IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202400640/A1

[2024] EWCA Crim 596

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 14 May 2024

Before:

LORD JUSTICE EDIS
MR JUSTICE MURRAY
HIS HONOUR JUDGE DENNIS WATSON KC
(Sitting as a Judge of the CACD)

REX
V
DAVID SHOTAYO

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MR C MORGAN appeared on behalf of the Applicant
MR J RILEY appeared on behalf of the Crown

J U D G M E N T

MR JUSTICE MURRAY:

1. Pursuant to the provisions of the Sexual Offences (Amendment) Act 1992 no matter relating to the victim of the offences to which we shall refer in the course of this judgment may be included in any publication if it is likely to lead members of the public to identify that person, to whom we shall refer as "MM", as the victim of any of the offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 1 November 2023 in the Crown Court at Woolwich before Mr Recorder Kovats KC and a jury, the applicant, David Shotayo, then aged 16, was convicted of one count of rape and one count of theft. On the same occasion, his co-defendant Kijani Scatliffe was convicted of one count of rape.

3. On 9 February 2024 at the same court, Mr Recorder Kovats KC sentenced the applicant for the rape to a detention and training order (DTO) for two years (24 months). He imposed no separate penalty for the theft and revoked a youth rehabilitation order (YRO) that had been imposed on the applicant on 5 September 2023.

4. The applicant's co-defendant, Kijani Scatliffe, was sentenced to a two-year YRO with intensive supervision and surveillance in respect of the offence of rape of which he had been convicted.

5. The judge refused the prosecution's applications for a sexual harm prevention order against each of the applicant and his co-defendant.

6. Prior to his trial, the applicant had been remanded in custody at Feltham Young Offender Institution for eight days. He was then remanded into local authority accommodation under section 91(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for 203 days, during which he was subject to an electronically monitored curfew. The curfew ranged from 10 hours to 12 hours per day during the course of the week.

7. The applicant applies for leave to appeal his sentence, his application having been referred to the full court by the Registrar of Criminal Appeals.

8. The applicant is represented on this application by Mr Callum Morgan, who represented him at his sentencing. At the direction of the Registrar, the prosecution is represented at this hearing by Mr John Riley.

<u>The facts</u>

9. At around 4.15 pm on 3 May 2023, the complainant, MM, a girl who was then 14 years old, encountered the applicant and Kijani Scatliffe in a park in Lewisham in London. The applicant and Kijani Scatliffe subsequently engaged her in conversation during which they called her "cute", asked her if she was a virgin and asked her if she gave oral sex. The applicant and his co-defendant asked MM to go to a secluded area of the park with them.

10. MM asked the applicant and Kijani Scatliffe if they had a "shank" (that is, a knife) but neither replied, which led her to think they did have a knife with them. Having taken MM to a secluded area, the applicant and Kijani Scatliffe each raped MM by penetrating her mouth with his penis. Neither of them ejaculated.

11. Afterwards, the applicant and Kijani Scatliffe rode off on their bicycles. MM then realised that her AirPods were missing. These had been taken by the applicant. They were subsequently recovered from his bedroom.

12. MM reported the rapes and the theft to the police on the next day.

13. The applicant was arrested for these offences on 9 May 2023, while he was in custody in relation to other allegations. He was interviewed by the police on the following day, in the presence of his solicitor and an appropriate adult. He did not provide answers of any substance to the questions he was asked.

14. On 2 May 2023, the day before these offences, the applicant had been sentenced at South East London Juvenile Court to a referral order for eight months in relation to an offence of robbery, an offence of possession of class B drugs (cannabis) and an offence of criminal damage. On 5 September 2023, the applicant was sentenced for nine further offences of robbery, two offences of theft from a person and one offence of criminal damage to a 12-month YRO with a 20-day activity requirement and a local authority residence requirement for six months. He admitted the breach of his contract under the youth referral order previously imposed, which was revoked.

The sentence

15. At the sentencing hearing on 9 February 2024, Mr Recorder Kovats KC had the benefit of: (i) a pre-sentence report dated 6 February 2024; (ii) a clinical psychology report dated 17 October 2023 by Dr Sinéad Marriott, a consultant clinical psychologist; and (iii) a victim personal statement from MM.

16. The judge noted that the applicant and Kijani Scatliffe were both to be sentenced as young persons. He referred to the core principles of the Sentencing Council Guideline on Sentencing Children and Young People. He also referred to the Sentencing Council Guideline on Sentencing Children and Young People for Sexual Offences.

17. The judge made clear that he regarded the applicant and his co-defendant as equally culpable for their respective rapes of MM. The crucial difference between them, he noted, was the applicant's offending record which included convictions of a number of serious offences, including 10 robberies. Kijani Scatliffe had only one prior conviction, which was for possession of a knife. The judge noted that the applicant remained to be sentenced for a further offence of robbery in respect of which he had pleaded guilty. The judge understood the applicant was considering vacating that plea. The judge noted that the applicant's prior sentences had not prevented him from further offending.

18. The judge noted that, in terms of the adult Sentencing Council Guideline for Rape, the applicant's rape fell within Category 2A. This was because the judge considered, based on

MM's victim personal statement, that the rape had had a very severe psychological impact on her and that the offence had been committed by the applicant and his co-defendant acting in tandem and "effectively presenting overwhelming force", although they did not have to use it, against MM. He considered that it was a further aggravating factor that MM had expressly asked at the outset of the incident whether either of them was carrying a knife, and they had conspicuously failed to answer, leaving her to conclude, in the judge's view, that they did in fact have a knife. The judge found that this significantly influenced her subsequent behaviour and was an aggravating factor.

19. The judge noted that there was significant mitigation in the applicant's case. His childhood had been difficult even by the standards of many defendants who appeared before the criminal courts. There had been significant involvement throughout the applicant's life by Social Services.

20. Having regard to the significant aggravating factor of his offending history, the judge took the view that the only possible sentence that could be justified was one of immediate custody, not only to mark the gravity of the offence but also to protect the public from further offending and bearing in mind the applicant's poor response to previous court orders. He then imposed a DTO for two years, as we have previously noted. He considered that it was not necessary to impose a separate penalty for the theft which was "part and parcel of the rape". The judge revoked the youth rehabilitation order that had been imposed on 5 September 2023.

21. After he had risen, the judge was asked to come back into court to confirm that it was his intention that 102 days be deducted from the 24 month term of the DTO, in addition to the automatic deduction of eight days to which the applicant was entitled in relation to his period on remand in custody at Feltham Young Offender Institution. The transcript records the following exchange between the judge and Mr Morgan (who is referred to as "Unidentified Counsel" in the transcript):

> "UNIDENTIFIED COUNSEL: I do apologise for asking your Honour to sit again. In relation to the sentence that has just been passed, can your Honour confirm that from that two years, the time spent subject to the curfew will be credited? It is 102 days.
>
> RECORDER KOVATS: Yes, and that is what I have written on the note I have put up on the side bar.
>
> UNIDENTIFIED COUNSEL: So two years less 102 days.
>
> RECORDER KOVATS: Yes, I have written, 'Credit for 102 days in local authority accommodation under 91.3. Automatic credit eight days at HMYOI Feltham. It is in my note.
>
> UNIDENTIFIED COUNSEL: Thank you, I just wanted to raise it because –
>
> RECORDER KOVATS: No, you are quite right."

22. In the judge's note of the applicant's sentence on the Digital Case System (DCS) posted on 9 February 2024 at 2.45 pm, the judge had written:

> "09/02/2023
>
> Both defendants: primary aim of YJS to prevent offending; have regard to welfare of offender.
>
> Crown do not seek retrial on counts 2, 5 6. CJA 1967 s.17 NG verdicts on those counts.
>
> Both defendants equally culpable of the rape.
>
> ...
>
> Shotayo
>
> Immediate custody required due to cumulative impact of gravity of offence, need to protect public, poor response to previous sentences, taking full account of mitigation of difficult childhood who has spent his life with involvement of social services.
>
> Automatic credit 8 days in HMYOI Feltham.
>
> Credit for 102 days in local authority accommodation under s.91(3)
>
> Count 4 oral rape 24 months DTO.
>
> Count 9 theft NSP.
>
> Credit for time in local authority secure accommodation
>
> Statutory surcharge £41.
>
> Refuse application for SHPO: not necessary, first sexual offence, high risk of inadvertent breach.
>
> Notification requirements 5 years.
>
> Revoke 05/09/2023 YRO."

23. The court clerk's note of the sentence on the DCS, which was confirmed as correct by the judge in his separate note on the DCS, did not include a deduction of 102 days from the 24-month term of the DTO. The court's order of 9 February 2024 recording the applicant's sentence recorded the sentence term as two years without deduction.

Submissions

24. On behalf of the applicant, Mr Morgan advances two grounds of appeal. First, that the

sentence was manifestly excessive, and secondly, that the sentence was wrong in principle on the basis of disparity between his sentence and that of his co-defendant.

25. In his written submissions in support of these grounds, as developed orally before us this morning, Mr Morgan submitted that the sentence was manifestly excessive for a number of reasons. First, he criticised the judge for giving too much weight to previous findings of guilt against the applicant and giving insufficient weight to his personal mitigation. Mr Morgan noted that, although the applicant had a significant offending history for his age, the applicant had only been sentenced for three of the offences in his history before he committed these offences. He had received a referral order for those first three offences. The referral order having been imposed the day before these offences occurred. The applicant had therefore not had the opportunity to respond to the referral order by engaging with the Youth Offending Services.

26. Mr Morgan, in his written submissions and as developed orally this morning, submitted that the judge failed to have sufficient regard to the principles set out in the Sentencing Council Guideline on Sentencing Children and Young People, and did not follow a sufficiently individualistic approach in determining the appropriate sentence in this case. In particular, he failed to focus sufficiently on rehabilitation when considering the appropriate sentence for the applicant. Finally, in relation to this first ground of appeal that the sentence is manifestly excessive, Mr Morgan submitted that the judge failed to give the applicant credit of 102 days for his time in local authority accommodation subject to an electronically monitored curfew.

27. In support of his second ground of appeal, on the basis of disparity between the applicant's sentence and that of his co-defendant, Mr Morgan submitted that the sentence imposed on the applicant was significantly more severe than that imposed on his co-defendant, despite the judge's view that they were equally culpable for their involvement in this offending. That disparity is too gross, he submitted, and therefore wrong in principle.

Decision

28. For this hearing, in addition to the materials that were before the sentencing judge, we had a report dated 8 May 2024 from the applicant's Youth Justice Service Case Manager relaying information regarding the applicant's conduct, general attitude, work and progress in custody at Cookham Wood Young Offender Institution. The overall conclusion from the report is that his behaviour in custody has been more negative than positive. As was noted by the author of the pre-sentence report, he continues to deny his guilt for his sexual offence against MM and therefore has not agreed to engage in sexual harm prevention work. He has been regularly rude and confrontational with staff and has been reluctant to comply with the requirements of a regime in custody. On one occasion he had to be restrained to prevent harm to others. He has two proven adjudications in custody, one for damaging prison property and one for intentionally endangering health and safety. On 8 May 2024 the applicant was transferred to Wetherby Young Offender Institution. We have had a brief update report of his conduct there which unfortunately does not appear to be any better. Needless to say these reports do not assist him on this application.

29. We are not persuaded by Mr Morgan's submissions that there was any error in the judge's analysis of the applicant's offending or in his application of the relevant principles to the determination of the applicant's sentence. The Sentencing Council Guideline on Sentencing Children and Young People for Sexual Offences indicates that a custodial sentence may be justified in a case where there is penetrative activity involving pressure, the threat of violence and/or severe psychological harm to the victim. The judge found that all of these were present in this case. The pressure and the threat of violence came from the combination of the two offenders and the implied threat that at least one was carrying a knife. The judge, who had presided over the trial and heard all the evidence, was entitled to conclude, also taking into account MM's victim personal statement, that MM had suffered severe psychological harm as a result of the applicant's offence against her.

30. Whilst it is true that the applicant had only just been sentenced for the first time when he committed his offences against MM and therefore had not been able to demonstrate a response to that sentence, it is striking that he offended the very next day after that first sentence was imposed. Moreover, his subsequent offending history, despite that initial conviction and sentence, amply supports the judge's conclusion that he has shown a poor response to the sentences he has received. The judge was entitled to take that into account in determining the appropriate sentence that he would be imposing for these offences.

31. The judge had observed that under the adult guideline for rape the applicant's offence would have fallen within Category 2A, which has a starting point of 10 years' custody in a category range of nine to 13 years' custody. On Mr Morgan's submission, the correct adult category would have been Category 3A, which has a starting point of seven years and a category range of six to nine years' custody.

32. The Guideline for Sentencing Children and Young People suggests that in a serious case where custody is appropriate the court may feel that a sentence broadly within the range of half to two-thirds of the appropriate adult sentence would be appropriate for an offender aged 15 to 17. The sentence passed in this case is considerably below half of the lower end of the range for a Category 2A offence and materially below half of the lower end of the range for a Category 3A offence.

33. We conclude that it is not arguable that the applicant's sentence was manifestly excessive for any of the foregoing reasons advanced by Mr Morgan on the applicant’s behalf.

34. Given the difference in the respective offending histories of the applicant and his co-defendant, there is, in our view, no merit in the argument that the applicant's sentence was wrong in principle by reason of disparity.

35. We refuse the applicant's application for leave to appeal against sentence on any of the foregoing grounds.

36. This leaves only the question of whether the sentence was manifestly excessive because of the judge's failure to give the applicant credit of 102 days for his time in local authority accommodation subject to an electronically monitored curfew. In our view this ground is arguable.

37. Having considered the transcript of the sentencing hearing, including the judge's sentencing remarks and the transcript of the post-sentence discussion (which we have quoted above), as well as the notes on the DCS, we are of the view that the judge must have taken into account the 102 days that the applicant spent in local authority accommodation subject to an electronically monitored curfew when he reached the conclusion that a 24-month DTO was the appropriate sentence rather than a longer period of detention under section 250 of the Sentencing Act 2020, given the seriousness of the sexual offence committed against MM and the circumstances in which it was committed. The transcript of the post-sentence discussion is in our view ambiguous. On the other hand, the judge's confirmation of the court clerk's clear note on the DCS is not.

38. Accordingly, we give leave to appeal against sentence on the sole ground that the sentence was manifestly excessive due to judge's failure to deduct 102 days for the period spent by the applicant in local authority accommodation on electronically monitored curfew. However, for the reasons we have given, we dismiss the appeal.