Judgments

CA, CRIMINAL DIVISION

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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday 25, September 2014

B e f o r e:

LORD JUSTICE PITCHFORD

MR JUSTICE IRWIN

MR JUSTICE SPENCER

R E G I N A

v

RHIANNON CORINNE ALICE BROOKER

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(Official Shorthand Writers to the Court)

Miss S Elliott QC and **Mr B Newton** appeared on behalf of the **Applicant**

Mr W Emlyn-Jones appeared on behalf of the **Crown**

(As approved by the Court)

1. LORD JUSTICE PITCHFORD: The Solicitor General seeks leave to refer to the court as unduly lenient a sentence of 3½ years' imprisonment imposed at the Bristol Crown Court on 26 June 2014. Following her trial before HHJ Lambert, which lasted for some 11 weeks, the offender, Rhiannon Brooker, was convicted of 12 counts of perverting the course of justice. The jury could not agree upon the remaining 8 counts and were discharged from reaching verdicts.

2. Following consultation with the complainant the prosecution elected not to seek a retrial on those counts. Of those counts upon which the offender was convicted five concerned false allegations of rape made by her against her former partner, Paul Fensome. Upon those counts the judge imposed concurrent terms of 3½ years' imprisonment. Six of the convictions were in respect of false allegations of assault by Mr Fensome, the seventh concerned a false accusation of false imprisonment. In respect of those seven counts the judge imposed concurrent sentences of 9 months' imprisonment, making 3½ years' imprisonment in all.

3. The Solicitor General contends that the sentence was unduly lenient because it failed adequately to reflect the seriousness of the offending, in particular its persistence, the harm caused to the victim and the serious implications to the administration of justice in general of offending of this kind. The Solicitor General recognises the significance in this particular case of personal mitigation available to the offender. It is submitted in the alternative that a reduction of the otherwise appropriate length of sentence was excessive in the circumstances rendering the sentence unduly lenient.

4. The offender, who is now aged 30, and Mr Fensome, a 40-year-old man of good character, commenced a relationship in 2009. They lived together at Mr Fensome's home from about May 2009. The offender was studying law with a view to becoming a barrister. Mr Fensome was a senior signalman in Birmingham. In September 2010 the offender moved to Bristol to attend the bar vocational course, as it was

then called, at the University of the West of England. Mr Fensome remained in Birmingham, but the two continued to see one another until about July 2011.

5. The offender mentioned to friends, and one of her tutors, her doubts of her ability to complete the BVC course. She hinted that things were going on in her life that were making her life difficult. She referred to her partner, but would provide no details. She confided in a similar manner to friends and received consistent support. Among other things she was advised to seek counselling and to go to the police.

6. The offender passed four of her 12 assessments with grades of outstanding and very competent, but then sought permission to defer her remaining eight assessments due, she said, to extenuating circumstances. They comprised assaults upon her by her partner. At or about the time when she made an application for special treatment on 8 March, the offender arrived late for a mock trial with visible injuries to her face and neck. Mrs Stringer, her tutor, telephoned the police. The offender declined advice from the Domestic Abuse Investigation Team, and when taken by Mrs Stringer to see a firm of solicitors she declined to seek a non-molestation order.

7. On 22 March 2011, the offender showed Mrs Stringer a text message which accused her of being "a fucking bitch for not being there". The offender claimed that the text had been sent by Mr Fensome while he was waiting for her outside her home; in fact, it was a text sent by the offender herself using a second telephone.

8. The offender deleted most of the text messages she had sent to Mr Fensome. Fortunately Mr Fensome had retained them all. Those messages were later to support his account of a harmonious relationship.

9. On 11 April 2011, the offender sent to Mrs Stringer written particulars of nine incidents she alleged against Mr Fensome, with all of which Mr Fensome was later charged.

10. On 24 May 2011, the offender went to the emergency department of Bath's Royal United Hospital with bruising and swelling to her head and face. She was advised to report the assault to the police and to stay in hospital so that the police could see her there. She waited and two police officers arrived to speak to her. She made a complaint that she had been assaulted while out walking by a man unknown to her. She said that she had been in a 2-year relationship with a person who lived in Birmingham, but she refused to name him. She said that she had been assaulted by him on some 30 occasions during the relationship. She had also been assaulted sexually. She claimed that she had been raped.

11. She was persuaded to accompany the officers to Bath Police Station where she spoke to DC Scane for several hours. She described one allegation of rape, but refused to allow the police officer to record the complaints that she was making. The officer was struck by an apparent lack of emotion for a person who had suffered from the events she described.

12. Investigation continued in consequence of which, after conversations with those who knew the offender in Bristol, Mr Fensome was arrested on 1 August 2011. He was charged and remanded in custody where he remained until released on bail on 8 August. The offender took part in 10 hours of video recorded interviews with the police during five days in August. As a result Mr Fensome was re-arrested on 23 August and charged with further offences. He was remanded in custody until 20 September when again he was admitted to bail. As a result he had spent some 36 days in custody in total.

13. We now turn to the specific and false allegations which form the basis of the offender's convictions at trial. She alleged that Mr Fensome had raped her on the first occasion, on 25 April 2009, just before the two

of them commenced home life under the same roof. She told the police that this had occurred at her mother's address. She claimed that Mr Fensome had forced her legs apart and raped her vaginally ejaculating inside her. The next morning she rebuffed his attempts to be affectionate with her, so he left the house.

14. On the contrary, it was Mr Fensome's recollection that the couple attempted to have consensual sexual intercourse, but had been constantly interrupted by the mother's dog so they gave up and slept in separate beds. What is more at 3 o'clock in the morning he had to leave the house because his shift started at 6 o'clock. That was count 1 on the indictment. Count 7 was an allegation of assault. The offender claimed that on 3 February 2011 she had been assaulted by Mr Fensome in the street in Bristol City Centre. Cell site data for their respective telephones demonstrated that the offender was not in Bristol City Centre that night and Mr Fensome was not even in Bristol; he was in Birmingham.

15. Counts 8 and 9 concerned an allegation of rape and a related allegation of assault. The offender said that on 13 February 2011 she had been returning to Bristol from her residential course held in Highgate House near Northampton. She had to change trains at Birmingham. She said that the offender met her there and that she reluctantly accepted his offer to drive her home. Instead she said he took her to his home in Birmingham where he assaulted her, kicked her and broke her finger. He then took her to his bed and raped her.

16. The allegation of a broken finger was significant because it was one of the injuries on which the offender relied in making an application on an Extenuating Circumstances Form to her college. The telephone evidence again gave the lie to these allegations. Cell site evidence demonstrated that the offender was in the Northampton area until 3pm on 13 February. She was in the area of Birmingham New Street just after 4pm, but only for the few minutes required for her to change trains. She sent a text while she was in Bristol at 6.17pm saying that she had not long got in. During the course of that day Mr Fensome's phone had not been in the area of Birmingham New Street at a time when the offender was at that place, and neither telephone was in the area of his home address at any time on that afternoon or evening.

17. Counts 10, 11, 12 and 13 concerned allegations of assault, rape, anal rape and a further assault. The offender said that around 5th and 6th March she had gone to Mr Fensome's home in Birmingham to collect some of her belongings. She claimed that while there Mr Fensome had assaulted her, grabbed her by the face and banged her head against the wall several times. The offender said that she then drove to Bristol. However, she had been followed by Mr Fensome who arrived unannounced and forced his way into her home. She described Mr Fensome assaulting her, leaving her to bleed, before he tied her up to a sofa with a boot lace and placed a hooded top over her face. She claimed that he then raped her. The incident continued, she said, when Mr Fensome kicked her in the ribs and in the back and tied her ankles together before raping her anally. She claimed that he had ejaculated a second time. Then she said she asked him to leave, at which point he grabbed her by the throat and strangled her until she lost consciousness.

18. The telephone data demonstrated that Mr Fensome was in Birmingham at 6.57 on 5 March and his work roster demonstrated that he was in work in Birmingham between 6am and 6pm on the following day. There was evidence from a pathologist called on behalf of the prosecution which could not prove that the offender's injuries, seen by others, were self-inflicted, but could demonstrate that they were consistent with self-infliction.

19. Counts 14 and 15 concerned a further allegation of rape and false imprisonment. The offender said that she had been raped at Mr Fensome's home on 25 April. She had gone there to collect the last of her possessions. To her surprise she found Mr Fensome in the property. He grabbed her, pulled her to the floor and tied her arms above her head with a cord. She was raped. Then she said that having raped her on two occasions Mr Fensome would not allow her to leave the house. The following morning she said that

he punched her several times to the head. She only managed to escape by threatening him with the screwdriver.

20. Her text messages to Mr Fensome, retained in the memory of Mr Fensome's phone, demonstrated that her visit to his home in Birmingham had been planned in advance and that the exchanges between them both before and after her visit had been entirely amicable. Nonetheless, on her return to Bristol the offender made a complaint to a friend, and to the doctor in hospital in Bath, that she had been assaulted, falsely imprisoned and raped. What she asked for was a letter for the university indicating that she did not intend to involve the police. That incident also formed the subject of a description in an Extenuating Circumstances Form written on 10 May 2011.

21. Count 16 was an allegation of assault. The offender suggested that Mr Fensome had assaulted her while she was out walking near to her mother's home in Bristol on the evening of 22 May. On that evening Mr Fensome had in fact attended a rock concert in Birmingham with friends until about 11pm. At 5.20am the following morning the offender sent a text message to him reading "Hey babe. How was the gig?"

22. The allegation in count 20 was of perverting the course of justice by making a false allegation of assault. On 19 or 20 June 2011, Mr Fensome was said to have visited the offender in Bristol. She showed to friends injuries that she said he had caused on 19 June. However, text messages between them demonstrated that throughout the relevant period they were in contact in affectionate terms.

23. As a result of the discoveries made, the police reviewed the case and in consequence the prosecution decided to offer no evidence against Mr Fensome on 13 January 2012 and not guilty verdicts were recorded in respect of him.

24. The offender was herself arrested on suspicion of perverting the course of justice on 8 November 2012. She admitted that the allegations that she had made had been false and that her various injuries had been self-inflicted. In her prepared statement she said, "the allegations were not true and I am very sorry that I made them. I find it very difficult to understand why I said these things." She was charged on 18 February 2013. Notwithstanding her confession, she pleaded not guilty to the indictment and the matter was tried at the Crown Court for the period we have indicated. It follows that Mr Fensome was required to give evidence during which, on the offender's instructions, he was accused of the very same offences which the offender had admitted were false.

25. The only explanation that could be tendered by the prosecution for the commission of these offences was that the offender was fearful for the results of her BVC assessment, which she wished to defer. So convincing were her complaints to friends and tutors that despite her reluctance to make official complaints to the police she found herself supporting her application for special treatment by making formal, cynical and false allegations against an innocent man. We observe that it is remarkable that throughout the period when she was making these false allegations she was in fact on affectionate and amicable terms with that very man.

26. As a child the offender had made allegations of sexual abuse against her father, but they had never been litigated and the judge could make no finding upon these. There was before the judge no psychiatric report which could have cast light on the motivation of the offender. The judge concluded that it was likely that the offender herself could not explain her recent conduct.

27. The judge's assessment of the offender and the seriousness of her offending, was, it is conceded on behalf of the Solicitor General, entirely appropriate. Amongst other things HHJ Lambert described the offender as:

"a bright star and a shining example of what could be achieved by those who lack special privilege or advantage. That went terribly wrong, with tragic consequences, when she began to lie;"

The judge described her conduct as relentless in her attempts to mislead. He said:

"no matter how willing some others may have been to believe [the offender] in the face of the most compelling contradictory evidence, she does bear the ultimate responsibility for circulating and then doggedly pursuing false rape allegations;"

He described her conduct as "designed to lead to Mr Fensome's convictions and sentence for terrible offences of rape". The judge took the view that had Mr Fensome been convicted of these offences he was at risk of many years imprisonment. The judge acknowledged that behaviour such as the offender's had "an insidious effect on public confidence in the truth of genuine complaints". That could have the effect of permitting "doubts to creep in where none should properly and in truth exist."

28. This offender, contrary to some others who make false allegations when under social pressure, was a woman of "high intelligence who went to significantly devious lengths to pervert the course of public justice". The judge regarded the offender's conduct as "utterly cynical, calculated and determinedly repeated".

29. The offender was of previous good character. The only other feature of mitigation was that following her arrest she commenced a sexual relationship with a long-standing friend. As a result they had a daughter together, who was nine months old at the time of sentence. The judge received a psychological report upon the effect of separation of the two. He also received a number of supportive testimonials from family and friends of the offender. A genuine bond had been formed between mother and baby. The family unit was strong and stable. The offender was a principal support for her disabled mother. Much of the material before the judge was supportive of the offender's innocence, which of course the judge was bound to ignore.

30. Having emphasised in his sentencing remarks the wickedness of the offender's offending, the judge concluded with the following words:

"I have taken into account the terrible consequences for a little child of her mother's imprisonment, but that can lead only to a significant reduction to the sentence, not, of course, to any possibility of mother being spared in a situation such as this, sad and deeply tragic though that is.

What the defendant did here was cold, calculated, sustained, repeated and on any analysis utterly wicked. I am obliged in the circumstances, however, to pass the least sentence which is commensurate with the seriousness of the offending.

Considering all these matters, I consider the right sentence for each false rape allegation is one of 3½ years' imprisonment, and the other offences, 9 months concurrent on each. That is the sentence which the accused must serve."

31. Our attention has been drawn to several previous decisions of the court. There are four that deserve particular attention. The first is a decision of 6 June 2008: R v Beeton [2008] EWCA (Crim) 142, [2009] 1 Cr App R~(S) 46 (Scott Baker LJ, Burnett J and HHJ Roberts QC). Following a plea of guilty the defendant was sentenced to 4 years' imprisonment upon four counts of perverting the course of justice, having made false allegations of violent rape against two separate males, one of whom was 17 years old. From an early stage the police had suspicions about the truth of the allegation, but the defendant continued to make it and made further and fresh allegations as the inquiry progressed. The defendant was diagnosed

with a personality disorder. It was thought that she may have been attempting to conceal a consensual affair with another man from her husband.

32. Burnett J, giving the judgment of the court, referred to the serious effect that false allegations of sexual misconduct could have upon genuine victims of sexual offences, and the administration of justice in such cases. Nonetheless the sentence was reduced to 3 years' imprisonment. One of the factors which influenced the court on that occasion was that the defendant was a mother with two children aged 4 and above.

33. The second case is R v McKenning [2008] EWCA (Crim) 2301, [2009] 1 Cr App R (S) 106. The court, over which the Lord Chief Justice, Lord Judge, presided, considered an application for leave to appeal by the applicant, who had been sentenced to 2 years' imprisonment following her plea of guilty to a single count of perverting the course of justice. The applicant made a false allegation of violent rape against an innocent man, whom she had invited back to her home for the purpose of sexual intercourse. She admitted the falsity of the allegation explaining that her partner was in prison and that she feared his anger when he was released.

34. The court refused the application. Lord Judge explained at paragraphs 15 to 18 of his judgment, delivered on behalf of the court, the harm that cynical abuse of the justice system can cause. Commencing at paragraph 15 he said this:

"15. Our attention has been drawn to a number of cases.

They were not, as far as we are aware, before the judge; but they do not sufficiently focus on the serious policy question which the judge addressed. The judge noted the effect of this offence on the victim, Mr Holling. He pointed out that the full panoply of measures to help women who were genuinely victims of rape had been deployed; all that was wasted; the victim suffered the humiliation to which we have referred in the course of the narrative. There had been ample opportunity for the applicant to tell the truth and bring the ordeal to an end. He referred to the so-called 'low conviction rate' for rape, much of which, the judge said, was ill-informed, but he pointed out that when the public knew that people like the applicant were wicked enough falsely to cry rape, that would affect the minds of juries assessing the evidence of genuine victims.

16. Our view can be briefly summarised. We endorse the approach taken by the judge. This was not, as so many cases involving the offence of doing an act tending or intended to pervert the course of public justice, a case of a guilty man or woman seeking to avoid responsibility for a crime -- often and frequently a relatively minor motoring offence. That is bad enough; but of its kind this was a very serious offence. Sexual intercourse with a woman without her consent is a shameful crime. When proved it merits, and it receives, heavy punishment. The reality must, however, be faced that when rape has taken place it is frequently very difficult to prove. It is also the case that when the defendant is truly innocent, a false allegation can be extremely difficult for him to refute. That is why, after sexual intercourse has taken place between adults, the investigation and prosecution of the allegation of rape presents the police and the Crown Prosecution Service, and, if the matter eventually goes to court, the jury with highly sensitive and sometimes desperately difficult decisions. Currently this is a very serious problem. The consequences for an innocent man against whom the allegation is made are very serious. In this case there was enough independent evidence eventually to enable the investigators to discover that the potential defendant was truly an innocent man. In the end he was fortunate. But for the meantime his entire life must have had a nightmarish quality. That lasted for three months. It could have been brought to an end at any time by one word from the applicant.

17. However, quite apart from the consequences to Mr Holling, this allegation involves more than the individual victim. Every false allegation of rape increases the plight of those women who have been victims of

this dreadful crime. It makes the offence harder to prove and, rightly concerned to avoid the conviction of an innocent man, a jury may find itself unable to be sufficiently sure to return a guilty verdict.

18. This offence caused great problems for the victim; but it also damaged the administration of justice in general in this extremely sensitive area. In our judgment the sentence imposed by the judge fell within the appropriate range..."

35. Thirdly, in R v Vine [2011] EWCA (Crim) 1860, [2012] 1 Cr App R (S) 78 (Elias LJ, Wyn Williams J and Sir David Clarke the court considered a sentence of 4½ years' imprisonment imposed upon the offender in respect of false allegations of rape made against nine separate men. She had pleaded guilty on re-arraignment. She was aged 26.

36. Following a contested trial it was the view of the court that the appropriate sentence would have been 6½ to 7 years' imprisonment. In the view of the court it was not demonstrated that the sentence imposed was manifestly excessive, and the renewed application for leave to appeal was refused. Several of the observations earlier made by the Lord Chief Justice were reiterated in the judgment of Sir David Clarke given on behalf of the court.

37. Finally, we have considered the decision of the court in R v Petherick [2012] EWCA (Crim) 2214, [2013] 1 WLR 1102 (Hughes LJ (Vice-President), Wilkie J and Popplewell J). Having earlier visited a submission that the United Nations Charter on the interests of children in R v Boakye [2012] EWCA (Crim) 838, Hughes LJ confronted the issue as to the extent personal mitigation involving the interests of children, and defendant parents of children, could affect the assessment of sentence. It is unnecessary to repeat the examination of the court of the relevant Article 8 and other factors. However, the full judgment deserves close attention.

38. At paragraph 20 the Vice-President expressed the view that a criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, would be effected to take it into consideration. The court would ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve. The Vice-President emphasised that the context in which the interests of family may closely be engaged is in consideration of the question whether a custodial sentence was appropriate in the first place for offences that did not obviously require an immediate sentence of imprisonment. Where imprisonment was inevitable at paragraph 24 the Vice-President continued:

"...in a case where custody cannot proportionately be avoided, the effect on children or other family members *might (*our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges."

39. We note that in the case of Petherick a young woman of good character had caused death by dangerous driving while under the influence of alcohol. In contradistinction to the present case that offender had demonstrated genuine remorse. The court took a starting point of 8 years' imprisonment, but reduced it for the plea of guilty to 5 years and 4 months and further reduced it by a period of 18 months on the grounds of the offender's personal mitigation, which included her relationship with her young son.

40. The judge was referred, in particular, to the judgment of the Lord chief Justice in McKenning by prosecuting counsel, Mr Bartlett, during the course of the offender's sentence hearing. The judge's sentencing remarks make clear that he had them fully in mind when he considered what was the appropriate and proportionate ultimate sentence. He did not identify his provisional starting point before giving effect to

the personal mitigation available to the offender. We must therefore consider what would have been the appropriate starting point and therefore whether the adjustment made by the judge was arguably excessive.

41. This was, without doubt, a serious case of its type. Not only had the offender set out falsely to accuse the victim, she also resiled from her confession and Mr Fensome was required to respond to the allegations a second time at the offender's trial. That is a factor which does not increase sentence, but it does mean that no adjustment is appropriate for regret and remorse - there was none. In our judgment, the appropriate starting point before consideration of personal mitigation was in the range of 5 to 6 years' imprisonment.

42. There are two factors which, in our view, may affect the judgment of the appropriate adjustment for the personal circumstances of a young mother with an infant child. We bear in mind the words of the Vice-President that they may provide significant personal mitigation, but may not necessarily do so: first is the potential harm to an infant child of separation from her mother and second is the impact upon the offender of that separation. The burden of imprisonment may be significantly greater for such an offender than it would be for a person without those caring responsibilities and who is sensitive to the performance of those caring responsibilities towards a young child. The interests of the child will be a consideration, but not the principal consideration when assessing the appropriate sentence.

43. In the experience of this court the position of a parent and young children may well determine whether a short sentence of imprisonment can be avoided at all, or alternatively suspended. In a more serious case the length of the sentence may be mitigated so that in compliance with section 153(1) of the Criminal Justice Act 2003 the custodial sentence is for the shortest term commensurate with the seriousness of the offence.

44. It is accepted on all sides that HHJ Lambert is a thoughtful and experienced judge. We have no doubt that he had the relevant factors well in mind. He also had the advantage of observing this offender during an 11-week trial. While he had to sentence a woman who had cynically manipulated the criminal justice system to the enduring harm of her victim, he was also sentencing a woman who had, upon the information available to him, been significantly changed by the experience of motherhood. We have the advantage of seeing two reports from the prison which post date the sentence hearing. It seems to us to support the judge's assessment of the offender. The prospect that the child might be able to join her mother in a mother and baby unit has disappeared. It follows that the sentence will impact both upon the child and upon the offender in the way that we have endeavoured to explain.

45. We grant leave to the Solicitor General. However we regard this as an exceptional case on its facts. We are unable to find that the sentence imposed on this individual was unduly lenient. The matter was for an assessment by a capable, experienced and thoughtful judge. We shall not interfere with his judgment.