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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202201773/A3

[2022] EWCA Crim 1157

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 29 July 2022

Before:
LADY JUSTICE CARR DBE
MR JUSTICE FRASER
THE RECORDER OF LEEDS
HIS HONOUR JUDGE KEARL QC
(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

REGINA
V
RAYMOND ELLIS

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MISS S PRZYBYLSKA appeared on behalf of the Attorney General
MR M KELLET appeared on behalf of the Offender

J U D G M E N T

LADY JUSTICE CARR: 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 that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction

1. We have before us an application by Her Majesty's Attorney General for leave to refer a sentence on the ground that it is unduly lenient. We grant leave.

2. The offender is Raymond Ellis, now 63 years old. He was convicted on his guilty plea of a single offence of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. On 13 May 2022 at Bristol Crown Court he was sentenced by Mr Recorder Bromige to five years' imprisonment and made the subject of an indefinite notification requirement.

3. The conviction arose out of events that took place in 1987. The victim was then only 17 years old. Ellis violently assaulted her, dragged her to a remote location, tied her up with her underwear and forced her to perform oral sex on him, ending only when he ejaculated into her mouth. He left her tied up. In 2019 the case was reviewed and DNA extracted from a sample taken from the victim. The profile was a match for Ellis.

4. What is argued by the Attorney General is that the reduction applied by the judge to reflect the previous maximum term for the offence of 10 years rendered the sentence unduly lenient.

The facts

5. The offence took place on the night of 15 March 1987. The victim had been out at a public house with friends. She missed her bus home and decided to walk. Ellis followed her. She realised that she was being followed and so picked up her pace, but Ellis kept up. She began to run, losing one of her stiletto shoes. Ellis picked the shoe up and chased her. He caught up with her and hit her in the face with the shoe, loosening one of her teeth and causing significant bleeding.

6. Ellis grabbed the victim and dragged her down an alleyway between two houses, through a garden and into an isolated area. He told her to take off her underpants which he then used to tie her legs together. He told her that she would have to "do things". He pulled up her skirt and her bra. She asked if he was going to kill her. She said she was 15 years old, in the hope this would change her attacker's mind. But Ellis was undeterred. He pushed her to the ground and he stood over her. He told her to suck his penis or he would hurt her. She did as she was ordered. He penetrated her mouth for up to 10 to 15 minutes until he ejaculated. He then ran off leaving the victim still tied up. She had never given oral sex to anyone before.

7. The victim freed herself and ran until she found a telephone box, but she was still frightened that Ellis would follow her. She called the police and waited until they came. She was examined by a doctor and samples were taken from her. She gave a statement to the police. The police were unable to identify her attacker at the time but they retained her jacket which bore a semen stain.

8. As we have indicated, in 2019 the case was reviewed. The jacket was examined. A DNA profile was obtained from the semen stain and it matched Ellis's profile. Ellis was arrested and interviewed under caution. He said that he had suffered brain damage and had no memory at the relevant time. He submitted a prepared statement in which he denied the offence and then made no comment.

9. Ellis had 16 convictions for 38 offences, including for an offence of indecency committed in 1977 in which he had attacked another girl in an alleyway and also forced her to perform oral sex on him. He had also been convicted of assaulting a woman with intent to rob in 1983 in the course of which offending he had kicked the woman in the head and the stomach. He had no convictions for sexual offences post-dating the offence in 1987, but at the time of the instant offence in 1987 he was subject to a probation order that had been imposed in September 1986 for an offence of burglary.

10. Ellis repeated to the author of a pre-sentence report that he could not remember the offence because of a brain injury in 1997, but had accepted his guilt on the basis of the DNA evidence. He was recorded as expressing a good level of insight into how his offending could have affected the victim. He said that he felt deeply ashamed and, since becoming aware of the matter, had felt overwhelmingly distressed. He was currently residing in a care home. The author expressed the view that the imposition of a custodial sentence would have a profound effect on his current support system. Re-settlement would depend on future social service placement.

11. Dr Raviraj, a consultant psychiatrist, provided a report to the court dated 10 November 2021 confirming that Ellis had indeed suffered a traumatic brain injury in 1997 after an assault. He was suffering from a schizo-affective disorder and had had manic psychotic and depressive spells. He had been admitted to hospital on a number of occasions over the last decade and on occasion had attempted to take his own life. However, he was well when medicated, though would rapidly relapse when he stopped taking medication. His difficulties were said to be exacerbated by substance misuse. The most likely diagnosis in Dr Raviraj's opinion was that Ellis had paranoid and emotionally unstable personality traits post head injury. He was at the time however in remission, supported by a community psychiatric nurse, and stable whilst taking anti-psychotic and mood-stabilising medication.

12. The victim provided an impact statement. The offence had blighted her life. She felt that it had ruined her chances in life. The offence had been extremely traumatic and frightening. She had been only 17 at the time and was just beginning a social life with her friends. After the attack she moved back to her mother's house, lost touch with her friends and stopped going out. In her words she became "a shell of a person". Her

attendance at college suffered and she failed to achieve the expected results academically. Her career prospects suffered and she now worked as a cleaner. She had begun to suffer anxiety and depression and to use alcohol to make herself feel better. She had convictions for offences that she had committed in drink as a result. She was on anti-depressants and she still slept badly.

The sentence

13. In sentencing, the judge referred to the significant impact of the offence on the victim. He agreed with the parties that the offence if committed now (i) would be charged as rape under section 1 of the Sexual Offences Act 2003, given that it involved non-consensual penetration of the mouth with a penis, and (ii) would fall into Category 2B for rape as set out in the Sentencing Council Guideline for Sexual Offences ("the Guideline") on account of the level of violence, the abduction and the particular vulnerability of the victim.

14. Category 2B offending carries a starting point of eight years' custody with a range of seven to nine years. The judge found the starting point after trial would be above the Guideline range bearing in mind the weight of the aggravating factors including the similar previous conviction, ejaculation and the use of a weapon to inflict violence. He said that there was little mitigation other than the guilty plea. The sentence after trial in his judgment would have been nine years and four months, had the offence been committed after 2003 and charged as rape. The judge then reduced that sentence to six years and eight months' imprisonment to reflect the differing maximum sentences for rape (life imprisonment) and indecent assault (10 years). He stated as follows:

> "So, the sentence after trial on the rape guidelines would have been 9 years and 4 months' imprisonment. Reminding myself that the maximum sentence for indecent assault is 10 years' imprisonment, the sentence that would have been imposed after trial for the indecent assault would have been 6 years and 8 months in custody."

15. He then applied a 25% reduction for guilty plea, notwithstanding that that plea had not been entered at the pretrial preparation hearing. Ellis's mental health had meant that it was reasonable to explore fitness to plead and his amnesia made the instruction of a DNA expert reasonable and necessary. Thus the overall sentence was reduced to one of five years' imprisonment. The judge found that Ellis was not dangerous, relying on his limited offending history in recent years and the impact of the brain injury.

Submissions

16. For the Attorney General, Miss Przybylska takes no issue with the categorisation by the judge of the offence under the Guideline for the modern offence, nor with the aggravating factors identified. Nor does she take any issue with the judge's approach to mitigation and guilty plea. The focus of the Reference is on the judge's approach to the calibration performed in order to reflect the difference between the maximum sentence for rape and for indecent assault. It is submitted that, although the sentencing exercise as a whole was plainly a careful one, the judge's reduction of two years and eight months (just under 30%) on account of the differing maximum sentences was reached in consequence of a misunderstanding of the purpose of such a reduction. In circumstances where the

offence was at the upper end of seriousness, it was not unjust to impose a sentence at the upper end of the available sentencing range. In the particular circumstances of this case it is said that the judge should have imposed no reduction at all. The authorities, emphasises Miss Przybylska, do not require a reduction for calibration in every case. This was also a single offence rather than a series of offences. Thus the over-arching submission for the Attorney General is that the sentence imposed in this case was outside the range reasonably open to the judge on the facts and was unduly lenient.

17. For Ellis, Mr Kellet submits that the judge properly applied the Guideline in a measured and reflective manner. He was faced with the difficulty, so says Mr Kellet, that the maximum sentence that the judge could impose was one of seven and a half years, given Ellis' guilty plea. Mr Kellet suggests that the individual features of this offending could have been worse. Further, in terms of mitigation Mr Kellet relies on Ellis' mental disorder, albeit not linked to the commission of the offence. In written submission, Mr Ellis suggested that the judge "inevitably" reduced the term of seven and a half years to reflect Ellis's mental difficulties. However, during the course of oral submissions and having been taken to the transcript of the sentencing remarks, Mr Kellet accepts that the judge in fact made no reduction, inevitable or otherwise, to reflect Ellis' mental difficulties.

18. Mr Kellet maintains the submission that this was a difficult sentencing exercise with very little room to manoeuvre. The extent to which the judge went down from the seven-and-a-half year maximum, as he puts it, cannot be said to be a gross error or a substantial departure from the norms of sentencing. It may have been lenient, but it was not unduly so.

Discussion

19. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type. We remind ourselves that the threshold for appellate interference is a high one. A sentence must be not only lenient but unduly lenient.

20. The Sentencing Council has provided guidance on the sentencing of historic sexual offences. In summary:
i) The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence.
ii) The sentence is limited to the maximum sentence available at the date of the commission of the offence.
iii) The court should "have regard to" any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003.
iv) The court should not seek to establish the likely sentence had the offender been convicted shortly after the date of the offence.

21. This court has considered this guidance on a number of occasions, including in R v Clifford [2014] EWCA Crim. 2245; R v Forbes [2016] EWCA Crim 1388, [2016] 2 Cr.App.R (S) 44 and R v DL [2020] EWCA Crim 881, [2021] 1 Cr.App.R (S) 19. The following general observations can be drawn from the authorities:
i) The court is entitled to reflect modern attitudes to historic offences and to look to modern sentencing guidelines. Where the court looks to a modern offence containing equivalent elements to the historic offence and where the maximum under the Sexual Offences Act 2003 is significantly higher, then the task of the judge will be to make due allowance for that.
ii) The court must use the relevant guideline applicable at the date of sentence in a measured and reflective manner in order to arrive at the appropriate sentence. This is why the Guideline uses the phrase "have regard to".
iii) Thus, a mathematical or overly mechanistic approach is to be avoided. Rather, measured reference to the Guideline is to be made causing the court to reflect the previous maximum sentence as part of the composition of the sentence based on current guidelines.
iv) The matter is to be tested by a consideration of whether the overall sentence imposed is excessive and disproportionate for the offending revealed, taking into account modern sentencing practice. What must be achieved is a proper calibration which reflects the statutory maximum available at the time of the offending.

22. As we have recorded, the judge reduced the sentence that he considered would apply under the Sexual Offences Act 2003, namely nine years and four months' imprisonment, to one of six years and eight months' imprisonment before credit for guilty plea. In doing so, rather than considering whether an overall sentence of nine years and four months' imprisonment would be excessive and disproportionate to the offending, taking into account modern sentencing practice, he appears to have asked himself what the sentence after trial in 1987 would have been. That is precisely the approach that the Guideline eschews. The seriousness of the offence assessed by the culpability of the offender and the harm caused or intended is the main consideration for the court.

23. Equally, the approach adopted by Mr Kellet, namely to proceed on the basis that the relevant maximum sentence for the purpose of the calibration exercise was seven and a half years is flawed and rejected correctly in our judgment by the Attorney General. The relevant maximum sentence was 10 years' imprisonment.

24. This was an extreme instance of a single offence of indecent assault involving the oral rape of a teenage girl in the context of a violent abduction which blighted the victim's life with long-lasting adverse consequences. Putting it another way, it was a most serious offence and a most serious example of indecent assault.

25. By reference to the Guideline, it was Category 2B offending, carrying a range of seven to nine years' imprisonment and a starting point of eight years. The Category 2 features that were both the sustained nature of the incident and the use of violence and the threats of violence.

26. There then fell to be added a very significant number of aggravating factors. We refer to

ejaculation, the use of a weapon, physical injury, restraint, the targeting of a lone victim late at night dragged into an alleyway and through an alleyway. Beyond that, and of real significance in our judgment, was the existence of Ellis' previous convictions and the fact that this offending was committed during the currency of a probation order. There was then also the very severe impact on the victim.

27. Specifically, unlike the position in DL (see in particular the remarks at [24]), the conduct here was at the very highest level. This was a type of indecent assault which readily justified a maximum sentence. A term of 10 years' imprisonment before credit for guilty plea would not be either excessive or disproportionate, taking into account modern sentencing practice and carrying out the proper and necessary calibration exercise.

28. Like the judge, we do not consider that any further reduction fell to be made by reason of Ellis' subsequent mental health problems. It is common ground that they did not serve to lessen Ellis's culpability. There is nothing in the material that we have seen - and we gave Mr Kellet every opportunity to take us to anything that we might have overlooked - to suggest that Ellis' condition cannot be managed properly in prison. Indeed a recent letter from a senior officer at HMP Dartmoor confirms that Ellis is coping and that his condition is being managed appropriately on medication. He is not unfit to serve in prison. The loss of his support environment was always inevitable on the basis that on any view a significant custodial sentence would be passed. Additionally, we bear in mind that Ellis had the benefit of a 25% discount for guilty plea because of his mental health complications.

29. In all these circumstances, as indicated, an overall sentence of 10 years' imprisonment before credit for guilty plea would have been entirely appropriate. After applying a 25% discount for guilty plea, a final term of seven-and-a-half years' imprisonment would then be reached. Set against these conclusions (and even by reference to the term of nine years and four months' imprisonment identified by the judge), it can readily be seen that a custodial term of six years and eight months before credit for guilty plea, resulting in a final sentence of five years' imprisonment, was not only lenient, but unduly so.

30. For these reasons, we will allow the Reference. The sentence of five years' imprisonment will be quashed and in its place will be substituted a term of seven and a half years' imprisonment. Ellis will not be released on licence until two-thirds of that sentence have been served. All other elements of the sentence remain undisturbed.

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

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