Neutral Citation Number: [2019] EWCA Crim 538
No: 201800327/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 March 2019

B e f o r e:
LADY JUSTICE SHARP DBE
MR JUSTICE GOOSE

THE COMMON SERJEANT
HIS HONOUR JUDGE MARKS QC
(Sitting as a Judge of the CACD)

R E G I N A
v
KELVIN BRIAN CYPHUS

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Mr G Carrasco appeared on behalf of the **Applicant**
Mr S Bailey appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MR JUSTICE GOOSE: In this application, Kelvin Cyphus, who is now aged 57, applies for an extension of time of 1,467 days and for permission to appeal his sentence imposed in the Crown Court at Warwick on 13 December 2013 by His Honour Judge Coates. The applicant pleaded guilty shortly before trial to six offences of rape, four of which were of a child under the age of 13, and a further offence of assault by penetration of a child under the age of 13. The judge sentenced the applicant to imprisonment for life, pursuant to section 225A of the Criminal Justice Act 2003, with a minimum custodial term to serve of eight-and-a-half years. Orders were also made for notification and sexual offences prevention pursuant to the Sexual Offences Act 2003.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences, such that no matter relating to the victims shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as a victim of these offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

3. The application for an extension of time was supported by an explanation for the substantial period of delay of 1,467 days. The applicant consulted new solicitors in April 2017, being almost four years after his sentence on 13 December 2013. Difficulties were encountered in obtaining information after that date. We shall return to this application to extend time later.

4. In 2009, shortly before these offences began in March of that year, the applicant was cautioned for sending indecent text messages of a graphic sexual nature to an 11 or 12 year old girl. Save for this caution, he had no other previous convictions or cautions. The applicant's offending concerned two victims. The first "AB" was aged from 11 to 13 when she was the subject of repeated offences of rape. The second victim "CD" was aged 12 when she was digitally assaulted and penetrated by the applicant.

5. The lead up to these offences concerned the applicant living with a registered sex offender in accommodation in which the victims were invited to attend and rewarded with alcohol, cigarettes and cannabis. Over time the grooming behaviour led up to sexual offending. The offences concerning AB were counts 4, 5, 8 to 11 on the indictment. These were offences of repeated behaviour of rape over a period between March 2009 and October 2011, whilst AB was aged 11, 12 and 13. Counts 4 and 5 represented specimen charges of rape whilst she was aged 11. Counts 8 and 9 represented specimen rape offences when she was aged 12. Counts 10 and 11 were specimen rape offences when she was 13. It is clear from the evidence of AB that she was raped repeatedly each week, often 12 times or more. The offending against her comprised repeatedly raping a young child over a three year period.

6. The offence in relation to CD of assault by penetration of a child under 13 concerned a single offence against her by the applicant when they were in his flat. CD was sitting on a sofa when the applicant went to her, pulling her trousers down and putting his hand into her knickers and inserting his finger into her vagina for about five minutes.

7. The police were informed of these offences after AB was reported missing from her home. She made disclosures to a witness and, over time, gave a full account of the offences against her. The applicant was arrested and subsequently CD began to disclose what had happened to her. A police search of the applicant's flat found a used condom in the wardrobe which, upon examination, was found to have DNA material of a matching profile to AB. On a pair of leggings of AB, further material with a profile matching the defendant's DNA was found.

8. After her initial disclosure, AB was interviewed further and described that she had been abused from age 11 to 13. It had started when she and CD stayed overnight in the applicant's flat, sleeping either side of him in his bed. She described the abuse as escalating, including his insisting on calling her his "little whore" and "prostitute", and making her call him her "sugar daddy". She would visit the applicant's flat three or four times a week. He had sex with her most weekends, using condoms, and, on occasions, there was unprotected sex. The last occasion when an offence was committed was shortly before her disclosures were made to the police. AB described that she had been paid £10 per week and was also provided with cigarettes, alcohol and other items. On the applicant's phone clear evidence of grooming was seen. When the applicant was interviewed by the police he denied any offending against either victim, which denials he maintained until shortly before his pleas of guilty.

9. In victim personal statements by AB and CD the full consequences of the applicant's offending were revealed. AB described that she had taken herself into foster care because she kept running away from home and was self-harming. She stated: "I did all of this because of what Kelvin did to me." Her self-harming included cutting her arms with glass, razors, knives and other items. She swallowed other items in order to harm herself internally. She did not feel normal and wanted to die. In an assessment report a history of repeated attempts of self-harm and suicide were revealed. That report dated in October 2013 was seen by the sentencing judge and referred to by him in his remarks. In her victim personal statement, CD described how the offence against her had affected her behaviour in school and then in relationships with men. She described herself as feeling "dirty".

10. In a pre-sentence report dated 2 December 2013, the author described the applicant as posing a high risk of harm to children. It was stated:

> "I assess that the following are current risk factors: deviant sexual desires, low victim empathy, minimisation, lack of understanding the consequences and poor thinking skills."

The applicant was assessed as a low likelihood of sexual recidivism with other re-offending predictors indicating a low likelihood of re-conviction. However, taking into account the risk assessment and that the applicant had shown very little victim awareness, with evidence of victim blaming, the applicant posed a significant risk of committing further serious specified offences against children in the future.

11. In sentencing the applicant, the judge described him as having committed frequent and repeated rapes of a young and vulnerable child. The police caution in 2009 was a clear

warning to the applicant, which he had ignored. The judge concluded that the applicant was dangerous, within the terms of section 229 of the Criminal Justice Act 2003, and that imprisonment for life was necessary. The risk assessment within the pre-sentence report, coupled with the nature of the offending and the period over which it occurred, led the judge to conclude that it was not possible to predict in the future a time that might arise when the applicant no longer presented as a significant risk of similar offending against children. The judge indicated that the determinate sentence after a trial for the totality of offending would have been 19 years' imprisonment on the basis that the rape offences of a child under 13 were Category 1A offences under the Sexual Offences Guideline, with a starting point of 16 years custody and a range of sentencing up to 19 years. After applying a 10 per cent discount and halving the custodial term, the judge imposed a minimum term of eight-and-a-half years upon each count on the indictment concurrently with each other.

12. On behalf of the applicant, Mr Carrasco does not dispute that the judge was entitled to find the applicant dangerous, under section 229 of the 2003 Act. Further, it is accepted that the minimum term based upon a post-trial conviction of 19 years, cannot be criticised. The application for leave to appeal is solely on the basis that the judge, when imposing imprisonment for life, imposed a sentence which was manifestly excessive. It is argued that as a sentence of last resort, the judge should have stepped back and imposed instead an Extended Sentence under section 226A of the 2003 Act. It is argued by Mr Carrasco that the offences themselves were not so serious as would justify a sentence of life imprisonment; the applicant did not have any previous convictions, only a caution; there was no established pattern of offending; the level of danger posed by the applicant to the public, whilst dangerous, did not indicate that he posed a long term danger and that an extended sentence would have been sufficient to deal with the danger posed.

13. In response to the application for permission to appeal, Mr Bailey, for the respondent, argues that the judge was not only entitled, but required, to impose a life sentence of imprisonment in the circumstances of such repeat offending, over a long period of time against such a vulnerable and young child. The fact that the applicant had turned to a second victim emphasised the risk posed. Accordingly, the respondent resists the application for permission being granted.

14. We have considered carefully the application for permission to appeal and whether it is arguable that the sentence of life imprisonment was manifestly excessive. Whilst the judge's sentencing remarks were brief, he clearly had in mind the correct assessment. It was clear that the applicant was dangerous, and that is not disputed. The judge was required to turn his mind to section 225(2) of the 2003 Act and in particular, section 225(2)(b) which provides:

> "... the court considers that the seriousness of the offence, or of 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."

15. In the case of R v Burinskas [2014] EWCA Crim 334, this court gave clear guidance on the application of section 225 after the commencement of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It was stated by Lord Thomas, CJ:

> "Where the sentencing judge is satisfied in the exercise of his judgment that an offender is dangerous and that the two conditions at s.225(2)(a) and (b) are met, there is no discretion. He must pass a life sentence."

The exercise of a discretion, material to this application therefore is within section 225(2)(b). In R v Burinskas at paragraphs 22 and 23, further clarification of this discretion is explained:

> "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 judgement 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.
>
> 23. It is inevitable that the application of s.225 in its current form will lead to the imposition of life sentences in circumstances where previously the sentence would have been one of IPP. It is what Parliament intended and also ensures (as Parliament also intended), so far as is possible, the effective protection of the public."

16. The issue for this application for permission to appeal sentence is whether the judge, in concluding that imprisonment for life was required, imposed a manifestly excessive sentence. It is not contended that such a sentence was wrong in principle. In making his assessment the judge correctly had in mind the seriousness of the offences over a substantial period of time and against a young and vulnerable child, aged between 11 and 13. Further, the consequences of that offending for the victim, AB, had been profound, leading to a very disturbed childhood, self-harming and suicide attempts. To a lesser extent CD has been substantially affected by the offence committed against her. The applicant's attitude to his offending, described in the pre-sentence report, provided clear evidence of the applicant's danger to the public, in particular to children. Whilst the applicant's previous police caution was not remarkable, it is not correct to suggest that there is no established pattern of offending; the seriousness of these offences over a three year period establishes a clear pattern of offending.

17. The judge was plainly concerned that there was no reliable estimate of the length of time that the applicant would remain a danger. Certainly, the judge was satisfied that it could not be measured in terms of the maximum extended licence under an Extended Sentence. A lack of significant victim empathy and evidence of victim blaming, that they had initiated sexual contact, entitled the judge to reach the conclusion that he did. We do not find, therefore, that the imposition of a sentence of imprisonment for life in this case was manifestly excessive, nor was it wrong in principle.

18. We return to the application for an extension of time. The applicant has provided no substantial reasons for his delay. He took almost four years to consult new solicitors in 2017. Even if we were to accept that the delay from 2017 until the application was issued, was reasonably and properly explained, that cannot be said for the inordinate delay from the time of sentence. Further, there is no evidence that he was formally advised against an appeal. The argument that he only thought about it after he was unable to attend treatment programs in custody adds little to the point. In our judgment, there is no good and sufficient reason for the inordinate delay in making this application. Accordingly, we refuse the application to extend time and dismiss the application for permission to appeal against sentence.

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