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Neutral Citation Number: [2006] EWCA Crim 3261
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Thursday, 14th December 2006

B E F O R E:

LORD JUSTICE LATHAM
(Vice President of the Court of Appeal Criminal Division)
MR JUSTICE MITTING

MR JUSTICE TEARE

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R E G I N A

−v−

STUART FARRAR

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MISS SHENTON appeared on behalf of the APPELLANT
MR STORRIE appeared on behalf of the CROWN

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J U D G M E N T
(As approved by the Court)

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1. MR JUSTICE MITTING: On 8th November 2005 the appellant pleaded guilty to one count of abducting a child, "CM", on 17th May 2005 and to one count of sexual assault of the same child on the same occasion, contrary to section 7 of the Sexual Offences Act 2003. The maximum sentence for abducting a child is 7 years and for sexual assault of a child, 14 years. On 14th March 2006 he was sentenced by His Honour Judge Steiger QC to imprisonment for public protection under section 225 of the Criminal Justice Act 2003, with a minimum term of 18 months for the assault and to no separate penalty for the abduction. An order disqualifying him from working with children was made. It was stated − erroneously − that he was subject to the notification requirements of Part 2 of the 2003 Act for ten years. The period should have been indefinite. He appeals against sentence by leave of the single judge.

2. The victim of the offences, "CM", was a six year old boy. He had left his home to go to play with friends. While waiting for them outside their house, he was approached by the appellant and was "made" to go with him, back to his flat. He never explained precisely how it was that the appellant made him do so. When there, the appellant suggested a game of "blind man's buff", he put a hood or pillow case over the boy's head and bounced him up and down on his knee. Unknown to the boy, he then unzipped his trousers and masturbated himself. He ejaculated. Semen, with a DNA profile matching that of the appellant, was later found on the boy's trousers. The boy was in the flat for 15 minutes. He was able to get off the appellant's knee and make his way home on his bicycle.

3. The appellant was arrested on 9th June and interviewed. He began by denying that the incident had taken place, but eventually admitted what had occurred, though he claimed it was the boy who had suggested the game.

4. The appellant was aged 22 when sentenced and had no previous convictions. The judge had, and plainly read with care, three reports on the appellant: (i) a psychiatric report dated 18th October 2005 by Dr Deo; (ii) a psychologist's report dated 28th November 2005 by Mr Wilson; (iii) a pre−sentence report dated 15th December 2005 by Mr Lee−Kilgariff.

5. Dr Deo assessed the appellant as fit to plead. Mr Wilson determined that his overall IQ rating was 74, but would have been in the mentally deficient category but for an exceptional result in one of the psychometric tests administered to him.

6. During the early stages of his interviews with both Dr Deo and Mr Lee−Kilgariff, the appellant was less than frank about the circumstances of the offence. He pretended to Dr Deo that he did not remember. He denied to Mr Lee−Kilgariff most of what he had eventually admitted to the police. The latter described "his current version of events" as "entirely implausible". Unsurprisingly, he concluded that his lack of ability fully to realise the extent of the harm caused by his behaviour was worrying. He also noted that, although the appellant had no previous cautions or convictions, the police had been contacted on three previous occasions after concerns were raised about his behaviour towards young boys. In August 2004, a seven year old boy, "GC", had complained that the appellant had invited him to his house and, whilst there, had asked

him if he wanted to wrestle and invited him to bend over a chair. After he refused, he placed the boy's legs around his waist, with his crotch against the appellant's legs and body. The boy eventually struggled free and ran home. After a police investigation, it was decided not to charge the appellant with any offence. In his sentencing remarks, the judge described that decision as "plainly erroneous". In a separate incident, in December 2004, the father of a 12 year old boy complained about inappropriate behaviour by the appellant in the changing rooms at Altrincham swimming baths. In June 2005 (i.e. just after the offences involving CM), there were reports that he had been inviting children back to his house to play games. Mr Lee−Kilgariff noted "other reports to the police VISOR unit in his local area regarding predatory males approaching young boys" involving the appellant. He admitted involvement in each of them, but denied any ill intent.

7. All of these factors led Mr Lee−Kilgariff to express the opinion that "he poses a very high risk of physical and psychological sexual harm to young boys".

8. This material caused the judge to have in mind, from the start, the possibility of a sentence of imprisonment for public protection. The prospect troubled him, because the appellant had no previous convictions of any kind. He decided that, in fairness to the appellant, the just way to proceed was for him to hear evidence about the August 2004 incident and to determine, to the criminal standard, where the truth lay. To that end, on 13th March 2005, he heard evidence from GC and from the detective constable who investigated the matter and from the appellant. He unhesitatingly preferred the evidence of GC and rejected that of the appellant. He concluded that his conduct was prompted by a sexual motive "such as to make him guilty of the offence of indecent assault as the law then stood, were he to have been tried by the jury for that offence". He did not investigate the other incidents and, for the purpose of determining the risk of serious harm from further specified offences and the appropriate sentence, he disregarded them. He treated the August 2004 incident as information about a pattern of behaviour of which the offence formed part under section 229(2)(b); and noted the appellant's continuing interest in contact with children as relevant information about him under section 229(2)(c). He concluded that there was a high risk of the repetition of specified sexual offences against children.

9. He then, correctly, considered whether the risk was of serious harm. He concluded that there was a risk of serious psychological harm, both to child victims and to their parents. He said that the facts of the August 2004 incident reflected "every parent's worst nightmare". He concluded that the appropriate sentence was a sentence of imprisonment for public protection, with a minimum term of 18 months. He did not order that any of the period which the appellant had spent in custody on remand, about four months, should count towards that term. Given the nature of the sentence, he concluded that it was unnecessary to make a Sexual Offences Prevention Order.

10. As is apparent from this description of the sentencing process, the judge directed himself to the provisions of chapter 5 of part 12 of the Criminal Justice Act 2003 and conducted the sentencing exercise required by them with meticulous fairness and attention to detail. Nevertheless, Miss Shenton submits that the process was

fundamentally flawed and that the judge could not, or at least should not, have concluded that a sentence of imprisonment for public protection was required.

11. Section 225(3) requires a court to impose a sentence of imprisonment for public protection in a case where life imprisonment is not available or justified (under subsection(2)) if:

> "(1) ...
>
> (a) A person aged 18 or over is convicted of a serious offence ... and
>
> (b) The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences."

Section 229(2) provides:

> "If at the time when the offence was committed the offender had not been convicted in any part of the United Kingdom of any relevant offence ... the court in making the assessment referred to in subsection (1)(b) −
>
> (a) must take into account all such information as is available to it about the nature and circumstances of the offence,
>
> (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part, and
>
> (c) may take into account any information about the offender which is before it."

12. The risk posed by the appellant fell to be considered under this subsection.

13. Miss Shenton submits that the judge fell into error in three respects:

(i) It was not open to him to find that the appellant had committed the assault on GC in August 2004. He was entitled to a verdict of a jury on that charge before it could be found to be part of a pattern of behaviour under section 229(2)(b).

(ii) Although there was a significant risk of harm to members of the public occasioned by specified offences, the harm was not serious.

(iii) The minimum term was too long.

14. As to her first proposition, the law was not in doubt before the enactment of the Criminal Justice Act 2003:

> "A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or

> verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see Anderson [1978] AC 94. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit." Per Lord Bingham CJ in Canavan [1998] 1 Cr App R (S) 243 at 245−246".

15. Nothing in the 2003 Act expressly overrides that principle, unlike section 17 (yet to be in force) of the Domestic Violence, Crime and Victims Act 2004. Does section 229(2)(b) do so impliedly? It will only do so if there is a necessary implication to that effect: "a necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation." Per Lord Hobhouse of Woodborough R (on the application of Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563 at paragraph 45.

16. Or, as Lord Nicholls put it in B (a minor) v DPP [2000] 2 AC 428 at 464:

> "... 'necessary implication' connotes an implication which is compellingly clear."

17. It is neither a matter of express language and logic, nor is it compellingly clear, that section 229(2)(b) has the effect of permitting a judge alone to decide that a defendant is guilty of a discrete offence unconnected with that for which he is to be sentenced. A 'pattern of behaviour' constituted by discrete offences can just as well be established by conviction by a jury or magistrates' court of the offences as by the finding of a judge alone. Hence, "language and logic" do not require the implication. Further, it is not "compellingly clear" that Parliament can be taken to have intended to deprive a defendant of the right to a trial by judge and jury or magistrates' court of a discrete offence by implication.

18. Accordingly, we hold that it was wrong in principle for the judge to undertake the exercise, and make the finding, that he did in relation to the August 2004 incident.

19. The principle must not be taken too far. As the court in Canavan recognised, full account can be taken of "acts done in the course of committing that offence or offences even when such acts might have been separately charged". In the specific case of sexual offences against children, evidence about the offences charged may demonstrate a pattern of behaviour before their commission which includes other criminal conduct, for example conduct which is an offence contrary to sections 14 or 15 of the Sexual Offences Act 2003. Such conduct is clearly part of "a pattern of behaviour of which the offence forms part". Nor, in our view, would a judge who had presided over a trial of a defendant charged with a sexual offence at which evidence of similar conduct was given, and must have been accepted by a jury, whether in relation to the same or another complainant, be prevented from taking such behaviour into account under

section 229(2)(b). The judge who sentenced Z (see [2003] All ER 385) could not realistically have been expected to treat his offence of rape as an isolated incident.

20. In his sentencing remarks, the judge made it clear that it was his finding about the incident in August 2004 which led him to conclude that the statutory criteria for a sentence of imprisonment for public protection were satisfied. Because the means by which he reached that decision was flawed, we must review it afresh.

21. We have an additional psychiatric report from Dr Holloway dated 10th October 2006, ordered by the single judge. She interviewed the appellant on 14th August 2006. In a pattern by now familiar, he sought to minimise the offences of which he had been convicted, but towards the end conceded that the incident occurred in the manner described by CM, and that he had sexual feelings for small boys, including the boy that he had taken home in August 2004, GC. In Dr Holloway's opinion, his behaviour was likely to be related to a sexual attraction to children and was of concern. He remained "at risk of inappropriate sexualised behaviour with children".

22. This is material that we are entitled to take into account under section 229(2)(c). It supports the judge's conclusion that there was a high risk that the appellant would commit further specified sexual offences against boys. If the offence of which he was convicted had been committed before 5th April 2005, this would have been an appropriate case for an extended sentence under section 85 of the Powers of Criminal Courts (Sentencing) Act 2000; but such a sentence is not now available. The only alternatives are imprisonment for public protection, a determinate sentence or a community order.

23. The critical question is whether or not the judge's conclusion that there was a significant risk of serious psychological harm to boys and their parents was justified. We regard his opinion about harm to parents as speculative. If correct, it would mean that in every case in which a young child was the subject of a sexual offence punishable with ten years' imprisonment or more, a significant risk of serious psychological harm would be found to exist, and an indefinite sentence imposed. That cannot be right.

24. We are, however, satisfied that there was and is a significant risk of serious psychological harm to young boys occasioned by the commission by this appellant of further specified offences. Although there is no evidence of serious harm to CM, it is highly likely that if the appellant continues to entice young boys into his home for his own sexual gratification, such harm will occur to them.

25. The evidence available to the judge demonstrated:

(i) that the appellant admitted an unusual interest in young boys and inappropriate contact with them;

(ii) that he had in fact committed a sexual offence against CM in profoundly troubling circumstances and with profoundly troubling features;

(iii) that he lacked any understanding of the inappropriateness of his behaviour or the

harm which it had caused and risked causing in the future.

26. These conclusions are powerfully supported by the evidence of Dr Holloway. On any view, there is a very high risk that he will commit specified sexual offences against young boys. If he does, the risk of serious psychological harm to them is, in our view, self−evident.

27. A man with a sexual attraction to young boys, like the appellant, who entices them into his flat for his own sexual purposes, and who has no insight into what he is doing, may well not stop at masturbation. Even if the scale of his offending were not to increase, the risk of serious psychological harm to a young boy towards whom he behaved as he did towards CM is real. It is a matter of chance and the character of CM that no such harm was caused to him. It is readily understandable how another boy, hooded for many minutes and bounced up and down on the knee of the appellant while the appellant was masturbating, would be subjected to serious psychological harm.

28. Accordingly, although not for the reasons that he gave and not by the route which he adopted, we agree with the judge's conclusion that this was an appropriate case for a sentence of imprisonment for public protection.

29. As to the minimum term, it equated, once no account is taken of time spent in custody, to a sentence of three years eight months. That would be, as a determinate sentence, a significant sentence for the conduct which the appellant admitted, but it cannot properly be described as manifestly excessive. Accordingly, we do not interfere with the minimum term set by the judge.

30. For those reasons, this appeal must be dismissed.