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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 20 February 2019

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE MARTIN SPENCER

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

R E G I N A
v
[MJL] AKA [SJB]

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Mr J MacAdam appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

MR JUSTICE MARTIN SPENCER:

1. By permission of the single judge, the appellant appeals against the sentence of 11 years' imprisonment imposed by His Honour Judge Hurst at Leicester Crown Court on 29 March 2018 for five offences of rape committed against his former partner over a period of about two and a half years. This sentence was imposed after the appellant was convicted of these charges by a jury, he having pleaded not guilty.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences and no matter relating to the victim of these offences shall during her lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of these offences. This prohibition shall apply unless waived or lifted in accordance with section 3 of the Act.

3. On the other hand, we have been informed that the appellant, who appealed in the name of [MJL], has by deed poll changed his name to [SJB]. That is therefore now his name. We further understand that this is something which is becoming more common and prevalent amongst convicted people so that they can, when they are released from prison, apply for jobs and hope that any search will not reveal their previous convictions.

4. We direct that the matters relating to these convictions shall be recorded against the name [SJB] equally as against the name [MJL] so that any applications that may be made in the name of [SJB] shall show the true position.

5. The appellant is now aged 30 having been born on 10 August 1988. The complainant was some two years older. They met in June 2010, when they were respectively aged 21 and 23 when the complainant lived in a flat with her sister. The appellant moved in with them a few months after meeting the complainant.

6. Shortly after he moved in, there was the first episode of violence when he hit her and things were then “edgy” for about a week after that when they did not have sex. There was then an argument in the living room just before the complainant's birthday when he confronted her as to why she was not having sex with him. He hit her again. He followed her upstairs and there he raped her. He pushed her on the bed so that she landed on her back. He held her down, lifted up her dress, literally ripped off her knickers and had sex with her. She told him to stop but he did not. Once he had finished he simply got up and coldly went downstairs to smoke a cigarette. This was count 1 on the indictment.

7. The second count of rape related to a further incident in March 2011. By this time, the complainant was finding the appellant's behaviour very controlling. At about midday, when the appellant was still in bed, the complainant said that he should get up and that precipitated him having a go at her. Whilst she was standing at the wardrobe he came up behind her and insulted her, telling her that she had let herself go and that she was ugly and fat. He then grabbed her arms and held them behind her back. She tried to fight him off but was unable to do so. He pulled off her pyjamas and raped her vaginally although she was shouting at him to get off. Again, as before, when he had finished he coldly went downstairs for a cigarette.

8. There was a friend of the compliant living with them at that time and she sent a text to the complainant asking if she was okay, having heard part of this incident and what was going on. The complainant said that everything was fine and pretended she was okay as she usually did. But in fact she no longer felt safe.

9. Count 3 alleged anal rape and that occurred in early 2012 when the complainant was in fact pregnant with their son, who was subsequently born in May 2012. During the pregnancy the appellant continued his emotionally manipulative and unpleasant behaviour. They did not have sex much because the complainant had not felt like it. On this occasion, as before, the appellant was insulting towards the complainant, saying that she was disgusting and no one would want her. He confronted her as to why she would not sleep with him, to which she responded that it was because he was horrible.

10. He stormed off but returned to the bedroom and tripped her up so that she ended up lying on the bedroom floor. He stood over her saying he wanted sex now. He then got on the floor, lying behind her as she was lying on her side, removed her knickers and raped her anally. She did not put up much of a fight. He said that she had deserved it and left her bleeding. The complainant did not seek medical attention because she though that if she did so she would have to tell the doctor what had happened.

11. Count 4 related to an allegation of oral rape in 2012. The appellant returned home one night at midnight and removed the complainant's duvet covers whilst she was asleep and took them onto the landing. The complainant tried to fight back on this occasion and followed him to the landing. During the struggle she trod on a trailing part of the duvet and ended up on the floor. The appellant then grabbed her face tightly, undid his trousers and put his penis in her mouth so that she could hardly breathe and was gagging. He ejaculated into her mouth and then went downstairs to watch television.

12. The final rape occurred in the late autumn of 2012 in the evening. By now they had a baby son aged approximately 6 months and he was in his baby bouncer in the living room. The appellant was again insulting the complainant, saying that she was disgusting, ugly, had a kid and no one would want her. He pushed her onto the sofa, pulled off her jeans and knickers and raped her vaginally, saying he wanted it and despite her pleas that she did not want to do it and asking him to stop. The complainant was inconsolable on this occasion because the appellant had done this in front of their baby.

13. Shortly after that final rape the appellant left the house and although there was in fact a reconciliation during 2013, by June 2013 it was all over and the complainant went to live with her parents for a while before getting her own place. The relationship between the appellant and the complainant was not good and they argued about contact with the child and about the maintenance arrangements.

14. In the summer of 2014, the complainant started a new relationship and gradually she found herself able to tell her new partner about what had happened with the appellant. In July 2015, she informed the police, with whom she had in fact obtained employment in 2013, and that led to the appellant's arrest and interview. He denied ever raping the complainant.

15. In opening the case to the jury, counsel for the prosecution referred to the appellant having raped the complainant about ten times in the course of their relationship. He said:

> "Because the defendant was abusive to [the complainant] so often, and because it happened over years, she does not remember the detail of every rape. But she has a clear memory of five rapes that she suffered, and you will hear her account of them."

These were the five rapes which formed the subject matter of the indictment and to which we have referred.

16. In sentencing the appellant, the learned judge, who had been able to form an accurate view of the appellant and the complainant and the full circumstances of their relationship in that he had presided over the trial, described the relationship as deeply destructive. Examination of, for example, messages between them on Facebook revealed a clear picture of a man who was sponging off the complainant, who was not working, who was taking her money and who was acting as a petulant child. He weaved around her a relationship such that he was in complete control and she felt she had no choice.

17. The complainant described the relationship as having been awful throughout and even though she constantly expressed to him her undying love and wanting to marry him and bear his child, he in fact constantly cheated on her and then when he returned to her belittled, humiliated, dominated and controlled her. This included insisting on having sex on occasions when she clearly did not want it. On the five occasions of rape it was clear that what he was seeking to do was in fact to punish her. The learned judge said:

> "What she could not believe on each occasion [was that] having finished and ejaculated you simply got up and walked away generally downstairs to smoke, and never said a word about it again. Utterly callous behaviour, leaving her lying on the floor weeping. You had on each occasion simply taken what you knew you could because you knew she would never complain."

In relation to the final offence, the learned judge considered the fact that the complainant was raped in the presence of her child to have been a serious aggravating factor, as Mr MacAdam today readily concedes.

18. The learned judge was referred to the definitive guideline for sentencing in sexual offences and in terms of harm he considered the case to be on the borderline between category 2 and 3. He said:

> "She has clearly suffered significant psychological harm and I cannot ignore the fact that this continued during a period of two to three years."

19. The factors bringing a case within category 2 include severe psychological or physical harm and prolonged detention/sustained incident. The learned judge said:

> "Well, this was a sustained behaviour with her knowing each time that you came in with that look in your eye it was going to happen again. There was clearly some violence in each of these allegations or each of these offences which have been proved, but I struggle

to say that the violence that you used against her went beyond that which is inherent in the given offence."

This was clearly a reference to one of the factors which can bring an offence within category 2, namely "violence or threats of violence beyond that which is inherent in the offence".

20. In our view, a further factor which brought the case close to the border of category 2 was additional degradation/humiliation and we refer to the history of the appellant insulting the complainant before and after the incidences of rape. In our judgment, the learned judge was correct to categorise this offence as on the borderline between categories 2 and 3.

21. The second question that arises within the definitive guideline relates to culpability. Matters putting an offence within culpability A include abuse of trust and previous violence against the victim. The learned judge referred to what prosecution counsel had said:

> "On each of counts 2 to 5 there had been the previous violence certainly in the form of rape and the accompanying physical violence which had happened on previous occasions."

22. The learned judge correctly directed himself that abuse of trust in the sense meant in the definitive guideline was not present, referring to the case of *R v Forbes* [2016] EWCA Crim 1388, where the court explained that this refers to the kind of relationship that exists between a pupil and a teacher or a priest and children in a school who are from disturbed backgrounds or a scout master and boys in his charge and not, for example, as here, a marital or quasi marital relationship.

23. However, the learned judge correctly drew attention to the fact that the way the appellant treated the complainant in this relationship was the clearest abuse of the trust which is to be found in such a relationship and was also an abuse of power. Again the learned judge said that it had to be on the borderline between categories A and B.

24. In our judgment, this was generous to the appellant. As prosecuting counsel had said, by the time count 2 was committed there had been count 1 of rape and therefore previous violence and the learned judge would therefore have been wholly justified in finding counts 2 to 5 as carrying culpability A. This is, in fact, now conceded by Mr MacAdam on behalf of the appellant, who says that this was, in relation to counts 2 to 5 at least, clearly culpability A.

25. In sentencing the appellant, the learned judge took a starting point for sentencing of one offence only as 8 years and then, by reference to the fact that there were five offences committed over a period of 2 or more years during which the appellant belittled, manipulated, dominated and controlled the complainant, raised this to 11 years and imposed that sentence on each offence concurrently.

26. Mr MacAdam, who has represented the appellant before us, submits that it should have been categorised as a category 3A case and that the starting point of 8 years was too high. He further submits that the learned judge failed to give sufficient weight to the mitigating factors, including the defendant's immaturity, the absence of previous convictions for sexual offences and the absence of aggravating features over and above those inherent in the

offences drawing on the submissions made by counsel who previously represented the appellant.

27. We refer to the definitive guideline giving the following starting points and ranges for the various categories:

    (i) Category 2A offence carries a starting point of 10 years with a range of 9 to 13 years;

    (ii) Category 2B, a starting point of 8 years with a category range of 7 to 9 years;

    (iii) Category 3A (the category conceded this case falls within) a starting point of 7 years with a category range of 4 to 9 years; and

    (iv) Category 3B, a starting point of 5 years with a category range of 4 to 7 years.

28. Having, in our view, correctly categorised these offences as on the borderline between categories 2 and 3 and having, generously in our view, categorised the culpability as on the borderline between categories A and B, we take the view that the learned judge was wholly justified in taking a starting point of 8 years.

29. In our view, the aggravating and mitigating circumstances balanced each other out and would have left a sentence of 8 years for a single offence. However, the learned judge rightly reminded himself that he was sentencing the appellant not for one offence but for five offences and he raised the sentence to 11 years to reflect the multiple offending.

30. In our judgment, this sentence and this approach was wholly justified and we can see no merit in this appeal.

31. For these reasons, the appeal is dismissed.

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