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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NOS 202202816/A3 & 202202648/A3

NCN [2022] EWCA Crim 1819

Royal Courts of Justice
Sitting at Cardiff Crown Court
Law Courts
Cathays Park
CF10 3PG

Wednesday 9 November 2022

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION

LORD JUSTICE HOLROYDE

MRS JUSTICE FOSTER DBE

MR JUSTICE GRIFFITHS

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

and

APPLICATION FOR LEAVE TO APPEAL SENTENCE

REX

v

JOSHUA CARNEY

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court
MR B LLOYD appeared on behalf of the Attorney General/Respondent
MR C REES appeared on behalf of the Offender/Applicant

J U D G M E N T

1. THE VICE PRESIDENT: Joshua Carney, to whom we shall for convenience refer as “the applicant”, pleaded guilty to seven offences of rape and other serious offences committed against a mother and daughter. He was sentenced to life imprisonment with a minimum term of 10 years.
2. His Majesty's Attorney General considers that sentence to be unduly lenient, and accordingly applies pursuant to section 36 of the Criminal Appeal Act 1988 for leave to refer the case to this court so that the sentencing may be reviewed.
3. The applicant submits that the sentence of life imprisonment was wrong in principle or manifestly excessive. His application for leave to appeal against sentence has been referred to the full court by the Registrar.
4. The victims of the offences are entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify either of them as the victim of these offences. As the judge did at the sentencing hearing, we shall refer to them simply as the mother and the daughter.
5. The offences were committed around 7 am on 1 March 2022. The applicant, aged 28, had been released four days earlier from a long prison sentence for burglaries. He was under the influence of Spice or another drug and/or of alcohol.
6. The mother heard a noise outside her front door and went to investigate. She saw the applicant, who was barefoot and dishevelled. He forced his way in and locked the door behind him. He punched the mother repeatedly about the head and threatened to stab her if she did not stop screaming. The daughter, who had been asleep upstairs, locked her bedroom door and dialled 999. She could hear some of what was happening downstairs

and feared that her mother had been stabbed.

7. We briefly summarise the facts of the offences which the judge was later to describe, accurately as "the stuff of nightmares". The applicant first attempted to rape the mother vaginally. He raped her orally. He then dragged her upstairs, assaulting her with punches when she tried to get away. He again raped her orally in her bedroom. He then demanded to know which room the daughter was in, despite the mother telling him that she was only 14 and imploring him to leave her alone. He took the daughter's mobile phone from her and took her to join her mother. He orally raped her mother in front of her. He hit the daughter to make her take her clothes off and commanded the mother to watch. He penetrated the daughter's vagina with his tongue and raped her both vaginally and orally. He then forced his fingers into the daughter's vagina, telling her that that was her punishment for calling the police. He again raped the daughter vaginally in front of her mother, this time ejaculating inside her. He was not wearing a condom.
8. The applicant then tried to leave, taking the stolen phone with him, but was detained outside the house by police officers responding to the 999 call.
9. The applicant was charged with six offences of rape, one of attempted rape, two of assault by penetration, one of committing an offence with intent to commit a sexual offence, two of assault occasioning actual bodily harm and one of theft. He pleaded guilty at a plea and trial preparation hearing in the Crown Court at Cardiff. He was sentenced at a hearing on 22 August 2022 by the Honorary Recorder of Cardiff, Her Honour Judge Lloyd-Clarke.
10. The applicant had previously been sentenced on 24 occasions for a total of 47 offences, most of them offences of burglary or theft but including some offences of violence when he was an adolescent. His most recent sentence was one of eight years' imprisonment for

a number of offences of house burglary, all of which had been committed whilst on bail.

He was on licence from that sentence when he committed the present offences.

11. The judge was assisted by a pre-sentence report and a psychiatric report. The pre-sentence report noted that since his teenage years the applicant had had no meaningful periods when he had abstained from offending. He had appeared to be doing well in prison shortly before his release on licence, but had committed these offences within days of release. The author assessed the applicant as posing a high risk of harm through sexual violence to women and girls. He expressed the view that the persistent pattern of burglaries set the circumstances for further serious offending, which could happen at any time.
12. The applicant had told the authors of both reports that he had no recollection of the present offences and was disgusted by what the evidence showed he had done. The consultant psychiatrist thought it likely that the applicant was intoxicated or suffering from drug-induced psychosis at the material time. The applicant had been assaulted in prison some years earlier and had been diagnosed as suffering from post-traumatic stress disorder as a result. There were also possible diagnoses of a mixed personality disorder and polysubstance misuse disorder. No medical disposal was suggested.
13. Both mother and daughter had made victim personal statements, which made clear the fear they had experienced and the flashbacks and nightmares which they have suffered ever since. Each expressed feelings of guilt at having been unable to protect the other. Those are understandable emotions, but of course neither has any reason to reproach herself. They had felt unable to remain in their home and had had to move away. The daughter's education had been interrupted and she was unhappy attending school because she would be asked intrusive questions. The judge summarised the evidence as showing

- that the offences had had a very severe effect on both victims which would last a lifetime.
14. The judge considered the sentencing guidelines relating to the individual offences and the over-arching guideline relating to totality. She indicated that she would pass concurrent sentences with the sentences for the rape offences reflecting the overall seriousness of the offending. No criticism is or could be made of her approach. Counsel on both sides had provided helpful sentencing notes and were able to make submissions on the issues of dangerousness and the appropriate type of sentence.
 15. It was common ground that the rape offences involved level B culpability under the relevant guideline. The judge found that six of the eight features indicating Level 2 harm were present: severe psychological harm; additional degradation or humiliation (in particular by forcing each of his victims to watch what he was doing to the other and by his derogatory comments to them); a sustained incident; violence or threats of violence going beyond what was inherent in the offences; forced or uninvited entry into the victims' home; and, in the daughter's case, a victim who was particularly vulnerable because of her youth. The judge was satisfied that the combination of those factors and the extreme impact on the victims justified a movement upwards into the Category 1B sentencing range.
 16. The judge identified a number of aggravating factors: the previous convictions (in particular those involving entering homes); ejaculation during one of the rapes of the daughter; the location of the offences in the victims' home and bedrooms; the fact that they had felt compelled to leave their home; the commission of the offences whilst on licence; the applicant's intoxication; and the increased trauma resulting from the mother/daughter relationship of the victims.
 17. The judge was satisfied that any mental health problems did not reduce the applicant's

culpability but gave them some little weight as mitigation. She also took into account the fact that the applicant had no previous convictions for sexual offending.

18. The judge found the applicant to be a dangerous offender, having regard to the nature and circumstances of the offences; the deliberate sadism involved in making each victim watch him raping the other; the use of sexual violence as a means of punishing the daughter; the evidence that the applicant was throughout acting in a controlled and deliberate manner; the applicant's capacity for manipulative and predatory behaviour; and the high risk of further sexual violence. She was satisfied that the seriousness of the offences justified a life sentence. She concluded that such a sentence was necessary because previous sentences had done nothing to deter the applicant from offending, his offences were becoming increasingly serious and there was no realistic prospect of his ceasing to abuse drugs. His motive in committing these offences was unknown, and it was impossible to assess when, if ever, the risk of further offending would end.
19. As to the minimum term, the judge concluded that an appropriate total determinate sentence after trial would have been 20 years' imprisonment. That notional term was to be reduced by 25 per cent to reflect the guilty pleas. The appropriate minimum term was therefore two-thirds of 15 years.
20. For each of the offences of rape and attempted rape, the judge sentenced the applicant to imprisonment for life and specified a minimum term of 10 years. She imposed concurrent standard determinate sentences of six years for assault by penetration, two years for committing an offence with intent to commit a sexual offence, nine months for each offence of assault occasioning actual bodily harm and no separate penalty for the theft. A number of consequential orders were made, about which we need say no more.
21. On behalf of the Solicitor General, Mr Ben Lloyd submits that the life sentences were

appropriate but that the minimum term was unduly lenient. He submits that for any one of the offences of rape, the number of Category 2 harm factors necessitated an initial upwards adjustment of the guideline starting point, and that the serious aggravating factors then necessitated a further increase to or beyond the top of the category range. The judge then had to reflect the facts that there were multiple offences and that there were two victims. Mr Lloyd submits that a notional determinate sentence of 20 years was much too short to reflect the overall seriousness of the offending and that a significantly longer minimum term was therefore necessary.

22. On behalf of the applicant, Mr Christopher Rees opposes those submissions. He emphasises the fact that the applicant has no previous convictions for sexual offences and has only once before committed any specified offence, that being when he was just 16 years old. In his application for leave to appeal against sentence Mr Rees makes no challenge to the finding of dangerousness or to the length of the notional determinate sentence on which the minimum term was based. He submits however that the safety of the public could sufficiently be protected by a standard determinate sentence or an extended sentence, and that a life sentence was therefore not justified. In particular, he submits that if the judge had passed an extended sentence, the applicant would have to serve at least two-thirds of the custodial term, would not be released before the end of the full custodial term unless the Parole Board assessed him as suitable for release, and would then be subject to licence conditions for what could be a lengthy period.

23. We have summarised those submissions very briefly, but we have taken into account all that was said on each side. We are very grateful to counsel for the clarity of their submissions, which we have found very helpful.

24. Reflecting on those submissions, we have reached the following conclusions. This was a

difficult sentencing exercise which the judge carried out with great care. We regard her approach as impeccable and we pay tribute to the clarity with which she explained the course she took.

25. The finding of dangerousness was supported by the pre-sentence report and was in reality inevitable for the reasons which the judge explained. It is, as we have said, sensibly not challenged.

26. Having made that finding, the judge correctly went on to consider what type of sentence was necessary. By section 285 of the Sentencing Code she was required to impose a sentence of imprisonment for life if the seriousness of the offending was such as to justify the imposition of such a sentence. Case law makes clear that a life sentence is a sentence of last resort: see in particular Attorney General's Reference No 27 of 2013 (R v Burinskas) [2014] EWCA Crim. 334, in which Lord Thomas, CJ said at paragraph 22 that the question whether the seriousness of the offending justified a life sentence required consideration of:

"i) The seriousness of the offence itself, on its own or with other offences associated with it ... This is always a matter for the judgement of the court.

ii) The defendant's previous convictions ...

iii) The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.

iv) The available alternative sentences."

27. As counsel have submitted, the judge was therefore required to consider, and clearly did consider, whether a standard determinate sentence or an extended sentence would provide sufficient protection for the public. She was entitled, and in our view correct, to conclude

that they would not. The offending here was not only very grave, but also gives rise to serious concerns for the future. There is nothing in the evidence to suggest that the applicant targeted the victims' home with sexual offending in mind; but if he did not, and if he was merely resuming his career as a burglar, then he switched with alarming speed from acquisitive crime to repeated sexual offences, showing a most disturbing attitude towards his victims. The judge was entitled to find that it was impossible to assess when, if ever, the risk for the public would end. Indeed, on the evidence available to the court it is in our view difficult to see what other findings she could have made.

28. The judge then had to reflect that under a standard determinate sentence or an extended sentence the applicant would be entitled to release at latest at the conclusion of the custodial term, whether or not he was assessed as presenting a danger to the public at that stage. He would be subject to licence conditions, which under an extended sentence could be for a lengthy period, but the circumstances of the present offending show that the licence conditions in force did not control the applicant's behaviour or deter him from further burglaries for more than a handful of days. In those circumstances, the sentence of last resort was justified and necessary. We do not regard the contrary as arguable and the application for leave to appeal against sentence must accordingly fail.

29. We turn to the length of the minimum term, which we emphasise is of course simply the minimum term which must be served as punishment before the applicant may apply for consideration for release on life licence.

30. We accept the submission that the guideline starting point for category B2 had to be increased to reflect the multiplicity of category 2 harm factors, and further increased to reflect the serious aggravating factors which substantially outweighed the limited mitigation. However, the judge was of course under a duty to impose the minimum

custodial term consistent with the overall seriousness of the offending. She had to be careful to follow the totality guidelines and to avoid double counting, for example as between the Step 1 factor of a sustained incident and the fact that there were several discrete incidents of rape within the overall offending. We do not think the applicant could have had any successful complaint if a slightly longer minimum term had been imposed, but we are not persuaded that the sentence imposed was one which, in the familiar words of Lord Lane CJ in Attorney General's Reference No 4 of 1989, 1990 1 WLR 41 at page 46A: "Falls outside the range of sentence which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate." It was not therefore unduly lenient.

31. For those reasons, we refuse leave to refer and we refuse leave to appeal. The effect of our decision is that the sentences remain as before.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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