[2019] EWCA Crim 1677
2019/02377/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 27 September 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE EDIS

and

MRS JUSTICE THORNTON DBE

R E G I N A

- v -

A C F

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss T J Ayling QC appeared on behalf of the Appellant

Mr O Saxby QC appeared on behalf of the Crown

J U D G M E N T
(Approved)

Friday 27 September 2019

LADY JUSTICE NICOLA DAVIES:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence.

2. On 11 September 2017, in the Crown Court at Reading, having been convicted following a trial of counts 46 and 56, and having pleaded guilty to the remaining sixteen counts, the appellant was sentenced as follows:

   Complainant AMF:

   - Count 15, rape of a child under 13 (multiple incident count), six years' imprisonment, to run consecutively to the sentence on count 46;

   - Count 46, rape (multiple incident count), 22 years' imprisonment;

   Complainant ALF:

   - Counts 17, 21, 22 and 23, rape of a child under 13, five years' imprisonment, to run concurrently with each other and with the previous sentences;

   - Counts 20 and 24, sexual assault of a child under 13, sixteen months' imprisonment, concurrent on each, to run concurrently with the existing sentences;

   - Count 25, assault occasioning actual bodily harm, six months' imprisonment, to run concurrently;

   - Counts 26 and 27, rape of a child under 13, six years' imprisonment, concurrent on each, to run concurrently with the existing sentences;

   Complainant LF:

   - Counts 28 and 29, rape of a child under 13, five years' imprisonment, to run concurrently on each and concurrently with the existing sentences;

   Complainant CF:

   - Counts 36, 37, 38 and 39, rape of a child under 13, five years' imprisonment, to run concurrently on each and concurrently with the existing sentences; and

   Complainant DF:

   - Count 56, doing acts tending and intended to pervert the course of public justice, six years' imprisonment, to run concurrently.

   The total sentence was, therefore, one of 28 years' imprisonment.

3. The appellant was acquitted of counts 42, 47, 49 and 50 (rape) and of count 55 (perverting

the course of public justice). A restraining order was imposed, pursuant to section 5 of the Protection Against Harassment Act 2005, unlimited as to time, as was a Sexual Harm Prevention Order of unlimited duration. Indefinite notification requirements were imposed.

4. There were three co-accused: "ZF" (the mother of the appellant), who was convicted of three counts of cruelty to a person under 16, two counts of perverting the course of public justice and was sentenced to eight years' imprisonment; "AF" (the appellant's father), who was convicted of two counts of cruelty to a person under 16, two counts of rape and was sentenced to a total of 26 years' imprisonment; Paul Johnson was convicted of one count of perverting the course of public justice, he was sentenced to fifteen months' imprisonment, suspended for 24 months.

The facts

5. The co-accused, ZF, had three children prior to forming a relationship with the co-accused, AF. They subsequently had eight children of their own, including the appellant (their eldest son), born in 1992, and the complainants, AMF, CF, ALF and LF. It was alleged at trial that the appellant, ZF and AF sexually abused the complainants between February 2001 and March 2007. Social Services had become involved with the family. One of the complainants disclosed being sexually abused at home. Police became involved, accounts were taken from the complainants and interviews were held with some of those who had been implicated. Family Court proceedings were instituted, during the course of which the appellant admitted that he had sexually abused his four younger siblings. He was taken into voluntary care in February 2007. The complainants subsequently retracted their police statements. The criminal investigation was closed. The Family Court proceedings continued, as a result of which the complainants were made the subject of full care orders. They were removed from the family home and placed in foster care or a children's home.

6. In early 2013, ALF and LF made disclosures to the police in relation to the alleged sexual offending. A second police investigation was instituted which encompassed offences relating to ALF, LF and two other siblings.

Offences involving AMF (counts 15 and 46)

7. In 2016, AMF (then aged 22) disclosed that she had been sexually abused by her father and the appellant. The abuse began in 2004, when she was aged 9 to 10. The appellant and her father would come into her room and vaginally rape her. The appellant did this on numerous occasions until she was about 12. At the time of the offending, the appellant was aged between 12 and 14. The abuse would occur two to three times a week and increased to almost every night as she became older. (The appellant pleaded guilty to count 15. The co-accused, AF, was acquitted of the counts alleging sexual offending during this time.)

8. AMF was placed in a children's home in 2009, her family would contact her and on occasions she would return to the family home. In 2011 she returned to live with her family in that home. Thereafter, her father continued to rape her as a form of punishment for transgressions such as using the telephone without asking, or engaging with the police or social workers. (AF was convicted of counts 45 and 48 (rape), but acquitted of the other counts which he faced.) AMF also alleged that the appellant continued to rape her (count 46). AMF said that the last incident occurred on 19 May 2016. (The appellant was acquitted of counts 47 (an allegation that she had been raped by him with the assistance of their mother) and counts 49 and 50 (allegations that she had been raped the day after her birthday as punishment for speaking to the police and further as punishment at the house of a family friend)).

Offences involving LF (counts 28 and 29)

9. In interviews between July 2013 and February 2014, LF (then aged 15) stated that the appellant had started to abuse her in January 2005. She was aged 8 and the appellant was aged 12. She had been stabbed in the leg by her sister, ALF, and they had argued. She told her father about the incident, who told the appellant. The appellant came into her room and screamed at ALF, as a punishment the appellant vaginally raped ALF. He then pushed LF to the ground and vaginally raped her. ALF told her mother about the incident, but no action was taken (count 28).

10. ALF could recall two further occasions when the appellant had raped her: the first, after she had been to the shops with AMF; the second when she used the wrong cup to make her mother a drink (count 29). LF described her father as being the ringleader. He controlled everything that happened in the family. Her parents were violent to each other. They would also be violent to the appellant if he did not administer whatever form of punishment his father had decided was appropriate. (AF was acquitted of any offending against LF.)

Offences involving CF (counts 36 to 39)

11. In an interview in November 2014, CF (then aged 19) stated that the appellant had raped him on numerous occasions between January 2005 and March 2007, when CF was aged between 9 and 11 and the appellant was aged between 12 and 14. They used to share a bedroom. CF would sleep on the top bunk bed; the appellant would sleep on the bottom bunk. The appellant would tell him to come down to his bed and would hit CF if he refused. The appellant would then anally rape him. The abuse occurred approximately once a week. On about six occasions, CF tried to tell his mother what was happening.

Offences involving ALF (counts 17 and 20 to 27)

12. In an interview in March 2013, ALF (then aged 15) stated that the appellant had begun to abuse her in February 2004, when she was aged 7 and the appellant was aged 11. She was asleep. The appellant had climbed into bed with her. He would talk to her, telling her that he knew that she was awake and she could hear him. He punched her in the face and had sexual intercourse with her (count 17).

13. On two further occasions, the appellant pulled down her trousers and touched her vagina: once in the car, when her father had stopped to buy drinks at a service station; and once in her bedroom (counts 20 and 24). On the latter occasion, the appellant had burnt her wrist with a cigarette when she tried to stop him from sexually assaulting her sister, LF (count 25).

14. During a family shopping trip in Reading, the appellant had vaginally raped ALF in the car park toilets (count 22). He had also raped her on numerous occasions at their home address (counts 26 and 27). On a further occasion, the appellant had raped ALF on an area of grassland whilst one of his friends watched. He also had a video camera on a tripod, which ALF believed had been used to film the incident (count 23).

The offence involving DF (count 56)

15. DF was one of the three children born to ZF prior to her relationship with AF. Following his allegations of child cruelty against his mother in 2014 (count 1, of which ZF was convicted), DF (then aged 33) stated that the appellant had contacted him and told him that his mother wanted him to write a letter retracting the allegations. They subsequently met in

person so that he could write the letter. DF had been sleeping in a tent in a park. But, having written the letter, he was allowed to stay at the family address, where he remained for some weeks. These arrangements were orchestrated by ZF who used the appellant to persuade or pressure DF into writing the letter. In sentencing, the judge observed that the appellant had been loyal to his mother, who exerted an enormous hold over him and the other children.

The Crown Court proceedings

16. 23. The appellant was aged 25 at the date of sentence. He had one previous conviction for shoplifting in January 2017. The judge treated the appellant and his co-accused as being of good character for the purpose of sentence. The judge described the evidence given during the ten week trial as representing one of the most serious cases of interfamilial sexual abuse that she had heard or in which she had been involved. Full credit was given for the appellant's guilty pleas at the plea and directions preparation hearing.

17. Counts 15, 17, 20 to 29 and 36 to 39 (the abuse which the appellant had admitted in the Family Court proceedings) were committed when the appellant was aged between 12 and 14. They took place when he was alone with his siblings, generally in the home and as a punishment. The appellant apparently regarded himself as the disciplinarian in the family. The punishment took a sexual form. The judge stated that the appellant's mother was aware of what had been going on. There was some evidence that she had beaten the appellant, but the judge stated that the overwhelming evidence was to the effect that ZF had turned a deliberate blind eye to what had taken place.

18. The judge identified the complainant AMF as a highly vulnerable individual. She had been raped as a child by the appellant and subsequently, having returned to the family home from care, was repeatedly raped by her father and the appellant on at least six occasions between July 2011 and January 2016 (count 45 by AF and count 46 by the appellant). AMF suffers from type 1 diabetes, she has self-harmed on occasions, she has also received a diagnosis of bipolar disorder. The judge found that her particular frailties will have been known to both her father and the appellant.

19. The sexual abuse by the appellant of his four siblings has had a significant effect on each of them. The court heard evidence of their disturbed behaviour as children, demonstrated at home and at school. All have required significant input from those tasked with looking after them. The abuse of them by the appellant and the lack of protection by their mother in the cases of ALF and CF has affected each of them significantly. Victim Impact Statements from LF and ALF were before the court.

20. Counts 1 and 2 charged cruelty against respectively DF and KF (the children of ZF), they were carried out by ZF and AF. The judge described ZF as a woman who had no control over her temper, she wanted to be in charge and would use deliberate force to dominate the family. ZF turned a blind eye to the sexual offences perpetrated by the appellant. He had himself been a victim of abuse by ZF's family. ZF had sought to control her children throughout their lives and was described by the judge as a dominating figure in the family.

21. AF physically abused two of his stepsons. He sexually abused his daughter, AMF, repeatedly over a five-year period and he raped her on her 22nd birthday. It was a repeated and sustained campaign of rape, including a punishment rape for talking to the police.

22. The judge identified the appellant as a victim of sexual abuse, he was abused by his extended family and as a result, he had come to regard sexual abuse as part and parcel of his life. It was his way of exerting control over others. The judge found that the sexual abuse which

the appellant had suffered had played a significant part in his behaviour towards his siblings. He did not fully appreciate at the earlier stage of the offending (2004 to 2007) that what was being done to him and what he was doing to others was out of the ordinary. The shame and disgust the appellant felt as a child at his behaviour has manifested itself in self-mutilation, which includes his genitalia. The judge stated that the appellant "sadly and horrifyingly exemplifies the phenomenon of the abused becoming the abuser". She observed that had the appellant's sexual abuse ceased when he was 14, and his offending had been limited to count 39, she would not have considered finding him dangerous, due to his youth and the sexual abuse by others of him. However, his sexual offending continued towards AMF, whom he knew was very vulnerable. As a result, the judge thought it appropriate to consider the issue of dangerousness.

23. The appellant had pleaded guilty to thirteen counts of rape and had been convicted of a further count of rape. The counts to which he had pleaded guilty were rape of a child under 13. The judge characterised the offending as being of such severity as amounting to a campaign of rape, such that a custodial sentence of twenty years and above may be appropriate. The victims were very young and therefore particularly vulnerable, the appellant was their brother and in some cases he was significantly older than his young victim. Given those factors, the judge placed the offending in Category 1A of the Sentencing Council Guidelines. She identified by way of aggravating factors: the fact of ejaculation; the fact that the offending took place in the family home; others were present at times; and there were multiple victims.

24. As to counts 20 and 24 (sexual assault of a child under 13 against ALF (non-penetrative stroking of the vagina)), the judge found that it was Category 1A offending by reason of the age and resulting vulnerability of the complainant. Similar aggravating features applied.

25. The judge identified the offence in count 25 (assault with a cigarette) as greater harm, by reason of ALF's age and vulnerability due to personal circumstances. The judge characterised the cigarette as a weapon. The starting point was eighteen months' custody. Aggravating factors were: the location and the presence of others.

26. As to the complainant CF, the judge repeated the observations insofar as they replied to ALF and the campaign of rape.

27. In assessing dangerousness, the judge found that AF and the appellant met the criteria. The appellant's offending spanned two distinct periods in his life. The first was serious offending as a child between the ages of 12 and 14, however, the judge accepted that his culpability must be scrutinised within the highly disturbed context of his family home. His second period of offending, which commenced in 2011, was when AMF returned to the family home, he knew that she was vulnerable. The appellant needed intervention, but insufficient was provided. As to the later offending by the appellant, which took place when he was aged 19 to 23, the judge found that it fell into Category 1A. She stated that the offences, either by virtue of the serious psychological harm or the vulnerability of the victim, could be categorised as a campaign of rape, falling outside the Sentencing Council Guidelines and resulting in a sentence of more than twenty years' custody. However, given the monitoring which would be provided by reason of the Sexual Harm Prevention Order and restraining orders, and the conditions which would attach to the appellant's licence on release, the judge was satisfied that a determinate would be appropriate.

28. Upon counts 15, 26 and 27 (multiple incident counts of rape of a child under 13 in respect of AMF and ALF, when the appellant was between the ages of 12 and 14), a starting point

of twenty years' custody was taken. It was reduced by half, to take account of the appellant's age at the time and his culpability. The application of the one-third discount, plus a little for personal mitigation, resulted in a sentence of six years' imprisonment for each of the three offences. In respect of all the offences which were committed between 2004 and 2007, the judge applied the same reductions and discounts to reflect the appellant's age, culpability, credit for guilty pleas and personal mitigation. Upon count 46 (multiple incident count of rape of AMF between July 2011 and May 2016, of which the appellant was convicted after trial), the sentence of 22 years' imprisonment was imposed. The judge identified no reduction in sentence for the age of the appellant, his history as a victim of sexual abuse and his personal mitigation. AF (his father) was also sentenced to 22 years' imprisonment for similar offending over a five-year period in respect of AMF. For the offence of perverting the course of justice (count 42), a sentence of six months' imprisonment was ordered to run concurrently for reasons of totality.

29. A pre-sentence report, which was before the court, provides a detailed and insightful assessment of the appellant and his offending, following a five-hour interview with him. The author of the report states that it is not possible to consider the appellant's behaviour without taking account of his own background of familial abuse, both physical and sexual, and the fact that the expectation of safety within the family had been eroded to a point where it is possible that the offences were seen by the victims as an extension of normal family behaviour, until addressed by Social Services. The appellant is recorded as not seeking to place responsibility with others, but he made comments, which were accepted, consistent with not understanding that his behaviour to his younger siblings was wrong until after he had been removed from the home environment in 2007. The author clearly states that the appellant's behaviour cannot be separated from his own experience of abuse, emotional, physical and sexual, during childhood. In the report, reference is made to the judgment in the 2007 Family Court proceedings, which documents sexual abuse of the appellant, not only by an older male cousin, but by his maternal aunt and grandmother. The report also provides the details of the appellant's own attempts at self-mutilation.

30. The author of the report states that the appellant's childhood and family background must be considered to be a contributory factor to his offending both as a child and as an adult. There are overt pressures and concealed influences within the family, a sense of loyalty to parents, and allegations of intergenerational physical and sexual abuse, which have created a culture of secrecy, distrust of professionals and a genuinely confused sense of sexual morality and norms within the wider family. It is within this context that all the offending has taken place. As to the offending which took place following his return to the home in respect of AMF, the author of the pre-sentence report states that the appellant must be considered to be fully culpable, he was in possession of the knowledge that such behaviour had previously been exposed as unacceptable and had led to separation of the family unit. In custody the appellant was under the care of the mental health team due to thoughts of suicide and self-harm. Medication was being prescribed.

31. The pre-sentence report assesses the appellant as posing a high risk of serious harm to adults and children known to him, namely, immediate and extended family members. The author identifies the considerable mitigation in relation to the earlier offences, which includes the young age of the appellant, his own experience of abuse and the fact that he is recorded to have made admissions at the time of the Family Court proceedings which were not subsequently resolved.

32. The report of Dr Michael Layton, a consultant psychiatrist, was also before the court. He identified the appellant as presenting with long-standing symptoms of depression, post-

traumatic stress disorder, substance abuse and personality difficulties. Those symptoms are best described as "complex PTSD", resulting from prolonged and severe trauma in childhood. It is the opinion of Dr Layton that the appellant's psychological and psychiatric problems stem from his experiences of childhood neglect, and emotional, physical and sexual abuse. The abuse of the appellant took place before he was 16, in a family setting where children were not kept safe and were routinely subjected to emotional and physical abuse and neglect. Dr Layton describes the complex nature of the ambivalent relationship which the appellant has with his parents, and identifies the fact that the appellant may remain to some degree under their control, as well as being affected by a deeply ingrained sense of loyalty, however misplaced.

The grounds of appeal

33. The appeal is directed primarily at the sentence of 22 years' imprisonment and to the consecutive nature of the sentence passed on count 15. Reliance is placed on the judge's assessment of the appellant as being himself a victim of sexual abuse – abuse by his extended family – which the judge assessed as having led him to regard sexual abuse as part and parcel of his life. It is said that it is what he learnt within the family environment and that it was to an extent within it normalised behaviour and a means of controlling others. The judge identified the shame and disgust which the appellant had felt as a child at his behaviour, which manifested itself through his own self-mutilation. Reliance is also placed upon the judge's description of the appellant as a victim of his upbringing.

34. In sentencing the appellant to 22 years' imprisonment on count 46 (the same sentence as was passed upon his father on a similar count), the judge is said to have failed to take account of the fact that this was not a breach of trust. AMF was just eighteen months junior to the appellant. The authority of *R v Forbes* [2016] EWCA Crim 1388 is cited, in which the court stated that:

> "17. … The mere fact of association or the fact that one sibling is older than another does not necessarily amount to breach of trust …"

At the time of this offending, the appellant was still young and immature. He was aged 19 to 23 in the relevant period, AMF was aged 17 to 22. Further, this was said to be learned behaviour, he had been put at risk by his parents when he was abused by members of the extended family. He was vulnerable by reason of past abuse, and this manifested itself in his own self-mutilation.

35. It is further contended that, when sentencing the appellant in respect of count 46, the judge failed to take account of the abusive background which impacted directly on the maturity of the appellant. Given his background, he should not have received the same sentence as his father, the man who failed to safeguard him when he was younger. In any event, any sentence passed by the judge should have been ordered to run concurrently in order to take account of the principle of totality.

36. In response, the Crown has properly relied on the seriousness of the offending and has identified the fact that (in respect of the offending between 2004 and 2007) the judge had regard to the family context, but it identifies the aggravating feature of the offending, namely: multiple victims, the force that was used, ejaculation and the presence of others.

Discussion and Conclusion

37. The appellant's offending was of the most serious. It represented a course of sexual conduct towards his younger siblings, the effect of which will remain with each of them for the rest of their lives. We do not seek in any way to minimise the effect of the appellant's offending upon the complainants, however, his offending has to be viewed in the wider context of the family into which he was born. There was before the sentencing court an impressive and insightful pre-sentence report. It appears that it was not dealt with at any length by the judge in what was clearly a difficult sentencing exercise.

38. It is undisputed that the appellant is the victim of sexual abuse. It was identified by the Family Court as having been committed by his maternal grandmother, his maternal aunt and a cousin on his mother's side of the family. It commenced when he was aged 11 and continued until he was about the age of 14. It is accepted that when he was taken into care in 2007, the appellant regarded his own behaviour towards his younger siblings and that of his abusers as normal within the context of his family, such was the depravity within the family. His parents neglected and physically abused the appellant. It is of note that in the Family Court proceedings in 2007, the appellant admitted the sexual abuse of his younger siblings.

39. Count 46 spans the period 2011 to 2016. The offending began when the appellant was aged 19 and continued until he was aged 23. In passing sentence upon count 46, no mention was made by the judge of any reduction for the age of the appellant; nor of the fact that he was the victim of sexual, physical and emotional abuse and neglect. In our judgment, these were highly relevant factors of which account should have been taken. We accept and agree with the assessment of the author of the pre-sentence report that it is not possible to consider the appellant's behaviour without taking account of his own background of familial abuse (emotional, physical and sexual) during childhood, together with the fact that his expectation of safety within the family had been eroded by reason the behaviour of his parents and his extended family.

40. The appellant was aged 19 when the second period of offending commence but, given the damage caused to the appellant by his destructive and abusive parental family, we conclude that he would not have possessed the maturity to fully understand the gravity, nature and consequences of his actions. The damage which had been caused to him did not cease when he attained the age of 18. His maturity, or lack of it, appears to have played no part in this aspect of the judge's difficult sentencing exercise. As Lord Burnett LJ stated in *R v Clarke and Others* [2018] EWCA Crim 185, at [5]:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. …"

41. Further, we have difficulty understanding how the same sentence of 22 years' imprisonment was passed upon the appellant's father for similar offending. His father was not only considerably older, as a parent he had wholly failed to provide any support or safety to his young son. The appellant's father played his own destructive part in the appalling childhood of his children.

42. In our judgment, there is force in the submissions advanced on behalf of the appellant that the sentence on count 46 did not reflect all the mitigating factors which were before the court, nor should it have been of the same length as that passed on his father for similar offending. To reflect these factors, we have concluded that the appropriate sentence on

count 46 is one of 20 years' imprisonment. That sentence is to run concurrently with the sentences passed on the other counts. Thus, we quash the sentence of 22 years' imprisonment passed on count 46 and substitute for it a sentence of 20 years' imprisonment, to run concurrently with the sentences on the other counts.

43. On count 5, a sentence of six years' imprisonment was imposed, and ordered to run consecutively to the sentence on count 46. We quash the consecutive nature of that sentence and substitute for it a sentence of six years' imprisonment, to run concurrently with the sentences on the other counts. Accordingly, the total sentence is one of 20 years' imprisonment. To this extent, the appeal is allowed.

44. Miss Ayling, Mr Saxby, as I said in my lengthy judgment, this must have been an extremely difficult sentencing exercise for the judge, and it is clear that it was a very difficult trial for all. The court would like to thank you for the quality of your submissions and the insight which was demonstrated in them.
