

Neutral Citation Number: [2019] EWCA Crim 109

Case No: 201801891/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Wednesday, 16 January 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE MCGOWAN DBE

HIS HONOUR JUDGE BURBIDGE QC
(Sitting as a Judge of the CACD)

R E G I N A

v

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Miss B Cherrill appeared on behalf of the **Applicant**

Miss S Lindop appeared on behalf of the **Crown**

J U D G M E N T

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LORD JUSTICE SIMON:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences which are the subject of this appeal. Under those provisions where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. On 20 March 2018 in the Lewes Crown Court sitting at Hove, the applicant, now aged 48, was convicted of 14 historic sexual crimes against two very young victims. On 9 April he was sentenced by the trial judge, His Honour Judge Rennie. On some of the counts the victim was TF and in respect of those counts he was sentenced as follows: counts 1, 2, 8 and 9 indecent assault of TF, contrary to section 14(1) of the Sexual Offences Act 1956, no separate penalty; counts 3 and 7, indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960, no separate penalty; counts 4 and 5, rape, contrary to section 1(1) of the 1956 Sexual Offences Act, a special custodial sentence of 13 years, comprising a custodial term of 12 years' imprisonment and an extended licence period of one year, pursuant to section 236A of the Criminal Justice Act 2003; count 6, false imprisonment, contrary to common law, no separate penalty.

3. In the rest of the counts the victim was JY. In respect of those counts he was sentenced as follows: counts 10 and 11, indecent assault, contrary to section 14(1) of the 1956 Sexual Offences Act, no separate penalty; counts 12, 13 and 14, rape, contrary to section 1(1) of the 1956 Act, a special custodial term of 12 years' imprisonment and an extended licence period of one year pursuant to section 236A of the 2003 Act. This term was ordered to be served consecutively to the terms passed in respect of counts 4 and 5.
4. The overall sentence was therefore a term of 24 years with an extended licence period of two years. Various ancillary orders were made, none of which give rise to an issue on this application which is an application for leave to appeal against sentence which has been referred to the full court by the Registrar of Criminal Appeals. We grant leave.
5. The appellant (as he now is) was the cousin of the victims TF and JY, who were also cousins of each other. The appellant had gone to live with TF's family as a result of his mother leaving his home due to his father's alcoholism and his father's serious neglect.
6. The offending against TF occurred between 25 July 1987 and 24 July 1990. The offences occurred when she was approximately six to eight years old and the appellant had been approximately 16 to 19 years old. The question of whether he was over 18 at the time of particular offending is an issue to which we will come later in this judgment.
7. The offending against TF involved the appellant penetrating her vagina on at least two occasions (count 1), penetrating her mouth with his penis on at least two occasions

(count 2) and forcing her to masturbate him on at least two occasions (count 3). He also vaginally raped her on two occasions (counts 4 and 5). In addition, he falsely imprisoned her in a flat with others present (count 6) and tied her up, during which attempts were made to force her to have sexual intercourse with another child who was present (count 7). In addition he digitally penetrated TF's vagina on one occasion in a graveyard (count 8) and on another occasion in a car on the way to a wedding (count 9). He ensured that TF did not tell anyone about the offending at the time by telling her that she would go into care and not see her family again if she did so.

8. The crimes against JY occurred earlier when the appellant was between 13 and 17 years old. He touched JY's vagina and forced her to masturbate him (counts 10 and 11). At this time she was between six and eight years old. He also raped her on three separate occasions when she was between eight and 11 years old (counts 12, 13 and 14).
9. When he was arrested and interviewed, he informed the police that the allegations had been mentioned at around the time of his wedding in 2002, but he denied the allegations and denied making any admissions about the allegations at his wedding.
10. The appellant was aged 46 at the date of sentence and had no material convictions. The Court had before it victim personal statements of TF and JY dated 18 March 2018. Both described in telling detail the impact of these crimes committed against them when they were children and its continuing effect on them, which included their fears and anxieties for their own daughters. We have also seen further statements expressing their concern about this appeal, setting out its impact on them. We fully understand the effect of the

appeal process on them, although ultimately this court must adopt an approach which is consonant with the law and established principles, as it must in all appeals.

11. In passing sentence the judge said that he recognised the appellant's background had been extremely difficult and deprived. He had been very fortunate to have been given a home by members of his extended family. The shocking reality was that over a number of years he had subjected two young girls aged between six and 11 to the most serious and systematic sexual abuse, which had culminated in each of them being vaginally raped on a number of occasions. That offending had been in addition to a large number of other sexual offences carried out against each of them, including digital penetration and forced masturbation. His offending started when he was relatively young but the fact that the offending had gone on until he was 17 in the case of JY and, as the judge said, 19 in the case of TF could not be ignored. The judge said that he would make some allowance for the fact that his earlier offending in relation to each of the victims took place when he had been younger. The offending was aggravated by ejaculation onto a child's face and the fact the offending had taken place in a home setting where each child should have been safe. He had also made threats to try and secure their compliance and to avoid detection of his offending over a long period of time. The offending equated to a campaign of sexual violence involving serious repeat offending that had gone on for years. His last act of betrayal was to put his victims through the ordeal of a trial. However the jury had seen through the allegations that he had advanced against the victims and he had been convicted on all counts.

12. The judge noted that the victim personal statements had described the devastating effect

and impact of his crimes on the two victims. His behaviour had destroyed much of their childhood and even as adults they carried the scars. They had been particularly vulnerable due to their young age when the abuse had started and the psychological harm caused to them had been profound.

13. By reference to the Sentencing Council Guidelines for the offence of rape of a child under the age of 13, the judge concluded that it fell within Category 2 in terms of harm. As far as culpability was concerned, he concluded that it fell towards the top end of Category B. Subject to totality, the judge passed sentences on the rape counts with no separate penalty on the other counts. The appellant had done some truly terrible things and had caused immeasurable harm and would have to go to prison for a long time. He then passed the sentences to which we have referred: a total sentence of 24 years' imprisonment. The judge added:

You will serve half of that sentence and the licence periods will each be extended by 12 months...

14. In the grounds of appeal and in her oral submissions, Miss Cherrill raised three matters of complaint. First, an over-arching submission that, despite the nature and extent of the offending, a sentence of 24 years was plainly too long. In any event, the sentences should have been imposed concurrently since they occurred at the same time. Secondly, she submitted that the judge gave insufficient weight to the appellant's youth at the time that the offences were committed. The dates on the indictment were not exact, but on any view he had been under 18 at the time he committed most, if not all, of the offences. Thirdly, she submitted that the judge gave insufficient weight to his traumatic background

which underlay these offences and the principle of totality.

15. It was the second of these grounds that alerted the Court of Appeal Office to the possibility that the further period of licence that must be imposed under section 236A in respect of offenders of particular concern where the person was aged 18 or over when the offence was committed - see section 236A(1)(b), had been imposed on an offender who was not over 18 during the period covered by the rape count.

16. Miss Lindop, who appears for the prosecution, submitted that there had been abundant aggravating features in relation to the offences of rape which had included ejaculation. Although the judge's sentencing remarks did not appear to reflect the appellant's youth, nevertheless, when the whole of the sentence was considered, it was clear that he must have made the appropriate allowance for the appellant's age and relative youth, as he said he had done. She submitted that the judge clearly had the principle of totality in mind and passed a sentence in accordance with that principle. She acknowledged that the appellant's age at the time of the rape offences precluded the court from imposing an additional period of licence under section 236A of the Criminal Justice Act 2003. Since the dates in the indictment showed that the offences were committed before his 18th birthday. However, she argued that there was one offence, count 9, when the offence was committed at a time when he was over 18. The basis for this was that TF's evidence in an ABE interview was that the offence took place when she was eight years old. Her birthday was 25 July 1989 by which time the appellant had had his 18th birthday. As Miss Lindop explained: There was a line in the ABE interview to this effect, although there was no date for the wedding referred to the count in the indictment (count 9). She submitted that although the judge

imposed no separate penalty in respect of count 9, it was a qualifying offence and the overall offending justified the imposition of an additional 12 months' licence pursuant to section 236A.

17. We start with the general approach of the judge. It is clear that he focused on the rape offences as being the most serious of what was serial offending over a lengthy period of time. In our view he was entitled to do so, and to place this offending within Category 2B of the Sentencing Council Definitive Guidelines for Sexual Offences for what would have been an offence contrary to section 5 of the Sexual Offences Act 2003 - see page 27 of the guidelines. He was also entitled to pass consecutive sentences in view of the fact that the offending was committed against different victims, providing of course he kept in mind the principle of totality.

18. This was an offence of Category 2 harm and Category B culpability. The guidelines indicate that for Category 2B offending the starting point is a term of 10 years with a range of eight to 13 years. The judge took 12 years in respect of the overall offending against each victim. In our view that does not give rise to legitimate complaint. These were not single offences of rape. There were two rapes charged in respect of JY and three in respect of TF. At the time of these crimes each victim was under the age of nine. The offending was marked by two aggravating factors as set out in the guidelines: ejaculation and steps taken to prevent the victims from reporting the offending which, as well as being oppressive in itself, enabled the offending to continue. There were also other offences that had to be taken into account: the serious indecent assaults against both victims and the charge of false imprisonment in the case of JY.

19. Our concern about the sentencing exercise is that the judge appears not to have taken into account the age of the appellant at the time of the offending. We have no doubt that in the light of the age difference between the appellant and his victims he would have seemed an adult, able to enforce his will upon them and to exert pressure by threats as to what would happen to them if they spoke out. However, the indictment specified a period during which he was 13 and 17 when he committed the offences of rape against TF and between 16 and 19 when he committed the offences against JY.
20. The decision of this court in *R v LF* [2016] 2 Cr.App.R (S) 271 provides at paragraph 27 a helpful checklist for judges when they consider the application of section 236A. Question C is: "Was the offender aged 18 or over when the offence was committed?" The judge plainly could not have considered that question, otherwise he would not have passed the 12-month period of extended licence in respect of the rape offences which the prosecution accept took place when he was under 18.
21. In our view, some adjustment to the sentence should have been made to the term of 24 years to take into account the appellant's relative youth. On the particular facts of this case we are persuaded that the reduction should have led to an overall sentence of 18 years.
22. We turn then to the specific issue raised by the sentences under section 236A. As we have noted, the prosecution accepts that these were unlawful and relies on the conviction on count 9 to justify a single period of 12 months special period of licence under section 236A. While we see the force of the point as a matter of analysis, the difficulty is

that the way in which the indictment was drafted, no doubt for good reason, covered a three year period from 25 July 1987 to 24 July 1990. For two years of that period, up to 25 July 1989, the appellant would have been under 18. The issue might have been specifically addressed by the judge since he had presided over the trial and this might have enabled him to be sure the offence had been committed when the appellant was 18. However, he did not do so, and in our view the issue is not sufficiently clear for this court effectively to re-sentence so as to impose a new and separate sentence on count 9 with an additional 12-month period of licence under section 236A.

23. Accordingly, we quash the sentences of 12 years on each of counts 4, 5, 12, 13 and 14 and substitute sentences of nine years on counts 4 and 5 and a further nine years on counts 12, 13 and 14 to be served consecutively. A total term of 18 years' imprisonment. We also quash the two sentences imposed under section 236A. To that extent the appeal is allowed.