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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Wednesday 7 October 2015

B E F O R E:

LADY JUSTICE HALLETT DBE
(Vice President of the Court of Appeal Criminal Division)
MR JUSTICE JAY

MR JUSTICE PICKEN

- - - - - - -
R E G I N A

-v-

BELL

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(Official Shorthand Writers to the Court)

MR R JAMES appeared on behalf of the Applicant
M S Foster appeared on behalf of the Crown

J U D G M E N T
(**Approved**)

1. MR JUSTICE JAY: This is a renewed application for leave to appeal against sentence.

2. On 23 April 2013, in the Crown Court at Portsmouth before His Honour Judge Price, the applicant was convicted of two offences of rape involving the victim PD. On 13 October 2013, at the same Crown Court before the same judge, he was convicted of robbery and assault by penetration involving a different woman. On 18 December 2013 he was sentenced to life imprisonment on the two rape counts and for the assault by penetration. A period of twelve years was specified as the minimum term.

3. The applicant then applied for leave to appeal against sentence on the rape matters, and against conviction on the robbery and assault by penetration matters. Permission was refused on the first matter and granted on the second.

4. On 16 July 2014 the full court, the Vice President of the Court of Appeal Criminal Division presiding, allowed the applicant's appeal against conviction and adjourned his renewed application for leave to appeal against sentence. The applicant was subsequently acquitted on his retrial. The renewed application returned to the full court, the Vice President again presiding, on 24 February 2015 but was adjourned for reasons which we will soon be explaining.

5. Before coming to the facts of this case, we make clear that given that the provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences, nothing may be published which would be likely to lead to the identification of the victim.

6. The rapes took place on 17 October 2012. The victim PD had regarded the applicant as a friend. She returned from a night out to find that her babysitter had locked her out. Unwilling to wake up her children, she went to see the applicant. It was agreed that she could stay the night. She was asleep in the same bed as the applicant, as she had been on previous occasions without incident.

7. As to what subsequently occurred, we quote directly from the judge's sentencing remarks:

> "Early next morning, half-past seven, quarter-to-eight, you raped her. You jumped on her. She told you to get off. You pulled her pyjama bottoms off. You got in between her legs. She tried to fight you off. She pushed at you with her hands. She kicked you. She brought her knees up but she could not get you off her. You tried to put your erect penis into her vagina and she said, 'Please don't do that. I've got children,' and you said, 'I don't care.' You then put a pillow over her face and you held it there. You applied pressure to that pillow whilst she was thrashing around trying to get you off. She thought she was going to die. You threw the pillow aside and you handcuffed her. The handcuff chain actually broke in the struggle.
>
> Your victim then reached for her phone to summon help, but you grabbed that. You threw it across the room, saying, 'You fucking ain't having that,

> you bitch.' Then you tried to put your erect penis in her mouth. You were aggressive. You were calling her a 'fucking bitch'. You were saying, 'This is all fake. You're a bitch.' She tried to reason with you. She was then on her front and you raped her anally. You inserted your penis into her anus and you began having sex with her. You then took your penis out of her anus and you put it into her vagina. Then you took it out of her vagina and you put it into her anus again. She said she needed to use the toilet and so you allowed her to get up from the bed. She walked past the toilet out of the front door and ran out into the street, virtually naked. And it was in that condition, she was so desperate to get away from you, it was in that state that she was seen by a passing motorist who stopped and took her immediately to the police station."

8. The applicant was born in 1966. He had no relevant convictions. The pre-sentence report before the sentencing judge, predicated as it was on both sets of offending, concluded that the applicant posed "a high risk of serious harm to female members of the public, especially those that he formed any type of relationship with."

9. There was also a psychiatric report by Dr Catherine Sherwin dated 23 November 2013. During the course of her interview with the applicant, which occurred over two days at the end of July 2013, he volunteered that there were actually three allegations relating to other events involving different women. This involved a sexual assault allegation involving a woman in Ibiza in June 2012 - she was the sister of PD - and an allegation of rape on FM. These allegations did not come to proceedings. They were never proved against or admitted by the applicant. However the applicant did accept during the course of his interview by Dr Sherwin that he had pushed the woman concerned at least twice. The psychiatrist appeared to have seen some different material concerning these further allegations, and our papers include a bundle which may reflect that.

10. Dr Sherwin concluded that the applicant was not suffering from any form of mental illness. His IQ was within the below average range but there was no evidence of any link between his level of cognitive functioning and his offending. It is clear that Dr Sherwin's assessment of risk was based on all the information available to her, including the matters for which he was convicted, and, as she put it, the fact that he "has been implicated in a number of other sexual offences, including ..... rape". However Dr Sherwin also considered the matter more broadly and identified a number of risk factors pertinent to the applicant's case, in particular his extreme minimisation and denial of the offence, some features of impulsivity and lack of empathy, and a history of early maladjustment and child abuse.

11. Overall, Dr Sherwin concluded that the applicant posed a significant risk of committing further sexual offences against adult women, including vulnerable individuals. He was likely to deploy psychological coercion, including extreme physical violence.

12. Armed with all this material, the sentencing judge concluded that the applicant was one of the most controlling persons and also one of the most dangerous he had encountered on the Bench. The judge specifically put out of his mind the unproven allegations to

which Dr Sherwin had had some regard. Given the degree of risk he posed, this was an appropriate case for a discretionary life sentence rather than an extended sentence.

13. As for the composition of the sentence, the judge said:

> "The periods of punishment on the two rapes will run concurrently, as it were, but consecutively to the four years in respect of the assault by penetration. That would make a total of fourteen years were I passing determinative sentences. But I am not passing determinate sentences. I am fixing a total period for punishment and the total period for punishment, reflecting the totality of your offending in this case, is one of fourteen years' imprisonment.
>
> However, I am aware that you have been in custody for fourteen months. That represents two years and four months in terms of the stated length of a prison sentence and I shall, therefore, reduce that fourteen years to a total of twelve years. And so the effect of the sentences that I have passed is this: there will be concurrent life sentences for the two rapes and the assault by penetration and the punishment period in respect of each life sentence is one of twelve years.
>
> What this means is that you will not be eligible for parole until at least six years have been served and what it also means is that whenever you are released, if you ever are Mr Bell, whenever you are released you will be on licence and subject to recall to prison for the rest of your life. You will be on the Sexual Offenders Register for the rest of your life. You are, I am obliged to tell you, on the banned list for the rest of your life and I make an order banning you from working with children for the rest of your life."

14. When this renewed application was before this court in February 2015, the concerns were two-fold regarding the psychiatric evidence. First, it was not really clear what Dr Sherwin's view would be if the assault by penetration matter, the conviction in respect of which had been quashed, were removed from the evidential frame. Secondly, the psychiatrist had clearly had some regard to the unproven allegations. The evidential basis for those was uncertain, as was the route by which Dr Sherwin came to view the material, so an up-dated psychiatric report was ordered.

15. Subsequent inquiries revealed that Dr Sherwin may have inadvertently been sent by the court material comprising the judge's bundle, including certain unused material referring to the other unproven allegations. However this may be speculation. It is not wholly clear how and why Dr Sherwin came to review this written material although we reiterate that it does appear that the applicant himself volunteered information about the other allegations.

16. Dr Sherwin re-interviewed the applicant on 13 May 2015 and gave a further report on 18 June. She stated that she understood the conviction for sexual assault had been quashed. She made no reference to the other unproven allegations, but appears to have

based her conclusions on the nature of and circumstances surrounding the offences against PD, looking at the applicant's offending in the light of his background. The applicant told Dr Sherwin that the PD allegations were "false and fake". He saw no purpose in undertaking any sex offender's treatment because he "did not do the crime". In Dr Sherwin's view:

> "Mr Bell has a number of risk factors in his sexual violence history ..... [Mr Bell] has been convicted of [a serious sexual offence and two counts of rape] ..... Mr Bell has shown an escalation in sexual violence, with use of physical constraint (handcuffs) and violence (holding a pillow over the face [of PD]) ..... As well as physical coercion, he has also used psychological coercion ..... "

17. Dr Sherwin then identified and re-stated the same features in the applicant's overall make-up which constituted him, in her opinion, a significant risk of causing serious physical and psychological harm to women.

18. In advancing his case in support of his application and, if necessary, appeal, Mr James, for the applicant made, in effect two submissions. First, he contended that the information before the court was not sufficient to compel a finding of dangerousness. In particular, there was no pattern of behaviour and no relevant previous conviction. He invited us to consider very closely the circumstances of the offence which, he said, arose out of a special set of circumstances which were unlikely to be replicated.

19. Secondly, he submitted more briefly that the facts of this case do not, in any event, justify a life sentence within Section 22 (5) of the Criminal Justice Act 2003.

20. In our view this is a case where it is appropriate to grant leave to appeal against sentence. One conviction underlying the applicant's sentence has been quashed and we are constrained to reconsider the matter for ourselves. The judge's notional determinate sentence on the rape counts must have reflected the overall sentence imposed and cannot be considered in isolation. We proceed on the basis that this appellant had no relevant previous convictions, was convicted by the jury on an indictment containing two counts of rape, and admitted some degree of force falling short of sexual violence against the sister of PD in Ibiza. We accept that this last factor does not advance the matter significantly.

21. It was drawn to our attention by Mr Foster, for the Crown, there were relevant decisions of this court, including R v Sanders, R v G, R v Edwards [2014] Crim App R (S) 45 and Attorney General's Ref No 27 of 2013 [2014] 2 Crim App R (S) 45.

22. The first issue which arises for judicial determination is that of dangerousness. Subject to Section 224A of the Criminal Justice Act 2003, if the appellant is not dangerous then this court must pass a determinative sentence but if he is then the second issue which arises is whether a discretionary life sentence under Section 225 is justified. Although this remains a sentence of last resort, it may arise for consideration if the necessary level of public protection cannot be achieved by the extended sentence regime

following the amendments achieved by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

23. In Attorney General's Ref No 27 of 2013, this court explained that a decision whether the seriousness of the offence justified a life sentence entails consideration: first, of the seriousness of the offence itself in accordance with Section 143 of the Criminal Justice Act 2013; secondly, of the defendant's previous convictions (irrelevant here); thirdly, of the level of danger the defendant poses to the public and whether there is a reliable estimate of the length of time he will remain a danger; and fourthly, of the alternative sentences available.

24. The judge concluded that the appellant was a dangerous offender. Although the evidence before us was more limited in the sense that two convictions had been quashed, we have no hesitation in coming to the same conclusion. We reach that outcome having regard to the nature and circumstances of the index offences, the matters set out in the pre-sentence report and Dr Sherwin's recent psychiatric report dealing with troubling underlying features of the appellant's background and psychological make-up confirming the view she had set out in her earlier report. As for the recent evidence, it might have been preferable if Dr Sherwin made it explicit that she was no longer taking into account the unproven allegation but that omission does not, in our view, undermine what she has said. In any event, it is only one aspect of the overall evidential picture. In short, there is clear and compelling evidence in this case that the appellant poses a significant risk of causing serious physical and psychological harm to women.

25. The next issue which arises is whether we should uphold the discretionary life sentence imposed by His Honour Judge Price or impose an extended sentence. Again, in reaching our conclusion on that issue, we are proceeding on a different and more limited set of factual premises. In our judgment the appellant poses a serious danger to the public and there is no reliable estimate of the length of time he will remain a danger. However, these factors militating in favour of a discretionary life sentence do have to be balanced against the first issue, namely the seriousness of the offences themselves. Undoubtedly, very serious though these offences were, ultimately we cannot conclude that it is appropriate in all the circumstances of this case to impose a discretionary life sentence. It follows that the appellant clearly qualifies for and merits an extended sentence under Section 226A of the Criminal Justice Act 2003. In short, he has been convicted of two specified offences; the risk criterion is satisfied; the court is not required to impose a sentence of imprisonment for life; and condition B in sub-section (1) (b) has been satisfied.

26. As for the appropriate custodial term, regard must be had to the relevant guideline of the Sentencing Guideline Council (see pages 10 and 11 of the Sexual Offences Definitive Guideline.) In our view this is a category 1 (b) case, given the extreme nature of the violence deployed. The starting point is one of twelve years' custody with a sentencing range of ten to fifteen years. The judge said that his concurrent determinative terms for these two offences would have been in the region of ten years' imprisonment. We have some regard to that, but consider that he must be taken to have

reduced this notional sentence to reflect the totality of the overall sentence he was imposing, including the matters which are no longer before us.

27. Having regard to all the features of the present case, we have concluded that the custodial term should be one of twelve years' imprisonment. For the purposes of Section 240ZA of Legal Aid, Sentencing and Punishment of Offenders 2012, the appellant is entitled to full credit for the time spent in custody on remand, namely four-hundred-and-twenty-eight days, but this aspect is dealt with administratively.

28. As for the extension period, the maximum we could impose under Section 226A (8) is one of eight years but in all the circumstances of this case we consider that the appropriate period is one of five years.

29. The practical consequences need to be spelt out for the appellant. The effect of Section 246A and Section 263 of the Criminal Justice Act 2003 is that the appellant will remain in prison until the requisite custodial period has expired in this case and the Parole Board have made a decision to the effect that it is satisfied that it is no longer necessary for the protection of the public that he should be confined. The requisite custodial period is two-thirds of the custodial term; it is therefore eight years' imprisonment less the time spent in remand in custody. If the Parole Board is not satisfied that it would be safe to release the appellant he will remain in custody until the custodial term expires.

30. As and when the appellant is released on licence, his licence will not expire until any original licence period and the extension period has elapsed. If the appellant re-offends during this period of licence, he is liable to be recalled to prison.

31. LADY JUSTICE HALLETT: Mr Foster and Mr James, could you - whilst we consider the next matter - discuss together the possible terms of the sexual offences prevention order, essentially one which would alert any future partner.

32. MR FOSTER: I have written down this: the defendant is prohibited from being in the sole company of any female person who is not aware that there are two convictions of rape on 23 April 2013.

33. LADY JUSTICE HALLETT: "Sole company" - that would mean if he met someone in a public house - - do we not mean in private?

34. MR FOSTER: Yes - sole private company?

35. LADY JUSTICE HALLETT: I think you need to discuss it. Given the circumstances of the matter of which he was acquitted where it involves relationships with women, we do not want him with a woman who does not know.

36. MR FOSTER: It has to be enforceable and clear. We will go and talk about it.

Adjourned

37. MR FOSTER: I have passed up a draft. I omitted to put on it "until further order". I apologise. It is in fact precisely what I have said. I have discussed it with my friend, and he is content with it.

38. LADY JUSTICE HALLETT: On the basis that "sole company" would not include a public house because there would be somebody else there.

39. MR FOSTER: Precisely, exactly. If the pub emptied so that only the appellant and another female was there, if he was with that female, well, this might kick in. If the female is at the other end of the bar, he would not be in her company.

40. MR JAMES: I think the phrase "in company" covers it.

41. LADY JUSTICE HALLETT: You are content - - - - -

42. MR JAMES: Yes.

43. LADY JUSTICE HALLETT: - - - - - that your lay client would understand.

44. MR JAMES: That implies socialising with, being together, etc. It is not just been being alone in a room. Being alone in a room with somebody quite accidentally, with no harm being done - - - - -

45. LADY JUSTICE HALLETT: I am concerned because these orders have ramifications. I do not want to make anything too broad.

46. MR FOSTER: No. It is the best we can do, I think, to cover the situation. I think it does cover what is aimed at.

47. LADY JUSTICE HALLETT: Remind me of the provisions. Just suppose it was found that this was too broad and found difficult to comply with for a particular reason we cannot - - - - -

48. MR FOSTER: The matter can be brought back to the court for amendment.

49. LADY JUSTICE HALLETT: If we made the order, does it have to be this court?

50. ASSOCIATE OF THE COURT: No, my Lady. It would go back to the Crown Court. (Pause)

51. LADY JUSTICE HALLETT: We are not happy.

52. MR FOSTER: So be it. We will go and try again.

53. LADY JUSTICE HALLETT: I am sorry to be difficult. But if this court does not ensure that any orders that emanate from it are really clear, given the consequences of a breach, then is there much chance of any other court in the country?

54. MR FOSTER: We will go and try again.

55. LADY JUSTICE HALLETT: Think about it - it is sole company of any female not aware of two convictions. Would that cover visiting his 95-year old grandmother in a hospital or in a private room? I think this is too broad for our liking. Unless you can

come up, between you, with something that we are satisfied really would cover what we had in mind without being too broad then we will have to abandon the idea.

56. MR FOSTER: We will go and try again.

57. MR JUSTICE JAY: We are not sitting after 1 o'clock.

58. MR FOSTER: So be it.

Adjourned

59. LADY JUSTICE HALLETT: Mr Foster and Mr James, any luck? Do you think you will be able to satisfy us?

60. MR FOSTER: We have two possible versions. This one, I suspect, the court will still feel is too broad. If the court does think that, I have another try which we have not succeeded in typing out.

61. LADY JUSTICE HALLETT: I can see the one you have - "seeking the sole company of or being and remaining in the sole company of any unrelated female who is not aware of his conviction". Have you taken the elderly grandmother - - - - -

62. MR FOSTER: We have taken the grandmother on board. But it may be - I will read it to the court - the court prefers this version which reads as follows: "The defendant is prohibited until further order from being on private premises in the sole company of any unrelated female who is not aware of his convictions dated 23 April 2013 or seeking to be or remaining in such company."

63. LADY JUSTICE HALLETT: My Lord thinks that still has - - (Pause). My Lord Mr Justice Picken has suggested: "The defendant is prohibited until further order from being in the company of an unrelated female person with nobody else present in the immediate vicinity who is not aware of his two convictions for rape." We have the "would" (?) covered. We have the grandmother covered. Public house: prohibited from being [in] the company if nobody else present. Work: in other words, he has to tell colleagues at work if he is going to be in the company with nobody else present.

64. MR FOSTER: With respect, if that is a draconian order may be that is not inappropriate.

65. LADY JUSTICE HALLETT: If he gets on a bus and nobody else present; he gets on a bus at night and then a woman gets on the bus.

66. MR FOSTER: I have dealt with that. He would not be in her company. He might be on the same bus but that is not, with respect, in her company. If he went and sat alongside her deliberately that might be different; with respect, that is the sort of thing I would seek to preclude.

67. LADY JUSTICE HALLETT: I am going to test this out because I want to make sure it is - - he goes into a shop and approaches a female shop assistant, there is nobody else around and he asks her for a box of soap powder. Is he in her company?

68. MR FOSTER: Surely not, with respect, in her company.

69. LADY JUSTICE HALLETT: Social company - no? You think "company" means social?

70. MR FOSTER: I do. I do not think, with respect, one is in the company of somebody from whom one is purchasing a box of matches.

71. LADY JUSTICE HALLETT: Mr James, I have been trying to do partly your job for you. I am sure you have been doing it yourself. What do you think? Are you content that this is an order with which he can comply? If not - if it really is impossible - I am sure we would be perfectly happy, if it proves to be impossible with good reason, that the court you go back to is told we basically were doing it - - - - -

72. MR JAMES: It is not going to be happening for quite a long time.

73. LADY JUSTICE HALLETT: You might not be around or anybody else. This has to be on the basis that this becomes a court order and no one is going to know how we got there or what we had in mind.

74. MR JAMES: If we had "private premises" it gets rid of all these buses, empty cinemas and that kind of thing, situation, park benches.

75. LADY JUSTICE HALLETT: That is probably to prevent him being in the company of - - - - -

76. MR JAMES: Why not "until further order from being on private premises in the sole company of any unrelated female, bla, bla, or seeking to be or remaining" - - actually, "and from seeking to be or remaining etc." That would have prevented - - this case would have been a breach of that.

77. LADY JUSTICE HALLETT: I think this is getting too difficult. I worry that in ten years time - - do either of you have access to the kind of order we make stopping people seeking the company of children?

78. MR FOSTER: Yes. Smith is precedent which sets out carefully what can and cannot be done. It is much easier with children.

79. LADY JUSTICE HALLETT: Because you are not going to meet a child in a pub or ask for a box of matches.

80. MR FOSTER: Precisely. In Smith, the judgment of Lord Justice Hughes suggested how such order could be drafted. But when you have people you might meet in the street and he cannot be constrained from normal social intercourse with persons he might meet or, indeed, striking up a relationship if he chooses to do so so long as he has the permission.

81. LADY JUSTICE HALLETT: I think what we would prefer to do - - Mr Foster, I raise this as a possibility, both my Lords are around next week. We have agreed between us,

if we can get the terms of the order sorted in principle, we would like to make an order. We will adjourn the final terms of it because it can be done in writing to give you and Mr James an opportunity. It is a bit unfair to throw this at you and then to try to get you to get it typed out at the last minute. Given the ramifications, I think we would rather take our time.

82. MR FOSTER: Certainly. Would it be permitted that we both draft an agreed order and submit it to the court electronically - perhaps I can take an address from the court clerk - and it is what happens in the Crown Court? It can all be done electronically.

83. LADY JUSTICE HALLETT: Yes. That would be the way forward. Essentially, make sure that you do not have any confusion. We are adjourning the question of sexual offences prevention order, having agreed in principle, and it probably would help certainly to have on the court record a signed document.

84. MR FOSTER: Yes.

85. LADY JUSTICE HALLETT: That would be very helpful. Or an agreed document. Obviously it is electronic; it is not going to have a proper signature on the document.