IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN: [2020] EWCA Crim 1349

CASE NO 201902767/B2-201903552/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 8 October 2020

LORD JUSTICE HOLROYDE

MR JUSTICE KNOWLES

MR JUSTICE CHAMBERLAIN

REGINA
v
MARK DAVID SCOTT

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MS H CHAPMAN appeared on behalf of the Applicant.

MS C BAINES & MR M MASSON appeared on behalf of the Crown.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 29 May 2019, after a trial in the Crown Court at Kingston upon Hull before Mr Recorder Nolan QC and a jury, this applicant was convicted of nine offences of rape and one of attempted rape. On 25 June 2019 he was sentenced on count 2 (a multiple offences count) to an extended determinate sentence of 28 years, comprising imprisonment for 20 years, with an extended licence period of 8 years. Concurrent standard determinate sentences varying in length between 8 and 12 years were imposed on the other counts.
2. His applications for extensions of time to apply for leave to appeal against one of his convictions and against sentence have been referred to the Full Court by the Single Judge.
3. The offences were committed over a period of years against a total of six women. Each of those victims is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of any of these offences. We, for our part, shall refer to the victims by initials.
4. Serious though they were, the offences can for present purposes be summarised briefly. RD was for several years the partner of the applicant. Between April 2005 and December 2009 the applicant repeatedly committed serious offences against her: a specific offence of anal rape (count 1), a multiple offences count (count 2) relating to at least 10 further anal rapes, a specific offence of vaginal rape (count 3) and a multiple offences count (count 4) relating to at least 10 further vaginal rapes. In sentencing, the recorder treated count 2 as the lead offence on which he imposed the extended determinate sentence, the custodial term of which was intended to reflect the seriousness of all the offences.
5. On count 5 the applicant was convicted of the anal rape of SD, a work colleague. That offence was committed in October 2013, when they were attending a training course which involved an overnight stay.
6. On count 6 the applicant was convicted of the attempted vaginal rape of SG, whom he had met when she was enjoying a night out in November 2017. SG has the misfortune to suffer from cerebral palsy, which visibly affects her movements.
7. Counts 7, 8 and 9 alleged offences in April 2018 of anal rape of KF, who met the applicant through a dating website but later realised she knew him from their school days. The jury acquitted of two of those counts but convicted of the third.
8. On count 10 the applicant was convicted of anal rape in August 2018 of SW, whom he had met socially through mutual friends. Count 11 was an alternative to count 10.
9. On counts 12 and 13 the applicant was convicted of offences in September 2018 of anal and vaginal rape of CW, whom he had met through a dating website.
10. Each of those complainants described some consensual sexual intercourse with the applicant, but complained of incidents when he had insisted on vaginal or anal intercourse against her wishes and despite her clear protests. The applicant's case was that all their sexual activity had been consensual.

11. Each of the offences was committed after the applicant had consumed alcohol and, in some cases, cocaine. A common theme of the complainant's evidence was that there were two sides to the applicant's character: when sober, he was charming and attractive; in drink, he was sexually demanding and rough.
12. The trial began on 28 April 2019 and finished about a month later. In addition to the evidence of the complainants, the prosecution called a number of witnesses who gave evidence of recent complaint. KF was the fifth of the complainants to give evidence. It is relevant to note that all of the jury's verdict were unanimous.
13. We turn to consider the grounds of the application for leave to appeal against conviction, which relates to contact between KF and a male member of the jury (to whom we shall refer as "the juror"). KF and the juror have made witness statements on which the applicant seeks to rely as fresh evidence. The parties helpfully agreed that this court could consider the application on the basis of the statements and that it was not necessary for either KF or the juror to attend this appeal hearing.
14. KF is a solicitor specialising in family work. Her work involves attendances at the combined court centre where the Crown Court trial was held. She was in the building on 29 May 2019, the day the jury returned their verdicts. She was informed by phone of the result. Her account in her statement is that whilst she was on the phone, the juror approached her and offered to tell her the verdicts. She indicated that she had already heard. The juror said words to the effect: "It was an easy decision. The judge said he was a very dangerous man". He then hugged KF and left. Later that day KF was in the street near the court when she saw some of the members of the jury emerging from the direction of a local pub. She says that as they passed her some smiled, one greeted her and the juror smiled and winked at her in what she thought was a flirtatious way. She says that up to that point she had had no other contact with him or any other member of the jury, save for seeing them whilst she was giving her evidence.
15. The juror’s account similarly is that his first contact with KF was after he had been discharged from his jury service. His statement does not mention approaching her when she was on the phone or giving her a hug. He says that he saw her when he was outside the court building with some other members of the jury. He does not mention any wink.
16. Shortly after 9 o'clock that night the juror sent KF a greeting on the dating website which had been mentioned in her evidence. KF had for a time stopped visiting that website and did not see the message until Saturday 15 June 2019. She replied to it, and over the rest of that day and the Sunday they exchanged text messages by phone, which became sexual.
17. On Monday 17 June KF met the support worker who had assisted her during the trial. She reported the exchange of messages. She was told that she must inform the police, and did so. The exchange of messages ceased. In their statements, both she and the juror expressed regret for having communicated with one another.
18. The grounds of appeal are that there is a real possibility that the juror was biased either against the applicant or towards KF. It is submitted that the juror was clearly desirous of KF at least on the day of the verdict, and it is a fair and proper inference that he was attracted to her during the trial. It is submitted that it is not clear whether either KF or the juror can be believed when they say that there was no contact during the course of the trial. The fair-minded and informed observer could not fail to conclude that there was a real possibility that the juror was biased towards KF. The conviction on count 9 is

therefore unsafe.

19. Ms Chapman, who represents the applicant in this court as she did at trial, refers us to the familiar test for bias stated in Porter v Magill [2002] 2 AC 357, namely:

    i. "... whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

20. She reminds us that in R v Abdroikov [2007] UKHL 37, at paragraph 15, Lord Bingham described the characteristics of the fair-minded and informed observer as follows:

    i. "... he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious..."

21. Ms Chapman submits that the juror chose to speak to KF and to hug her when they encountered one another in the court building. She further submits that in his statement he tried to minimise his involvement with KF. She submits that there is a clear inference that he was attracted to KF while she was giving her evidence and that there is accordingly a real possibility that he was biased in favour of her during the trial.
22. In making her oral submissions today Ms Chapman emphasises that the conduct occurred within a short time after the return of the verdicts, and therefore within a matter of hours after the jury had been discussing the credibility of KF's evidence. She relies on that as an indication of the real possibility of bias. She further relies upon the fact that it can be seen from the exchange of text messages that certainly KF and, as a matter of common sense probably also the juror, knew that it was inappropriate and perhaps downright wrong for them to be in communication with one another. Ms Chapman submits that against that background, it is troubling that they nonetheless continued to exchange their messages.
23. Ms Baines, who also appeared at the trial, accepts on behalf of the respondent that an inference may be drawn that the juror was attracted to KF when she was giving her evidence, but submits that there is no real possibility that the jury was biased either in favour of KF or against the applicant. She submits that the encounter between the juror and KF in the court building was a matter of chance and that the suggestion of some contact between the two during the trial is purely speculative. She points out that the jury unanimously convicted the applicant of the offence against KF charged in count 9 but unanimously acquitted him of the offences charged in counts 7 and 8. She suggests that there is a lack of logic in the proposition that bias in favour of KF caused the juror somehow to influence the eleven other members of the jury to convict on one of the relevant three counts but not the other two. She submits that even if there was a doubt about the individual juror's impartiality, it would not follow, in the circumstances of this case, that the conviction on count 9 should be quashed.
24. We are very grateful to both counsel. The high standard of their respective written and oral submissions confirms the view which we formed on reading the papers, that both had shown considerable expertise and skill in the course of the trial. We have reflected on their submissions.

25. We begin by making the obvious point that no issue as to possible bias arose until after the verdicts had been returned, the trial concluded and the jury discharged. We are not therefore concerned with an issue as to whether the recorder should have discharged the juror. The issues for this court is whether the fresh evidence should be received pursuant to section 23 of the Criminal Appeal Act 1968 and, if so, whether that evidence shows actual or apparent bias on the part of the jury such as to cast doubt on the safety of the conviction. Those issues are of course interlinked, because by section 23(2)(b) one of the matters which this court must consider in deciding whether to receive fresh evidence is whether it appears that the evidence may afford a ground for allowing the appeal.
26. We are unable to accept the submission that there may well have been some contact between KF and the juror during the trial. Both witnesses deny it, and there is no evidence casting doubt on what they say in that regard. The exchange of messages contains nothing which refers to or even hints at any previous contact. KF told the juror in one of her text messages that she had noticed him when she was giving evidence because he was younger than the other members of the jury and she thought him attractive; but there is nothing to suggest that she had taken any step to contact him. Neither the juror nor KF has been required to attend to face cross-examination on this point. The issues must therefore be considered on the footing that communication between the two only began after the verdicts had been returned.
27. In R v Khan [2008] 2 Cr App R(S) 13, Lord Phillips CJ, at paragraph 9, drew an important distinction between partiality towards the case of one of the parties and partiality towards a witness. Association with or partiality towards a witness will not necessarily result in the appearance of bias, though it may do so if the witness is so closely associated with the prosecution that partiality towards the witness is equated with partiality towards the party calling the witness. Lord Phillips continued at paragraph 10 as follows:

> i. "Where an impartial juror is shown to have had reason to favour a particular witness, this will not necessarily result in the quashing of a conviction. It will only do so if this has rendered the trial unfair, or given it an appearance of unfairness. To decide this it is necessary to consider two questions:
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> ii) Would the fair-minded observer consider that partiality of the juror to the witness may have caused the jury to accept the evidence of that witness? If so
> iii) Would the fair-minded observer consider that this may have affected the outcome of the trial?'
>
> i. If the answer to both questions is in the affirmative, then the trial will not have the appearance of fairness. If the answer to the first or the second question is in the negative, then the partiality of the juror to the witness will not have affected the safety of the verdict and there will be no reason to consider the trial unfair."

28. We respectfully adopt that approach. As to the first question, we think that the fair-minded observer, reading the exchange of text messages as we have done, would have little doubt that the juror and KF were attracted to one another at the time of that exchange, and would regard it as a real possibility that the juror had begun to feel attracted towards KF while she was giving her evidence. It does not however follow that there is a real possibility that partiality towards KF caused the juror to accept her evidence. The juror contributed to the unanimous not guilty verdicts on the other two counts relating to KF. He contributed to the unanimous guilty verdicts in respect of five other complainants, towards whom it is not suggested he was partial. In order to do so do, he and the eleven other members of the jury must have disbelieved much of the applicant's evidence.
29. We note also that in his sentencing remarks the recorder observed that the acquittals on counts 7 and 8 were explicable on the basis that KF's evidence in relation to those counts left open the possibility that she may on the occasions concerned have been giving "mixed messages" to the applicant.
30. In those circumstances, we are not persuaded that the fair-minded observer would consider that partiality towards KF, as opposed to an impartial assessment of all the evidence relevant to count 9, may have caused the juror to accept KF's evidence on that count when he otherwise would not have done so. Still less are we convinced that partiality on the part of the juror may have caused the jury as a whole to accept her evidence when they otherwise would not have done so. It follows that, in our view, Lord Phillips' first question must be answered in the negative.
31. So too must be the second question. The combination of verdicts returned by the jury indicates a conscientious obedience by them to the recorder's direction that they should consider each count separately. We agree with Ms Baines that there is no basis for thinking that partiality on the part of the juror somehow resulted in his persuading the other members of the jury to convict the applicant on one of the three counts relating to KF when they otherwise would not have done so.
32. We are therefore satisfied that there is no arguable basis on which the proposed fresh evidence could be said to be capable of providing a ground for allowing the appeal and we decline to receive it. There is no ground on which it could be argued that the conviction on count 9 is unsafe. If we had thought otherwise, we would have been willing to grant the necessary extension of time. As it is, no purpose would be served by extending time because an appeal has no prospect of success.
33. We turn to the application for leave to appeal against sentence. The applicant is now aged 36. His only previous convictions were for driving with excess alcohol in 2015 and possession of cocaine in 2019. He had no previous experience of custody. He had a history of hard work and service for the community, and testimonial letters from persons who knew him well spoke highly of him. It is relevant to note that he is now helping others in prison, providing support for those with problems of alcohol and drug abuse. There is clearly a better side to his character.
34. However, a pre-sentence report assessed the applicant as posing a "high" risk of serious harm to women. The recorder found him to be a dangerous offender and concluded that an extended determinate sentence was necessary for the protection of the public. No challenge is or could be made to those decisions. The grounds of appeal contend that

the custodial term was manifestly excessive in length, in particular because the judge, in following the Sentencing Council's Definitive Guideline on Sentencing for Rape Offences, placed all or most of the offences into too high a category. She argues that with the possible exception of three of the offences, the appropriate category for each was 3B, for which the guideline indicates a starting point of 5 years' custody and a range of 4 to 7 years. She also submits that there was no justification in this case for the judge to extend the licence period by the maximum term permitted.

35. The recorder in his sentencing remarks said that:

    i. "Given the vulnerable circumstances and nature of each of the victim, each of the counts would come into at least category 2B of the guidelines".

36. For that category the guideline indicates a starting point of 8 years and a range of 7 to 9 years' custody. He went on to emphasise the need to have regard to totality.
37. With respect to the recorder, we see force in the submission that these were not or were not all category 2B offences. It seems that the recorder accepted the submission of the prosecution that the category 2 harm features were the severe psychological harm caused to the victims and the additional humiliation/degradation inflicted on KF. We note though that the recorder did not specifically say so. A victim personal statement may provide a sufficient basis for a finding of severe psychological harm: see R v Chall [2019] EWCA Crim 865. However, without in any way understating the harm undoubtedly suffered by the victims in this case, we take the view that most, if not all, the victim personal statements which were before the recorder fell short of showing that high level of harm. KF did suffer an additional humiliation in that the applicant, in addition to raping her, rejected her request to be allowed to go to the bathroom with a curt instruction that she should "piss the bed". We question however whether that would be sufficient to take the case into category 2 harm. We similarly accept Ms Chapman's submissions as to specific features relating to the sentences on counts 5 and 6. We do not think that any of the category A culpability factors was present in any of the cases other than counts 1, 3 and 4 (in respect of which, Ms Chapman realistically recognises that it is difficult to argue against the determinate sentences of 12 years' imprisonment). We therefore see force in the submission that the majority of the offences should have been placed into category 3B.
38. It is important to note that the top of the category 3B range coincides with the bottom of the category 2B range. As we have indicated, Ms Chapman recognises that at least some of the offences could fairly be placed into the higher of those categories. In relation to those that did not, it is inescapable that each successive rape was aggravated by those that had gone before, so that an increase above the guideline starting point was necessary. Our concern, at this stage, must be with the totality of the sentencing rather than the precise structure of it. The recorder had to sentence for offences over a long period of time, increasing in frequency in the later stages, against six different victims. He had well in mind that he had to impose a sentence which reflected the seriousness of the overall offending whilst observing the principle of totality.
39. The guideline indicates that "offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate".
    Ms Chapman submits that even if these offences could be said to amount to "a campaign

of rape", it was a campaign which lacked some of the very serious features in other cases in which that phrase is applicable. We agree that the phrase "campaign of rape" does not entirely aptly describe this offending; but it perhaps makes little difference, because that is not the only way in which rape offences may be of such severity as to attract sentences of 20 years or more.

40. Ms Chapman has invited our attention to two decisions in Attorney-General's References. We view those as being of limited help to the applicant, not merely because the facts of cases inevitably differ but also because this court, when increasing a sentence which has been found to be unduly lenient, imposes a sentence which comes at the bottom of the range which was properly open to the sentencing judge. The question here is whether this total sentence was arguably manifestly excessive.
41. Stepping back from the submissions made about individual counts, it must be noted that the first of the applicant's victims (RD) was raped at least 22 times over a period of four-and-a-half years. After a trial, that offending alone merited, in our view, a total sentence in double figures. There were then further rapes of five victims over a period of 5 years.
42. In such circumstances, whilst the total sentence of 20 years may be regarded as stiff, it is, in our view, impossible to argue that it was manifestly excessive. Again, if we had thought otherwise, we would have been willing to grant the necessary extension of time. But again, no purpose would be served by our doing so because an appeal against sentence has no prospect of success.
43. For those reasons, grateful though we are to Ms Chapman for her excellent submissions, the applications are all refused.

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