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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 15 February 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE ELISABETH LAING DBE

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

R E G I N A
v
AS

R E G I N A
v
SM

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If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Mr J Doyle appeared on behalf of the **Appellant AS**
Mr P Taylor appeared on behalf of the **Appellant SM**
Mr S Heptonstall appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: These two appeals have been heard together because they raise similar issues of principle. They are otherwise unrelated. In each of the appeals, the provisions of the Sexual Offences (Amendment) Act 1992 apply to protect the victim. Accordingly, in relation to each appeal, no matter relating to the victim 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. These prohibitions continue to apply unless waived or lifted in accordance with section 3 of the Act. Any report of the proceedings should be anonymised accordingly.

2. AS, a woman now aged 27, appeals against a sentence of 20 months' imprisonment imposed following her guilty plea to an offence contrary to section 10 of the Sexual Offences Act 2003 of causing or inciting a child to engage in sexual activity. The ground of her appeal is that her personal circumstances and mitigation, in particular relating to her illness, were such that her sentence should have been suspended. SM, a man now aged 68, appeals against a sentence of 9 years' imprisonment imposed following his conviction of an offence of rape contrary to section 1 of the 2003 Act. The grounds of his appeal are that the judge failed sufficiently to reduce the length of sentence to reflect the difficulties which the appellant would face in prison as a result of his motor neuron disease ("MND"), and that a deterioration in his condition since the date of sentence has the consequence that he will face exceptionally severe hardship in serving his sentence.

3. At an earlier directions hearing the court adjourned the hearing of the appeals in order to allow time for a further medical report to be obtained in each case. Further reports have been obtained, and in each case we have considered them de bene esse before hearing submissions as to their admissibility.

4. We are grateful to all counsel for their written and oral submissions. Before looking at the details of each appeal, it is appropriate for us to consider the principles which a court should follow when sentencing a defendant who is seriously disabled, or in serious ill health, or very elderly. We start with the relevant statutory provisions.

5. Subject to certain exceptions which are not relevant to either of these appeals, a court sentencing an adult offender must comply with section 142 of the Criminal Justice Act 2003, which in material part states:

> "Purposes of sentencing
>
> (1)Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—
>
> (a)the punishment of offenders
>
> (b)the reduction of crime (including its reduction by deterrence)
>
> (c)the reform and rehabilitation of offenders
>
> (d)the protection of the public, and

(e)the making of reparation by offenders to persons affected by their offences."

6. Section 248 of the 2003 Act states:

"Power to release prisoners on compassionate grounds

(1)The Secretary of State may at any time release a fixed-term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

7. There are mandatory rules governing the way in which prisons are run. Chapter 12 of Prison Service Order 6000 sets out the procedures for early release on compassionate grounds ("ERCG"): that is, the permanent early release on licence of a prisoner who would not otherwise have reached his or her automatic release date, conditional release date or parole eligibility date on grounds relating to the prisoner's medical condition or in tragic family circumstances. Paragraph 12.3.1 states three fundamental principles underlying the approach to ERCG:

"(i) the release of the prisoner will not put the safety of the public at risk;

(ii) a decision to approve release would not normally be made on the basis of facts of which the sentencing or appeal court was aware;

(iii) there is some specific purpose to be served by early release."

In relation to early release on medical grounds, paragraph 12.4 is in these terms:

"12.4.1 Early release may be considered where a prisoner is suffering from a terminal illness and death is likely to occur soon. There are no set time limits, but three months may be considered to be an ~appropriate period. It is therefore essential to try to obtain a clear medical opinion on the likely life expectancy. The Secretary of State will also need to be satisfied that the risk of re-offending is past and that there are adequate arrangements for the prisoner's care and treatment outside prison.

12.4.2 Early release may also be considered where the prisoner is bedridden or severely incapacitated. This might include those confined to wheelchairs, paralysed or severe stroke victims. Applications may also be considered if further imprisonment would endanger the prisoner's life or reduce his or her life expectancy. Conditions which are self-induced, for example following a hunger strike, would not normally qualify a prisoner for release."

Appendix A, which sets out the detailed criteria for early release, states that the criteria applied in medical cases are:

"- the prisoner is suffering from a terminal illness and death is likely to occur soon; or the prisoner is bedridden or similarly incapacitated; and

- The risk of re-offending is past; and

- There are adequate arrangements for the prisoner's care and treatment outside prison; and

- Early release will bring some significant benefit to the prisoner or his/her family."

8. Although the wording of the second criterion in paragraph 12.3.1 of the Order is perhaps not entirely clear, we cannot think that it presents any obstacle to ERCG in a case where the sentencing or appeal court is aware that a prisoner's illness is terminal but cannot know with precision when it will end the prisoner's life. We do not understand the Order to be applied in practice in a way which would exclude cases where the court was aware of a terminal illness. If it were, we anticipate that such an exclusion would be challenged in the civil courts.

9. The principles to be applied by a judge when sentencing have been considered by this court in a number of decided cases. They are not in doubt, and are not challenged in either of these appeals. It is not contended on behalf of either appellant that, by reason of her or his medical condition, imprisonment would amount to cruel and inhuman treatment such as to breach the appellant's rights under Article 3 of the European Convention on Human Rights. Nor is it argued that the sentence imposed on either appellant would have been excessive in the case of an offender who did not suffer from serious health problems. Rather, it is submitted that, by reason of each appellant's ill health, the serving of a prison sentence is so much harder for her or him than it is for other prisoners that Ms AS's prison sentence should be suspended, and Mr SM's prison sentence should be substantially reduced in length, and perhaps suspended, so as to allow for his immediate release or release in the very near future.

10. In R v Bernard [1997] 1 Cr App R (S) 135, the Court of Appeal allowed an appeal against a sentence for importation of cannabis, and reduced the sentence in length, in part because of the appellant's medical condition. He was 63 years old and suffered from a narrowing of his oesophagus, which caused difficulty in swallowing; hypertension; and diabetes which was not, and probably could not be, controlled in the prison environment. He was at particular risk of heart attack and stroke. The court reviewed earlier caselaw and drew from it the following four principles:

(i) a medical condition which may at some unidentified future date affect either life expectancy or the prison authorities' ability to treat a prisoner satisfactorily may call into operation the Home Secretary's powers of release by reference to the Royal Prerogative of mercy or otherwise but is not a reason for this court to interfere with an otherwise appropriate sentence;
(ii) the fact that an offender is HIV positive, or has a reduced life expectancy, is not generally a reason which should affect sentence;
(iii) a serious medical condition, even when it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than would otherwise be appropriate;
(iv) an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of any general principle, to impose a lesser sentence than would otherwise be appropriate.

11. In R v Qazi [2011] 2 Cr App R (S) 8 the appellant, who had pleaded guilty to offences involving different types of fraud, suffered from a genetic disorder which required frequent blood transfusions and infusions of medication. Whilst in custody he had not received a blood transfusion at the required time, and his condition had in consequence deteriorated. The Court of Appeal first considered and rejected a ground of appeal alleging breach of the appellant's Article 3 rights, indicating that a successful appeal on such a basis would be an exceptionally rare event. The court went on however to conclude, taking into account further medical evidence which had become available since the date of sentencing, that the appellant's medical condition was a mitigating factor which should be given more weight than it had been by the sentencing judge. The appeal against sentence was therefore allowed to the limited extent of reducing the total sentence from 5 years 6 months to 5 years.

12. At paragraph 35 of the judgment of the court given by Thomas LJ (as he then was), the court set out a number of principles which include the following:

> "v) Once a sentence of imprisonment has been imposed, unless it is to be contended on appeal that the judge should not have imposed a sentence of imprisonment because imprisonment anywhere would ipso facto cause a breach of Article 3, the relevance of an appellant's medical condition relates solely to the assessment of the overall length of the sentence in accordance with the principles established in Bernard.
>
> vi) Any issues as to breach of the duties of the Secretary of State in relation to medical treatment and conditions in prison are matters for civil remedies and not for this division of the Court of Appeal."

13. In R v Hall [2013] 2 Cr App R (S) 68 the appellant, aged 30, suffered from a progressive and irreversible hereditary condition which caused him severe pain and disability. He had been confined to a wheelchair for 15 years. He was nonetheless able to travel to South America for a holiday, and on his return to the United Kingdom used the cushion of his wheelchair to try to conceal 2.8 kilograms of cocaine at a high level of purity. On appeal, his sentence of 3 years' imprisonment was reduced to 18 months, the court again taking into account a deterioration in his medical condition since the date of sentencing. At paragraph 11 of the judgment of the court, Hughes LJ (as he then was) noted that the appellant's personal mitigation was "most unusual, perhaps close to unique", and described the restrictions imposed upon the appellant by his multiple medical conditions as being "much greater than most cases of paralysis". At paragraph 12, it was observed that the impact of imprisonment upon the appellant was enormously greater than the impact on any able-bodied, or even significantly disabled, man. A legitimate aim of sentencing is to preserve, to the extent that one can, some parity of punishment between like offenders. At paragraphs 13 and 14, the court referred to Qazi and said that, independently of the exceptional possibility of a breach of Article 3:

> "the sentencing court is fully entitled to take account of a medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the appellant, or as a matter of generally expressed mercy in

the individual circumstances of the case: see Bernard."

The court concluded that it was an appropriate case for an exceptional application of mercy, saying at paragraph 20:

> "Those who are gravely ill, or severely disabled, or both, may well have to be imprisoned if they commit serious offences. Their condition cannot be a passport to absence of punishment. If this appellant should ever again offend seriously, that would no doubt be the inevitable outcome, and some loss of the quality of care compared with a self-organised home regime would no doubt necessarily follow. But for the reasons which we have already set out, the impact on this appellant of a sentence of imprisonment is greater by a margin which it is difficult to overstate than it would be on an ordinary appellant. There is no lack of punishment in what he has undergone since being sentenced in the summer of last year. He is now said by the hospital to be significantly more frail than at the time of sentence."

14. The most recent case cited to us is R v Clarke; R v Cooper [2017] 1 WLR 3851, [2017] 2 Cr App R (S) 18. The appellants in that case were very elderly, being aged 101 and 96 respectively at the times of their sentences. The court considered the three cases which we have just mentioned, and concluded that the principles to be applied in a case of a very elderly offender were the same as those applicable where an offender suffers from severe ill health. That similarity of approach was "not surprising since similar considerations arise and since, often, ill health and old age are intertwined". The court however rejected a submission that cases involving elderly defendants could be approached on a general basis by relying on statistical material as a basis for an assumption about life expectancy, or by generally equating an elderly prisoner with one who is terminally ill. Such generalised approaches would be wrong because sentencing must be done on a case-by-case basis. At paragraph 25 the Vice President, Hallett LJ, giving the judgment of the court, summarised their approach as follows:

> "Whilst we consider that an offender's diminished life expectancy, his age, health and the prospect of dying in prison are factors legitimately to be taken into account in passing sentence, they have to be balanced against the gravity of the offending, (including the harm done to victims), and the public interest in setting appropriate punishment for very serious crimes. Whilst courts should make allowance for the factors of extreme old age and health, and whilst courts should give the most anxious scrutiny to those factors as was recognised in R v Forbes [2017] 1 WLR 53, we consider that the approach of taking them into account in a limited way is the correct one."

We respectfully adopt and particularly emphasise the Vice President's reference to the need to balance issues personal to an offender against the public interest in imposing appropriate punishment for serious offending.

15. We must also refer to the Sentencing Council's definitive guideline on imposition of custodial sentences, which sets out the proper approach to the court's decisions as to whether a custodial sentence is unavoidable and, if so, whether it can be suspended.

The guideline emphasises that the court must have reached a conclusion that a sentence of imprisonment is unavoidable, and decided the minimum sentence which is commensurate with the seriousness of the offending, before considering whether that prison term can be suspended in the circumstances of the particular case. The factors listed as indicating that it would not be appropriate to suspend a custodial sentence include this: "Appropriate punishment can only be achieved by immediate custody". The factors listed as indicating that it may be appropriate to suspend a custodial sentence include this: "Strong personal mitigation".

16. This brief review makes clear that, setting aside the very rare case which may involve a breach of Article 3, a sentence should be adjusted to reflect serious ill health only when it is appropriate to do so in accordance with the principles stated in Bernard and subsequent cases (to which, for convenience, we will refer as "the Bernard principles"). There are however two specific issues which we must resolve in relation to the application of those principles.

17. First, is it proper for this court to take account of medical evidence obtained after sentencing which shows a significant deterioration in a serious medical condition which was known to the sentencer? We emphasise the limited terms of that question: we are not here concerned with, and say nothing about, the approach to be taken when a serving prisoner sustains serious injury, or becomes seriously ill, in circumstances which were neither known nor foreseeable at the date of sentencing.

18. Mr Taylor, for Mr SM, has very properly drawn to our attention the case of R v Shaw [2010] EWCA Crim 982, in which the appellant had been taken ill whilst remanded in custody awaiting sentence. He became blind in one eye and weak on one side, but medical examination did not reveal any other serious problem relevant to his imprisonment. Two days after being sentenced, he suffered a stroke, and for a time was at a high risk of death. The court in that case recognised that it will on occasions be appropriate to have regard to matters which have arisen since sentence was passed, but followed the general rule that this court on appeal will only interfere with a sentence if persuaded that at the time it was passed it was unlawful or wrong in principle or manifestly excessive in length.

19. We acknowledge the importance of the general principle, but in our view the later caselaw to which we have referred shows that a more flexible approach may properly be taken in cases of a significant deterioration in a known medical condition. Thus in Qazi, at paragraph 42, the court said that the trial judge had taken into account evidence then available as to the appellant's medical condition. This court nonetheless considered, in the light of all the information available at the appeal hearing, that a further allowance should have been made. In Hall, at paragraph 20, the court referred to events after the sentencing which had demonstrated the real potential for an unexpected deterioration in the appellant's condition and said:

> "If the judge had known of them, we think that he would have felt able to make a significantly greater reduction in his sentence. At all events, now that we do, and bearing in mind the additional blow which life has now dealt the appellant, we are satisfied that his is an appropriate case for an

exceptional application of mercy."

We have also been referred to R v Streater [2014] EWCA Crim 2491, in which this court took into account evidence of a rapid and serious deterioration in the appellant's medical condition since the date of sentencing.

20. We conclude that in cases of serious ill health this court *may* have regard to a significant deterioration in a medical condition which was known at the date of sentencing. The cases in which it will be appropriate to do so are however rare. First, the case must be one where the appellant can bring himself within the Bernard principles. Secondly, the medical evidence establishing the deterioration must be received by this court as fresh evidence pursuant to section 23 of Criminal Appeal Act 1968. So far as material for present purposes, that section provides:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice-
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> ...
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
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> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to-
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> (a) whether the evidence appears to the Court to be capable of belief;
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> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

Those two requirements are of course linked, for the fresh medical evidence will no doubt be relied on as affording a ground of appeal by reference to the Bernard principles. Putting the matter generally, it seems to us that in cases of serious and worsening ill health, the combination of the Bernard principles and the consideration mentioned in section 23(2)(b) is one which will present a substantial obstacle to a successful appeal in all but the most compelling cases.

21. The second issue raised by one of these appeals, and not answered in explicit terms by previous decisions of this court, relates to fresh evidence which shows a significant new prognosis as to the likely course of a terminal illness. This issue may arise in either of two situations: where the sentencing judge is aware that the offender suffers from serious ill health, and makes a reduction in sentence on that ground, but the terminal nature of the illness is only diagnosed at a date after sentence has been passed; or where

the sentencing judge is aware that the offender suffers from a terminal illness, and makes a reduction in sentence on that ground, but fresh evidence shows that there has been a significant deterioration in the offender's health since the date of sentence, such that the approximate date at which death is now expected to supervene is significantly before the earliest date of release. In our judgment the principles to be applied are these:

a. The terminal prognosis is not *in itself* a reason to reduce the sentence even further than it might be reduced in accordance with the Bernard principles. The court must impose a sentence which properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter to be considered by the prison authorities and the Secretary of State under the ERCG provisions which we have mentioned.
b. However, the appellant's knowledge that he must now face the prospect of death in prison, subject only to the ERCG provisions, is a factor relevant to the application of the Bernard principles. So too is the prospect that his worsening condition during his decline towards death will make each day harder for him than it already is, and much harder than it is for prisoners in good health. The terminal prognosis must therefore be taken into account in assessing whether imprisonment weighs so much more heavily on the appellant than it does on other prisoners that the length of the sentence must exceptionally be reduced, even if this court concludes that no proper application of the Bernard principles could result in such a reduction as would enable the appellant to be released before death.

22. We turn to consider whether in either of these appeals the application of those principles leads to the conclusion that the sentence should be varied as an act of mercy. We start with the appeal of Ms AS.

23. Ms AS is married to a woman who is the mother of a boy, to whom we shall refer as G, who is now a young teenager. The appellant and her wife have been together since shortly before G was born, and the appellant has treated him as her son. G was at the material time a friend on social media of a slightly older girl, P. In circumstances which remain unclear to us, the appellant began to communicate with P via social media. The appellant did so using a pseudonym and under the pretence that she was G. Posing as her stepson, she sent numerous sexually suggestive and explicit messages to P. These communications were reported to the police, and the appellant was arrested.

24. Examination of her mobile phone showed that communication between the appellant and P began at the end of January 2016. On 29 January the appellant, posing as G, told P that she loved her. The conversation became sexual on 1 February. P sent the appellant a picture of her breasts. The appellant told P that she was gorgeous and described how she wanted to penetrate P with her fingers and perform oral sex on her. P asked the appellant to stop during some of the exchanges. Similar communications took place on 2 and 3 February, when the appellant gave a detailed description of what she would like to do to P, interspersed with expressions of love. On 4 February the appellant claimed that she (as G) had injured her ribs, and then sent P an image of bruised ribs. G had not in fact suffered any such injury, and the appellant had obtained the image by a Google search. The appellant also sent P an image of G's unclothed

upper body. The appellant continued to send messages to P on an almost daily basis until 12 February 2016. She used two different social media platforms.

25. As a result of the initial police investigation G, then aged 12, was formally interviewed by police. G's mother was also spoken to: she had seen the communications on her son's Instagram account, and had been troubled by what she believed to be his exchanges with an older girl. P was interviewed in March 2016. She admitted that some of the conversations were sexualised but said that she believed she had been in communication with G throughout. P had exchanged messages with the appellant, as herself, in January and had believed that the appellant was nice and friendly. She had also spoken with the appellant on the telephone but had not met her in person. The distress which each of these persons must have suffered, and the fear which G must have experienced when he learned he was suspected of a serious criminal offence, can readily be imagined.

26. The appellant initially denied any wrongdoing, and claimed that other persons had access to her mobile phone. She did however plead guilty at the pre-trial preparation hearing on 16 June 2017. Her sentence was adjourned in order to obtain a pre-sentence report, and came before His Honour Judge Wall QC in the Crown Court at Birmingham on 29 August 2017. The appellant had written a letter to the court expressing her remorse and her sincere apologies to P and her family. The pre-sentence report then available to the court referred to the appellant's suffering from rheumatoid arthritis, psoriatic arthritis and fibromyalgia which caused her severe pain and limited her physical capabilities to the extent that she had become largely bed-bound and was in need of daily care and heavy medication. The author of the report stated that the appellant's physical deterioration had clearly led to an emotional and psychological deterioration. The author suggested that the appellant's illness in the two years preceding the offending had taken away her feelings of independence and physical control, and suggested that by entering into a form of relationship with P the appellant might have been trying to regain some control. The author noted that the appellant remained in a supportive relationship with her wife and family, and invited the court to consider a suspended sentence. A number of testimonial letters from the appellant's family and friends spoke of the severe pain and disability which the appellant suffered, and described her offending as wholly out of character. There was however no formal medical evidence before the court, and in particular no psychiatric or psychological report.

27. The judge in his sentencing remarks began by noting that the appellant was of previous good character. He rightly described this serious offence as involving grooming and incitement to sexual activity which included penetration, with a significant disparity in age between the appellant and P. He rightly identified three aggravating features, namely that the offending was planned and sophisticated, involved the adopting by the appellant of the false persona of her young stepson, and caused her wife to become suspicious of her son when she saw the social media communications. He assessed the offence as falling within category 1A of the relevant sentencing guideline, for which the guideline gives a starting point of 5 years and a range of 4 to l0 years. None of that assessment is, or could be, the subject of any complaint. Indeed, given the aggravating features, there could have been no legitimate complaint if the judge had concluded that,

for an offender without serious health problems, the appropriate sentence after a trial would have been rather longer than the 5-year starting point.

28. The learned judge then referred to the mitigation afforded by the appellant's health. At page 3 E-G he said this:

> "I don't need to go into full details, but it is obvious from what I have read, that you are heavily reliant on the care of others, that you spend a lot of your time effectively bedridden, or in a wheelchair. I am convinced that any time you spent in custody will be much harder for you that would be for anybody else in your position. For that reason, I reduce the starting point considerably to one of thirty months, and then give you the credit that I indicated I would, of one third, to twenty months' imprisonment. I regret that I cannot suspend that term. I cannot suspend it because I have reduced the sentence greatly to take account of your health, and the other mitigation, to even reach the starting point that I have. I am afraid it is necessary, in cases such as this, where there has been a course of deliberate conduct and manipulation, for the public to be warned as to the effect it has on people to commit offences such as you have done."

29. Thus the appellant was sentenced to 20 months' imprisonment. A sexual harm prevention order was made, which will continue until further order, and of course the appellant will be included in the relevant list by the Independent Safeguarding Authority. In passing the sentence he did, the learned judge clearly gave considerable weight to the appellant's medical problems. The grounds of appeal drafted by counsel submitted that the judge should have gone further, and suspended the 20-month sentence. Counsel relied on the contents of the pre-sentence report and on his limited instructions as to the difficulties which the appellant was facing in prison.

30. When the appeal first came before this court, there was a short report from the prison at which she was held, which referred to a number of difficulties which she had experienced, including in receiving her medication. The report indicated that until that problem was resolved it had been a frustrating and distressing time for appellant, whose physical and mental health had been affected. She was also very distressed because she was not permitted any visits by G. Her health issues prevented her from working in the prison. She had nonetheless remained polite and compliant at all times.

31. There was at that stage still no medical evidence to support the suggestions made in the pre-sentence report. In granting an adjournment, this court directed that a psychiatrist be instructed to interview the appellant in prison and to prepare a report directed to the issue of whether her mental health condition is or may be causally connected to her commission of the offence and if so, how and to what extent. A representation order was granted to enable that to be done and to enable the appellant's solicitor to prepare a fresh evidence application and affidavit in support.

32. There is now before the court a report dated 3 January 2018 by Dr Whitworth, consultant forensic psychiatrist. There is an affidavit by the appellant's solicitor

explaining why no such report had previously been obtained, but no notice of application for leave to adduce fresh evidence.

33. Dr Whitworth records that the appellant has been diagnosed as suffering type one diabetes, although she is no longer reliant on insulin therapy. Since her mid-20s, the appellant has suffered from psoriatic arthritis. This is a chronic condition with acute flare-ups. It causes pain, stiffness and swelling in the appellant's shoulders, hands, knees and feet. She also suffers from fibromyalgia, a long-term condition which also causes widespread pain, fatigue, muscle stiffness, disturbance of sleep and problems with memory and concentration. Since 2006 the appellant has been under the care of a consultant rheumatologist. She is prescribed a variety of medication, mainly for pain relief and the reduction of inflammation.

34. The appellant gave an account to Dr Whitworth of daily pain. She is usually able to bathe, toilet and feed herself, but when she experiences a flare-up she can be so disabled by pain that she cannot get out of bed or dress. Before her imprisonment, she spent long periods confined to her house and was often reliant on a wheelchair. She has found it difficult to meet her physical care needs in prison, and has on occasions fallen and needed to await the assistance of other prisoners before she could get up. She told the doctor that she has not been receiving any education in prison because she cannot access the relevant room, and she needs help to negotiate a step into the visiting room.

35. Dr Whitworth notes that the appellant has never had any formal contact with psychiatric services. The appellant could offer no explanation to the doctor for her conduct, but stated that it had not been associated with sexual arousal. The appellant accepted that she deserved to be punished for her offence, but said that she was not in her usual mental state at the relevant time. She said he could not understand why she acted as she did. She described having felt under a big black cloud from about mid-2014 as a result of her diminishing physical capabilities. She had lost interest in activities which she had previously enjoyed, and had suffered a loss of appetite and loss of libido. Her sleep was often disturbed because of pain, and she had become argumentative and irritable. Her symptoms had however slowly but spontaneously improved during 2016. On examination of her mental state, Dr Whitworth found the appellant to be of at least average intelligence, with no reported symptoms of any mood or anxiety disorder and no report of anything which might be associated with serious mental illness.

36. In Dr Whitworth's opinion, the appellant's account was that over a period of 18 months to 2 years before the offending "she experienced a deterioration in her mental state commensurate with a diagnosis of a moderate depressive episode with somatic syndrome". Chronic debilitating illnesses such as psoriatic arthritis and fibromyalgia are associated with a high incidence of depressive disorders. In her opinion, the appellant's physical conditions may have masked symptoms of a co-existing mental disorder, with the result that the severity of the mental disorder was not recognised and treated.

37. On the specific issue about which she had been asked, Dr Whitworth says this:

> "The index offence is of a very serious nature and there is no direct relationship between [the appellant's] mental illness and offending. Nonetheless, the offence occurred at a time when [the appellant] was clinically depressed. Poor decision making is a core symptom of depression and in my opinion, reduced ability to exercise judgment may offer a partial explanation as to [the appellant's] actions."

38. Mr Doyle realistically acknowledged that the further medical evidence only provided limited assistance to Ms AS's appeal. He submitted to us however that the impact of custody on Ms AS was a particularly heavy one and that, in a case in which she appeared to have acted entirely out of character as her illness worsened, this court should take a merciful course.

39. We see no reason to doubt the broad accuracy of the appellant's account to Dr Whitworth of her deteriorating mental condition in the period preceding the offending. We therefore accept the basis on which Dr Whitworth has formed her opinion, and we are of course satisfied that her evidence is capable of belief. We are not however persuaded that the report is capable of affording any ground for allowing the appeal.

40. In our judgment, in the light of all the evidence now available (including, de bene esse, Dr Whitworth's report) the highest the appellant's case can be put is as follows:

> a. Imprisonment is undoubtedly significantly harder for this appellant than for a person in good health serving a similar sentence for a similar offence. However, the information from the prison indicates that the initial problems with her medication have been resolved, and that the restrictions upon her movements and activities within the prison are not very severe.
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> b. There is no medical evidence showing a direct link between the appellant's mental health and her offending. Dr Whitworth's expert opinion goes no further than establishing a partial reduction in the appellant's ability to exercise judgment at the material time.

41. In our judgment, that falls well short of the exceptional circumstances which must be shown if the Bernard principles are to be relied upon. This appellant does not come within the small category of offenders for whom imprisonment is so much harder to tolerate than it is for other prisoners that an exceptional course must in mercy be taken. It must be remembered that the judge did not ignore or overlook the appellant's problems when sentencing. On the contrary, he made a very significant reduction in the sentence which would otherwise have been appropriate for the offending. In our judgment, that reduction met the justice of the case. For the reasons which he gave, the judge was entitled - and in our view correct - to conclude that the sentence must take effect immediately and could not be suspended. He had already made a substantial reduction in the length of the sentence, and the proper application of the Sentencing Council's guideline did not require him to take a doubly exceptional course by

suspending that shortened term. Although the judge did not of course have any expert medical evidence available to him, we take the view that the evidence subsequently obtained does not make it necessary or appropriate for this court to take a different approach to sentencing or to reach a different decision as to the appropriate length of sentence.

42. We therefore decline to admit the evidence of Dr Whitworth. That is not in any way a criticism of Dr Whitworth: it is an assessment by this court that the opinion which she expresses does not provide any basis for allowing this appeal. We would add that, if we had taken a different view as to the admissibility of the evidence, we would of course have required the appellant's solicitor to file the necessary notice of application and an explanation for his failure to do so before this hearing, and we would have wished to give close consideration to the explanation put forward as to why this evidence, or other expert evidence, was not obtained at an earlier stage.

43. In the result, we regard Ms AS's case as having unusual features, but not as a case which calls for exceptional leniency. The learned judge in our judgment made a sufficient allowance for the mitigating factors relating to the appellant's health, both physical and mental. The appeal of Ms AS accordingly fails and is dismissed.

44. We turn to the appeal of SM, which has been referred to the court by the Registrar. We have to consider, in the first instance, an application for an extension of time of 292 days to apply for leave to appeal against sentence. In short, it is said that the appellant initially received negative advice. It then took time to obtain the necessary transcripts, and it was difficult to find a suitable expert. The explanation for the delay is not entirely satisfactory, but having regard to the overall merits of the case we are prepared to grant that extension of time. The appellant also applies, pursuant to section 23 of the Criminal Appeal Act 1968, to adduce two reports of Professor Talbot.

45. Mr SM had no previous convictions when he was convicted of the offence for which he received the sentence which is the focus of these applications. He had led an exemplary life, working as a respected teacher for many years, and having been appointed a magistrate.

46. As we have indicated, Mr SM appeals against a sentence of 9 years' imprisonment imposed for an offence of rape. The complainant, whom we will call C, was an adult who had learning difficulties, and who functioned, in some respects, at the level of a child of 5 to 7 years' old. The learned judge, when sentencing Mr SM, found that she lacked the capacity to consent to sex, a view with which, it seems, Mr SM himself agreed. C was the daughter of Mr SM's partner, AB. Mr SM did not, however, live in their household. He lived in his own house, but spent a good deal of time with them.

47. In his skeleton argument Mr Taylor advances two linked points in support of the contention that the appellant's sentence should be reduced, either to the extent that he is released immediately, or, if not immediately, then "in the very near future". First, that the sentence was manifestly excessive because the judge failed to give any credit for the fact that the appellant had been diagnosed with a terminal illness, namely MND, or his exemplary character. Secondly, in the light of fresh evidence (two reports by

Professor Talbot, dated 8 October 2017 and 18 January 2018), the sentence of imprisonment should be significantly reduced as an act of mercy.

The medical evidence before the judge

48. At sentence, on 9 December 2016, there was a report dated 11 0ctober 2016 from Dr Nightingale, a consultant neurologist. He had examined Mr SM in October 2016, having first seen him on 28 June 2016. The limited, express, purpose of the report was to give an opinion as to whether Mr SM was fit to stand trial.

49. Dr Nightingale confirmed a diagnosis of MND. He explained that MND is a progressive neurodegenerative disease which appears in older people for reasons which are not understood. It causes progressive weakness and wasting of the muscles of limbs, trunk, face, and throat. Weakness starts in one part of the body, and then spreads, leading to total paralysis, inability to speak and swallow, and, eventually, to breathe. The prognosis varies. Most people die within two or three years of diagnosis. In some cases, people survive for longer.

50. The appellant was on medication (Riluzole: see Dr Nightingale's later report, to which we refer below), which had a modest effect on the progress of the condition. In October 2016, the appellant had some areas of weakness. But he was still able to play 18 holes of golf and had not noticed any change in his speech or swallowing. He had only mild emotional lability. Both Dr Nightingale and Mr SM agreed that the experience of cross-examination would not be a problem for Mr SM.

51. This report did not address, at all, the effect on the appellant of a long prison sentence, as his condition inevitably deteriorated in custody. All that the judge knew when he sentenced appellant was that the appellant was likely to die within 2 to 3 years, and that he would suffer from increasing weakness in that time, leading, eventually, to total paralysis.

Exchanges between counsel and the judge before sentence

52. We have read the transcript of the discussions between the judge and counsel before sentence. All agreed that the offence fell in category 2B of the relevant Sentencing Council guideline, although it seems that the judge might have inclined to the view that the offence was on the cusp of category 2A. The judge was shown Dr Nightingale's report. Counsel representing Mr SM told the judge that he had "a short update" from Dr Nightingale (which we have not seen). Dr Nightingale's view was that the shorter time frame was "the most likely reality of the situation". The judge noted, however, that Mr SM could still play 18 holes of golf, which was perhaps "an indication that at the moment his degeneration has not been to the severe extent to impact on his daily living". The appellant’s counsel said that the sad reality was that degeneration in such cases could be relatively swift. He made the point that the length of the sentence is one that would see the appellant serving out his natural life in incarceration. The judge's response was "if that is the case, that is a matter for the prison authorities and not necessarily for me to take into account at the sentencing stage".

A summary of the judge's approach to sentence.

53. The judge referred, in detail, to Mr SM's high standing in society. He said that on 4 May 2015 C had visited her sister, who had a new baby, in hospital. The appellant had then driven C to his house, rather than, as he had been asked to do, driving her to the flat where she had been living independently (we note, since 2014). The appellant lived alone and knew his house would be empty. The judge had no doubt that the appellant had taken the decision to rape C. C was making it plain that she did not consent, but he went on regardless. In any event, she was not capable of giving consent. She was extremely vulnerable.

54. The appellant betrayed the trust put in him by AB. She trusted him as a respected colleague, a magistrate, and somebody whom she loved. She had trusted him to drive her daughter around, and to have a normal relationship with C. The appellant had let his sexual desires "overcome any sense of common decency". He had behaved in a way that was "truly despicable". He was entitled to run a defence, but it involved blaming C for what had happened. The suggestion that C had enthusiastically instigated sexual activity had doubtless added to the upset and harm caused to C's mother, sister and grandmother, who had sat through the trial.

55. The judge had read AB's statement, which described the effect of the offence on her and her sense of guilt for having introduced Mr SM to C. She should feel none. AB described the effect on C. She had become upset and fearful. She was worried Mr SM would seek her out. She is no longer able to live independently. It was likely that she would have to stay at home. "The effect therefore has been truly devastating".

56. It was not appropriate to adjourn for a pre-sentence report. The judge noted Dr Nightingale's report. The appellant had symptoms of MND. The prognosis was "not good, as you know". The judge summarised Dr Nightingale's report. He had been told by counsel that the appellant might die more quickly than the average patient with MND. The effect did not appear to be extreme as at the date of sentence. "It is therefore inevitable, given that this offence must attract a lengthy ... sentence in custody, that you may die in custody, subject of course to any action taken by the prison authorities".

The later medical evidence

57. Dr Nightingale provided a further report dated 15 August 2017. Importantly, in our judgment, he provided a fuller description of the effects of MND. He said that MND's natural history meant that it is widely seen as "one of the most unpleasant of all diseases". Progressive weakness of limbs means that a person can no longer use them. There is increasing difficulty speaking, and swallowing, and, later, breathing. "Thirst, hunger, shortness of breath and pain in joints as a result of the severe muscle weakness and immobility are extremely disabling and distressing".

58. With appropriate management the suffering can be greatly reduced, so that the pain, distress and other awful symptoms can be reduced. Management by a specialist team is necessary. The treatment must be tailored to the patient, as each case is different.

Without such specialist care, "there would be great and needless suffering". Dr Nightingale listed the types of specialists who are needed to ensure such care.

Professor Talbot's evidence

59. As we have indicated, the appellant applies to adduce fresh evidence in the form of medical reports dated 8 0ctober 2017 and 18 January 2018 by Professor Talbot, a Professor of Neurology and a Consultant Neurologist.

60. In the first report, Professor Talbot recited the history and described the appellant's then current symptoms. We do not consider it necessary to describe these, as the appellant's condition has deteriorated since then, as evidenced both by Professor Talbot's later report and by a report dated 13 February 2018 from Care UK, which provides personal care to the appellant in prison. Professor Talbot's view at that stage was that there was a wide variation in survival rates. It was now about three years since the appellant had first had symptoms. He could still walk and was still independent, so it was likely that his disease had a slower than average rate of progression.

61. Professor Talbot estimated that the appellant's life expectancy, from October 2017, was 9 to 18 months or 12 to 18 months. The appellant's mobility would decline in the next 3 to 6 months. He would have fragmented sleep and would need help cutting his food. He would need assisted ventilation at night in 6 months' time, and would be using a wheelchair intermittently. In 12 months' time, he would be fed entirely by a percutaneous endoscopic gastrostomy feeding tube ("PEG"). He would need help with all activities of daily living and would need help with breathing at night.

62. In his second report, Professor Talbot revised his views. He described the appellant's current symptoms. The appellant's weight had gone down significantly in the past 3 months, by 6 to 7 kilograms. Having tested various aspects of the appellant's functioning, Professor Talbot's opinion was that his rate of decline had increased. He considered that the appellant was likely to die within the next 6 to 9 months from 18 January 2018. In paragraph 6 of this second report, Professor Talbot described the likely further progress of the appellant's condition, and his likely future care needs. In the light of the very recent letter from Care UK, which we refer to next, we do not consider that it is necessary to say any more about this aspect of Professor Talbot's second report.

The report from Care UK

63. Ms Mooney, a registered nurse, and Deputy Head of Healthcare at the prison, has provided us with a letter dated 13 February 2018. She describes the deterioration in the appellant's condition since Care UK's last report. He is frail and tired. He has abnormally high levels of carbon dioxide in his blood. His respiratory muscles continue to get weaker. He needs a BiCAP machine to deliver, through a mask, pressurised air to his airways, which stops his throat muscles from collapsing. This allows him to breathe in the night. He is independent with this. He is losing interest in eating because of the effort it demands from him. The consultant physician has been asked to refer the appellant for the insertion of a PEG tube. He is at risk of choking.

64. He can still communicate effectively and is still enjoying teaching English as a foreign language to other prisoners. This keeps his brain active and alive, in his view. He has been referred for a wheelchair. He does not yet need one, but it is anticipated that by the time the referral has been processed, he will.

65. He now has a hospital-style bed. A cellmate/peer carer helps him with the activities of daily living. He can still do these independently, but if he has support with them, he can save energy. We are dismayed to read that the local authority prison social work team refused to assess the appellant because they consider that he is eligible for continuing healthcare whereas the local NHS Trust consider that he is not. There appears to be an unattractive stand-off between these two public bodies.

66. The appellant can manage the breathing apparatus at the moment. Once he is no able longer to manage that, and/or the PEG, he will need nursing care 24/7. That is not available at the prison where he is presently held, and he will have to be moved at that stage to a different prison which does have such facilities.

The applicant's submissions

67. Mr Taylor produced an excellent skeleton argument which we have found very helpful, and which he amplified in his oral submissions. We intend him no discourtesy if we summarise his argument briefly.

68. He submits that the sentence of 9 years' imprisonment was manifestly excessive. He does not criticise a starting point of 9 years' imprisonment before mitigation, but submits that it is evident that the judge failed to reduce the sentence in any way to reflect the appellant's terminal illness, the degree to which his health would deteriorate during the sentence, and the impact which imprisonment would have on him. The judge should have balanced, but did not, the need to punish the appellant against a recognition that he was approaching the end of his life. The judge erred in relying only on the Secretary of State's power of early release for compassionate reasons. The judge also erred in failing to give any credit for the appellant's lack of previous convictions and exemplary good character.

69. Mr Taylor further submits that we should admit as fresh evidence, and take into account, Professor Talbot's reports. It is submitted that this material should lead to a very significant reduction in sentence so as to allow the appellant's release, immediately or in the near future, of for the suspension of his sentence, as an act of mercy. In short, the evidence should be admitted in the interests of justice.

Discussion

70. We have no doubt that this was a serious offence, with many aggravating features. It was arguably in category 2A, not 2B. We have already noted that the judge may well have considered that the offence was on the cusp of categories 2A and 2B. The judge ultimately fixed on category 2B. We do not consider that it would be appropriate for us to revisit that part of his approach.

71. However, we are also in no doubt that the judge failed to treat the appellant's condition as any mitigation. We accept the submission that the judge considered that the appellant's condition was solely a matter for the Secretary of State, and not a factor which should influence the length of the appellant's sentence. In relation to that aspect of this difficult sentencing process, the judge erred in principle.

72. We have already considered the principles which apply when this court is asked to admit as fresh evidence, evidence about a condition which was known at the date of sentence, but which has, since that date, significantly deteriorated. We consider that, in the appellant's case, we should admit, under section 23 of the Criminal Appeal Act 1968, both of Professor Talbot's reports and the update so recently provided by Care UK. We note that there was a limited expert's report before the sentencing judge. We consider that the sentencing judge could, and should, have been given more help about the likely future course of the appellant's condition, and therefore, of its effect on him in prison. We nonetheless consider that it is in the interests of justice for us to take into account the evidence of recent significant deterioration both in the appellant's condition and in his prognosis.

73. We have no hesitation in reaching two further conclusions. First, we consider that the appellant's sentence should be significantly reduced in order to reflect the impact of imprisonment on him, in his current state of health, and to reflect the fact that he will die from MND in the near future. Secondly, however, we do not consider that this is a case in which any such reduction can or should lead to the appellant's immediate release, or that we should reduce the sentence and then suspend it. We must maintain the balance, to which this court referred in Clarke, between factors personal to the elderly or very ill offender, and the public interest in punishing serious offences. We recognise of course that both Mr SM and his family and friends will be distressed by that conclusion, and will understandably focus on the hardship to Mr SM of remaining in prison as he nears the end of his life. The court however must not lose sight of the seriousness of the offending or of the harm suffered by the victim of the offending.

74. Balancing those competing interests as best we can, and in the light of all the evidence now available as to the appellant's ill health, we conclude that the shortest sentence which can properly be imposed for this very serious offence is one of 5 years' imprisonment.

75. For those reasons, we grant the necessary extension of time, and we grant leave to appeal. We quash the sentence of 9 years' imprisonment and substitute for it a sentence of 5 years' imprisonment. To that extent the appeal of Mr SM succeeds. If by reason of his deteriorating physical condition Mr SM is to be released on compassionate grounds sooner than on the expiry of his sentence, that must be for the Secretary of State to decide.

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