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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 6 February 2019

B e f o r e:
LORD JUSTICE HOLROYDE

MR JUSTICE SWEENEY

HIS HONOUR JUDGE WALL QC
(Sitting as a Judge of the CACD)

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

R E G I N A
v
DAVID LOMAX

Mr P Jarvis appeared on behalf of the **Attorney General**
Ms K Colley appeared on behalf of the **Offender**

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J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: David Lomax, to whom we shall refer as "the offender", was convicted by a jury of offences of rape and misconduct in a public office. On 17 October 2017, in the Crown Court at Leeds, he was sentenced to a total of 4 years 9 months' imprisonment comprising concurrent terms of 4 years 9 months for rape and 2 years for misconduct. Her Majesty's Attorney General believes that total sentence to be unduly lenient. Her Majesty's Solicitor General accordingly applies 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 protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, no matter relating to her shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences. That prohibition will continue to apply unless and until waived or varied in accordance with section 3 of the Act. We shall refer to her throughout as "J".

3. The offender is now aged 84. He committed these offences on 20 October 1978, when he was aged 43 and J was aged 21. The offender was at that time a police officer with many years' experience. He was serving as a warrant officer in the West Yorkshire Police. His duties included taking enforcement action against persons who had been fined by a court and had failed to pay the fine. In that role he had a power of arrest but he also had a degree of discretion as to whether he exercised that power in a particular case.

4. J lived with her abusive husband and their young daughter. She had been fined by a court. She was in arrears in her payment of that fine. In early October 1978 the offender came to J's home. He explained to her that there was a warrant for her arrest. J asked if she could have a week to pay the fine. The offender said she could but told her that if she did not pay he would have to arrest her on the next occasion.

5. The next occasion was on 20 October 1978. J had still not paid the fine. The offender returned to her flat. She was alone when he arrived. Her husband was in licensed premises, their young daughter was elsewhere but was due home shortly. J invited the offender into the flat and she told him she could not pay the fine. He said that in that case he would have to arrest her. She begged him not to do so because her daughter was shortly due to return from her grandmother's house. The offender then indicated to J that they could "sort this". When she asked what he meant he said: "Let me fuck you". She refused. The offender asked if she wanted to go to prison. She shook her head. The offender said that it would only take 5 minutes and if they had sexual intercourse he would not need to return for another 2 weeks. J felt she had no choice but to comply.

6. The offender took her into her bedroom. She did not want to have intercourse on the marital bed for fear that her husband would detect the offender's strong aftershave. The offender therefore raped her against the bedroom wall. She told him not to ejaculate inside her. He withdrew his penis and ejaculated onto the wooden floor. He then left saying that he would return in 2 weeks. J wiped the floor using a towel but then left the towel where it lay because she could not bear to touch it. She tried to conceal the incident from her husband but it appears that he eventually found out.

7. In November 1978 other police officers arrested J because of her continuing non-payment of the fine. At that point she reported the rape, which the arresting officers initially treated as a false excuse for her non-payment of the fine. However, when J indicated that she had not yet felt able to move the towel from where it lay on the floor a forensic scientist went to her home. The scientist recovered semen samples from both the floor and the towel. The level of DNA science at that stage was insufficient to enable the DNA recovered from the towel to be matched to any particular individual. The sample was however retained.

8. The offender was at that stage arrested and interviewed about J's allegation; he strongly denied it, saying there had been no sexual activity between him and J. He was not charged and continued his police service.

9. Nearly 40 years passed. As J's victim personal statement made clear and, as the judge rightly emphasised in his sentencing remarks, the profound effects of the rape remained with her. Her husband was, as we have indicated, abusive and had often been violent towards her. Prior to the rape she had called the police on several occasions. After the rape, she no longer trusted the police and so simply tolerated the violence at the hands of her husband. Sometimes the violence was justified by the husband precisely because his wife had had sex with a police officer. Thoughts of the rape would come to her mind; she had never been able to escape them. When she learned in 2017 that the case was to be re-opened all her memories came flooding back.

10. In 2016 the semen sample from the towel was further examined as part of a cold case review. Advances in science meant that it was now possible to match the DNA recovered from the semen to the offender. He was arrested on 6 July 2017 and interviewed. He accepted that he had gone to J's home to collect the money owing under the fine but said that he had been accompanied by another officer and was not alone. He claimed that as soon as J opened the door and saw police officers, she ran back inside the premises and left via a window. The offender's account continued to the effect that he had then searched the flat whilst the other officer returned to the police station. The offender said that whilst searching he had found a number of pornographic magazines and had, whilst reading them, masturbated himself to ejaculation and then wiped himself with a towel.

11. The offender was charged with the offences of rape and misconduct in a public office. The particulars of the latter offence being that:

> "... while acting as a public officer, namely a police officer, wilfully misconducted himself by committing a sexual offence (rape) against [J]."

12. He pleaded not guilty to those charges and maintained his denial at trial. In the course of his evidence at trial, he put forward a third version of events, saying that when he went to J's flat she was there together with her daughter. She had led him into the bedroom and had masturbated him to ejaculation on the understanding that if she did that he would not arrest her.

13. The offender had no previous convictions. At the sentencing hearing, submissions were made relying on his many years of police service and on a number of character references which were before the court. Submissions were also made as to the offender's age and poor state of health. He suffered from diabetes and had limited mobility walking with the aid of a stick. Further submissions were made about the effect of a prison sentence upon the offender's wife who, although younger than him, was in poor health and dependent upon his care.

14. Submissions were also made to the court by both prosecution and defence as to the appropriate categorisation of the rape offence in accordance with the Sentencing Council's Definitive Guideline. The prosecution submitted that it was a category 2 offence because it had the feature that the victim was "particularly vulnerable due to personal circumstances" and that it involved category A culpability because of the clear abuse of trust. For the offender, it was submitted that the level of harm was category 3, although it was accepted that the culpability was in category A. Counsel submitted that it would be improper double counting for the judge to have regard both to the offender's position as a police officer and to particular vulnerability on the part of J.

15. The judge accepted defence counsel's submissions, saying at page 2C of the transcript:

> "I accept that the aggravating features of your abusive position and her vulnerability are so intertwined that to count them both within terms of culpability and harm would be double counting and that this can properly be said to be a category 3A case. The meaning of that is that the starting point is one of seven years and the range from six to nine years. I bear in mind and have tempered the sentence markedly because of your age and the vulnerabilities of your health. I bear in mind that the sentence will bite upon your family and especially upon your wife. I also bear in mind that you were not a young and immature man when this offence was committed. You were a mature and experienced man who, in summary, used your power and authority to subjugate a young and vulnerable woman to your sexual desires."

The judge treated the misconduct offence as an aggravating feature of the rape and so imposed the concurrent sentences to which we have referred.

16. For the Solicitor General, Mr Jarvis submits that the sentence was unduly lenient for the following reasons. First, J was particularly vulnerable because her circumstances were that she was alone in her flat, waiting for her daughter and fearful of the consequences for herself and her daughter of her non-payment of the fine. She was thus vulnerable to anyone who sought to take advantage of her position to blackmail or otherwise abuse her. Mr Jarvis submits that her vulnerability arose from her circumstances at the time, not solely from the fact that the offender was a police officer. He argues that her vulnerability would have been the same if, for example, the offender had been a private debt collector appointed by a court. He submitted that the offender preyed upon that vulnerability. Secondly, Mr Jarvis submits that the offender's abuse of the trust and power placed in him as a police officer was a separate and serious matter. He submits that it would have been a serious matter even if the sexual activity had been consensual.

Mr Jarvis points, by way of broad analogy, to the circumstances of the case of R v Fletcher [2011] EWCA Crim 1802; [2012] 1 Cr App R(S) 62, in which a sentence of 32 months was upheld by this court in a case in which a police officer had pleaded guilty to misconduct in public office. The circumstances of that case were, in very brief summary, that the offender had attended the home of someone who had dialled 999 and who was in a distressed and vulnerable state and he had taken advantage of her to have consensual sexual intercourse. Thirdly, Mr Jarvis repeats the submission that this should properly be regarded as a case of category 2 harm and category A culpability, for which the sentencing guideline gives a starting point 10 years' custody and a range of 9 to 13 years. He submits that whilst the judge was of course correct to take into account the offender's mitigation, the weight which could be given to that mitigation was limited. Although the offender had a good police record and had served the public for many years, it was that which had enabled him to be in the position he was when he committed the offence. Mr Jarvis submits that age and ill-health are only to be taken into account in a limited way as indicated in R v Clarke, R v Cooper [2017] EWCA Crim 393; [2017] 2 Cr App R(S) 18.

17. On behalf of the offender Ms Colley, who represented him below as well as before this court, submits first that any victim of rape is vulnerable: it follows that for a case to come within category 2 of the Definitive Guideline the particular vulnerability must go beyond that which is inherent in the nature of the offence. She submits, secondly, that the abuse of trust which properly places the case into category A culpability cannot be double counted so as also to treat J as particularly vulnerable and so to elevate the harm from category 3 to category 2. She maintains her submission that category 3A is the appropriate classification. Thirdly, she submits that aggravating features such as the commission of the offence in J's own bedroom and the fact of ejaculation do not, even collectively, elevate the case from category 3 to category 2. She accordingly submits that the judge took a proper approach. As the trial judge who had heard all the evidence and had the opportunity of observing both J and the offender, the judge was particularly well placed to assess the appropriate sentence. In all the circumstances, she submits, the sentence was not unduly lenient.

18. In addition to the matters which were urged upon the sentencing judge, reliance is placed before this court on further material which has recently been obtained. A letter dated 18 January 2019 from the Health Care Lead of the relevant prison indicates that the offender suffers from a number of diagnosed conditions for which he receives the appropriate medication. These are prostate cancer, chronic kidney disease, knee osteoarthritis, hypertension and hypothyroidism. The letter indicates that the offender suffered a chest infection in late November 2018 for which he was admitted to hospital for four days. A separate report from the prison, dated 11 December 2018, shows, as one would expect, that the offender is a polite and quiet prisoner who causes no trouble.

19. We have reflected upon the helpful submissions of counsel, for which we are grateful. There are, in our view, two features of this offending which made it particularly serious. First, J was liable to lawful arrest and detention because she had not paid a fine imposed by a court. She was faced with the imminent prospect of arrest at a particularly difficult time, when her daughter was shortly to return to the family home from which the child's father was already absent. It can, of course, be said that J had

brought that unhappy prospect upon herself by her non-payment of the fine. But her position was nonetheless such that she was particularly vulnerable to abuse by a police officer of the position of trust and power which gave him a discretion not to arrest or not to arrest immediately. Secondly, the offender did abuse his position of trust and power in the most cynical manner, giving J a choice between immediate arrest and submission to rape. Those features are, of course, closely interlinked and they do overlap. But we accept the submission of the Solicitor General that they are distinct: one is relevant to harm, the other to culpability. The judge was faced with a difficult sentencing process and we well understand why he was anxious not to double count the serious features in a way which would be unfair to the offender. It was however important that he give appropriate weight to the two features.

20. In our judgment, the appropriate categorisation under the guideline was, as the Solicitor General submits, 2A. Had the judge made that categorisation, the serious features which we have mentioned would have largely been taken into account by the categorisation. The only significant further aggravating feature would be the fact of ejaculation, which in the particular circumstances of this case added comparatively little to the overall seriousness. Adopting this approach the judge would then have had to consider the mitigating features rightly advanced on behalf of the offender and would have had to consider what further reduction from the guideline starting point was necessary in order to reflect the degree of overlap between the two principal features which we have identified.

21. It seems to us that approaching the matter in that way the result would be to bring the case to the bottom of the category 2A range or even somewhat below it. The judge, as we have said, instead placed the case into category 3A, for which the starting point is 7 years and the range 6 to 9 years. But if that approach be taken it is necessary to take into account, as a serious aggravating feature, the vulnerability of J when confronted with the offender's offer to spare her from immediate arrest. It was also in that approach necessary to give full weight to other aggravating features such as the commission of the offence in J's own home, she being known by the offender to be in a position of particular vulnerability and in effect blackmailed by him. On this approach, it seems to us that the final sentence would inevitably be above the category 3A guideline starting point and at or near the upper end of the category range.

22. The judge might therefore have reached a similar final sentence by one of two different routes. But in the event he imposed a total sentence after trial which was below the category 3A range and indeed below the starting point for a category 3B offence. With all respect to the judge, we have no doubt that that sentence failed to impose just and proportionate punishment for this very serious offending which has substantially blighted J's life.

23. We recognise the difficulties of a lengthy prison sentence for a man of the offender's age and with his poor health and we recognise that anxiety about his wife's position will make prison particularly difficult for him. But even making every allowance which at this stage we can make in the offender's favour, we conclude that the least sentence which was properly open to the judge was a total term of 8 years' imprisonment. It follows that, in our judgment, the sentence imposed below fell well short of the range

reasonably open to the judge and was unduly lenient. We therefore grant leave to refer. We quash the sentences imposed below, and substitute for them concurrent sentences of 8 years for the offence of rape and 4 years for the offence of misconduct in public office. Thus the total term is increased to 8 years' imprisonment. As before, the offender remains subject, indefinitely, to the notification requirements.