

Neutral Citation Number: [2009] EWCA Crim 963

Case No: 2008/04629/A1

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEICESTER
MR JUSTICE OTTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2009

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE LLOYD JONES
and
MR JUSTICE WYN WILLIAMS

Between :

R
- v -
Pitchfork

Mr E Fitzgerald QC and Miss Q Whitaker for the Appellant
Mr B. R. Escott-Cox QC for the Crown

Hearing date : 30th April 2009

Judgment

The Lord Chief Justice of England and Wales

1. On 22nd January 1988 in the Crown Court at Leicester before Otton J, Colin Pitchfork (the appellant) pleaded guilty to the rape and murder of two young girls, conspiracy to pervert the course of justice, and two further separate offences of indecent assault. He was sentenced to life imprisonment for murder, 10 years' imprisonment on each count of rape, 3 years' imprisonment for conspiracy to pervert the course of justice and 3 years' imprisonment for the offences of indecent assault, all sentences to run concurrently.
2. In accordance with the then practice, the Secretary of State set the tariff or minimum term before consideration could be given to his possible release at 30 years. In due course the applicant was notified of this decision. Following the coming in to force of the Criminal Justice Act 2003 (the 2003 Act), the appellant sought a review of the minimum term. On 1 August 2008 Grigson J, as the reviewing judge, specified a minimum term of 30 years, less the time spent on remand before sentence. Leave to appeal was granted by the full court.
3. This judgment is being handed down at the same time as the judgment of a differently constituted court in *R v Bamber*. Some issues common to both cases arose, but, save where necessary, we shall not repeat those we have already addressed in *R v Bamber* in the present judgment.

Brief Summary of the Facts

4. The appellant was born in March 1960. His conviction in January 1988 followed a series of serious sexual offences, two of which culminated in murder. We have read a number of statements which have made us acutely aware of the continuing lifelong grief of the families of the two victims of murder. Their suffering is heartrending.
5. In February 1979, one afternoon, a 16 year old schoolgirl walking home was attacked by the appellant. He came up from behind her, forced her into a nearby field and undid her clothing, and put his hand down the front of her jeans. In the apparent belief that someone was approaching and might discover him, he suddenly desisted and ran off.
6. Nearly 4 years later, in November 1983, a 15 year old girl, Linda Mann, left her home to go and visit one of her friends. As she was walking near a footpath, she encountered the appellant. He exposed himself to her, and took her away from the footpath. He attacked her, removing all her clothes from beneath the waist. He raped her, and then strangled her to death with her own scarf. Throughout the incident, his car was parked nearby, and his baby son was asleep in the back of it.
7. Many years later, when interviewed, he admitted that the girl was terrified and in fear of her life and what he "was going to do to her".
8. In October 1985, another girl aged 16 was walking home at 10.30 one October evening. The appellant approached her from behind. He held a screwdriver to her throat saying, "no noise or I'll kill you". He then took her to a dark corner behind some lockup garages. With the knife at her throat, he committed oral rape. He left her at the scene, threatening that if she said anything he would return and find her.

9. The fourth incident occurred in June 1986. Another 15 year old schoolgirl was the victim. She was last seen alive at 4.30 in the afternoon on 31st June. She was reported missing later that day. Her concealed body was not found until 2nd August. When she was found, she was naked from the waist down. She had died of manual strangulation. It was clear that this was a particularly violent rape and probable buggery, and the girl herself had put up a considerable struggle. There was substantial bruising consistent with at least 2 punches to the side of her face, and another to the front. There were large grip marks bruises to her upper arms. The pathologist described a “brutal sexual attack”. The perineum was substantially split. The anal ring was spread with three fissures. He concluded that the rape and strangulation were coexistent with and, because no bruising associated with the torn perineum was found, may well have continued after death.
10. The inquiries into this offence led the police to seek blood samples from men living in the vicinity. Between January and February 1987 the appellant persuaded a friend called Kelly, who lived away from the district, to impersonate him and to provide the police with a blood sample in his stead. This was described as a very elaborate conspiracy, and involved the replacement of the photograph in the appellant’s passport with Kelly’s photograph, and Kelly learning the details of the appellant’s domestic life. Kelly provided the police with a blood sample on 27 January 1987. Fortunately for Kelly himself, the appellant became indiscreet while in a public house, and the police were informed. Kelly was interviewed and admitted his involvement in the plot.
11. The appellant was arrested. DNA techniques were used for the first time in connection with a serious criminal investigation. His samples connected him with all four offences. He then made a detailed confession and admitted the offences and a conspiracy to pervert the course of justice. The Crown did not and do not accept all the details of the appellant’s account in his interview, and in relation to the offences of sexual violence and murder, describe the appellant’s account as a “sanitised” version of events, not least because the appellant was contending that he had used no violence towards either of the victims and that both victims had removed their own undergarments. He also asserted that the only reason for killing them was the risk of identification. That, of course, is serious enough, but the Crown’s case was that the strangulations represented perverted sadism.

The Proceedings

12. The appellant pleaded guilty. The court was provided with a psychiatric report. This recorded a “personality disorder of psychopathic type accompanied by serious psycho sexual pathology” and observed that the appellant “will obviously continue to be an extremely dangerous individual while the psycho pathology continues”.
13. In his sentencing observations Otton J observed that the rapes and murders “were of a particularly sadistic kind”. He said that it would be inappropriate to make a recommendation as to the minimum term because it was “perfectly clear that you will only be released when the psycho pathology has ceased to exist”. He further pointed out that had it not been for the use of scientific means “of detection known as DNA fingerprinting, you might still be at large today and other young women would have been prey to your actions”.

14. In the report prepared for the Secretary of State Otton J observed that the appellant was “clearly a danger to young women” and he believed that there was “a substantial risk of re-offending”. In relation to the actual “length of detention necessary to meet the requirements of retribution and general deterrence for the offences” he added that the appellant “should only be released when the authorities are satisfied that he is no longer a danger to women. In any event, in view of the serious, callous and cunning conduct the actual length should be not less than 20 years”.
15. Lord Lane CJ observed tersely, “25 years minimum, but from the point of view of the safety of the public I doubt if he should ever be released”.
16. In passing we note and reject one of the submissions on behalf of the appellant. Long before the principle was enshrined in statute, judges, with Lord Lane at the forefront, were always prepared to make a discount from sentence for a guilty plea, unless, as in cases like this, the appellant’s guilt was overwhelmingly apparent.
17. It is to be emphasised, as we have emphasised in earlier decisions, and repeated in *R v Bamber*, that these were recommendations to the Secretary of State. The responsibility for the decision as to the setting of a minimum tariff was vested in the Secretary of State. In due course, following the decision in *Doody*, the offender was notified of the Secretary of State’s decision. He concluded “that the heinous nature of the offences warranted a significantly higher tariff than that which had been recommended by the judiciary”. Accordingly the tariff was set at 30 years. The Secretary of State indicated that he would take account of any written representations the applicant wished to make. As far as we are aware none were received.
18. Subsequently, in July 2001, the Secretary of State reconsidered the tariff afresh, and having done so, explained why he had set the tariff higher than that recommended by the Lord Chief Justice, and re-set it at “30 years”. He explained that he had “attached weight to the fact that there were two murder victims, both of whom were attacked as they were out walking and both of whom were vulnerable by virtue of their relatively young age and sex. He has also attached weight to the murders having occurred on separate occasions and to their having been preceded by offences of rape, the second of which was described by the trial judge as “...particularly violent...he has further attached weight to your having killed the victims to avoid the possibility of their being able to identify you and to your attempt to pervert the course of justice in connection with the DNA sampling. He has had regard to your convictions for offences of indecent assault”.
19. The appellant made an application under paragraph 3 of schedule 22 to the 2003 Act for a judicial review of the tariff period. At the conclusion of the review Grigson J fixed the minimum term at 30 years on each conviction of murder. The considerations which led to this conclusion can be seen from his short judgment. He understood, correctly, that both Otton J and the Lord Chief Justice believed that the appellant should not be released until he no longer represented a danger to the public. As required by the legislative structure, he addressed the recommendations of the trial judge and Lord Chief Justice. He believed that Otton J’s decision to make “no recommendation” was the equivalent of a “whole life order” that Otton J intended a “whole life order” because the appellant was so dangerous that it would be inappropriate to make any recommendation.

20. Grigson J’s reasoning is criticised, and in our view is open to criticism, on the basis that he misunderstood Otton J’s report to the Secretary of State. We agree with Mr Edward Fitzgerald QC on behalf of the appellant that if Otton J or Lord Lane had intended a whole life order, this would have been stated in unequivocal terms. We accept that they may well have anticipated that the appellant would never be released from prison, but that was because they could not anticipate any realistic possibility that he would cease to represent a danger to public safety. However it did not follow from that conclusion that they positively recommended a whole life order. The words “not less than” (Otton J) and “minimum” (Lord Lane CJ) are certainly not clear enough to support that conclusion. What is more, as we have seen, the Secretary of State himself did not approach his own decision on the basis that either the trial judge or the LCJ had recommended a whole life tariff. We therefore are unable to accept that Grigson J’s analysis of the judicial recommendations was correct.
21. We must therefore conduct our own review and assess the minimum term in the light of the legislative structure created by schedule 22 of the 2003 Act. This governs the decision to be made by the reviewing judge. In view of the submission by Mr Edward Fitzgerald on behalf of the appellant, we must recite paragraphs 3 and 4 of schedule 22.
22. Paragraph 3 of schedule 22 provides:
- “(1)On the application of the existing prisoner, the High Court must, in relation to the mandatory life sentence, either –
- (a) order that the early release provisions are to apply to him as soon as he has served that part of the sentence which is specified in the order, which in a case falling within paragraph 2(a) must not be greater than the notified minimum term, or
- (b) in a case falling within paragraph 2(b), order that the early release provisions are not to apply to the offender.
- (2) In a case falling within paragraph 2(a), no application may be made under this paragraph after the end of the notified minimum term.
- (3) Where no application under this paragraph is made in a case falling within paragraph 2(a), the early release provisions apply to the prisoner in respect of the sentence as soon as he has served the notified minimum term (or, if he has served that term before the commencement date but has not been released, from the commencement date).
- (4) In this paragraph “the notified minimum term” means the minimum period notified as mentioned in paragraph 2(a), or where the prisoner has been so notified on more than one occasion, the period most recently so notified. ”

23. Paragraph 4 of schedule 22 provides:

“(1) In dealing with an application under paragraph 3, the High Court must have regard to –

- (a) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it,
- (b) where the court is satisfied that, if the prisoner had been sentenced to a term of imprisonment, the length of his sentence would have been treated by section 67 of the Criminal Justice Act 1967 (c.80) as being reduced by a particular period, the effect which that section would have had if he had been sentenced to a term of imprisonment, and
- (c) the length of the notified minimum term or, where a notification falling within paragraph 2(b) has been given to the prisoner, to the fact that such notification has been given.

(2) In considering under sub-paragraph (1) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, the High Court must have regard to –

- (a) The general principles set out in Schedule 21, and
- (b) Any recommendation made to the Secretary of State by the trial judge or the Lord Chief Justice as to the minimum term to be served by the offender before release on licence.

(3) In this paragraph “the notified minimum term” has the same meaning as in paragraph 3.”

24. The submission by Mr Fitzgerald is that the decision of the Secretary of State constituted a breach of the appellant’s rights under article 6 of the European Convention of Human Rights (the Convention) to a fair trial and the overall demands of fairness required that the judicial decision did not constitute a violation of the prohibition on retrospective penalties under article 7 of the Convention. The starting point in the review is the recommendation made by the Lord Chief Justice. We disagree with this approach to the legislative structure. This requires the judge conducting the review to have regard to the recommendations of the trial judge and the Lord Chief Justice and to the considerations contained in schedule 21 of the 2003 Act. In reaching his conclusion he must also have regard to the order made by the Secretary of State, not as a consideration influencing his decision on the review, but for the purpose of ensuring that the result of the review will not produce any increase in the length of the prisoner’s incarceration beyond the period already fixed by the Secretary of State’s order. This represents a ceiling above which the order made by the reviewing judge may not go and the provision is designed to avoid any breach of the principle against the retroactive imposition of sentence now encapsulated in article 7 of the Convention.

25. Mr Fitzgerald further submitted that in conducting the review, the eventual determination of the tariff period should not take account of increases in sentencing practice after the date of sentence. He relied on *R v Secretary of State ex parte McCartney*...a decision relating to a discretionary rather than a mandatory life sentence which, assuming it advances the general proposition advanced by Mr Fitzgerald, does not sustain the weight he sought to place on it for present purposes. The reviewing judge, and this court, are bound not by *McCartney*, but by the legislative structure. As the court explained in *R v Caines, R v Roberts* [2006] EWCA Crim 295

“...the transitional provisions in schedule 22 apply irrespective of the guidance in force when the original minimum period was fixed, all cases to which the transitional arrangements apply are now to be dealt with identically, whatever the arrangements when the tariff period was fixed.”

26. The court further noted that the “transitional provisions created an unusual responsibility for a judge”. The judge is required to decide the application and conduct the review by assessing the seriousness of the offence in the context of the statutory guidance in schedule 21 whilst simultaneously reflecting on the judicial recommendations made at an earlier stage at a time when different sentencing regimes existed, without addressing the guidance which they offered or the likely outcome of their application. The judgment continued:

“... in any event the trial judge and Lord Chief Justice may have recommended different tariff periods. (The reviewing judge) is not conducting an appeal from the judicial recommendations, or the decision of the Secretary of State, nor passing sentence as such. Nevertheless although he did not preside over the original trial his decision will impact directly on the date when the prisoner may be released on licence. Plainly the process is properly identified as a review, but it is not a judicial review in the formal sense...

Given the structure of schedule 22, it would be inappropriate for the judge to approach the review as if he were required to assess and then apply whatever he thought would have been the judicial tariff at the time when the original sentence was imposed...in our judgment schedule 22 is not so confined. It expressly requires the judge to address the guidance in schedule 21. Sentencing practice or standards at the time of sentence are properly reflected in the views expressed by the trial judge, and in particular, the Lord Chief Justice, who would have made his recommendation in each individual case in the context of his overall responsibility for making a recommendation in every such case. Between them these provide sufficient material for the reviewing judge to take account of contemporary standards when the original recommendation was made”.

27. As we have emphasised, the legislation does not, as it could, simply invite the judge or require him to endorse the recommendation of the trial judge or that of the Lord

Chief Justice, or where they differ, find a mean between them. The reviewing judge is expressly required to address the general principles in schedule 21. Neither the original judicial recommendations nor the schedule enjoys some kind of hidden, unspecified primacy. The assessment by the reviewing judge is not fixed exclusively by reference to the general principle set in schedule 21, any more than it is fixed by the judicial recommendations. The judge is conducting a fresh review, taking account of both the judicial recommendations and schedule 21.

28. We have recorded the judicial recommendations. Examining these convictions in the light of schedule 21 itself, Mr Fitzgerald realistically accepts that these murders fall into the exceptionally high category of seriousness for which the starting point today would indeed be a whole life tariff, not the 30 years ordered by the Secretary of State. That however is not the statutory test. Reminding ourselves that the future safety of the public is secured by the order for imprisonment for life, which stands unaltered whatever the result of this review, and focusing exclusively on the elements of punishment and deterrence, the review which we have conducted might well have produced a period somewhat in excess of the 30 year period ordered by the Secretary of State, albeit, given the recommendations of the trial judge and the Lord Chief Justice, not a whole life tariff. In the result, and subject to any discounts for exceptional progress in custody, we shall assess the review period at 30 years imprisonment.

Exceptional Progress

29. That leaves the question whether any allowance should be made for the exceptional progress made by the appellant since he was first incarcerated. Grigson J examined a very substantial bundle of evidence. The appellant's progress goes far beyond general good behaviour and positive response to his custodial sentence, but reflects very creditable assistance to disabled individuals outside the prison system. On the evidence before us he has sought to address the reasons behind the commission of these offences. He has achieved a high standard of education, to degree level. In 20 years in custody he has never been placed on report and he is trusted to help with the wellbeing of fellow inmates. Beyond all that, he has made himself a specialist in the transcription of printed music into Braille, thus using the opportunities he has taken to educate himself in prison to the benefit of others. This is an intensely specialised skill and his work is used throughout this country and internationally with the support of the RNIB. In summary, he is "performing a useful and outstanding service for so many". Grigson J expressed himself in unequivocal terms that so far as he was concerned this was the first case of its type "where the progress made by the applicant can properly be described as exceptional".
30. Grigson J directed himself that the power to reduce the minimum term to reflect such progress is discretionary, to be exercised in the context of the nature of the offences and the minimum term. He concluded that it would be "wholly inappropriate to reduce what I regard as a modest sentence for truly horrific crimes", adding that the exceptional progress was a factor which the Parole Board was entitled to take into account.
31. Mr Fitzgerald submitted that no possible basis had been suggested for interfering with Grigson J's conclusion that the appellant had indeed made exceptional progress in custody and, if so, that the appropriate course would be to reduce the minimum term

which would otherwise be specified by 2 years. He referred us to *R v Caines*, *R v Roberts* as well as a number of other decisions at first instance. Their general effect is that, consistent with the legislative purpose, where exceptional progress is indeed established in the course of a schedule 22 review, the appropriate course is for this progress to be reflected in a small reduction in the minimum term ordered in the review process. As the court observed:

“...if the reduction is to operate effectively, save perhaps in the unusual case where the new tariff may be lower than the original minimum term, it must surely do so against the fixed minimum term, not against the newly assessed, albeit notional tariff...if exceptional progress is set against the new notional tariff rather than the original term, in practice the eventual result would at least in part be based on a starting point higher than the original minimum term, which if not expressly prohibited in this particular context, would be inconsistent with the express prohibition against an increased tariff... in our judgment if exceptional progress is properly to be taken into account...it should be productive of real benefit for the prisoner.”

32. In the present case, we cannot identify any sufficient reason why the exceptional progress found by the judge should not be recognised and given practical effect, in the assessment now to be made of the minimum term to be served by the appellant. The minimum term will therefore be reduced by 2 years, to 28 years and the allowance for time on remand is unaltered. That said, we emphasise that the decision has no bearing whatever on the continuing effect of the sentence of life imprisonment on the appellant. He cannot be released unless and until the safety of the public is assured.