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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 203

CASE NO 201900989/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 11 February 2021

LORD JUSTICE POPPLEWELL
MR JUSTICE SPENCER
THE RECORDER OF RICHMOND-UPON-THAMES
HIS HONOUR JUDGE LODDER QC
(Sitting as a Judge of the CACD)

REGINA
V
DM

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MR A MALIK QC appeared on behalf of the Appellant

MISS K PRESTON appeared on behalf of the Crown

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J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave granted by the full court. It is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead to the identification of the victim of the offences. This judgment will be appropriately anonymised. The prohibition applies indefinitely unless waived or lifted in accordance with section 3 of the Act.
2. The appellant is now 77 years old. He was 75 at the date of conviction and sentence. On 22 January 2019 in the Crown Court at Aylesbury, he was convicted by the jury of historic sexual offences committed against his daughter, A, between 1971 and 1980. The six counts on the indictment, which included multiple incident counts, were charged as indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. The case was adjourned for a pre-sentence report.
3. On 15 February 2019 the appellant was sentenced by the trial judge, Her Honour Judge Tulk. In respect of five of the six offences he was sentenced to a total of five years' imprisonment. Because the remaining offence (count 2) involved penetration, it rendered the appellant an offender of particular concern and the judge was required to pass a sentence for that offence under section 236A of the 2003 Act. On count 2 the judge imposed a custodial term of four years, with the obligatory additional period of 12 months' licence. The total custodial term was therefore nine years.
4. The effect of the sentence is that the appellant will not be released automatically at the halfway point after serving four-and-a-half years. Instead, at that stage he will be entitled to apply for parole, but potentially he may have to serve the remaining two years of the special sentence on count 2, that is to say a total of six-and-a-half years. The sole issue in the appeal is whether the sentence passed by the judge took into account sufficiently the appellant's ill-health in view of his diagnosis of cancer, or alternatively whether the deterioration in his health since he was sentenced calls for a reduction in the term he was ordered to serve. Other grounds of appeal were initially pursued, but leave was refused by the single judge and those grounds were not renewed.
5. In view of the narrowness of the issue, it is unnecessary to recite the facts of the offences in any detail. Suffice it to say that they reflected a systematic campaign of sexual assault against his middle daughter, A, over a period of seven to eight years when she was aged between seven and 15. He would then have been in his late twenties and early thirties. The abuse took the form of touching her vagina in various situations in the family home and when out with him. On one occasion he digitally penetrated her vagina (count 2).
6. The impact on the victim throughout her life has been devastating. It has affected her attitude towards men, her relationship with her husband, and has made her over-protective towards her own children. She has suffered with depression and needed prolonged counselling. Only decades later did she feel able to come forward to the police.
7. The appellant had been diagnosed with prostate cancer in June 2006, some 12 years before the trial. The judge was well aware of this, although no full medical report was provided. For example, he had been unfit to attend court for the plea and trial preparation hearing on 5 September 2018 because of symptoms of anxiety and depression, triggered in part by a deterioration in his prostate cancer. There was a report from his GP to that effect. The judge had also been informed that the trial might need to be interrupted or delayed if he received an appointment for a further scan due

in December 2018.

8. Despite the progress of his cancer, the appellant had continued to live a normal, active life, including continuing to work as a coach driver. The pre-sentence report made no reference at all to his cancer which was perhaps an indication of its limited impact on his everyday life at that time.
9. In passing sentence, the judge alluded to the appellant's age and health which she took into account as a mitigating factor. She said:

    i. "I have taken into account the fact that, at 75 years old, you will find coping with the inevitable prison sentence more difficult than somebody ... younger and in better health. I know, although I have no medical reports about it, that you are undergoing ongoing monitoring and medication for prostate cancer and I have considered therefore the cases of *Clarke* and *Cooper*, which deal with the approach of the court in relation to passing [a] sentence of imprisonment upon older people - in that case they were 101 and 96, so a lot older than you - but older people [in] ill health in relation to whom there may occasionally be a possibility that [the] sentence required to reflect the gravity of the offences may lead to their dying in prison."

10. By the time the full court heard the renewed application for leave on 10 September 2020 there was a medical report from the appellant's consultant oncologist, Dr McGeoch. There had been some deterioration in the appellant's condition. Dr McGeoch stressed that in prostate cancer any prognosis was subject to a wide range of error, but he estimated that the appellant's life expectancy was around two years. He was responding well to treatment. Other options would be explored, including chemotherapy.
11. It was in the light of this medical report that the full court granted leave, directing that a more detailed medical report be obtained on the continuing programme of treatment and future options available, and the extent to which the condition impinges upon the appellant's life whilst in custody. The court also directed a report from Her Majesty's Prison Service as to whether consideration had been or was likely to be given to an exercise of the powers available to the Home Office to release somebody who is terminally ill. It was agreed that the appellant's solicitors would obtain the reports.
12. We are grateful to Mr Malik QC for his written and oral submissions. He drafted the new ground of appeal and appeared before the full court when leave was granted. We are also grateful to prosecuting counsel, Miss Preston, for her written and oral submissions, and in particular for her analysis of the medical evidence.
13. The picture which emerges from the material before us is as follows. When the appellant was seen by a consultant clinical oncologist Dr Sabharwal on 24 August 2018, his prostate- specific antigen (PSA) had been rising and a change of medication was suggested. The appellant had recently completed a five-day tour of the Isle of Wight driving a coach.
14. When Dr Sabharwal saw the appellant next on 12 October 2018, his PSA had risen slightly more. Scans of the chest, abdomen and pelvis were proposed and a bone scan. The appellant was pleased that he had recently passed his medical for bus driving.
15. Dr Sabharwal next saw the appellant on 30 November 2018, a few weeks before the trial.

He remained generally well in himself. His bone scan was negative, but his CT scan had shown three indeterminate lesions in the right lung for which a repeat scan in three months was recommended. His PSA remained stable. That was the state of the medical evidence at the time of sentence on 15 February 2019, although the judge was not provided with these reports.

16. The appellant next saw Dr Sabharwal on 15 March 2019, a month after sentence. The appellant was generally well in himself. His recent CT chest scan had shown that the lung lesions had resolved, although there was possibly a new sclerotic focus suspicious for metastatic disease. Further scans were proposed and the appellant was to be seen again in six weeks' time.
17. It is apparent that there was then a CT scan on 31 May 2019 which confirmed the presence of bone metastases in thoracic and lumbar vertebrae and pelvis.
18. The next medical report we have is from Dr McGeoch, over a year later, dated 20 July 2020, a report which was presented to the full court. As well as giving a prognosis of around two years, Dr McGeoch reported that the appellant was responding well to treatment.
19. In accordance with the directions of the full court, a further report was obtained from Dr McGeoch. It is undated but it must have been written in late September 2020. Dr McGeoch set out details of the appellant's current treatment and medication. He had been on this treatment since June 2019 and the treatment would continue for as long as it proved effective. A recent CT scan performed on 16 September 2020 had shown no appreciable signs of metastatic disease. The sclerotic lesion previously seen had resolved. Dr McGeoch was unable to comment on the day-to-day impact of the appellant's illness and treatment whilst in custody. Although the appellant had reported lower back pain, Dr McGeoch did not think this was caused by the cancer. He stood by his prognosis of about two years. Statistically however the prognosis was likely to fall into the range of 18 months to four years.
20. At a virtual conference with the appellant in prison on 1 October 2020, he provided his solicitors with information as to the day-to-day impact of his illness and treatment. He informed his solicitor that he was in constant pain from the cancer, for which he was taking eight paracetamol tablets per day. He had been provided with a special mattress enabling him to sleep on his side because of the pain in his pelvis. His day-to-day functioning was proving challenging, particularly in relation to using the lavatory. His solicitors expressed concern about the appellant's mental health now that he was aware of his limited life expectancy, a fact which had previously been kept from him. Mr Malik told us in his oral submissions, and we readily accept, that this news came as a terrible blow to the appellant.
21. At the request of his solicitors, the Governor of HMP Littlehey provided the information the full court had requested in relation to the possibility of early release on compassionate grounds ("ERCG"). In a letter dated 2 October 2020 the Governor confirmed that the appellant had made no application to be released under ERCG. The Governor had not been informed of the appellant's medical condition and terminal diagnosis, but the prison's healthcare partner, Northampton NHS Trust, would identify anyone who fitted the criteria for ERCG. It was a well-practised process at this particular prison owing to the high number of elderly prisoners. The Governor had not been informed that the appellant was likely to die soon or was bedridden or severely incapacitated.

22. The Governor's letter set out the basis on which early release on medical grounds is considered under the relevant prison regulations. Early release may be considered where a prisoner is suffering from a terminal illness and death is likely to occur soon. There are no set time limits but three months may be considered to be an appropriate period. Early release may also be considered where the prisoner is bedridden or severely incapacitated. As none of those factors currently applied, the Governor suggested in his letter that any application for ERCG at present was unlikely to succeed.
23. On 6 November 2020 the appellant's solicitors wrote to the Criminal Appeal Office expressing surprise at the content of the report from the prison. It was said that the appellant now required a CT scan of his spine and pelvis as well as a camera examination of his bladder.
24. On 17 November 2020, Dr Chaudhary (a general practitioner) wrote to the Prison Governor on behalf of the NHS Trust. Dr Chaudhary confirmed that the appellant was currently having chemotherapy for his prostate cancer. He was currently fully able to conduct the activities of daily living and had been able to work within the prison. His prognosis remained at around 18 months to four years. He was being monitored on a frequent basis by the palliative care consultant at the prison and the palliative care nurse.
25. The most recent written medical information we have before us is a letter dated 4 December 2020 from the appellant's solicitors to the Criminal Appeal Office. The solicitors had been informed on 3 December 2020 that the appellant was receiving palliative care in prison and was seeing a doctor once a week. The appellant had lost a substantial amount of weight and was taking ten painkillers a day to ease the pain he was experiencing.
26. In the course of the hearing, Mr Malik confirmed that there was no further medical update in writing, nor indeed did Mr Malik suggest that any was required. The prognosis remains the same, and very properly Mr Malik relied upon the wider bracket of 18 months to four years. Mr Malik confirmed that the appellant is not confined to bed, he is able to walk. Mr Malik acknowledged that, in the context of cases of this kind which the court might encounter, the degree of incapacity is not as great as others.
27. Mr Malik submits that the appellant's medical state and poor health was not properly assessed and taken into account at the time of sentence. His primary submission is that although the judge was aware in general terms of the appellant's prostate cancer, what she did not know was the much-reduced life expectancy which only emerged from Dr McGeoch's report much later. Mr Malik submits that the appellant's life expectancy is now less than two years, subject to the broader bracket we have mentioned, and that nine years' custody simply did not reflect a proper reduction for the prospect of the appellant dying in prison within four years or so of the date of sentence. Mr Malik submits in the alternative that as an act of mercy this court could properly reduce the sentence now in view of his reduced life expectancy and the deterioration in his condition.
28. We have considered carefully all the material before us and the submissions which have been made. The proper approach in a case such as this was definitively considered by this court in R v Stephenson [2018] EWCA Crim 318, [2018] 2 Cr.App.R (S) 6. Following and applying the principles set out in R v Bernard [1997] 1 Cr.App.R (S) 135, it was held that a medical condition which might at some unidentified future date affect either life expectancy, or the prison authority's ability to treat a prisoner satisfactorily,

might call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise, but was not a reason for the Court of Appeal to interfere with an otherwise appropriate sentence. The fact that an offender had a reduced life expectancy was not generally a reason that should affect sentence. A serious medical condition, even when this was difficult to treat in prison, would not automatically entitle an offender to a lesser sentence than would otherwise be appropriate. An offender's serious medical condition might enable a court as an act of mercy, and in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate. It was also held, applying established authority, that the sentencing court is fully entitled to take account of a medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the appellant or as a matter of generally expressed mercy in the individual circumstances of the case. Those who are gravely ill or severely disabled, or both, may well have to be imprisoned if they commit serious offences. Their condition cannot be a passport to absence of punishment.

29. The court in Stephenson referred to the case mentioned by the judge in her sentencing remarks, R v Clarke and Cooper [2017] EWCA Crim 393, [2017] 2 Cr.App.R (S) 18, where it was said, at [25]:

    i. "Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors ... we consider that the approach of taking then into account in a limited way is the correct one."

30. In Stephenson the court acknowledged that in the event of significant deterioration in a known medical condition, a more flexible approach may properly be taken. The Court of Appeal may have regard to a significant deterioration in a medical condition known at the date of sentencing, but the cases in which it will be appropriate to do so will be rare. The case will have to be one where the appellant could bring himself within the Bernard principles. Moreover, the medical evidence establishing deterioration will have to be received by the court as fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968.
31. Applying these principles, we take full account of all the material placed before us. We have considered first whether the sentence is properly open to criticism on the basis that the judge paid insufficient regard to the appellant's ill-health. We reject any such criticism. The judge took into account the information which was available. Had she been supplied with the medical reports in existence at the date of sentence, to which we have already referred, there would have been nothing to indicate any greater degree of mitigation than she already acknowledged. Furthermore, in our judgment if she had

been made aware of a reduced life expectancy that would not have affected her assessment of sentence having regard in particular to her reference to the cases of Clarke and Cooper.

32. As to the subsequent deterioration in the appellant's medical condition, there is, in our judgment, nothing to indicate that the appellant is not receiving appropriate care and treatment whilst in prison. Quite the reverse. His reduced life expectancy is not in our view in itself a justification for reducing his sentence even as an act of mercy. These were very serious offences which have had a lasting life-long impact on his victim. He continues to deny his guilt. He has roughly two-and-a-half more years to serve before he is eligible for parole. Should his condition deteriorate significantly it will be open to the Secretary of State to transfer him to hospital or to consider early release on compassionate grounds. Those are matters for the Secretary of State and the prison authorities and not for this court.
33. For these reasons, despite the very helpful submissions of Mr Malik, we are not persuaded that this sentence was or has become manifestly excessive. Accordingly, the appeal must be dismissed.

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

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