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IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL
FROM MANCHESTER CROWN COURT
(HER HONOUR JUDGE H MANLEY)
Case No: 2024/00002/A5
NCN:[2024] EWCA Crim 824



Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 9th July 2024

B e f o r e :

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MRS JUSTICE THORNTON DBE

R E X

- v -

MOHAMMED NADEEM HUSSAIN

Miss D Fitzpatrick appeared on behalf of the Appellant

Mr H Edwards appeared on behalf of the Crown

APPROVED JUDGMENT

MR JUSTICE BRYAN:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. This judgment has been anonymised accordingly.

2. On 2 October 2023, following a trial in the Crown Court at Manchester Crown Square, before Her Honour Judge Hilary Manley and a jury, the appellant (then aged 26) was convicted of the attempted rape of C1 (Count 2) and assault occasioning actual bodily harm of C2 (Count 4). He was found not guilty of the intentional strangulation of C1 (Count 1) and the oral rape of C2 (Count 5).

3. On 1 December 2023 he was sentenced by the Learned Judge in respect of Count 2 to life imprisonment, with a minimum term of eight years, pursuant to section 323 of the Sentencing Act 2020, and to a concurrent term of four years' imprisonment in respect of Count 4.

4. The appellant appeals against sentence with the limited leave of the single judge. The ground on which leave was granted is that the Learned Judge erred in principle and/or passed a manifestly excessive sentence when she imposed a life sentence rather than an extended sentence under sections 279 and 280 of the Sentencing Act 2020. Other grounds that were refused, and were not renewed before us, included that the minimum terms of eight years was itself manifestly excessive.

5. In order to put the sentence that was passed into its full context, it is necessary to set out not only the facts of the current offending, but also those relating to the appellant's previous serious sexual offending.

6. We deal first with the facts of the current offending. On 10 August 2022 the appellant went out in the Cheetham Hill area of Manchester in the early hours of the morning. In the light of the appellant's previous offending behaviour and the evidence at trial, the Learned Judge concluded that he was deliberately on the lookout for sex workers to target in order to express his violent sexual feelings towards females. His first victim was C1. Having agreed to pay her to provide him with oral sex, he then became violent. He sought to justify his impulses to hurt and humiliate her by claiming that she had in some way short changed him, which was untrue. He shoved her to the ground and proceeded to attempt to rape her vaginally. This whole episode was captured on CCTV and it shows an extremely determined and concerted attempt to commit rape. The appellant's bare buttocks are visible between her thighs. His pelvis is thrusting against her groin area, and this continues for a lengthy period of time (some seven minutes).

7. The light of the appellant's mobile phone camera can be seen on the CCTV footage and it is clear (as per C1's evidence) that the appellant was filming his attack whilst simultaneously providing a running commentary, saying things such as: "Raping this fucking bitch, this fucking slag right now". C1 heard the appellant playing back a recording of her voice saying: "Please don't hurt me".

8. In the course of this attempted rape, the appellant pulled down C1's top, kissed her breasts, pulled down her underwear and licked her vagina, before then removing the condom that she had put on his penis for the oral sex. The appellant then pulled down his trousers and underwear to below his knees and began a long and protracted process of trying to rape C1,

during the course of which C1 could feel his penis on her genitals. During this the appellant taunted her, saying: "Do you like this, you fucking slag? I love role play and this is what I do to my little sister". C1's ordeal only ended, not due to any decision or action to desist on the appellant's part, but by chance as a passer-by disturbed the appellant which gave C1 the chance to flee.

9. With just seven minutes the appellant had selected another victim, C2. Again, he agreed to pay her to provide him with oral sex. Again, on the pretext that he had been ripped off by her in terms of how long it would continue, the appellant turned violent and visited upon her a determined, vicious and brutal, physical attack. He punched and kicked her multiple times to the head and face. He put his hands around her throat and forced his fingers into her mouth. She struggled to breathe and she thought that she would die. During the course of the attack he told her "Shut up bitch". She feigned unconsciousness in an attempt to bring the ordeal to an end. She only managed to get away from the appellant when he paused for a moment and she took the opportunity to flee. The attack took place over a prolonged period of time which lasted 10 to 15 minutes. She sustained graphic injuries at the hands of the appellant. They are clearly shown in the photographs before us. During the course of the attack, her dialysis tube was dislodged which necessitated C2's admission to hospital. She never returned home. She died three weeks later. The appellant's attack did not directly cause her death, which was the result of her tragic life of substance abuse and frail health, but it was as a consequence of the appellant's brutal attack that she had to be hospitalised to have her dialysis tube re-inserted.

10. Shockingly, these offences were committed only 14 weeks after the appellant had been released on licence, having been sentenced to an extended sentence in 2017 for multiple offences of sexual activity with a child under 16 and making indecent photographs of children. The earlier finding of dangerousness and the associated extended sentence had accordingly done nothing to prevent what can only be described as an escalating pattern of violent sexual offending by the appellant.

11. The appellant has what the Learned Judge rightly described as a profoundly troubling criminal record. At the age of only 26 he already had five convictions for 13 offences, spanning from 20 June 2015 to 11 October 2017. His relevant convictions included an offence of battery (in 2015); disclosing private sexual photographs and films with intent to cause distress (three offences in 2016); attempting/causing a child under 13 to watch a sexual act in 2016; assault occasioning actual bodily harm (in 2016); sexual activity with a child (three offences in 2017); and making indecent photographs of children (three offences in 2017).

12. More specifically, he had previous convictions for assaulting his then girlfriend, "CF", and another for assaulting her new boyfriend. During the course of his relationship with her, CF allowed him to take explicit photographs and videos of them engaging in sexual acts. On New Year's Eve 2015/2016 the appellant and CF had planned to meet, but in the event they did not. He called her a "dirty slag" during a telephone conversation and accused her of cheating on him. The appellant sent CF's 12 year old sister sexualised private messages on Facebook, stating: "We can go out. I can take you anywhere, or I'll give you money. Do you remember when you came downstairs in the kitchen in your knickers? You've got a cute little arse. When I was fucking your sister, I used to imagine it was you. Ask your sister. I pretended it was you. Don't tell or show anyone this. This is our little secret. Ring me." The messages also contained the appellant's number and 15 images and 26 videos of the appellant and CF engaged in sexual activity. In addition, the appellant included three images of him holding his erect penis. Thereafter, the appellant and CF continued to argue. He posted on Facebook numerous images of CF either nude or engaged in sexual activity with the appellant

– all without her consent. He messaged her that he would continue uploading similar videos. Accompanying one set of images of CF, the appellant wrote: "Pics and vids are flying out. Don't give a fuck about this slag".

13. The appellant's behaviour then escalated to contact sexual offending with a child. On 11 October 2017, the appellant was sentenced in respect of three offences of sexual activity with a child under 16 and offences of possessing indecent images of children. He was found to be dangerous (as defined within section 308 of the Sentencing Act 2020) and was sentenced to a total of 54 months' imprisonment, with an extended licence of 36 months.

14. The facts of that offending were as follows. The victim was a 14 year old girl and the appellant was 19 years old at the time. She was residing in a children's home. Following her grooming by the appellant, they met up and the appellant invited her back to his flat. There he gave her five or six large vodka and cokes. She became drunk and they began to kiss. Throughout the kissing, the appellant took photographs and video recordings of the victim. She says that the appellant then became rough. He placed his hands around her neck and squeezed. She had bruising to her neck and back as a result. She told him to stop and he did for a short period. He told her that he wanted to continue having sex and she let him do so. She described being very drunk, almost semi-conscious. During the sexual intercourse the appellant said to her: "Do you want me to stop or do you want me to rape you?" The victim describes being frozen in fear. She recalls closing her eyes and awaking to find the appellant holding her hair and his penis in her mouth. On another occasion she said that she had closed her eyes and the appellant put his hands back around her throat. She cried and the appellant told her to "shut up, you dirty little slag". When the police arrested the appellant, they seized a mobile phone from him on which were recovered 40 images of the victim, 7 of which were in a Snapchat folder.

15. The parallels with the current offending are obvious in terms of the type of sexual violence, what he said and did to women, and the worrying trend of ever increasing sexual violence. The appellant had only been released from prison on licence on 29 April 2022, and just over three months later he was offending again, with the trend escalating to even more serious sexual and physical violence.

16. The Learned Judge had a pre-sentence report before her. Whilst its author was under the misapprehension that the appellant had also been found guilty of the intentional strangulation of C1 and the oral rape of C2, much of her report remained apposite. She identified that the appellant betrayed significant deficits in terms of his beliefs and attitudes towards women to whom he showed objectifying and abusive attitudes and dehumanised them, all whilst failing to recognise the harm he caused. He used sexual offending as a means of asserting control, and he had a perceived sense of entitlement to act as he did. He used both alcohol and heroin in a lead up to his current offending, which impeded his judgment and disinhibited his behaviour. The author concluded that he represented a high risk of serious harm to the public, namely female sex workers, future partners, and female children aged 12 upwards.

17. The Learned Judge also had a psychiatric report before her from a Dr Antonesei. She concluded that the appellant presented a moderate for "future violence", a moderate for "serious physical harm", which she explained as a moderate risk that the violence would involve or escalate into a serious or life-threatening physical harm.

18. In her sentencing remarks, the Learned Judge first set out the circumstances of the current offending, as well as his previous offending, and identified his relevant previous convictions. She stated: "It is clear you view these women as beneath your contempt and you treated them accordingly. You have a profoundly troubling criminal record." She noted that

there were similarities in the way in which the appellant had behaved to the complainants and the way in which the appellant had behaved in the earlier offences.

19. The Learned Judge chose to sentence on Count 2 (the attempted rape of C1) to reflect the totality of the offending on that night, including the violence inflicted on C2. That was clearly an appropriate course. She sentenced by reference to the Sexual Offence Guideline for the offence of rape, noting, rightly in our view, that the attempted rape of C1 came as close to the completed offence as it is possible to get. The fact that the appellant in the event failed to penetrate C1 was through no lack of trying on his part over the course of what was a prolonged, violent encounter, as caught on the CCTV; it only ceased due to the appellant being disturbed.

20. The Learned Judge identified that the offending was Category 2 harm. It was a sustained incident, C1 was particularly vulnerable as a woman who was providing sexual services late at night on the street, and she was subject to additional degradation and humiliation. The Learned Judge drew back from concluding that the extreme nature of those factors elevated the full offence to Category 1, but they placed the offending in the top of Category 2, with culpability A due to the recording of the offence, with a starting point of 10 years' custody, and a range of 9 to 13 years' custody. She rightly identified that the appellant's previous convictions were highly relevant and highly aggravating, as was the commission of the offences on licence for previous sexual offending and the very determined attempt to dispose of evidence by factory re-setting his mobile phone before it could be seized by the police.

21. The Learned Judge identified that the appropriate sentence before regard was had to the aggravating factors would have been 13 years' imprisonment (no doubt due to the number of Category 2 harm factors and to reflect the totality of the offending against both victims). She reduced that to ten years' imprisonment as an attempt, before increasing it to reflect the aggravating factors to a sentence of 12 years' imprisonment.

22. Turning to dangerousness, the Learned Judge had regard to the pre-sentence report, the psychiatric report and her own observations of the appellant throughout the trial and when giving evidence. She was wholly satisfied that there was a significant risk of the appellant causing serious harm in the future by committing further specified offences. In that regard she identified that the offences were committed by the appellant upon particularly vulnerable women whom she was satisfied the appellant deliberately targeted. The appellant demonstrated a vicious contempt towards each of them, and during their commission he sought further to degrade and humiliate them. The appellant committed the offences against a background of troubling sexual and violent offending towards females, as reflected in his previous convictions. She was wholly satisfied that the appellant presented a very grave and enduring danger towards all females, fuelled by an intense hatred towards them, and that this risk had escalated and continued to escalate. In addition, the appellant had been at liberty, subject to supposedly stringent licence conditions, for only 14 weeks before he committed the present offences. She noted that the appellant continued to deny the offences and had deliberately refused to attend court for his sentencing hearing, which illustrated the appellant's total lack of remorse or insight.

23. Having found the appellant to be dangerous, the next stage was for the Learned Judge to consider whether the seriousness of the offences justified a life sentence, pursuant to section 285 of the Sentencing Act 2020. In that regard the requirements of section 285(1) were met (the appellant was over the age of 21; the offence was a Schedule 19 offence; the offence was committed after 4 April 2005; and the Learned Judge had made a finding of dangerousness). Accordingly, section 285(3) was applicable. It provides:

"(3) If the court considers that the seriousness of —

(a) the offence, or

(b) the offence and one or more offences associated with it,

is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life."

24. The Learned Judge concluded that the seriousness of the offence against C1, coupled with the offence against C2 only minutes thereafter, justified the imposition of a sentence of imprisonment for life. Having reached such a conclusion, she had to impose a sentence of life imprisonment, which she did, setting the minimum term at eight years (two-thirds of a determinate sentence of 12 years).

25. She expressed her conclusions in these terms:

"... I appreciate that a life sentence is a sentence of last resort and I have considered this issue at length and with great care.

The offence of attempted rape, together with the associated offence of assault occasioning actual bodily harm, is, in my view, a particularly serious one. It is appropriate to treat the assault occasioning actual bodily harm as an associated offence. It was committed just seven minutes after the attempted rape against another vulnerable sex worker and was clearly a grotesque expression of your anger and hatred towards women.

Having taken into account your highly relevant previous convictions and the fact that it is clear that an extended sentence of imprisonment appears to have afforded no reduction of your risk – indeed you have if anything become more dangerous – I am of the firm view that the level of danger you pose to the public is extremely high and there is no reliable estimate of the length of time you will remain a danger. The fact that you are a man of only 26 years means that you have before you many decades in which, in my view, you will likely remain a very dangerous person. I am not satisfied that the available alternative sentences would provide sufficient protection to the public. Therefore I am satisfied that these offences are so serious that a sentence of life imprisonment is required. For the reasons I have already set out, I am satisfied that no lesser sentence is appropriate to protect the public. Therefore the sentence I pass upon you is one of life imprisonment. ..."

26. The appellant sought leave to appeal against sentence on the following grounds:

- (1) The offences for which the appellant had been convicted did not justify a sentence of imprisonment for life; and/or
- (2) Insufficient regard was had to the modus operandi of the attempted rape offence; and/or
- (3) Insufficient regard was had to the substantial differences between the previous offences and the instant offences; and/or
- (4) When considering that the appellant had spent 15 months remanded in custody before sentence, whilst also subject to recall on licence, resulting in that time not counting as served on the instant offence, the minimum term of eight years was too long; and/or
- (5) The appropriate sentence should have been an extended determinate sentence imposed under sections 279 and 280 of the Sentencing Act 2020 and the court erred in imposing a sentence of imprisonment for life.

27. The single judge gave limited leave to appeal against sentence. In doing so he stated:

"I consider that you should have the right to argue before the full court that your sentence of life imprisonment was manifestly excessive and that an extended determinate sentence of imprisonment would have sufficed. The submission that the minimum term of eight years' imprisonment was too long is not, in my judgment, reasonably arguable."

28. The grounds in relation to the length of the minimum term were not renewed before us, which we consider to have been a realistic approach as, like the single judge before us, we do not consider that the grounds, so far as they relate to the minimum term, are even arguable.

29. The real gravamen of the submissions advanced by Miss Fitzpatrick on behalf of the appellant, both in her helpful skeleton argument and in her oral submissions before us, for which we are very grateful, is that the offence against C1 (the attempted rape) and the associated offence of assault upon C2 were not such as to justify the imposition of a sentence of life imprisonment.

30. In *Attorney General's Reference No 27 of 2013 (R v Burinskas)* [2014] EWCA Crim 334; [2014] 2 Cr App R(S) 45, Lord Thomas CJ, giving the judgment of the court, gave guidance on a number of conjoined appeals in relation to what is now section 285(3) of the Sentencing Act 2020 (then section 225 of the Criminal Justice Act 2003). After stating at [18] that a life sentence remains a sentence of last resort, at [22] the court gave guidance as follows:

"22. In our judgment, taking into account the law prior to the coming into force of the CJA 2003 and the whole of the new statutory provisions, the question in s.225(2)(b) as to whether the seriousness of the offence (or of the offence and one or more offences associated with it) is such as to justify a life sentence requires consideration of: -

- i) The seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of

s.143(1). This is always a matter for the judgment of the court.

- ii) The defendant's previous convictions (in accordance with s.143(2)).
- 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."

31. The court then went on to consider the application of those factors in relation to the cases that were before it. The court stated (at [138]) that the "...court must consider all the matters set out at paragraph 22 of this judgment, starting with the seriousness of the offence itself. ...". Whilst it is of some assistance to consider those individual cases, ultimately every case will turn on its own facts. What is clear from the judgment and the consideration of the individual cases is that the seriousness of the offence itself (or of offences associated with it) is the first matter to be considered. But the other matters identified are also of importance, and may be of decisive importance in particular cases, to justify the imposition of a life sentence (including such matters as previous convictions, the level of danger to the public, and whether there is a reliable estimate of the length of time that the defendant will remain a danger).

32. In the present case there is no challenge to the finding of dangerousness, and nor could there be. The appellant had previously been found to have been dangerous and an extended sentence had been passed. Undeterred, and whilst on licence, he went on to commit even more serious and violent offences against lone and vulnerable women. As the Learned Judge rightly concluded, it was clear that an extended sentence of imprisonment appeared to have afforded no reduction of his risk and, if anything, he had become more dangerous.

33. We consider that the Learned Judge was entitled to conclude that the offence of attempted rape together with the associated offence of assault occasioning actual bodily harm upon another vulnerable sex worker within minutes thereafter were particularly serious, having regard to the circumstances of such offending, as already set out above, the violence used (as graphically shown in the photographs) and the duration of the ordeal through which each complainant was put. In this regard, we reject the suggestion that the seriousness of the offending was reduced by reason of the fact that the appellant was not also convicted of the offence of intentional strangulation, or the oral rape of C2. Convictions on those counts would have been yet further aggravating factors when sentencing for the lead offence.

34. It is of course always possible to contemplate more serious sexual and violent offending. Had the appellant been a man without relevant previous convictions and without the particular circumstances of the further offending, set against the backdrop of the prior offending, the position might not have justified a life sentence. However, the appellant's previous convictions were highly relevant and presented a very troubling picture of escalating sexual violence, as the Learned Judge rightly found. We reject the suggestion that the previous sexual offences were dissimilar. The overall picture was one of a pattern of escalating sexual violence, coupled with humiliation and additional degradation (through the use of photographs and/or filming of victims), culminating in the offences in question (including the filming of C1's ordeal).

35. What is more, the offences were committed whilst the appellant was on licence for relevant previous sexual offending; and, crucially, a previous extended sentence had been no deterrent whatsoever to the appellant moving up to even more serious sexual and violent offending and within a very short period of time of being released on licence – i.e. the alternative sentence (in the form of an extended sentence) that was available had not worked in the past, and there was no reason to conclude that it would work in the future.

36. Yet further, and as was the position in a number of the cases in *R v Burinskas* where a life sentence was upheld, we consider that the Learned Judge was amply justified in concluding that the level of danger that the appellant posed to the public was extremely high and that there was no reliable estimate of the length of time he would remain a danger. We note that Ms Fitzpatrick acknowledges in her skeleton argument that public protection was needed; but we cannot accept her submission that the scope of up to eight years' extended licence would have provided appropriate protection to address the level of risk presented by the appellant. As the Learned Judge rightly found, the appellant, who was aged 26, had before him many decades in which he was likely to remain a very dangerous man, and she was entitled to conclude that the available, alternative sentence (in particular an extended sentence) would not provide sufficient protection to the public; whereas a life sentence, with associated licence regime, would.

37. In such circumstances we are satisfied that the Learned Judge in her careful, insightful sentencing remarks did not err in principle in passing a life sentence. Indeed, having made the justifiable findings that she did, she was obliged to pass a life sentence.

38. Accordingly the appeal against sentence is dismissed.
