

Neutral Citation Number [2019] EWCA Crim 1269
2018/04367/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 10th July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CHOUDHURY

and

HIS HONOUR JUDGE FIELD QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

R J

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Mr A Fell appeared on behalf of the Appellant

J U D G M E N T
(Approved)

LORD JUSTICE HOLROYDE:

1. This appellant was convicted of sexual offences committed almost 50 years ago against his younger half-sister. On 4th October 2018, in the Crown Court at Isleworth, he was sentenced by His Honour Judge Curtis-Raleigh to a total of six and a half years' imprisonment.

2. He now appeals against his sentence by leave of the single judge.

3. We shall refer to the victim as "J". She is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences. In view of her family relationship to the appellant, it will be necessary for him to be anonymised in any report of these proceedings.

4. The offences were committed between 1968 and 1971, when the appellant was aged between 17 and 20 and J was aged between 8 and 10. All the offences were committed in J's bedroom at the family home at night, at times when the parents were downstairs. It seems that some or all of the offences were committed after the appellant had been drinking in the earlier part of the evening.

5. On count 1 of the indictment, the appellant was convicted of indecency with a child, contrary to section 1 of the Indecency with Children Act 1960. That charge related to the first sexual offence committed against J, when the appellant exposed his penis and asked her to touch it.

6. From that beginning, the appellant's offending rapidly escalated in seriousness. Count 2 charged indecent assault, contrary to section 14 of the Sexual Offences Act 1956. This charge related to the first occasion when he made J suck his penis. After the first such occasion, J said that the appellant would repeat the act "every weekend that he could".

7. Count 3 was a multiple incident count of indecent assault, contrary to section 14 of the 1956 Act. The particulars of the charge specified that the offence was committed on at least three occasions, in addition to the occasion charged in count 2.

8. Eventually, when she was aged about 9, J told her mother what the appellant was doing. Sadly, her mother did not believe her and called her an "evil child". J does not know whether anything was said to the appellant, but his offending stopped. It was not, however, until many years later that the offences were reported to the authorities.

9. The appellant was arrested in February 2017. In interview under caution, he denied J's allegations, saying that they were "rubbish". He claimed to have had a good relationship with his family, until a row at the time of his 40th birthday. He maintained his denial at the trial held in September 2018, but was, as we have said, convicted of all charges.

10. The appellant was aged 67 when sentenced. He is now just 68. His only other conviction was in 1983 for an offence of theft, which does not impact upon the sentencing decision.

11. No pre-sentence report was thought to be necessary at the time of sentencing; and we are satisfied that none is necessary now.

12. J had made a Victim Personal Statement following the appellant's convictions. She said, unsurprisingly, that she was still hurt by her mother's failure to believe her. She said of this:

"... even when I found the courage to tell her what [the appellant] was doing to me and how I wanted this to stop, she didn't believe me and told me I was never to mention this again or speak to anyone else about this, ever."

The result is that, in addition to suffering the other consequences of these offences, J says that throughout her adult life she has felt ashamed that she had not been able to do anything years ago. In the experience of this court it is sadly far from unusual for a victim of offences of this nature to feel such a sense; but there is no foundation for it and J should not feel any shame. J went on to say in her statement that, as a result of these events, she felt that her relationship with her mother had been destroyed. She had been pushed aside after her disclosures, with the result, she said, that the appellant's offences had taken her childhood away from her.

13. It appears that the appellant lived away from the family home for a time during J's adolescence, but returned to live there when she was about 13. Of this development, J said:

"My freedom to be comfortable in my own home was gone. I no longer felt comfortable walking around at home in my nightdress and dressing gown. I could no longer be in the same room as him especially if no other member of the family were in there. From this day on I no longer felt part of my own family and I felt that I became a shadow of my former self."

J added that, despite her happy marriage and her loving relationship with her own children, she continued to suffer flashbacks of the offences. After the appellant's arrest, the "horrid memories" had come flooding back and she became depressed. She was signed off work for some time and was prescribed antidepressant medication.

14. In light of the well-known decision of this court in *R v Forbes* [2017] 1 WLR 53, the judge was required to sentence appropriately in accordance with current sentencing practice, but could not exceed the maximum sentence available at the time when the offences were committed. The maximum sentence available at that time was two years' imprisonment on count 1 and five years' imprisonment on each of counts 2 and 3. In a striking illustration of the increased seriousness with which offences of this nature are now regarded, it was common ground at the sentencing hearing that for the offending charged in counts 2 and 3, the modern equivalent offence under the Sexual Offences Act 2003 would be rape of a child aged under 13, contrary to section 5 of that Act, which carries a maximum penalty of life imprisonment. It was further common ground that the offences would today fall within category 2B of the guideline applicable to sentencing cases of rape of a child under 13. The guideline indicates a starting point of ten years' custody and a range from eight to thirteen years. The judge was required, in accordance with [9] of *Forbes*, not simply to apply that guideline but to cap it at the maximum sentence under the 1956 Act, but rather to "use the guideline in a measured and reflective manner to arrive at the appropriate sentence".

15. In his sentencing remarks, the judge rightly emphasised the effect of the offences on J. She

had suffered a great deal over the course of her life as a result of what the appellant had done. He considered the guideline and said that if similar offences were committed today, the sentence would clearly be in double figures. Important factors were the commission of the offences in J's own bedroom, where she was entitled to feel safe, and her young age at the time. He took into account the matters of mitigation which were put forward by Mr Fell, then as now representing the appellant. The offences were committed when the appellant was aged 17 or 18. Aged 67 at the time of sentencing, he had in the intervening years led a blameless life (with the solitary exception of the single, unrelated offence). It was submitted to the judge that, at the time of sentencing, the appellant was in poor health and that his elderly wife was largely dependent upon him.

16. Balancing all those factors, the judge imposed eighteen months' imprisonment on count 1, a concurrent term of three and a half years' imprisonment on count 2, and a consecutive term of three years' imprisonment on count 3, thus arriving at the total sentence of six and a half years' imprisonment.

17. In his written grounds of appeal, Mr Fell submitted that the total sentence was manifestly excessive, having regard to the appellant's age at the time of the offences, his age when convicted, his previous effective good character, his good behaviour since the offences, and his then existing ill-health.

18. In most helpful and focused submissions to the court this morning, Mr Fell has added to those points. He has referred to the fact that the appellant, as can be seen on the video-link, is now confined to a wheelchair, having suffered a fall whilst in prison at the beginning of this year in which he sustained fractures of his hip and arm. We recognise, of course, that for a man already elderly and in ill-health to suffer such injury, and as a result to be wheelchair-bound, necessarily adds to the difficulty of serving a prison sentence. The principal focus of Mr Fell's submission has been on the young age of the appellant at the time the offences were committed.

19. At this stage of the proceedings, we are concerned with the total sentence imposed, rather than with the structure by which that total was reached. Standing back, the appellant fell to be sentenced for one relatively minor sexual offence and for at least four very serious offences committed over a period of time against a young victim who suffered the lasting harm which is apparent from her Victim Personal Statement.

20. The judge was faced with a difficult sentencing process. In addition to making measured and reflective use of the guideline for current offending, he had to take into account that the appellant was aged only 17 when the offending began, thus making it appropriate to consider the separate guideline relating to the sentencing of young offenders, and was only a very young adult at the time of the latest of the offences. In this regard, it is relevant to note that no submission was made to the judge below, or to this court, to the effect that the appellant was particularly immature for his age. The appellant's good conduct over many years was a factor in his favour, particularly bearing in mind his youth at the time of the offences. But as both the guideline and *Forbes* at [23] to [24] make clear, this can carry only limited weight against such serious offending. In referring to the seriousness of the offending, it is appropriate at this point to refer again to the lifelong effect of the offending upon its victim.

21. Matters of ill-health can also in general carry only limited weight, when balanced against the seriousness of the offending. Whilst we recognise that the serving of a prison sentence has become harder for the appellant as a result of his recent injury, we do not regard that development as a factor which bears upon the sentencing decision.

22. The judge clearly had all relevant considerations well in mind and carefully balanced them. In our judgment, the total sentence of six and a half years' imprisonment was within the range properly open to him. It cannot be said to be manifestly excessive.

23. In those circumstances, grateful though we are to Mr Fell for his submissions, the appeal fails and is dismissed.

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