Neutral Citation Number: [2018] EWCA Crim 2693

Case number: 2018 00189/01126 C3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Friday 23 November 2018

B e f o r e:

LORD JUSTICE LEGGATT

MR JUSTICE LEWIS

THE RECORDER OF RICHMOND ON THAMES
HIS HONOUR JUDGE LODDER QC

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R E G I N A

v

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MR MARK FRASER appeared on behalf of the **Applicant**
MISS SUSANNAH BRAMLEY appeared on behalf of the **Crown**

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J U D G M E N T

(Approved)

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LORD JUSTICE LEGGATT:

1. On 13 December 2017, after a trial before His Honour Judge Moss and a jury in the Crown Court at Guildford, the appellant was convicted of three offences of indecent assault, contrary to section 14 of the Sexual Offences Act 1956, and one offence of indecency with a child, contrary to section 1 of the Indecency with Children Act 1960. On 15 February 2018 he was sentenced for these offences to terms of imprisonment ranging from one to two years - two years being the maximum term that could be passed under the legislation that applied when the offences were committed. The sentences were ordered to be served concurrently with each other, making the total sentence, therefore, one of two years' imprisonment.

1. Applications for leave to appeal against both conviction and sentence were referred to the Full Court by the Registrar. We granted leave to appeal at the outset of the hearing and have proceeded to hear the appeals.

2. Reporting restrictions apply to this case, and nothing must be published which is likely to lead members of the public to identify the victim of the offences.

Background

3. It has become common in recent years for cases involving allegations of sexual assault to be prosecuted long after the relevant events are alleged to have occurred but, by any standard, the length of time which elapsed between the offences alleged in this case and the trial of the allegations was immense. The appellant was born on 27 May 1946. The offences are said to have occurred at some time during the two year period between 9 June 1960 and 8 June 1962, that is to say when the appellant was aged between 14 and 16 years old. The complainant is his younger sister, who was born in June 1949 and was aged between 11 and 13 at the relevant time. The trial was therefore concerned with events said to have occurred more than 55 years earlier.

4. The prosecution case was that the complainant was sexually assaulted by the appellant in their family home. She shared a bedroom with an older sister and the appellant shared a bedroom with a younger brother. The complainant testified that the appellant would enter her bedroom when she was in bed at times when their parents and the older sister were out. On these occasions, he would touch her all over her body, at first over, and then under, her nightie. To keep her quiet, he would put his hand over her mouth or sometimes would put a flannel in her mouth.

5. The four counts on the indictment related to four different forms of sexual assault which the complainant said all took place on multiple occasions. Count 1 alleged touching the complainant's breasts, and count 2 digital penetration of her vagina. Count 3, the offence of indecency with a child, charged the appellant with making the complainant masturbate him, and count 4 with making her perform oral sex on him.

6. The complainant gave evidence that she believed that this abuse went on over a period of about a year but inevitably she could not identify particular occasions and dates; and the prosecution case was accordingly put on the basis that each form of assault occurred at least twice in the period of two years covered by the charge.

7. The complainant's evidence was supported by evidence given by her younger brother that he recalled once, late at night, hearing the appellant's voice coming from the complainant's bedroom and the complainant saying, "That's enough, stop, [X]", after which the appellant came into the bedroom that he shared with his younger brother. There was also evidence given by the complainant's husband that, some time after their marriage in the 1970s, she had confided in him that she had been abused by her older brother when she was a young girl. And a woman police officer, who is a friend of the complainant, gave evidence that the complainant told her about the alleged assaults in September 2013. It was as a result of the encouragement of this friend that the complainant ultimately reported the matter to the police.

8. It took a long time for the case to come to trial, mainly because the appellant is now seriously ill - a matter to which we will return. The first hearing in the magistrates' court took place in September 2014. There was a plea and case management hearing in the Crown Court in January 2015. It took a long time for medical reports to be provided about the state of the appellant's health and information emerged in a piecemeal fashion.

9. His medical condition, as it was in 2017, and as it is now on the basis of a recent medical report which has been obtained and which we have admitted in evidence on this appeal, can be summarised as follows. The appellant has advanced diabetes and many complications which arise from this. These include: eye damage, with poor vision; peripheral neuropathy, leading to numbness, loss of sensation and pain in his feet; and peripheral vascular disease, which has resulted in the amputation of his left leg below the knee and the amputation of three right toes. He cannot walk and is confined to a wheelchair. Most critically, he has end-stage kidney disease and relies on regular dialysis treatment three times a week to keep him alive. He has also suffered from unrelated conditions, including a perforated bowel (for which he spent over four months in hospital) and upper gastrointestinal bleeding, for which he required blood transfusions. Those episodes occurred during the period that the case was proceeding to trial. In recent years, he has spent his time constantly in and out of hospital.

10. In a report dated 8 December 2016 a Dr Suckling, a consultant nephrologist, estimated the appellant’s chance of surviving five years as only 15-20% and his chance of surviving ten years as only 5%. The updated report provided to us at this hearing from a different consultant nephrologist estimates his chance of surviving ten years from when his dialysis started in 2012 as only 15-20%.

11. At a further case management hearing in February 2017, the court heard an application that it would be an abuse of process to try the appellant. That application was rejected. On the basis of the medical evidence the judge concluded that, although the appellant's medical situation was unstable and unpredictable, he was fit at times to stand trial. However, he could not attend court on days when he undergoes dialysis, and on any day when he attended court he could not sustain attendance for more than about two hours.

12. The trial was listed to begin on 27 November 2017, with a three-week time estimate, and a direction that the court would sit for a maximum of half a day on three days a week. On 3 November 2017 a pre-trial review took place, at which it was confirmed that the trial would start on 27 November. The appellant was to attend on Monday, Wednesday and Friday of each week for two hours a day, and there were to be no live witnesses on days when the appellant did not attend.

13. On the first day of the trial, Monday 27 November 2017, the appellant did not attend court as he had been taken to hospital. The case was adjourned until the following day so that enquiries could be made about when he would be fit enough to attend. On the next day the court was told that there was a realistic expectation that the appellant would be able to attend court on the Friday, 1 December, and the trial was adjourned until then.

14. On the Friday, the appellant had still not been discharged from hospital. The prosecution applied to proceed in his absence. The application was granted, a jury was sworn, the prosecution opened its case and the recording of the complainant's ABE interview was played to the jury. The trial was then adjourned until the Monday, 4 December 2017.

15. On that day the appellant was still absent. The trial continued in his absence in the morning, with the complainant being asked a supplemental question and then cross-examined by the appellant's counsel. Her evidence was followed by that of her husband. At 1pm the court then adjourned until the Wednesday. On Wednesday, 6 December, the appellant attended court for the first time. The prosecution evidence was completed on that day.

16. When the court next sat on the Friday, 8 December, the appellant was again present, but in his counsel's opinion was not in a fit state to give evidence. An application was made for him to give evidence on the following Monday, which was granted.

17. On that Monday, 11 December, the appellant was in attendance and fit to give evidence. He gave evidence and was cross-examined. The statement of the other defence witness (who was the appellant's and complainant's older sister) was read to the jury. At 1pm the trial was adjourned.

18. When the court next sat on Wednesday, 13 December, the appellant was once more in attendance. Closing speeches were made and the judge summed up the case. The appellant left court at 1pm, by which time the summing-up was almost completed. The jury retired shortly after the lunch adjournment at 2pm. At 2.56pm they returned unanimous guilty verdicts. The case was then adjourned for reports to be obtained before sentencing.

The appeal against conviction

19. The ground on which the appellant's convictions are challenged on this appeal is that the judge is said to have been wrong to proceed with the trial in his absence. On behalf of the appellant Mr Fraser submits - and is undoubtedly correct - that it is a fundamental principle of criminal justice in this country that a person accused of a crime has a right to

be present during his trial. It is accepted that this right is not unfettered and that the court has power to proceed in the absence of a defendant. We were referred, as was the judge, to the leading case of R v Jones [2003] 1 AC 1, a decision of the House of Lords, and to the decision of Court of Appeal in R v Howson (1982) 74 Cr App R 172. Those and other authorities make it clear that the power to proceed in the absence of a defendant should be exercised with great caution, even when the defendant has voluntarily absented himself, and all the more so if his absence is involuntary as a result of illness, as it was in this case.

20. It is further submitted - and this has been the focus of Mr Fraser's oral submissions this morning - that the appellant was prejudiced by the fact that the complainant's evidence, including cross-examination, was given in his absence because the appellant was subsequently criticised by the prosecution for raising certain matters in his evidence which had not been put to the complainant when she was cross-examined and it was suggested that he had fabricated that evidence. There were three such matters: the first related to building wigwams with the complainant when she was 8 years old; the second to the fact that their father worked every night according to the appellant, and not irregular shifts as the complainant had said; and the third matter (which is said to be the most significant) was that the appellant said in evidence that he took the complainant dancing on many occasions in her mid to late teens, the implication being that she would not have gone with him if her allegations were true.

21. All these matters were mentioned by the appellant to his counsel on the first day that he attended court and it is said that his recollection of them was prompted by seeing his younger brother giving evidence. Mr Fraser submits that, if the trial had not been started in the absence of the appellant, it is likely, or at least possible, that the appellant would have raised the matters in time for his counsel to put them to the complainant in cross-examination, thus avoiding the suggestion of late fabrication.

22. In relation to this last point, it does not seem to us that either the matters themselves or the appellant's late reference to them were of any real consequence in the context of the evidence and the case overall. But in any event they are not thoughts which were triggered by seeing the complainant's evidence-in-chief since the appellant was not there to see that evidence. Nor was the appellant prevented by his absence from court from communicating them to his representatives. Moreover, he had had many months, if not years, while the case was proceeding to trial to reflect on the allegations and the evidence that he would give. We accept that the appellant was ill for long spells during that period, but we do not accept that that prevented him from giving attention to the subject matter of this case, which must have been very much on his mind. In any event, as Miss Bramley has pointed out this morning, to the extent that there was prejudice through the late raising of the matters in question, there would have been some such prejudice in any event based on the fact on which she relied as part of her argument at the trial that no reference to those matters had been made by the appellant either when interviewed by the police or in his defence statement, which there had been many opportunities to consider during the course of the proceedings and, if necessary, amend.

23. In these circumstances, we reject the suggestion that any prejudice which the appellant sustained as a result of raising these matters late can be attributed to the judge's decision

to start the trial in his absence. More generally, we do not accept that the decision to proceed with the trial in the absence of the appellant (to the extent that it did proceed in his absence) was unfair. The judge applied the correct legal principles and took account of the relevant factors. Those included the long delays, albeit not through fault of the appellant, in bringing the case to trial; the many adjournments which had already been granted, including when the trial started; the interests of witnesses, including the complainant, who had been waiting a long time to give evidence; and, crucially, whether the appellant's counsel was fully instructed and able to represent his interests without him being present, which Mr Fraser confirmed to the judge that he was. It was also highly relevant that the complainant's evidence-in-chief, apart from her answer to one supplementary question, was contained in a video recording which the defence received months before the trial. Although the appellant did not view the recording, he had seen a transcript of it. Accordingly, although he was not in court to see the recording played to the jury, the appellant knew exactly what evidence would be given by the complainant as her evidence-in-chief.

24. Furthermore, this is not a case where the defendant was prevented by his ill-health from giving evidence. The appellant was able to, and did, give evidence in court in his own defence – which, for a defendant who wishes to testify, is the most critical aspect of the right to participate in the trial: see the recent decision of this court in R v Welland [2018] EWCA Crim 2036. The appellant was also present in court to hear the rest of the defence evidence, closing speeches and the judge's summing-up.

25. In the circumstances we think it impossible to say that the judge exercised his discretion wrongly in proceeding with the trial in the appellant's absence to the limited extent that he did. The appeal against conviction is therefore dismissed.

26. We would add for completeness in relation to that appeal that an application was made by Mr Fraser this morning to rely on a recent witness statement made by the appellant. That statement refers to the three matters already mentioned which he gave evidence about anyway at the trial but in addition certain other similar evidence. We can see no justification at all for admitting that evidence as there is no good reason, in our opinion, why that evidence, if considered relevant, could not have been adduced at the appellant's trial.

27. The appeal against sentence

28. The judge, in his detailed sentencing remarks, outlined the facts of the offences. He referred to a witness statement made by the complainant describing the impact of the offences on her. In that statement she relates how, even though the incidents happened some 55 years ago, she has carried the effects of them with her ever since, in the form of periodic anxiety and depression and feelings of uncleanliness and insecurity. The judge noted that she has, as she says, been fortunate to find the love and support of a kind and sympathetic husband, to whom she has been married since the age of 21.

29. In relation to the appellant, the judge noted that at the time when he committed the offences he was himself a boy of only 14. When sentenced, he was 71 years old. In all the years in between he had been of good character, having no conviction for any

criminal offence apart from a motoring offence. He has had, in the judge's description, a life filled with much sadness and sorrow and illness. He worked as a boat builder. He was married, but his marriage broke down. He had two sons and a daughter. One of his sons committed suicide and the other also died. His former wife has died. He is now gravely ill. The judge referred to the appellant's illnesses and numerous disabilities, and to the fact, which we have mentioned, that his life expectancy is now extremely low. The judge said that he could not ignore the fact that the appellant is gravely ill.

30. The judge noted that under today's Sentencing Guidelines the general sentencing levels for offences of the kind of which the appellant has been convicted are significantly higher than the maximum sentences which the court has power to impose under the legislation which is applicable because it was in force at the time when the offences were committed. The judge said that he had been invited to conclude that he should impose a suspended sentence, but he was satisfied that to do so would not send out the right signal to the appellant or to anyone else. He concluded that the appropriate sentence was one of two years' imprisonment.

31. On behalf of the appellant, Mr Fraser has submitted that the judge was wrong in all the circumstances to impose a sentence of immediate imprisonment, and that taking into consideration his youth when the offences were committed, how long they were committed, the appellant's lack of criminal convictions and the grave state of his health, the sentence should have been suspended. Alternatively, Mr Fraser has submitted that the court can and should properly take account of the medical situation of the appellant and reduce his sentence as an act of mercy, in accordance with established principles.

32. The Crown responds that the judge took account of all the relevant circumstances and factors, and that the sentence imposed cannot be said to have been manifestly excessive. However, the Crown accepts the principle that the court can, as a matter of mercy, take account of the appellant's serious ill-health.

33. We agree that the judge considered the relevant factors, but we do not think that he accorded to some of those factors the weight they deserve. It is essential to bear in mind the appellant's young age when these crimes were committed. Even if the court were dealing with recent offences, that would be a major mitigating factor. The current guideline sentence lengths to which the judge referred in his remarks are for adult offenders; a significant reduction would be required in sentencing a boy aged 14.

34. Second, it was at the trial, and is at this distance in time, impossible to establish to the criminal standard of proof the number of occasions when each type of offence occurred. That is why the prosecution case was put at the trial on the basis that each type of offence was committed on at least two occasions. A person convicted of a crime is entitled to be sentenced on the basis of the facts which have been proved beyond reasonable doubt, and only those facts. That means that, for the purpose of sentencing the appellant, it must be assumed that the eight occasions proved at the trial were the only occasions when the offending occurred.

35. Third, this is not just an ordinary case of an offender who has no previous criminal convictions: this appellant has lived between 55 and 60 years - the best part of a lifetime - since he committed these offences without ever offending again. That is a factor to which considerable weight should be given.

36. Last, and by no means least, the appellant is, as the judge recognised, gravely ill. The medical evidence indicates that, to put it bluntly, he is very near the end of his life.

37. Long, long after the events occurred crimes committed by the appellant in his youth have caught up with him. He has been tried and convicted by a jury. The complainant has been vindicated. We do not underestimate the impact which the offences have had on her and what she has suffered. We consider that the judge was entitled to pass an immediate prison sentence to mark this offending, but that is all that it can properly do. Matters would have been different if the appellant had been prosecuted and convicted some time ago, but in his present state of illness and in all the circumstances of this case no purpose is served by keeping him in prison. It is punishment enough that he has been publicly convicted and imprisoned, and will end his life in shame. In our opinion the sentence imposed is, in justice and in mercy, longer than was necessary. It should be quashed and replaced by a sentence of one year's imprisonment on all counts concurrent. To that extent this appeal is allowed.

38. MR FRASER: Would it be possible, my Lord, to have a post hearing conference with F?

39. THE CLERK OF THE COURT: We can arrange that, my Lord.

40. MR FRASER: Thank you, I am grateful.