No. 202001022 B5

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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1866

Royal Courts of Justice

Friday, 19 November 2021

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE FRASER

HER HONOUR JUDGE WALDEN-SMITH

REGINA

V

JOHN ANDREW DURKIN

REPORTING RESTRICTIONS APPLY:

THE SEXUAL OFFENCES (AMENDMENT) ACT 1992

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MR G. CARSE appeared on behalf of the Appellant.

MR F. DILLON appeared on behalf of the Respondent.

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JUDGMENT

LORD JUSTICE WILLIAM DAVIS:

1
Before the court are listed a renewed application for permission to appeal against conviction by Mr John Andrew Durkin, together with an appeal against sentence on a strictly limited basis relating to the victim surcharge. The order of the single judge was that he would be given leave on that ground, but without any right to attend or make representations.

2
Mr Durkin is not present. That is because at the prison in which he is housed there have been cases of Covid 19. The prison is in lock down. He is not able to attend via prison video link as had been planned. His absence is involuntary.

3
In relation to the matters initially listed before the court, his absence is of no consequence. He would not have been entitled to attend his renewed application for permission to appeal against conviction and would have had no right to address the court.

4
In relation to the appeal against sentence as originally envisaged, the correction of the victim surcharge would not have entitled him to attend. However, as will become apparent, there is a further issue in relation to sentence which is substantive, albeit technical in nature, and we intend to grant leave to appeal in relation to sentence on the wider ground.

5
In ordinary circumstances, Mr Durkin would have a right to attend such an appeal. Given the particular circumstances, what we propose to do is to deal with the case in its entirety. Should Mr Durkin, once he has received the decision and the judgment of the court, wish to raise further argument or reopen the appeal, then he will be entitled to do so so long as he does so within seven days of receiving notice of the court's order and the court's judgment.

6
With those preliminary remarks we therefore move to consider the case as a whole. Mr Durkin's offending attracts the provisions of the Sexual Offences (Amendment) Act 1992. No matter relating to those against whom he offended during their lifetime is to be included in by publication which is likely to lead members of the public to identify the people concerned as victims of his offending.

7

Mr Durkin was convicted on 19 April 2016 in the Crown Court at Liverpool of 18 counts of indecent assault contrary to s.14(1) of the Sexual Offences Act 1956. That was historic offending dating from the end of the 1980s and into the early 1990s. He was sentenced three days later to a sentence of 16 years' imprisonment as an offender of particular concern. A period of a year's extended licence was added to that sentence. A sexual harm prevention order was made, about which we need say no more. A victim surcharge was ordered.

8
He now applies for an extension of time in which to renew his application for an extension of time for leave to appeal against conviction following refusal by the single judge. In addition, he appeals against sentence with limited leave, restricted simply to the imposition of the victim surcharge order. He also renews his application for leave to appeal against sentence on grounds of his own composition which were refused by the single judge. For reasons which will become apparent, we extend time for the appeal against sentence and grant leave in relation to that appeal. We do not do so by reference to his grounds which have no merit. Rather, the substantive sentence imposed on Mr Durkin was at least in part unlawful and justice clearly requires us to correct that.

9
The indictment on which he was tried and convicted contained 18 counts. Counts 1 to 17 concerned a girl to whom we shall refer as "C1". She was the daughter of a woman with whom the appellant had formed a relationship. From about 1989 he moved into the family home and assumed the role of father figure. The indictment covered a period from late 1989 to late 1993. The broad scheme of the indictment was that there were four counts in relation to each succeeding period of 12 months; the counts representing four different types of sexual offending.

10
The offending began when C1 was 7. She was at home with the appellant when he was naked. He told her to get undressed and made her move her hand up and down his erect penis. He then ejaculated into the bathroom sink. That was the first count on the indictment and it stood alone in terms of the relevant calendar year. Making C1 masturbate his erect penis to ejaculation was something which occurred on a regular basis over the next four years. Generally, the activity occurred in the appellant's car after he had collected C1 from Brownies. He would park the car in a golf club car park before masturbation occurred. Counts 2, 6, 10 and 14 on the indictment reflected this activity when C1 was aged 8, 9, 10 and 11.

11
The second type of sexual assault was reflected by Counts 3, 7, 11 and 15. Those counts related to the same years as the masturbation counts. They covered instances when C1 was forced to perform oral sex on the appellant. There were two different circumstances in which this would occur. First, it happened on occasion in the golf club car park; namely, on the occasions when the appellant had collected C1 from Brownies. It was thus associated with incidents of masturbation.

12
Second, it would occur at weekends in the family home. On occasion C1 would be in bed with the appellant and he would play a game called "going under the clothes." This involved C1 going under the bedclothes and performing oral sex on the appellant. The significance of those counts is that, had the offences been committed in 2016 when the appellant was convicted, they would have amounted to offences under s.5 of the Sexual Offences Act 2003. As such, a sentence under s.236A of the Criminal Justice Act 2003 was required to be imposed and this is something that the judge recognised.

13
The third type of sexual assault was covered by Counts 4, 8, 12 and 16. When the appellant and C1 were in his car in the golf club car park, in addition to masturbation and oral sex, he would push his fingers into her vagina. This would have amounted to an offence contrary to s.6 of the Sexual Offences Act 2003, had he committed it after the introduction of that Act. Again, a sentence under s.236A was required to be imposed. Once again, this was appreciated by the sentencing judge.

14
The final group of counts, 5, 9, 13 and 17, related to the appellant rubbing his penis against C1's vagina. These incidents occurred when C1 and the appellant were in bed together. The appellant would be naked. He would get C1 to sit astride him. He would then rub his penis against her vagina. In evidence she described this as him trying to force his penis into her. We shall have to consider hereafter whether this offending amounted to an attempt to penetrate C1 and the potential consequences in relation to operation of s.236A.

15
We observe that all the counts relating to C1 were pleaded as a single incident. There was no multiple incident count. The case was summed up to the jury on the basis that the counts represented repeated activity in the relevant period. It is clear that no objection was taken to that course. It would appear that that was the basis upon which the case was conducted on both sides. On the face of it, that procedure was contrary to the principles set out in Canavan [1998] 1 WLR 604. We apprehend that in reality all parties proceeded on the basis that the nature of the offending was such that it would have fallen within the Criminal Procedure Rules 10.22 which permits more than one incident to be reflected in a single count. At trial the defence appear to have proceeded as if the counts alleged multiple incidents even though the jury were not directed on that basis. However, the offending of which the appellant was convicted, even on a single incident basis, was extremely serious. We conclude that we do not need to resolve this apparent error in the trial and sentencing process. The sentences imposed were justifiable even on proper application of Canavan principles.

16
The last count of which the appellant was convicted concerns C1's sister, to whom we are refer to as "C2". She was younger than C1. On a single occasion between 1993 and 1995, when C2 was seven or eight, she was in bed with the appellant and her mother. She was lying next to the appellant, so between the appellant and her mother, when she felt the appellant's erect penis rubbing to and fro across her back.

17
The overall prosecution case was that the appellant had targeted C1because she was regarded as a troublesome child. Had she complained at the time, people would have put her complainant down simply to her being difficult. The defence case was that C1 was lying. Moreover, she recruited C2 to support her and to provide credence to her complaints. The appellant called his stepdaughter and his son who had lived in the same household and they supported the case that they had all lived a normal family life.

18
C1 in fact first complained of the appellant's activity in 2000 and again in 2003. ABE interviews were conducted then, but, for whatever reason, no action was taken until after a further complaint in 2014. It is clear, whatever else may be the position, that C1 was not responsible for those delays.

19

We turn to the renewed application for permission to appeal against conviction. The appellant was convicted in April 2016. His application for leave was not lodged until 2020. He had been advised by his trial counsel that he had no grounds of appeal. That advice had been provided promptly. We have a letter dated 29 July 2020 from the appellant's sister which purports to explain the delay that then followed of more than four years. It is not necessary to analyse that letter. Put bluntly, it provides no satisfactory explanation at all for the delay. However, we propose to consider the appellant's arguments on the issue of conviction on their merits. If there is real merit in any ground, we shall extend time: otherwise, we shall not.

20
There are seven grounds of appeal. The first invites this court to admit evidence not called at trial, which it is said could well have affected the jury's verdict. We shall concentrate simply on whether this evidence would have made any difference. It comes from three sources. Natasha Cameron is the niece of the appellant. Apparently, it was said that at some point she had fallen out of a bunk bed at the family home and the appellant had picked her up. This appeared in a statement made by the mother of C1 and C2. Ms Cameron made a statement in August of 2020 saying that in fact there was no occasion when she had fallen out of a bunk. This episode was not referred to in the judge's summing-up. Indeed, whether the jury had the evidence of the mother is far from clear. There is no reference to any statement from her. Even if they did, this evidence, whether it came from the mother or Natasha Cameron, had absolutely no relevance to the issues in the case. Consequently, admission of the evidence of Ms Cameron could not possibly have affected the jury's verdicts.

21
Next, there is evidence from the appellant's sister. She now states that in 1998 she was approached by C1 and C1's mother, each of whom said that they would have the appellant put in prison as a paedophile. Plainly, this evidence would have been available at trial, but none of it was put to C1. We ask ourselves (a) whether it would have been admissible and (b), more pertinently, what conceivable probative value it would have had. We answer neither question in favour of admitting the evidence. Assuming these events occurred, they were simply consistent with the prosecution case and C1's allegations and would have taken the appellant nowhere.

22
Finally, in relation to fresh evidence, it is said that in 2013 C1 had a conversation with a police officer named Cosgrove about her allegations against the appellant. It is suggested that this man Cosgrove could give evidence to assist the appellant's case. We have no statement from him so it is impossible to say what he could say. From that it follows that we cannot conclude that he would have anything useful or relevant to say. None of this so-called fresh evidence satisfies the test of admissibility in s.28 of the Criminal Appeal Act 1968.

23
The second ground is allied to that first ground. We have been provided with social services' records relating to the appellant's son Matthew. This is the son who gave evidence at trial. When Matthew's mother died in 2004, an issue arose as to where he was going to live or, more pertinently, with whom he was going to live. In the end he lived with various members of his extended family. That included at one point C1, by now an adult. Issues arose as to contact between the appellant and his son Matthew and as to the financial support due from the appellant. The social work records show that in 2004 and 2005 there was contact between C1 and the appellant in relation to Matthew. This is said to be material which would have undermined C1's evidence that she had been sexually abused by the appellant and that she had been traumatised by the abuse. We are quite satisfied that it would not

have any such undermining effect. Contact in the context of caring for a child some ten or more years after abuse could not begin to undermine C1's account. Again, the evidence would have not have affected the jury's verdict.

24
By his third ground the appellant complains that C1's medical records were not disclosed by the prosecution. The disclosure of such records was requested by the appellant's solicitors before trial. The Respondent's Notice indicates that such disclosure, as satisfied the relevant criteria, was indeed made. We have no basis upon which to find that that did not happen. Therefore, we cannot conclude that it is even arguable that there was a lack of proper disclosure.

25
The fourth ground of appeal is that at trial C1 "implied" that the golf club car park was secluded. It is said that there are now photographs available to contradict this. How it was that C1 "implied" the nature of the car park is unclear. In any event, the photographs are recent whereas the relevant events occurred about 30 years ago. We do not in fact know what the photographs show, because we have not been provided with copies. In the event, that does not concern us. No photograph taken now could be of any assistance even if it were appropriate to conclude that an implication by C1 might have been something that would have affected the jury.

26
The fifth ground is that the appellant has learning difficulties yet no special measures were made available for him. What such measures would have been has not been specified. As a matter of fact, trial counsel and solicitors were aware of the appellant's issues. They were not concerned about any aspect of his participation in the trial. One reason for this is because they had conducted the first trial: the trial in 2016 was a retrial, the jury having failed to agree at the first trial. The appellant had coped with that trial perfectly well and continued to do so in the retrial. Given that information, we are satisfied this ground has no substance.

27
There is a connected ground as a sixth ground, because it also relates to the appellant's ability to engage in the trial process. It is not disputed that at some point very shortly before he was due to give evidence the appellant's mother died. He says that this significantly affected his ability to give proper evidence. Clearly, that may well be the case. However, trial counsel was aware of the position at the time. He advised the appellant that he should not give evidence; rather some application should be made to adjourn the trial for whatever period was appropriate. The appellant agrees such advice was given. He rejected it. In those circumstances, he has to abide by the consequences of his decision: whether it was a wise one may be questionable, but it is far too late now to raise it as something which might have affected the fairness of the trial. We observe that he relies on the decision of this court in Orr [2016] EWCA Crim 889. It is unnecessary to rehearse the background and facts of that case. It is of no relevance at all to the appellant's position.

28
The final ground is that it is said that defence counsel and the solicitors were guilty of failing properly to represent the appellant. For any such argument to have any hope of success, there must be very clear evidence of substantial failures. No such evidence exists here. For instance, what is cited is that the defence team failed to provide a signer for the appellant's wife; she needing that form of interpretation. That is simply not true. We have seen the contemporary documents that demonstrate that a signer was available. The decision was made on other grounds not to call the witness.

29
It follows that there is no arguable ground of appeal against conviction. Therefore, there is no reason to extend time. We refuse the application to do so.

30
The appellant's own grounds of appeal against sentence are not arguable. He complains that the sentencing judge failed to take into account the fact that he had been acquitted of one count at his first trial. There could have been no reason for the judge to do so. He was concerned solely with the offences of which the appellant was convicted at the retrial.

31
The appellant also complains that no new evidence was provided by the prosecution at the retrial. He says that a witness who had been called at the first trial did not attend the retrial. All of that may be true. None of it has any relevance to sentence.

32
The true ground of appeal against sentence, for which we have given leave, arises from what was noticed by a Court of Appeal lawyer, Mr Ian Dowty, when the appellant's case was first listed before this court as a non-counsel application in relation to the victim surcharge. Not for the first time, Mr Doughty was able to point to a serious irregularity which had occurred in the sentencing and trial process, which hitherto had not been spotted by anybody at all: see for instance Patten [2019] 1 WLR 5265. We are, as ever, grateful to Mr Dowty. The consequence is that the appellant and the respondent prosecutor have been represented before us to assist us with determining the proper outcome. It is accepted on all sides that the sentences as imposed cannot stand and we are very grateful to counsel Mr Carse, representing the appellant, and Mr Dillon, representing the prosecution, for the submissions they have made both orally and in writing.

33
We turn to the way in which the judge approached sentence. His sentencing remarks were detailed and careful. He set out the facts as he found them to be and he then took the correct approach in determining the level of sentence for a set of historic sexual offences as set out in Annex B of the Sentencing Council Definitive Guideline in Relation to Sexual Offences. He first identified where each set of offences would fall within the current legislation. What we shall call "the masturbation counts", he considered would have been charged as sexual activity with a child. By reference to appropriate levels of harm and culpability that offence on the facts of the appellant’s case had a starting point eight years' imprisonment with a range of five to 10 years. The counts relating to oral sex would have been charged as rape of a child you under the age of 13. The appropriate starting point would have been 13 years with a sentencing range of 11 to 17 years. Digital penetration of the vagina would have been indicted as assault of a child under 13 by penetration. A starting point of 11 years with a range of seven to 15 years would have been appropriate. The final set of offending, namely rubbing the penis against the vagina, the judge concluded would have been charged as sexual activity with a child under 13. The relevant category here would have led to a sentence starting point of three years with a sentencing range of two to six years.

34
The judge then went on to note that sentence on any individual count had to be limited to the maximum sentence potentially imposed at the time of the commission of the offence. All of the offences of which the appellant was convicted had a statutory maximum of 10 years.

35

Third, the judge noted that sentence had to take place within the regime applicable at the time of sentence. So it was that he had regard to the applicable guidelines under the Sexual Offences Act 2003 and the relevant definitive guidelines. Having conducted the analysis as set out above, setting out the factors relevant to harm and culpability together with the aggravating factors and such mitigation as there was, the judge then said this:

"Were the offences to be sentenced under the new Act, the individual component parts would be considerably in excess of the sentences I am about to pass. The global sentence, however, would not be different. It is the global sentence that is paramount. Its component parts are perhaps of less importance."

36
He went on to say that the appropriate sentence to reflect overall criminality was 17 years' imprisonment and he said that that would be expressed by reference to a custodial term of 16 years' imprisonment with a fixed one year's period of licence; that being pursuant to s.236A of the Criminal Justice Act 2003.

37
This was the point at which the judge fell into error. He set out his sentences on the individual counts. Where an offence required a sentence pursuant to s.236A, such a sentence was imposed. That was in relation to the offences equivalent to rape or digital penetration. In each case, the sentence imposed was six years' custodial term with one year's extended licence. These sentences were ordered to run consecutively and the judge expressed this as a custodial term of 12 years. He also imposed consecutive determinate terms of two years in relation to the very first offence in time against C1 and in relation to the separate offence against C2. That was a total, therefore, of an additional four years. By this route, the judge achieved a custodial sentence of 16 years. To that term he added a year's extended licence. The sentences on the other counts were determinate terms of varying lengths, all of which were ordered to run concurrently. We need say no more about them since they have no effect upon the sentence.

38
As recorded by him the judge imposed a sentence pursuant to s.236A of the 2003 Act of 17 years: a custodial term of 16 years and an extension period of one year. Such sentence could not have been imposed on any one count alone, because, as the judge rightly noted, the maximum for each offence of indecent assault was 10 years' imprisonment. Section 236A(4) specifies the total of the custodial term and extension period must not exceed the maximum sentence for the offence. The term of 16 years’ imprisonment was arrived at by the inclusion in the total of the consecutive determinate sentences imposed in relation to Count 1 (the very first offence concerning C1) and Count 18 (the offence concerning C2). These were offences which did not qualify for sentences under s.236A. Thus, as expressed by the judge, the sentence was unlawful. Moreover, having so calculated the total custodial term, a single global extension period of one year was appended. Given that the judge said that he was imposing sentences pursuant to Section 236A in relation to two sets of offences with a period of extended licence applied to each, it was an error to impose a single extension period of a year: see LF [2016] 2 Crim App R (S) 30.

39
A sentence under s.236A is a single indivisible sentence comprising the custodial term and the extension period. It must be passed for each qualifying offence. It may be passed concurrently or consecutively. Where such sentences are passed consecutively, both the period of imprisonment and

the extension take effect consecutively. Here, the judge imposed sentences for two sets of offences to which s.236A applied. The sentence in each case, in terms of the custodial term, being was 6 years. The terms were ordered to run consecutively. That resulted in a total sentence under s.236A of 14 years comprising a total term of 12 years and a total extension of two years. That is how the sentences passed pursuant to Section 236A should have been expressed: see LF at [27]. That would not have offended the bar on imposing a sentence exceeding the maximum for the indicted offence since the individual sentences were less than the maximum term of 10 years. The determinate sentences of two years and two years ordered to run consecutively could not have formed part of the s.236A sentence.

40
We pause briefly to consider whether the judge also fell into error in relation to the counts concerning the appellant rubbing his penis against C1's vagina, in respect of which she had said that the appellant had tried to force his penis into her. We ask whether he should have found that that activity would have been an offence equivalent to attempted rape of a child under the age of 13, in which event, again, a sentence under s.236A would have been mandatory. We are satisfied that the judge was entitled to find, as he did, that this was activity equivalent to sexual activity with a child and, therefore, not a s.236A offence. He heard the trial. He was best placed to assess the nature of the offence. It would ill behove us to go behind his finding of fact.

41
Standing back, this is not a case in which any legitimate criticism could be made of an overall custodial term of 16 years. The appellant's offending spanned more than four years. Even on the basis of a single incident per count it involved regular and gross sexual abuse of a young and vulnerable child in his care. We are concerned only to correct the unlawfulness of the sentence imposed. Our conclusion is that the correct expression of the sentence imposed for the appellant should be this. First, there should be standard determinate sentences on Count 1 and Counts 18 of two years, each sentence to run consecutively. This was the order made by the judge albeit that he then impermissibly included them in the sentence pursuant to Section 236A. There will follow a sentence of 14 years under s.236A of the 2003 Act, comprising a total custodial term of 12 years and an extension of two years. That sentence will run consecutively to the determinate sentences.

42
That requires us to consider whether that restructuring would offend s.11(3) of the Criminal Appeal Act 1978. As matters currently stand, the appellant is subject to a sentence of which he has to serve half (8 years) before he can be considered for release. Whether he is released at that point is not an automatic provision. It has to be considered by the Parole Board. Should the Parole Board not consider him safe to release, he will remain in custody. He could be required to serve the entire term of 16 years. We note that the prison, perfectly properly, are currently operating on the premise that that sentence is lawful and will have that effect.

43
The properly structured sentence which we have identified will involve the appellant serving half of the determinate sentence, namely, two years. He in fact already has completed that portion of the sentence. He then will commence serving the overall sentence imposed under s.236A. He will be considered for release, at the halfway point of that custodial term; namely, after six years. That means that the point at which he will be considered for release will be exactly the same as under the sentence imposed by the judge; namely, eight years after beginning his custodial term. Were he not to be released by the Parole Board, he would have to be released at the end of the 12 year custodial term. Thus, the maximum term that he would spend in custody would be 14 years, rather than the 16

years as under the sentence as structured by the judge. That analysis leads to us the conclusion that such restructuring would not offend the prohibition in s.11(3) in relation to dealing with an offender on an appeal more severely than he was dealt with in the court below. The punitive element of the sentence, as correctly expressed and structured, could be the same as would follow were the sentence imposed by the judge to remain unaltered. That would be the position were the Parole Board to sanction release at the half way point of the custodial term. Under no circumstances could the punitive element be more severe.

44
We have considered the detailed submissions made by counsel, in particular Mr Dillon, for which we are very grateful. Mr Dillon departs, or at least in writing departed, from the reasoning of Mr Doughty and offered a variety of restructured sentences. However, his very helpful note concluded with this. “None of the suggested rectifications can hope to be perfect and, ultimately, it is a matter for the court to balance the various elements of any proposed substitute sentence in an effort to give effect to the intention of the original sentencer, whilst achieving an overall sentence which is lawful, just and proportionate and which ensures that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.”

45
We agree with the analysis and the sentiments of that passage. Mr Dillon agreed in oral argument that the punitive element of a sentence is what matters. Thus, in relation to sentences imposed pursuant to 236A, the critical element is the custodial term rather than any extended licence. That appears from previous authorities, as most recently reviewed in A [2020] EWCA Crim 948. We note what was said at [25] of A, namely that a formulaic mathematical or rigid approach should not be adopted. We are satisfied that the approach we have adopted (a) will achieve a lawful sentence and (b) will not make matters worse for the appellant and, conceivably, could be his advantage.

46
Finally, we turn to the reason why permission was first given in relation to sentence, namely the victim surcharge. These offences all predated the relevant time at which such a surcharge can be imposed and so we quash the surcharge.

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