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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 28 November 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE COCKERILL DBE

HER HONOUR JUDGE WALDEN-SMITH
(Sitting as a Judge of the CACD)
R E G I N A
v
ENIOLA BALOGUN

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Mr D Emanuel appeared on behalf of the **Appellant**
Mrs C Milsom appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: This appellant, who was born on 12 December 1997 and so is now 20 years old, was convicted of three offences of rape. He pleaded guilty to four further offences of rape and one offence of distributing offensive photographs of a child. On 15 December 2017, in the Crown Court at Wood Green, he was sentenced for one of the rape offences to an extended determinate sentence, under section 226A of the Criminal Justice Act 2003, of 29 years, comprising a custodial term of 21 years' detention and an extension period of 8 years. Concurrent standard determinate sentences totalling 10 years' detention were imposed for the other offences.

2. The appellant now appeals against his total sentence by leave of the single judge. No challenge is made or could be made to the finding of dangerousness or to the decision of the court below that an extended determinate sentence was appropriate. Before this court this morning Mr Emanuel, appearing for the appellant, has sought belatedly to challenge the length of the extension period. We shall return to that point later in this judgment. The principal issue in the appeal is as to the length of the custodial term.

3. Each of the appellant's victims is entitled to the protection of the Sexual Offences (Amendment) Act 1992. Under the provisions of that Act, where a sexual offence has been committed against a person, no matter relating to her shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as the victim of that offence. This prohibition will continue to apply unless and until lifted in accordance with the Act. We shall therefore not name the victims but shall instead refer to them by initials.

4. The offences were committed between 24 April and 23 September 2016 when the appellant was aged between 18 years 4 months and 18 years 9 months. His victims were aged between 13 and 16.

5. The first victim was AJ, aged 15, when she met the appellant in April 2016. They exchanged contact details. The appellant thereafter repeatedly contacted her and threatened her until she agreed to meet him. She was frightened by his threats because at their first meeting she had seen that he was in possession of a knife. When she eventually agreed to meet him he took her to the stairwell of a building and threatened to kill her and her family. He then forced his penis into her mouth but stopped after a short time when someone came into the stairwell. Later that night he called her and said the next day she had to "finish it off" because she knew he wanted her to give him oral sex. He later required her to participate in a video call in which she was only wearing a top and knickers. He told her that he had taken a screen shot of the video call.

6. In relation to AJ the appellant pleaded guilty to an offence of oral rape.

7. In June 2016 the appellant met JA, then aged 16, in the street. He engaged her in conversation and eventually persuaded her to give him her mobile number. He thereafter sent messages which became increasingly sinister in tone. She eventually agreed to meet him in late July. They went to his house, where he lived with his mother, and into his bedroom. She was frightened to see two samurai swords on the

bed. He took her phone from her and made her give him oral sex before he would return it. He recorded the oral sex and for a time continued to try to contact her.

8. In relation to JA the appellant pleaded guilty to an offence of oral rape.

9. Also in June 2016 the appellant approached in the street another girl, CT, then aged 16. She gave him her phone number and he called her that evening saying he wanted to do sexual things with her. She refused, but he contacted her again at a later date saying he would hurt her. In fear, she agreed to meet him. They went to his house. In his bedroom she too was frightened to see knives. He forced her to suck his penis, took pictures of her doing so and later sent those pictures to her via Instagram. When his mother returned to the house he took her into the garden where he again forced her to have oral sex. He then forced his penis into her vagina. He eventually allowed her to leave, threatening to circulate the pictures he had taken if she told anyone.

10. In relation to CT, the appellant was convicted after a trial of two offences of oral rape and one of vaginal rape.

11. The youngest of the appellant's victims, DU, was aged only 13 when he approached her in the street in July 2016, although it was accepted that she looked older than her true age and she had told the appellant she was 15. She gave him her phone number and they arranged to meet the following day. At that meeting she told him she did not have a boyfriend. He took her phone from her, went through her messages, told her she was lying and took photographs of some of her messages which he threatened to post on Instagram. Later that night he demanded that she meet him, which she did. He took her keys and phone from her and told her to give him oral sex if she wanted them back. He then orally raped her, an offence to which he later pleaded guilty. He returned her belongings and let her go. But as soon as she was back in her house, he contacted her and demanded a video call in which she would be half naked, threatening to post her personal information online if she did not comply.

12. In late July 2016 the appellant met AS, then aged 16. They went to his bedroom at his mother's house where she saw the swords on the bed. He took one of her phones from her and told her she could not have it back unless she performed oral sex on him. He photographed her doing so. He retained one of her phones, saying she would get it back when she gave him oral sex on a future occasion.

13. In relation to AS the appellant pleaded guilty to an offence of oral rape.

14. When the appellant was arrested indecent images of a 14-year-old girl, HP, were found on his phone. HP declined to be a witness. The appellant pleaded guilty to an offence of distributing indecent photographs, contrary to section 11B of the Protection of Children Act 1978.

15. By these offences, the appellant caused severe and lasting harm to his young victims, which they described in victim personal statements. It is not necessary for the purposes of this judgment to rehearse the contents of those statements, but we have them well in mind.

16. The appellant was originally tried in March 2017 on an indictment charging him with offences against CT and DU. The jury convicted him of three offences against CT but were unable to agree upon any verdict in relation to DU, and a retrial was ordered in relation to those charges. The police had in the meantime become aware of the other complainants and accordingly a trial began in September 2017 in relation to the allegations concerning not only DU but also AJ, JA and AS. Following the opening speech for the prosecution the appellant entered the guilty pleas to which we have referred. The remaining charges were ordered to lie on the file.

17. Prosecuting counsel Mrs Milsom, then as now appearing for the Crown, helpfully provided the sentencing judge with a sentencing note which said, amongst other things, that all of the offences were mitigated by the appellant's relative youth. The note said that although the appellant had been convicted and sentenced as an adult, "he is still relatively young and lacks emotional development or maturity".

18. A detailed pre-sentence report was available to the sentencing judge. This indicated that the appellant's parents had separated when he was 3 years old and he had for a time lived with his father in the United States. At the age of 7 or 8 he had returned to the UK and had then lived an unsettled and transient lifestyle with his mother and his younger brother. The family were more than once evicted from their homes because of nonpayment of rent.

19. As an adolescent the appellant on occasions either left the family home or was required by his mother to leave. On such occasions he either stayed with friends or slept rough. He had obtained eight GCSEs and had passed the first year of a BTEC Level 3 Business Course but had been expelled both from school and from college. He had only occasional periods of employment. At the time of these offences he was unemployed and was it seems leading a wholly unstructured life in which he appears to have derived an income from selling cannabis.

20. The report indicated that following the appellant's remand in custody there was some improvement in his relationship with his mother and his brother. However, he was not attending any courses whilst on remand in custody and had more than once been found by prison officers in possession of prohibited items.

21. The reporting probation officer regarded the appellant as mainly presenting as a mature young man but sometimes coming across as immature. She expressed this view:

> "In my view, despite his statements of accepting responsibility and being remorseful, there is an aspect of Mr Balogun that does not appreciate the seriousness of his actions, the devastating nature of his behaviour or the consequences to the victims."

Later in her report the reporting probation officer repeated that at times the appellant "came across as being immature, which may be understandable given his age". She added this:

> "Although Mr Balogun appears to now realise the seriousness of the

> offences it is, in my assessment not something that he gave any consideration to at the time."

She referred to the statement by the appellant to her that he wanted to address his offending behaviour and made the "strong suggestion" that further work regarding his attitude towards victims would be required to enable any meaningful offence-focused work to take place.

22. In his sentencing remarks the learned judge summarised the offences, which he noted as showing a pattern of manipulation, threats and the use of force. He emphasised that none of the young victims of these offences should regard what happened as being in any way their fault. He reiterated that point at the very conclusion of the hearing, expressing the hope that it would be of some help to the victims that he had publicly expressed the very firm conclusion that none of what had happened was their fault. He hoped that the hearing would be the start of their recovery process.

23. The learned judge referred to the pre-sentence report and summarised its effect in the following terms:

> "... you feel no regret or remorse for your actions. You appear to have little understanding about the effect your actions have on your victims and you appear to care even less. Of even more concern, is your apparent belief you are entitled to demand sexual activity from young girls who are total strangers to you despite their clear and obvious reluctance. While you appear to have conceded to [the probation officer] that you may not have been properly educated with regard to consensual activity, I am far from convinced that you have reached any meaningful realisation in this respect."

24. The judge accepted submissions by prosecuting counsel as to the categorisation of each offence in terms of the Sentencing Council's Definitive Guideline in relation to sexual offences. The rape of AJ was a category 2B offence, with a starting point of 8 years' custody and a range from 7 to 9 years, aggravated by being committed in a public location and by the use of weapons to frighten. The rape of JA was a category 2A offence, starting point 10 years and range 9 to 13 years, aggravated by the use of weapons to frighten. Each of the rapes of CT was similarly a category 2A offence, aggravated by the use of weapons to frighten and by blackmail. The rape of DU was a category 3B offence, starting point 5 years and range 4 to 7 years, aggravated by ejaculation. The rape of AS was a category 3A offence, starting point 7 years and range 6 to 9 years.

25. The judge regarded the offences as amounting to a campaign of rape. He made the finding of dangerousness against which, as we have indicated, there is no appeal. He stated that he would have in mind mitigating factors put forward by defence counsel, relating to the appellant's young age when he committed the offences, his immaturity and his broken home and broken family life. The judge further stated that he would have regard to the principle of totality and to the promise he had given that there would

be a reduction in the sentence for the guilty pleas, late though they were, because the complainants were saved the ordeal of having to give evidence.

26. The judge then referred to a discussion with leading counsel for the appellant, in the course of which counsel had acknowledged that an overall sentence of 14 years for the offences committed against CT would not be unreasonable. The judge then continued:

> "In my judgment, the very least additional sentence I should pass in respect of the other four complainants, having in mind those same factors, is an additional sentence of 10 years. That gives a sentence of 24 years. But I must also keep my promise to you and so I reduce the overall sentence to 21 years.
>
> Having found you dangerous, I must pass an extended sentence and the extension I add is one of 8 years. I will pass the 21-year sentence in respect of the vaginal intercourse offence committed on [CT] with concurrent sentences in respect of the other offences."

27. On behalf of the appellant two grounds of appeal are advanced by Mr Emanuel against the total length of the custodial term. Mr Emanuel accepts that the offending amounted to a campaign of rape and was very serious but submits that the sentence of 24 years, before credit for the guilty pleas, was manifestly excessive. In particular, he submits that the judge fell into the error of double counting some factors and passed a sentence which might have been appropriate for a mature adult offender but was excessive for an offender who was aged about eighteen-and-a-half when he committed the offences. Mr Emanuel points out that although the appellant's victims were younger than him, they were all teenagers.

28. Secondly, Mr Emanuel submits that the judge, in the course of the sentencing hearing, gave undue prominence to the contents of the victim personal statements, taking over the reading of them from counsel, and created an impression that he had attached undue weight to the contents of those statements when determining the appropriate length of sentence.

29. Mr Emanuel points to passages in the pre-sentence report, including those which we have cited, which he suggests show the appellant to have been immature at the time of committing the offences. He invites our attention to the decisions of this court in R v Peters [2005] 2 Cr App R(S) 101, and Attorney-General's Reference R v Clarke [2018] 1 Cr App R(S) 52. We shall return to those cases shortly.

30. Mr Emanuel points to the fact that in the sentencing guideline relating to sexual offences a specific mitigating factor which should be taken into account where it arises is "age and/or lack of maturity where it affects the culpability of the offender". He seeks to put his submissions into the context of a number of recent reports dealing generally with the treatment of young adults in the criminal justice system. He submits that the appellant's age and lack of maturity were not properly reflected in the sentence passed. Given that the judge said that he had taken into account the

mitigating factors advanced by counsel below, Mr Emanuel observes that the judge must have started with a notional sentence after trial in excess of 24 years.

31. Mr Emanuel also criticises the terms, which we have quoted above, in which the judge spoke of a sentence of 14 years in relation to CT and a further total sentence of 10 years in respect of other complainants before giving credit for guilty pleas. There was, submits Mr Emanuel, no specific reference in the sentencing remarks to the fact that the appellant was only a few months beyond the age at which he would have been sentenced in accordance with the principles applicable to a child or young person.

32. With reference to the cases on which he relies, he points out that although Peters was a murder case, the judgment of the Lord Chief Justice in Clarke makes it clear that the principles there referred to are of general effect.

33. As to his second ground of appeal Mr Emanuel submits that an inference is to be drawn that in reaching such a high total sentence as 24 years' detention, before giving credit for the guilty pleas, the judge must have attached undue weight to the victim personal statements and to his desire to convey a public message that he was sympathetic to the position of the complainants.

34. As to the point raised for the first time today, Mr Emanuel submits that the length of the extension period is linked to the length of the custodial term. He orally applies for leave to appeal against that aspect of the sentencing also and submits that where the custodial term is as long as has been imposed in this case, the further imposition of the maximum period of extension of licence goes beyond what was necessary or proportionate.

35. For the respondent Mrs Milsom resists each of these grounds of appeal. She submits that the learned judge was entitled to approach the case in the way he did, that he had due regard to the appellant's age and level of maturity and that the resulting sentence was not manifestly excessive for these very serious offences. She emphasises that the appellant was an adult when he committed the offences. She submits that whilst the principles stated in Peters make it clear that the court should recognise that a young adult offender may not be fully mature, she contends that in the circumstances of this case, the judge was entitled to treat this appellant as being fully mature. In this regard she seeks to draw a distinction between emotional immaturity and the culpability of the appellant for committing offences which, she suggests, had a degree of sophistication and planning about them.

36. We are grateful to counsel for their submissions, both written and oral. We have reflected upon them. We can deal briefly with the second ground of appeal which, in our judgment, has no merit. The learned judge was entirely justified in making the important point that none of the victims of these offences should regard herself as having been at fault or to blame in any way. The experience of the courts is, sadly, that all too often victims of sexual offences mistakenly carry a burden of guilt in the erroneous belief that they must somehow have contributed to the offence committed against them. We therefore do not criticise the judge for making the point he did in emphatic terms. We can see no basis for suggesting that the judge then gave

inappropriate weight to that aspect of the case in determining what total sentence was just and proportionate to reflect the seriousness of the offending as a whole. Nor do we regard the fact that the judge himself read aloud parts of the victim personal statements as giving rise to any such inference as that for which Mr Emanuel contends. We therefore turn to the first and principal ground of appeal.

37. We begin by considering the Sentencing Council's Definitive Guideline in relation to the sentencing of children and young people. This guideline contains both overarching principles and an offence-specific guideline for sexual offences. In relation to the seriousness of offences committed by children and young persons, paragraph 4.7 of the Overarching Principles contains a non-exhaustive list of factors reducing seriousness or reflecting personal mitigation, which includes "unstable upbringing including but not limited to ... disrupted experiences in accommodation or education" and "limited understanding of effect on the victim". A corresponding list of mitigating factors in the Sexual Offences Guidelines, in relation to children and young people, similarly includes reference to unstable upbringing. It also indicates, on page 36 of the guideline, that sexual offending by children and young people can arise through "a lack of understanding regarding consent, exploitation, coercion and appropriate sexual behaviour". The Overarching Principles at paragraph 6.46 state that where a custodial sentence must be imposed the court may feel it appropriate to apply a sentence broadly in the region of half to two-thirds of the adult sentence for those aged 15 to 17.

38. This appellant was, of course, an adult at the time when he committed the offences and at the time when convicted. We bear very much in mind that in relation to children and young people statute requires the court to have regard to the principal aim of the youth justice system, namely to prevent offending by children and young people and to the welfare of the child or young person. Those statutory requirements do not apply to an offender who has attained the age of 18. It is nonetheless well established by case law that the young age and/or lack of maturity of an offender do not cease to have any relevance on his or her 18th birthday. The point arises in an acute form, where a young offender is convicted of murder and must be sentenced to the appropriate form of life sentence, with a minimum term selected in accordance with the provisions of schedule 21 to the Criminal Justice Act 2003. The starting point indicated by that schedule for an offender aged under 18 at the time of the offence is markedly shorter than the starting point for an offender aged over 18.

39. It was in the context of sentencing for murder that this court in Peters stated at paragraph 11 of the judgment:

> " Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday. Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of

the offender's maturity."

40. Similarly in the more recent case of Clarke, which was not a murder case, the Lord Chief Justice, giving the judgment of the court said at paragraph 5:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear ... Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research... is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision even if an offender has passed his or her 18th birthday."

41. In the present case the court is concerned with the commission by a young adult of a series of very serious sexual offences with a number of aggravating features. In accordance with the principles which we have summarised, the fact that the appellant had attained the age of 18 before he committed the offences does not of itself mean that the factors relevant to the sentencing of a young offender had necessarily ceased to have any relevance. He had not been invested overnight with all the understanding and self-control of a fully mature adult. It is also relevant to note that if the appellant had committed his offences a few months earlier than he did and had therefore been under 18 at the time of the offending, a court sentencing him at a later date would have been required by section 6.2 of the Definitive Guideline to "take as its starting point the sentence likely to have been imposed on the date at which the offence was committed".

42. We note that the appellant's only previous convictions were for offences of disorder and carrying a bladed instrument in 2015 and for possession of cannabis in 2017, although of course his account to the probation officer indicated his involvement in other criminal offending.

43. The fact that within a few months of attaining the age of 18 he had committed a series of sexual offences so grave as to merit (in the case of a mature adult offender) a total sentence substantially longer than the appellant's life to date, made it necessary to give careful consideration to all the factors relevant to his committing those offences.

44. The detailed pre-sentence report had, as its primary focus, the issue of dangerousness. It did however give a clear account of the very disrupted and unstable childhood and lifestyle of the appellant, and we accept Mr Emanuel's submission that the report did provide some evidence of a lack of maturity on the part of the appellant, a lack of appreciation of the seriousness of his offending and an inability to be open about his offending or about difficulties stemming from his upbringing and lack of stability. There were undoubtedly features of maturity in his conduct, and it is not suggested that he should be treated as having little more than the understanding of a child. Nonetheless, we accept that the appellant's young age, level of immaturity and apparent inability at the time of the offences to appreciate their seriousness or their consequences

were important matters to be taken into account in determining the appropriate custodial term.

45. With all respect to the judge below, we do not think his notional sentence of 24 years' custody after trial gave sufficient weight to those factors. Even for a mature adult offender, in whose case there would be the additional aggravating feature of a much greater disparity in age between offender and victims, a sentence of 24 years would, in our view, have been a stiff one, though not manifestly excessive. If that total was reached having taken into account the mitigating factors which counsel had placed before the sentencing judge, it follows that the judge must initially have had in mind a significantly higher total. A significantly higher total sentence for a mature adult would, in our judgment, have been excessive. A total sentence after trial for this young adult offender of 24 years was, in our view, excessive.

46. The precise basis on which the judge assessed the level of credit given for the belated guilty pleas to some of the charges was not spelled out in the sentencing remarks, but we think it clear that the judge did intend a significant reduction was to be made.

47. Accepting as we do the learned judge's analysis of the appropriate categorisation of the individual offences, we must have regard, as did he, to the principle of totality. We must also, for the reasons we have indicated, give greater weight than did the judge to the features of youth, comparative immaturity and lack of appreciation of the seriousness of the offending or of the harm which the appellant was causing. Finally, we must reflect the credit which the judge intended to give for the belated guilty pleas. In our judgment, the appropriate total sentence, taking into account all those considerations, was a custodial term of 18 years. The appropriate way in which to express that total sentence, consistently with the structure of the judge's sentencing, is to reduce the custodial term of the extended determinate sentence imposed by the judge in relation to the rape of CT which was selected as the lead offence.

48. We return briefly to the belated application for leave to advance an additional ground of appeal relating to the length of the extension period. There is, in our judgment, no good reason why leave should be given for an additional ground to be raised at this very late stage, long after the single judge considered the application for leave on the papers. In any event, Mr Emanuel's submissions on that point do not seem to us to provide any arguable basis for interfering with the length of the extended licensed period.

49. We accordingly allow the appeal to this extent. On count 2 of indictment T20167510, we quash the extended sentence imposed below and substitute for it an extended sentence, comprising of a custodial term of 18 years' detention in a young offender institution and an extension period of 8 years. All other sentences remain unaltered and, as before, will run concurrently with the principal sentence. Thus, the effect of our judgment is that the total custodial term is reduced from 21 years' detention to 18 years' detention.

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