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2018/04059/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 26th February 2019

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE STUART-SMITH

and

THE COMMON SERJEANT
(His Honour Judge Marks QC)
(Sitting as a Judge of the Court of Appeal Criminal Division

R E G I N A

- v -

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Mr M Newport appeared on behalf of the Appellant

Miss L Oakley appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 26th February 2019

LORD JUSTICE MALES: I shall ask the Common Serjeant to give the judgment of the court.

THE COMMON SERJEANT:

1. On 2nd August 2018, in the Crown Court at Basildon, the appellant pleaded guilty to an offence of rape committed by him over 32 years earlier, on 17th September 1985. For this offence he was sentenced by Miss Recorder Claire Davies to an extended sentence of eighteen years, the custodial element of which was thirteen years, with an extension period of five years.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. No matter may be reported about the case if it is likely to lead members of the public to identify the victim of the offence.

3. The appellant now appeals against the sentence imposed by leave of the single judge.

4. He was born on 20th September 1949 and is now 69 years of age. He has a truly dreadful antecedent history, particularly insofar as sexual offences are concerned. In 1966 and again in 1971 he was placed on probation for offences of indecent exposure. In 1978 he was again placed on probation for indecently assaulting his 11 year old niece. His next offence in time, committed on 17th September 1985, relates to the instant offence.

5. Between September and November of the following year, 1986, the appellant committed two burglaries of dwelling houses with intent to rape, one offence of indecent assault of a female under 16 and two offences of rape. For these offences he was sentenced to a total of fourteen

years' imprisonment. In relation to two of these offences, he was armed: on one occasion with a knife and on the second occasion with a screwdriver. A number of the offences occurred in the early morning.

6. In July 1996 he was convicted of indecent assault on a female, for which he received a sentence of four years' imprisonment. In relation to the same incident, he was convicted of attempting to render a female insensible, unconscious or incapable of resistance, with intent to commit rape. For that offence he was sentenced to life imprisonment and ordered to serve a minimum term of nine years four months. That incident occurred within weeks of his release from the fourteen year sentence. Those offences involved him approaching a female who was walking home alone in the early hours of the morning. The appellant followed her and placed a polythene bag over her head. He then held her around the neck and tried to drag her up a hill. He forcefully put his hand up her shorts and tried to insert his fingers into her vagina, but was unable to do so. When she screamed, he ran off.

7. This catalogue of offending is of particular relevance when set against the background of the instant offence. The victim of the offence was aged 18. She lived with her parents in the grounds of a school in Essex. At the time she worked in London and would leave home every morning at around 6 a.m. in order to take the bus to work. As was her wont, she did this in the early morning of 17th September 1985. As she waited for the bus, she noticed a male sitting on a wall. She realised that she had seen him sitting there on the two preceding days. The male, who turned out to be the appellant, ran towards her and grabbed her around the neck. He held a Stanley knife, which he pressed against the side of her neck. He stated that he did not want to hurt her and then walked her towards the gate of a nearby farm. There he forced her down to the ground, removed her underwear and raped her, ejaculating inside her. He then got up and ran out of the farm, but returned a short time later in order to collect the Stanley knife that he had

left upon the ground. Although the police were involved from the outset and a sample of semen was recovered from her vagina, the identity of her assailant remained unknown.

8. In 2016, however, as a result of scientific advances in relation to DNA analysis, the case was reviewed by a Cold Case Investigation Team. As a result, on 19th April 2017 the appellant, who was by then serving the term of life imprisonment to which reference has already been made, was arrested. He declined to comment when interviewed, but said in a prepared statement that he could not remember any facts relating to the day in question.

9. A subsequent DNA analysis showed that it was in excess of a billion times more likely that the appellant contributed to the DNA profile obtained from the victim's knickers than that it had been left there by an unknown individual. As a result of that finding, the appellant was re-interviewed on 24th January 2018 but again declined to comment. He was charged with the offence later that day.

10. He made his first appearance on 26th February 2018. Thereafter, on 6th April 2018 he entered a not guilty plea at the plea and trial preparation hearing. The trial was fixed for 6th August 2018, but a matter of days before the trial the appellant indicated an intention to change his plea, which he did on 2nd August 2018.

11. It was apparent from the victim impact statement in this case that this offence has had an absolutely devastating effect upon the victim. She describes how the incident changed her entire life. She was unable to return to work in London and had had to give up her job. Thereafter, she had become paranoid that any male walking behind her was going to attack her. As she put it, "Every day I look over my shoulder, I am so paranoid someone is running up to grab me". She started to drink heavily. She describes how her attacker was in her head every day and how she

would relive the incident in her dreams every night. She tried to commit suicide. She had been married three times and had never felt able to trust those with whom she was in a relationship. Since the incident, she has been on medication for anxiety and depression. She has constant flashbacks and at times it feels as though the incident just happened yesterday.

12. The case for the prosecution is that this was a category 1A offence within the sentencing guidelines. This has not been disputed on behalf of the appellant. So far as harm is concerned, a category 1 offence is an offence where the extreme nature of one or more category 2 factors is present, or where there is extreme impact caused by a combination of category 2 factors. The relevant category 2 factors here are:

1) the severe psychological harm caused to the victim;

2) the abduction of the victim;

3) the threats of violence to the victim from the brandishing of the Stanley knife, beyond that which is inherent in the offence; and

4) the fact that the victim was particularly vulnerable at that time of the morning.

13. So far as culpability is concerned, higher culpability is indicated where there has been a significant degree of planning. This was evidenced here by the fact that the appellant had been watching the victim on two preceding days and had deliberately armed himself with a knife.

14. For a category 1A offence, the starting point is fifteen years' custody, with a range of thirteen to nineteen years.

15. The aggravating features of the case are the appellant's previous history and the fact that he ejaculated. The threats and use of a weapon have already been taken into account in fixing this as a category 1 offence.

16. The mitigating feature here is the appellant's guilty plea. As already indicated, this came very late in the day. Accordingly, it is not contended that the appellant was entitled to any more than the fifteen per cent discount which he was given by the learned Recorder.

17. In the event, although it is accepted on the appellant's behalf that as a standalone offence the sentence imposed was unexceptionable, it is submitted that, given that he is already the subject of a life sentence and in particular that he has now served about twelve and a half in excess of his tariff, this should have been reflected in the sentence that was imposed for this offence. It was also submitted (in writing) that it was manifestly excessive and/or wrong in principle for him to have been made the subject of an extended sentence, given the fact that he is already subject to a life sentence. Moreover, it has been submitted that the appellant is no longer properly regarded as being dangerous, bearing in mind that this offence occurred nearly 33 years ago and having regard to the views of the Parole Board who have considered his case in the relatively recent past.

18. We deal with these submissions in turn. A point relating to totality arose in the recent case of *R v Green* [2019] EWCA Crim, in which reference was made to *R v Cosburn* [2013] EWCA Crim 1815 and *R v McLean* [2017] EWCA Crim 170. In giving the judgment of the court in *McLean,* Treacy LJ made the following observation:

> "It seems to us, however, that this appellant must have made a conscious choice not to disclose the July 2014 matter in the hope that it would go undetected. In those circumstances he cannot now claim to be sentenced as if both matters should have been dealt with together in January 2015. To permit that to happen at this stage would be unjust to the public interest in giving the appellant an undeserved and uncovenanted bonus. This case, therefore, is a salutary illustration of the benefits which can accrue to offenders from making voluntary admissions of additional offending and the risks that they run if they choose not

to do so."

As pointed out by Simon J (as he then was) in *Cosburn*:

> "When considering its approach to sentencing where there have been previous sentences for similar historic criminality, the court should have in mind whether allowance or adjustment should be made in the case before it. The proper application of the approach will vary from case to case. In some cases, it may have an impact on the later sentence. In other cases, it may have no impact at all."

19. In our judgment, the undeniable fact of the matter is that over 30 years having elapsed, the appellant thought that he had got away with this offence of rape. Furthermore, it is apparent to this court that in their consideration of his case in the last few years, the Parole Board had been significantly misled in that they were not in full possession of all the relevant facts. Not only did they not know anything about the offence which is the subject matter of this appeal, but equally as importantly they did not know that the appellant, by suppressing that information, had not made a clean breast of his past offending. Had they been aware of that, they may well have been a good deal less inclined to recommend his transfer to open conditions in May 2013 and Dr Deborah Kingston, a clinical psychologist, may not have made a positive recommendation to the Parole Board, as she did, in 2016 for the appellant's release.

20. What the Parole Board were also unaware of was the appellant's attitude towards the current offence after he was charged with it. This is not a case where, following the DNA revelations, the appellant made a full and frank confession. On the contrary, it is apparent from the detailed and very helpful pre-sentence report prepared by Sarah Austin-Carroll, to whom this court is indebted, that it was not until extremely late in the day, when he realised the strength of the DNA evidence against him, that the appellant was willing to admit this offence. He was to tell

the probation officer that he recalled the weekend prior to the offence, when he had travelled to collect a black Pyrenean dog from out of the area, but claimed that he could not remember this offence because of his long employment hours. At one point, he also sought to rely upon the fact that the police had "suspiciously" (as he put it) destroyed other items of evidence such as clothing. Thus it is that the probation officer, in our judgment correctly, concludes that, despite his guilty plea, the appellant is in a state of denial, and she comments upon the fact that he had failed to disclose or address the current offence during his time in custody. Her concluded view is that the appellant poses a very high risk of further sexual offending. That is a conclusion with which this court entirely agrees.

21. In the event, taking account of the totality of the factual background to this case, and notwithstanding that he is serving a life sentence, we are entirely satisfied that the provisions of section 226A of the Criminal Justice Act 2003 apply in the case of this appellant and that the sentence imposed was neither wrong in principle nor manifestly excessive. In our judgment, the fact that he has served in excess of twelve years more than the tariff period under the life sentence cannot avail him. It does no more than reflect the fact that throughout this time the Parole Board have not regarded the risk that he continued to pose as capable of being safely managed in the community.

22. Accordingly, this appeal is dismissed.

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