IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE MILITARY COURT CATTERICK

JUDGE SMITH CMAO: 20/08/2024

CASE NO 202403020/A5

[2024] EWCA Crim 1680

Bulford Military Court Centre
22 Mons Avenue
Bulford Camp
Salisbury SP4 9NN

Wednesday, 4 December 2024

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE MORRIS
MRS JUSTICE FOSTER DBE

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.273 OF THE ARMED FORCES ACT 2006

REX
v
MARTIN JULIAN ROBERTS

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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR J POLNAY KC appeared on behalf of the Attorney General
MISS F PENCHEON appeared on behalf of the Offender

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: During a period of months in 1985, when he was aged between 15 years nine months and 16 years nine months, Martin Roberts ("the offender") committed serious sexual offences against a girl then aged between six years 11 months and seven years 11 months. In July 2024, before Assistant Judge Advocate General Smith, he was sentenced by the Court-Martial to a total of four years' imprisonment. His Majesty's Solicitor General believes that sentence to have been unduly lenient. Application is accordingly made pursuant to section 273 of the Armed Forces Act 2006 for leave to refer the case to this court so that the sentencing may be reviewed.
2. The victim of the offences is entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences. We shall simply refer to her as "V" and we shall avoid referring to any circumstantial detail which might lead to her identification.
3. At the time of the offences both the offender and V were the children of servicemen serving in Germany. They each lived in army accommodation, and in common with other children of servicemen played out in the area around their homes.
4. The offender was convicted after a trial in the Court-Martial of nine offences contrary to section 70 of the Army Act 1955 of committing a civil offence. The civil offences were one of rape, contrary to section 1 of the Sexual Offences Act 1956, for which the maximum penalty was life imprisonment; and eight of indecency with a child, contrary to section 1 of the Indecency with Children Act 1960, for which the maximum sentence was two years' imprisonment.
5. Summarising the offending very briefly, the offender under the pretext of playing a game persuaded V to accompany him to a quiet area where he licked her vagina (charge 1).

Under the pretence of showing her something in the basement of his home, he kissed her using his tongue (charge 2). He again took her to a quiet area, persuaded her to lie down and raise her skirt, and then rubbed his erect penis against her. He told her that this was a secret and she could not tell anyone else (charge 3). On a further occasion the offender babysat V and her older brother. He sent her brother into the garden on a pretext and penetrated V's vagina with a candle (charge 4). V was frightened and said that she was sore, but the offender said that she could not tell anyone because she knew she had done something wrong. Again on an occasion when the two were in a quiet area, the offender persuaded V to lie down by telling her that her father would be dismissed if people found out what she had done. V believed that threat. He rubbed his penis against her (charge 6). On a further occasion when the offender was babysitting he required V to suck his penis (charge 8) and then vaginally raped her (charge 7). She cried and ran away from him. He followed her, told her to sniff his fingers and told her that she had enjoyed it. Finally, on two further occasions the offender caused V to masturbate him (charges 9 and 10).

6. These offences had a grave effect on V who was initially confused, believing, wrongly but understandably, that she was in some way responsible. Of course, she was not. The offending later affected her relationships with others over many years.
7. Since the offending the offender for his part has led a law-abiding life. He served in the Armed Forces for a number of years. During that period he was on one occasion sentenced by his Commanding Officer to one week's detention for stealing. With that exception, he has no previous convictions or cautions.
8. If it were not for the fact that the offender's father had been serving abroad at the material time, the courts of England and Wales would have had no jurisdiction over this

offending. As it is, by the legislative route which Mr Polnay KC for the Solicitor General has helpfully explained, the Court-Martial had jurisdiction to try these charges and the Solicitor General is entitled to ask this court to review the sentencing.

9. At the sentencing hearing the judge was assisted by a victim personal statement from V, the effect of which we have very briefly summarised. The judge also had a number of letters from members of the offender's family, including his children and stepchildren, who spoke highly of him. The offender has lived in Germany for many years, holds dual nationality and has a German partner. He suffers from some health problems. His partner, who also has health problems, wrote in her letter to the court of her fears as to what would happen to the family in Germany if the offender were imprisoned.

10. The judge noted, correctly, that the offender was not a Service person at the time of the offending and therefore the guidelines issued by the Judge Advocate General were not applicable to this case. He considered the Sentencing Council's guideline relating to the sentencing of children, and the guidelines specific to the modern equivalent offences. They were identified as including rape of a child under 13, assault by penetration of a child under 13 and sexual assault. The judge concluded that an adult offender who had recently committed the same offences would now be sentenced to a total of 12 to 14 years' imprisonment.

11. The judge recognised, however, that it was necessary for him to apply the principles stated by the Court of Appeal, Criminal Division in Ahmed and others [2023] EWCA Crim 281, in particular at paragraph 32. Summarising the decision in that case very briefly, where an adult is to be sentenced for offences committed as a child, the sentencing court must follow the Children guideline. It must have regard to the statutory maximum sentence which would have been available at the time of the offending and

must take as its starting point the sentence which it considers would likely have been imposed if the child offender had been sentenced shortly after the offending. The court should therefore consider the types and lengths of custodial sentences which would have been available at that time for an offender of the relevant age.

12. In the circumstances of this case, the custodial sentences available if a court had been dealing with the offender in about 1986 were a term of youth custody not exceeding 12 months, or detention for any period under section 53 of the Children and Young Persons Act 1933. The judge stated that a total of 12 months' youth custody would at the time have been regarded as inadequate punishment for what he referred to as a "catalogue of serious offending escalating in its gravity", and that a sentence of detention under the 1933 Act would have been imposed. The judge noted that until about two years before the hypothetical time of sentencing, the sentences available to the court would have included Borstal training, which would have involved a custodial term equivalent to a modern sentence of up to four years.

13. The judge concluded that the appropriate total sentence was four years' imprisonment. He imposed that sentence as follows: three years for the offence of rape (charge 7), one year consecutive for the offence of indecency (charge 4), and concurrent terms of two years (charge 8), one year (charges 1, 3, 6, 9 and 10) and six months (charge 2).

14. His Majesty's Solicitor General submits that the total sentence was unduly lenient. Mr Polnay begins by reminding the court that in R v Billam [1986] 1 WLR 349 the Lord Chief Justice giving the judgment of the court said:

> "For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case ...

> The crime should in any event be treated as aggravated by any of the following factors: ... (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; ... Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point ... In the case of a juvenile, the Court will in most cases exercise the power to order detention under the Children and Young Persons Act 1933, section 53(2)."

15. Mr Polnay then invites our attention to the decision of the Court of Appeal, Criminal Division in R v SJ [2023] EWCA Crim 651. That was an appeal against sentence in which the court was required to consider what total sentence would likely have been imposed in 1996 or 1997 on an offender convicted of the following offences committed as a 16 or 17 year old against a girl aged nine: two offences of rape, one vaginal, one anal; and offences of indecent assault which included digital penetration, what would now be oral rape, masturbating himself and compelling his victim to swallow the semen which he had ejaculated onto his hand, and two offences involving penetration of his victim's vagina with a vibrator. Mr Polnay, recognising of course the factual differences between the two cases, submits that the disparity between the total sentence imposed in this case and the total sentence imposed by the Court of Appeal in SJ illustrates that the present sentence is unduly lenient.
16. Mr Polnay submits that a number of aggravating factors are present in this case. The offence of rape was the culmination of a series of serious offences committed over a period of time. The victim was very young. Although not formally in a position of trust, the offender as a babysitter was responsible for his victim's wellbeing. More generally, by reason of his age he was in a position of power over her. The victim was raped in her own home. She was subjected to some elements of additional degradation. Threats were made to ensure that the offender was able to commit the offence and to prevent reporting.

The offender engaged in grooming behaviour and his offending has had a substantial and serious ongoing effect on the victim.

17. Mr Polnay fairly recognises that mitigating features are present: the offender's age at the time of the offending, his good character both before and after the series of offences with which the court is today concerned, and the fact that imprisonment may be more onerous for the offender than for many other prisoners because of his poor health and the fact that he may be detained at a considerable distance from his home and family.

18. Mr Polnay also referred to the decision of the Court of Appeal Criminal Division in R v BPO [2024] EWCA Crim 517 in which the court reiterated the established principle that early release provisions must not ordinarily be taken into account by a sentencing judge.

19. Against that background, and noting that the total offence thought by the Court of Appeal to be appropriate in the case of SJ was one of nine years' imprisonment, Mr Polnay makes two principal submissions. First, having regard to the level of sentencing which he submits is indicated by Billam and by SJ, the total sentence imposed here by the judge failed sufficiently to reflect the seriousness of the offending. Secondly, Mr Polnay suggests that the judge wrongly had regard to the provisions governing release on licence when structuring his sentence. In his oral submissions this morning, Mr Polnay has focused on the first of those submissions, and has acknowledged that if he fails on his primary submission the court is unlikely to regard the second ground as in itself a reason to increase the sentence.

20. Miss Pencheon, representing the offender here as she did below, submits that no criticism can be made of the approach carefully taken by the judge or of the conclusion which he reached. She points out that in Billam the court was specifically concerned to note the significantly lower level of sentencing for sexual offences which had hitherto been

common and to indicate that for the more serious offences which were coming before the courts by 1986 the level of sentencing needed to be increased. She points out however that the statistics quoted by the court in Billam recognised that up to that point in time, some offences even of rape had been punished with non-custodial sentences. She submits that when dealing with a young offender a court would not invariably have imposed a sentence of detention under section 53 of the 1933 Act.

21. We are grateful to both counsel for the care with which they have prepared their written and oral submissions and the focused way in which they have presented them.

22. Reflecting on the submissions our views are as follows. Having regard to Billam, which would have been decided at about the time of the notional sentencing exercise if this offender had been dealt with soon after his offending, we accept the submission that an adult sentenced in about 1986 for rape of a young child would have received a "substantially higher" sentence than five years' imprisonment. It does not, however, follow that a 16-year-old sentenced for such a rape and for the other offences which were here committed by the offender when aged 15 to 16, would have received a total sentence greater or much greater than four years' custody. We do not think that the Solicitor General's submissions derive support from the decision in SJ. We do not question that decision on its facts, but the facts were materially different from those of the present case. In SJ the offender was older than this offender and the offences were yet more serious.

23. Further, like the Assistant Judge Advocate General, we see force in the submission that a judge sentencing in about early 1986 with recent experience of imposing sentences of Borstal training on young offenders would probably have imposed a total sentence of detention for no more than about four years. We think it also relevant to give at least some weight to the fact that the offender is now sentenced to imprisonment in

circumstances which are somewhat more difficult for him than for many other offenders.

24. All these reflections lead us to the conclusion that the total sentence of four years, if it was lenient at all, was not unduly lenient.

25. As to the second point raised in writing by the Solicitor General, we are not persuaded that the judge made any error. When sentencing for a number of offences a judge may impose concurrent or consecutive sentences, and on an appeal it is generally the total sentence rather than the structure of the sentencing which is important. In the circumstances of this case, we can well understand why the judge took the view that the rape should be treated as the lead offence and that there should be at least one consecutive sentence to reflect the increased criminality of the other offences. In explaining his approach the judge did not say, and in our view did not imply, that he had altered the sentence he would otherwise have adopted in order to achieve a particular result in terms of the release provisions. Rather, he was indicating how he had felt it appropriate to structure the sentencing having regard to the decision in Ahmed and to all the circumstances.

26. For those reasons we conclude that there is no arguable ground for saying that the total sentence was so lenient that this court should interfere. Accordingly, grateful though we are to Mr Polnay, we refuse leave to refer.

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

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