in the bedroom and he denied that she ever went into the kitchen. He also denied that she had made any disclosures to her mother whilst they were still in his home. The defence at trial was one of complete denial.

10. The trial was originally scheduled to be heard by HHJ Canavan and a jury in September 2022. On that occasion, as a preliminary matter, the defence made an application to exclude the ABE interview under section 78 of the Police and Criminal Evidence Act 1984 ("PACE"). Both prosecution and defence submitted skeleton arguments and provided authorities on the point. The application was refused. The judge found that the mother's presence amounted to a substantial breach of the Code of Conduct. However she found that, having regard to the nature and number of the interventions, a reasonable jury properly directed could still be sure that, notwithstanding the breaches, the complainant had given a credible and accurate account. The judge observed that defence counsel had been unable to identify any interventions by the mother which amounted to her prompting the child or providing answers for her. The judge also noted that there were aspects of the interview that could potentially assist the defence. In the event, the trial did not proceed on that occasion. Nothing occurred in the course of the trial which did take place subsequently (before HHJ Kamill and a jury) to cause HHJ Canavan's ruling to be revisited. No complaint is made about any of the legal directions given to the jury or about the judge's summing-up.

11. The applicant now contends that the breaches of the Code of Conduct were so egregious that the interview should have been excluded. However, the question whether the evidence should have been excluded depends not so much on the number or seriousness of the breaches as on their impact on the quality of the evidence and the fairness of admitting it. HHJ Canavan subjected the interview to careful scrutiny before reaching her conclusion. She

also applied the correct legal test (see R v K [2006] EWCA Crim 472). Her ruling is carefully reasoned and it focused on the key issue, namely whether a properly directed jury could find that the child's evidence was reliable and untainted by the mother's numerous interventions. She decided that the complainant was able to give a narrative account without prompting or leading by the mother.

12. We can see no reason to disturb that evaluation. We agree with the single judge that there is no realistic prospect of the conviction being regarded as unsafe by reason of the admission of the ABE interview.

13. The second ground of appeal relates to bad character evidence which was adduced at the trial. Prior to the trial, the prosecution applied to admit the fact (but not the facts) of the 2017 conviction under section 101(1)(d) of the Criminal Justice Act 2003. Leave was granted by HHJ Canavan. No complaint is, or could be, made about that ruling.

14. Section 74(3) of the Police and Criminal Evidence Act 1984 provides that:

> "In any proceedings where evidence is admissible of the fact that the accused has committed an offence,… if the accused is proved to have been convicted of the offence—
>
> (a) by or before any court in the United Kingdom ...
>
> he shall be taken to have committed that offence unless the contrary is proved."

15. After Judge Canavan's ruling admitting the evidence of bad character, there were exchanges between the Crown and the defence, because the applicant maintained that he had been wrongly convicted of the offence in 2017.

16. At the trial before HHJ Kamill, the defence sought to adduce evidence, not to challenge the fact of the previous conviction, but in order to impugn the credibility of the complainant in the 2017 case. They wished to adduce statements from three witnesses to whom it was said that that complainant gave different accounts of the assault on different occasions. All three of those witnesses had given evidence at the previous trial, but the defence had not been able to procure their attendance at this trial. In the Respondent's Notice, it is stated that the defence did not even seek to introduce the evidence given by those witnesses on oath at the previous trial, but only their section 9 statements. If they were not allowed to put those statements before the jury, the defence submitted that they should be afforded a further opportunity to try to call those witnesses.

17. The justification for seeking to adduce this evidence was said to be because the prosecution was adducing the 2017 conviction in order to show that the applicant had a propensity to touch children sexually. It was submitted that the evidence was relevant and admissible to counter that suggestion, and to establish that the applicant had been wrongly convicted on that occasion. The prosecution had not been planning to call the complainant in the 2017 case, but the defence said that they could always call her in rebuttal.

18. HH Judge Kamill refused the application. The defendant went on to give evidence in his own defence. He maintained his innocence of the earlier offence, claiming that the police had "set him up". Therefore, the judge did not preclude him from seeking to rebut the evidential presumption in section 73(4) of the Police and Criminal Evidence Act.

19. Before the trial judge, and again in the Advice and Grounds of Appeal, the applicant sought to place reliance on the case of R v C [2011] 1 Cr App R 17, in which the Court of Appeal (Criminal Division) ruled, and defence counsel in that case accepted, that the way in which the right to challenge the conviction is exercised must be subject to proper judicial control and case management. Lord Judge LCJ said that, in general terms, the trial judge was right to have regarded the fact that the defendant asserted his innocence was insufficient to require the prosecution to call witnesses from the earlier trial to reprove his guilt. The real issue for the trial judge was how to arrange the mechanics of the trial process, so as to ensure that whilst the prosecution may adduce admissible evidence which proves the defendant's guilt, he should continue to be able to address and refute it, even when that evidence takes the form of a previous conviction and without, at the same time, turning the present trial into a retrial of the earlier offences. It was therefore essential, said Lord Judge, for the defendant to identify in his Defence Statement all the ingredients of the case he would advance to discharge the evidential burden of proving that he did not commit the earlier offences. The bare assertion that he did not commit those offences was inadequate.

20. In the present case, the applicant was not seeking to call fresh evidence which might have proved that he was innocent of the offence of which he had been convicted, but to argue that his conviction was wrongful on precisely the same evidence on which a previous jury had convicted him. As the trial judge recognised, this was an invitation to conduct a rehearing of the earlier trial. Moreover, the previous offence was committed in circumstances in which only the complainant and the applicant were present. As HHJ Kamill said, in those circumstances it is difficult to see how adducing the evidence of three people who were not present and whose memories and reliability had already been assessed by the previous jury, could possibly assist.

21. We agree with the single judge's refusal of leave on this ground essentially for the reasons that he gave. As he put it:

> "Attempts, without material fresh evidence as to the primary facts, to argue that the first jury had simply got it wrong in convicting by advancing arguments as to the unreliability of the complainant at that trial were never going to prevail under s. 74 (3) of PACE. The trial Judge's ruling on this aspect was justified."

For those reasons, the renewed application for leave to appeal against conviction is refused.

22. Turning to the renewed application for leave to appeal against sentence, it is submitted that the sentence was manifestly excessive because it was not in accordance with the Definitive Sentencing Guidelines. Specific complaints are made that the judge placed too much weight

on the applicant's previous conviction for a similar offence, and that she failed to consider or attach sufficient weight to the applicant's medical condition, which is mentioned in the pre-sentence report, although at that time there was no supporting medical evidence. The applicant has annexed a medical record (dated 6 March 2024) to a letter which he sent to the Court following the refusal of leave to appeal by the single judge. It is unnecessary to refer to the nature of his ailment but, on the information presently before the Court, it is unpleasant but not life-threatening.

23. The Prosecution Note for Sentence indicated that count 3 fell within category 2 for harm, and that there were features of category A for culpability, in that there was said to be an element of grooming involved. That is possibly better characterised as an abuse of trust. The judge treated count 3 as a category 2A offence, with a starting point of 11 years and a range of 7 to 15 years. She balanced the fact that this was not the most serious offence of its type against the aggravating factors of the previous conviction and the fact that the offence was committed on licence, resulting in a sentence equal to the starting point for that category of offence.

24. The single judge characterised the sentence as "severe but not excessive". It would certainly have fallen within the range even for a category 2B offence. The applicant's medical condition affords little by way of mitigation and the modest uplift for the previous conviction was entirely justified.

25. However, as already noted, the judge should have passed a special sentence for offenders of particular concern equal to the aggregate of the appropriate custodial term and a further period of 1 year, for which the offender is to be subject to licence. In fairness to the judge, it appears that this was not drawn to her attention by the prosecution at the time. There is no reference to it in the Sentencing Note, defence counsel did not mention it either, and no application was made after the event to cure the sentence under the slip rule. It was left to the Registrar to identify it for us. These types of sentences are particularly difficult and complicated, and we wish to make it clear that it is not the sentencing judge's fault that she ended up passing a sentence which turns out to have been unlawful.

26. What is the Court to do in circumstances such as this? Unfortunately, it is not as simple as substituting a restructured sentence of the same length as the sentence that was passed by the judge, as one might initially think. In R v A [2020] 1 WLR 5014, (which coincidentally happened to concern an offence of assault by penetration of a child under 13 for which the judge had failed to impose the mandatory sentence for offenders of particular concern under what was then section 236A of the Criminal Justice Act 2003), this Court set out the proper approach to be taken on appeal. First, the Court should determine the appropriate sentence without regard to the time that the offender was likely to spend in custody. Next, that sentence should be compared with the original sentence to ensure that it did not contravene the requirements of section 11(3) of the Criminal Appeals Act 1968, by imposing a sentence that was more severe than the one that was actually imposed by the lower court.

27. The problem is that, in this case, even if we were to impose a special custodial sentence of 11 years on Count 3 (comprising 10 years in custody and 1 year's extended licence), it would contravene section 11(3). In R v D [2022] 1 Cr App R(S) 47, in which a similar problem

arose, applying the principles set out in R v A a special custodial sentence was imposed, but the custodial term of the sentence was reduced, such that the offender's entitlement to release under the new sentence would occur before the offender's entitlement to release on the longer determinate sentence.

28. In the present case, the applicant was sentenced to a determinate term of 11 years' imprisonment. He would therefore have been entitled to automatic release after serving two-thirds of that sentence (7 years and 2 months). As in R v D, we should impose a mandatory special custodial sentence, but we have to reduce the custodial term so that the automatic release will occur no later than it would have done under the unlawful determinate sentence. To do so would require us to impose a special custodial sentence of 8 years and 2 months, comprising a custodial term of 7 years and 2 months' imprisonment and an extended licence period of 1 year. We see no reason to adjust the concurrent determinate sentences imposed on the other counts.

29. Accordingly, we grant leave to appeal against sentence purely for the purposes of correcting the unlawful sentence and allow the appeal on that ground. We quash the sentence imposed on count 3 and substitute for that sentence a special custodial sentence of 8 years and 2 months, comprising a custodial term of 7 years and 2 months and an extended licence period of 1 year. That sentence will run concurrently to the sentences on counts 1 and 2.

30. We consider that there was no merit in any of the other points that were raised by the appellant and that the single judge was right to refuse leave on those other grounds. Save to the extent that we have indicated, the renewed application for leave to appeal against sentence is refused.

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