Neutral Citation Number: [2024] EWCA Crim 1006

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 19 July 2024

Before:

LORD JUSTICE WILLIAM DAVIS

MRS JUSTICE THORNTON

SIR ROBIN SPENCER

REX

v

BTU

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MR ROB MOCHRIE appeared on behalf of the Applicant
MR PETER GLENSER KC appeared on behalf of the Crown

J U D G M E N T

SIR ROBIN SPENCER:

1. These applications for leave to appeal against sentence and for an extension of time for leave to appeal against conviction have been referred to the full court by the Registrar.

2. The anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences in this case. Under those provisions no matter relating to the victim of these offences shall be included in any publication if it is likely to lead members of the public to identify that person as the victim of these offences. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

3. Because of the need to avoid jigsaw identification, we shall anonymise the applicant's identity when our judgment is published in writing, and for the same reason, we shall avoid referring to factual details of the case which may risk such identification.

4. We grant the extension of time and we grant leave to appeal against conviction and sentence.

The technical issue arising from the indictment

5. The appellant is a man now in his mid-70s. He was charged with a series of sexual offences committed against his adult daughter, whom we shall call 'V'. The indictment he faced when the matter first came before the Crown Court in October 2020 charged him with two offences of incest (counts 4 and 5), two offences of rape (counts 1 and 3), and an offence of indecent assault (count 2). He entered guilty pleas to the counts of incest, which were charged as offences contrary to s.10 Sexual Offences Act 1956. The indictment alleged that the offences were committed between 1989 and 1997. That was why they were charged under the 1956 Act. That Act was repealed by the Sexual Offences Act 2003. The equivalent offence under the 2003 Act is sex with an adult relative: penetration, contrary to

s.64 of the Act. The material ingredients of the offence are the same.

6. It is now common ground that the offences charged as incest in fact took place in 2007 and should therefore have been charged contrary to s.64 of the 2003 Act. That is the basis of the appeal against conviction, which is not opposed. We shall return to the solution to that technical difficulty on which the parties are agreed.

Trial and sentence

7. The appellant pleaded not guilty to the remaining counts on the indictment and in due course he was tried for those offences in 2023.

8. Also a defendant in the same trial was the appellant's younger brother whom we shall call 'B'. He was charged with a series of offences committed against the same victim, V, who was his niece. Those offences were committed much earlier, between 1976 and 1981, when V was still a child. There were counts of rape and counts of indecency with a child which, under the Sexual Offences Act 2003, would now be charged as oral rape.

9. In September 2023 the jury convicted both the appellant and his brother B on all the counts they faced. The trial judge sentenced them both immediately.

10. The appellant was sentenced on the counts of rape to concurrent terms of 23 years' imprisonment, with a concurrent sentence of 18 months for the indecent assault. The judge also had to sentence the appellant on the counts of incest to which he had pleaded guilty at the first Crown Court hearing in 2020. The maximum sentence for incest under the 1956 Act was 7 years' imprisonment. Allowing credit of 25 per cent for the guilty pleas, the judge imposed sentences of 4 ½ years' imprisonment for those two offences, concurrent as between themselves but consecutive to the 23 years for the other offences. The total sentence was therefore 27 ½ years' imprisonment.

11. The brother, B, was sentenced to a total of 18 years' imprisonment, with an extended licence period of 1 year. As we shall explain later, the brother had been under 18 years of age when he committed or began to commit the offences, which explains the lower sentences in his case.

Substitution of guilty pleas to the correct offences, s.3A Criminal Appeal Act 1968

12. It was only after the appellant had lodged the appeal against his sentence that the error in relation to the counts of incest was recognised. It was identified by prosecuting counsel, Mr Glenser KC, in the respondent's notice. We need not go into the detail of how the error came about. Suffice it to say that there had originally been some uncertainty or confusion as to the date of the incidents giving rise to the charges of incest. It had, however, become clear by the time of the trial that the offences must have been committed in 2007.

13. Mr Mochrie, who has represented the appellant throughout, gratefully acknowledged in his subsequent written submissions that Mr Glenser's analysis was correct, and it was for that reason that he lodged the appeal against conviction in order to remedy the error. We too are grateful to Mr Glenser for identifying the error and for suggesting the remedy. Both Mr Glenser and Mr Mochrie have very properly acknowledged their responsibility, as they put it, for the error which arose, although we observe that it was an error which seems to have passed by everyone.

14. The solution to the problem is to be found in 3A Criminal Appeal Act 1968, headed "Power to substitute conviction of alternative offence after guilty plea". S. 3A provides as follows:

> "(1) This section applies on an appeal against conviction where—
>
> (a) an appellant has been convicted of an offence to which he pleaded guilty,
> (b) if he had not so pleaded, he could on the indictment have pleaded, or been found, guilty of some other offence, and

(c) it appears to the Court of Appeal that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of the other offence.

(2) The Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the appellant's plea of guilty a plea of guilty of the other offence and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

15. Applying this section it is agreed and we are satisfied that:

(1) had the error been discovered at the time, the indictment could have been amended to add counts alleging the correct equivalent offence contrary to s.64 of the 2003 Act;

(2) if the appellant had not pleaded guilty to the incorrect offences of incest, he could on that indictment (suitably amended) have been found guilty of those other offences contrary to s.64;

(3) his pleas of guilty to the counts of incest indicate an admission by the appellant of facts which prove him guilty of the s.64 offences.

16. Accordingly, instead of allowing or dismissing the appeal against conviction, this Court is entitled to, and does, substitute for the appellant's plea of guilty to each of the counts of incest a plea of guilty to the equivalent offence contrary to s.64 Sexual Offences Act 2003. For the record, the particulars of those new offences have been helpfully set out by Mr Glenser in a proposed new two-count indictment. It is not necessary, however, for the appellant to be re-arraigned. We simply substitute guilty pleas to those new counts in accordance with s.3A. In due course, pursuant to s.3A(2), we shall pass an appropriate sentence for the s.64 offences in substitution for the total sentence of 4 ½ years' imprisonment which the judge imposed on the counts of incest.

The facts of the offences

17. We turn then to the substantive appeal against sentence, concentrating on the total sentence

of 23 years' imprisonment for the offences of rape and indecent assault. We must first give a brief summary of the facts of all the offences.

18. The offences of rape and indecent assault were committed in the late 1990s when V was in her mid to late 20s. It is crucial to understand that by that stage V had been the subject of sexual abuse by B (her uncle) when she was a young child. She had also been subjected to abuse in relationships with partners. The judge was satisfied that the appellant was well aware that she was for that reason an extremely damaged and vulnerable young woman. It was also plain that she loved the appellant as her father.

19. The first time the appellant raped her (count 5) was at his flat. They had been out together drinking. When they returned to his flat, he plied her with more alcohol. She passed out. Taking advantage of her unconscious state he got on top of her and raped her. She awoke to find that she was lying on her back with the lower part of her body naked and her legs spread out. The appellant was on top of her having sex. She froze and pretended not to have woken up "until he'd finished", as she put it. She knew he had finished when he ejaculated.

20. The next offence in time was the indecent assault (count 6). This took place at her own house where she lived with her children. She and the appellant had been out drinking. They returned to her house. The appellant said it was too late for him to go home. She said that if he was going to stay the night, he would have to sleep on the sofa in view of what had happened previously. Despite this, the appellant got on to the bed with her and put his hand down her trousers and in between her legs. This time she was not drunk because the children were at home. She grabbed his wrist and pushed him away, telling him "Get off me. Don't you dare touch me. I don't want to do this."

21. The second offence of rape (count 7) took place later at a different address when she had

moved house. Her children were staying elsewhere for the night. She and her father went out together for the evening. He complimented her on her appearance which she appreciated. He said he did not want her to call him 'Dad'. When they returned to her house she told him he would have to sleep in one of the children's bedrooms which were empty. Although they had been out drinking, she was not as drunk as she had been when he raped her previously. This time she got into bed and went to sleep. She awoke once again to find the appellant on top of her having sex with her. She made a movement and opened her eyes, at which point the appellant desisted and jumped off her.

22. The offences originally charged as incest took place several years later in 2007. The appellant and V had been estranged for a while but there was a reconciliation. The appellant arranged a surprise trip for her to London. He booked a room at a hotel. It was a single room with only one bed. During the stay he had full penetrative sex with V. It was consensual. He also took her to a sex shop to buy a vibrator and took photographs of her engaging in sexual activity. Thereafter their consensual sexual relationship lasted for over three months.

23. The first count of incest, for which a plea to the s.64 offence has now been substituted, represented the first occasion in London; the second count of incest was a specimen count, reflecting at least three further occasions.

24. The offences did not come to the attention of the police for many years. The appellant was interviewed by the police in September 2017. He denied raping or sexually assaulting V. He said he had engaged in consensual sexual activity with her in the 1990s and again in 2007. This admission seems perhaps to be the origin of the incorrect charging of incest under the 1956 Act in that earlier period. However, the prosecution never accepted that there had been consensual activity in that early period. The appellant's defence at trial was that all sexual activity with V had been consensual.

25. The appellant had no previous convictions. There was no pre-sentence report, nor was any report necessary. The offences were so serious that a very lengthy sentence of imprisonment was inevitable.

The judge's sentencing remarks

26. In passing sentence the judge said that the defendants between them had caused V overwhelming and catastrophic harm. He drew no distinction between the level of harm each had caused her. As a result of B's offending, the love, affection and care that V craved became equated in her mind with sexual touching. That led to a series of destructive toxic relationships. The appellant had made false offers of love to her, knowing that she was a profoundly damaged and vulnerable woman, so that he could exploit his own daughter for his depraved sexual obsession. He had plied her with alcohol to commit the offences of rape. Waking from an alcohol-induced sleep to find that she was being raped by her own father was, the judge said, "the final psychological and emotional blow, the coup de grâce, as it were, delivered by her own father on this deeply traumatised woman".

27. In relation to the subsequent offences charged at that stage as incest, the judge said that the appellant had somehow convinced her that she was in some kind of boyfriend/girlfriend type relationship with him. As well as consensual incestuous activity he persuaded her to indulge in sexual photography for his own pleasure.

28. Turning to the application of the relevant Sentencing Council guideline for rape, the judge said he was satisfied that the severe psychological harm she had endured was more than sufficient to make it a category 1 case for each defendant; that is to say a case of severe psychological harm of an extreme nature. She was particularly vulnerable when the appellant started abusing her sexually. From the harm she had already suffered, the appellant knew what he was inheriting and exploited it. There were elements of emotional

manipulation; alcohol was used to support the sexual abuse; there was abuse of trust over an extended period of time. The judge concluded that there was in reality no mitigation. The judge then imposed the sentences we have indicated: 23 years for the rapes and indecent assault, and 4 ½ years consecutive for the offences of incest, a total of 27 ½ years.

29. We should explain that the sentences imposed upon the appellant's co-accused, B, were constrained by the statutory maximum of 2 years for the offences of gross indecency at the time they were committed and the sentences were all reduced by one-third to reflect B's young age when the offences were committed. The judge started at 27 years for the offences of rape which he reduced by one-third to 18 years.

Counsel's submissions

30. We are grateful to both counsel for their written and oral submissions.

31. On behalf of the appellant, Mr Mochrie addressed us this morning. We say at once that we were impressed by the focus and realism of his submissions which were all that such submissions should be. Mr Mochrie has always accepted that there was level A culpability: there was plainly an abuse of trust and alcohol was used to facilitate the offending. In his grounds of appeal and written submissions Mr Mochrie had submitted that the judge was wrong to place the offences of rape in category 1, where the starting point is 15 years and the range up to 19 years.

32. Mr Mochrie has always accepted that there was severe psychological harm, but in his written submissions he contended that the judge was wrong to find that the severe psychological harm caused by the appellant's offending was of an extreme nature. He had submitted that the offences should have been placed in category 2, with a starting point of 10 years, and a range up to 13 years. Realistically Mr Mochrie now accepts, particularly in the light of the points made by Mr Glenser in the respondent's notice, that these were, as the

judge found, properly to be regarded as category 1 offences.

33. Mr Mochrie acknowledges that the victim, V, had made numerous suicide attempts during the currency of the proceedings. He has submitted that this may well have been the result of the delay between giving her first video recorded interview to the police in 2017 and the conclusion of the trial in 2023. The defendants were not charged until 2020. A trial date in 2021 had to be vacated owing to shortage of court space during the Covid pandemic. There was an abortive trial in 2022. Mr Mochrie has suggested that these delays may well have exacerbated the psychological harm V suffered. Mr Mochrie had also contended in his written submissions that the severe psychological harm was not necessarily caused by the appellant's offending, bearing in mind that as a child she had been abused in the most abhorrent way by her uncle. He accepted in his oral submissions, however, that the appellant must take full joint responsibility for the serious psychological harm V suffered. Mr Mochrie points out that in sentencing the uncle, the judge described his offending as akin to a campaign of rape, whereas in the appellant's case there were only two offences of rape.

34. Mr Mochrie, as we say, has very properly revised his approach and his concessions. However, he submits that even if the judge was correct to place the offences of rape in category 1A, as he now accepts, with a range up to 19 years, the judge was wrong to go outside and above that range to 23 years. Mr Mochrie prays in aid the appellant's age and lack of previous convictions. In his oral submissions he pointed out that alcohol was not necessarily involved in all the offences and that it was part of the background to the offending that V was drunk, rather than a situation where alcohol was given to her in order to facilitate the offences.

35. In the respondent's notice Mr Glenser submitted that the judge was correct to place the rapes in category 1. He suggests, and it is now accepted, that the psychological harm caused was cumulative. Abuse at the hands of the appellant, he said, cannot be separated from the

psychological impact of abuse by her uncle and her partners. He submitted that the serious suicide attempts she made were a clear and sufficient demonstration of enduring severe psychological harm and it matters not at what stage the suicide attempts took place. As to totality Mr Glenser points out that the judge was sentencing the appellant for two offences of rape, each of which had a starting point of 15 years, and a range up to 19 years. There were additional aggravating factors, as the judge identified.

Discussion and analysis

36. We have considered carefully all counsel's submissions. We are quite satisfied, as is now conceded, that the judge was entitled and correct to place both the offences of rape in category 1 rather than category 2. The judge was particularly well placed to assess the level of severe psychological harm having presided over the trial and seen V give evidence. We accept Mr Glenser's submission that the stage at which genuine suicide attempts were made is immaterial provided they were attributable to the appellant's offending. He referred us to the observations of this court in *R v JM* [2015] EWCA Crim 1638; [2016] 1 Cr App R (S) 21 at [8] and [9]. The court said that for a 15-year-old girl to make a serious suicide attempt demonstrates severe psychological harm:

> "... It does not matter whether it is the onset of this trial or the revelation of the offending or the offending itself which causes the harm. It is all part of the history and all part of the harm caused by the offending."

We respectfully agree with and endorse those observations. Indeed it is in the light of this authority and those observations that Mr Mochrie has revised his stance and now accepts that the offending fell within category 1.

37. We are satisfied, therefore, the judge was entitled to find that the severe psychological harm was of an extreme nature and that it was caused equally by the offending of both defendants. This flows not least from the judge's very clear finding that the appellant's offences of rape were committed against a victim whom he knew to be particularly vulnerable and

a profoundly damaged woman because of the abuse she had already suffered at the hands of others, and his finding that the appellant deliberately exploited that vulnerability.

38. We are therefore satisfied that each of these rapes had a starting point of 15 years, with a range up to 19 years.

39. We accept too that the judge correctly identified as an aggravating factor that there was emotional manipulation. Although not mentioned specifically by the judge, ejaculation was an aggravating feature of the first rape. We agree that the appellant's age and lack of previous convictions and good character afforded no real mitigation. As the guideline makes clear, the more serious the offence, the less the weight that should normally be attributed to previous good character.

40. The real issue, as Mr Mochrie identified, is whether the judge was correct to pass a sentence on the appellant for these rapes well in excess of 20 years, above the top of the range for category 1A. We bear in mind that the guideline states:

> "Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate."

41. We accept that the first offence of rape taken in isolation merited a significant increase from the starting point of 15 years. The total sentence for the two rapes had to reflect the fact that there were two very serious offences. That merited a further significant increase. However, this was not, in our judgment, offending akin to a campaign of rape. Although very serious and aggravated by the familial relationship, these two offences were in our judgment not of such severity as to call for a sentence over 20 years. We think the sentence of 23 years for the rapes was manifestly excessive.

42. In order to determine the appropriate total sentence it is necessary to deal first with the

appropriate sentence for the offences of sex with an adult relative, contrary to s.64 Sexual Offences Act 2003. The maximum sentence is 2 years' imprisonment. There were two counts reflecting a total of four offences over a period of several months. Applying the relevant Sentencing Council guideline, we are satisfied that there was raised harm and raised culpability so that these were category 1 offences, each with a starting point of 12 months' custody and a range up to 2 years.

43. In our judgment the appropriate sentence on those two counts, after credit of 25 per cent for the guilty pleas, is 18 months' imprisonment, concurrent on each count. We agree with the judge's approach that this must be consecutive to the sentence for the rapes. It is because we are mindful of totality that we have kept the sentence to only 18 months.

44. We are satisfied that the just and proportionate sentence for the rapes is 19 ½ years' imprisonment rather than 23 years, and the proper total sentence, with 18 months consecutive for the s.64 offences, taking account of totality, is therefore 21 years' imprisonment.

Conclusion

45. Accordingly, we allow the appeal against sentence. We quash the sentences of 23 years on the counts of rape (counts 5 and 7) and we substitute concurrent sentences of 19 ½ years' imprisonment. The concurrent sentence of 18 months' imprisonment on count 6 for indecent assault remains unaltered.

46. For the avoidance of any doubt, we quash the sentences of 4 ½ years' imprisonment which the judge imposed for the offences of incest. Instead, for each of the offences of sex with an adult relative we pass a sentence of 18 months. Those sentences will be concurrent as between themselves but consecutive to the sentence of 19 ½ years, making the total sentence of 21 years' imprisonment.

47. Pursuant to 3A(2) of the Criminal Appeal Act 1968 we have taken the course of substituting pleas of guilty to the s.64 offences instead of allowing or dismissing the appeal against conviction. Accordingly, we make no order in relation to that appeal.