The Criminal Appeal Reports (Sentencing) 1990/1991

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ATTORNEY GENERAL'S REFERENCE NO.7 OF 1989 (PAUL ANTHONY THORNTON)

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Leggatt and Mr. Justice Hutchison): January 12, 1990

Rape—rape of former sexual partner—length of sentence—application of guidelines in Billam (1986) 8 Cr.App.R.(S.) 48.

Two years' imprisonment increased to four and half years in the case of a man convicted of raping a woman with whom he had previously had a sexual relationship.

The offender was convicted of rape. The offender met the complainant, then aged 16, in 1987: they lived together for about 18 months, and became engaged, but the relationship deteriorated and sexual intercourse ceased after December 1988. In February 1989 the offender asked the complainant to visit him, which she did. When she arrived at his flat, the offender lost his temper, pushed her across a room, dragged her over to a bed and removed her clothes before raping her. The complainant left the flat in a distressed condition. The offender contested the case on the ground that he did not realise that she was not consenting, but was convicted. Sentenced to two years' imprisonment.

Held: the Court had to determine whether the sentence was so far outside the proper limits of what a sentence for this type of crime should be as to merit interference. The fact that the Court would have passed a more severe sentence than the sentencer imposed was not enough: the question was whether the sentence was so far out of line as to be outside the proper limits of a judge's undoubted discretion. This was what was meant by "unduly lenient." The sentencer had been referred to *Stockwell* (1984) 6 Cr.App.R.(S.) 84 and *Cox* (1985) 7 Cr.App.R.(S.) 422, but not to *Billam* (1986) 8 Cr.App.R.(S.) 48, or *Berry* (1988) 10 Cr.App.R.(S.) 13, *Mills* (1988) 10 Cr.App.R.(S.) 369, and *Workman* (1988) 10 Cr.App.R.(S.) 329. The first two cases were decided before the guidelines for sentencing in cases of rape were set out in *Billam*. In *Stockwell* and *Cox* sentences for the rape of a separated or divorced wife were reduced to two years and three years respectively, in both cases on a plea of guilty. In *Berry*, decided after *Billam*, a sentence of six years was reduced to four for the rape of a former cohabitee, the Court recognising that while *Cox* made plain the significance of a previous settled sexual relationship, the cases did not provide guidance as to the correct level of sentence, as they antedated *Billam*. In the two later cases, sentences of four years and five years were upheld, in each case for the rape of a woman with whom the appellant had had a previous sexual relationship. The way in which the Court approached the present case was this: the mere fact that the parties had lived together over a period of time and had regular sexual intercourse did not license the man to have sexual intercourse with the girl willy-nilly once that cohabitation had ceased. It was however a factor to which some weight could be given, as was indicated in *Berry*. The earlier, pre-*Billam* cases of *Stockwell* and *Cox* gave very little assistance. The feature of this case which singled it out from the others was that there was no plea of guilty. The Court had come to the conclusion that the sentence was outside the proper limits of the judge's discretion in such cases and was unduly lenient. The Court would substitute a sentence of four and a half years' imprisonment.

Cases cited: *Stockwell* (1984) 6 Cr.App.R.(S.) 84, *Cox* (1985) 7 Cr.App.R.(S.) 422, *Billam* (1986) 8 Cr.App.R.(S.) 48, *Berry* (1988) 10 Cr.App.R.(S.) 13, *Mills* (1988) 10 Cr.App.R.(S.) 369 and *Workman* (1988) 10 Cr.App.R.(S.) 329.

References: rape, Current Sentencing Practice Commentary B4–1.3(E); [1990] Crim.L.R. 436

J. Bevan for the Attorney General; *A. Dalgleish for the offender.*

LORD LANE C.J.: This is a reference under section 36 of the Criminal Justice Act 1988. It arises in the following circumstances.

On September 15, last year at St. Albans Crown Court the offender was sentenced to two years' imprisonment for rape after a plea of not guilty.

The facts of the case, in so far as they are relevant, are these. The offender is now 31 years of age. When he was 28 he met the complainant, who was then a young girl of 16, in the summer of 1987. From April of that year, or thereabouts, they lived together until Christmas of 1988. In June 1988 it seems they became engaged, but the relationship thereafter deteriorated. On about December 27, the victim left. That was the end of the relationship so far as sexual intercourse was concerned between them.

The complainant wished thereafter that they should simply remain friends, but the offender seems to have had the wish to renew the sexual relationship with the girl. There was an occasion in January 1989 when they had met together but no sexual intercourse took place.

On February 23, the offender telephoned the girl asking her to visit him and she did so. He apparently did not answer the door, probably because he was under the influence of drink inside the flat. However the next day he renewed the invitation and she accepted once again and went along to the flat. It was then that events took place which gave rise to this prosecution.

The complainant thought that the offender was somewhat tense, "uptight" was the expression used, and he started to talk about the break in their relationship and plainly started to lose his temper, because he kicked an electric fire across the room. Then started a series of violent acts, although perhaps not of extreme violence. He pushed her or kicked her across the room. She declined to remove her jacket as he wished her to and he seized her by the lapels and threw her down. At that stage, according to her, he told her that she would hate him for what he was about to do. When he gave evidence he asserted that although that expression had been used, it was at the end of the incident that it was used and not at the beginning, as the girl suggested.

She was then dragged over to the bed where her clothes were removed. She tried to stop him pulling off her jeans by raising her legs up to her shoulder, and then curled herself up on the bed in order to protect herself from the assault and to protect herself from what no doubt she feared was about to happen. He held her by the wrists and forced her legs apart and in short he penetrated her with his penis. He did that for short periods of time on two occasions. She had not said "no" in so many words, because, according to her, she was scared not only by what was going on but by what his behaviour had allegedly been in the past. When it was all over, according to her, she was told to wipe her eyes and once again made the remark, according to her, that she would hate him for what he had done.

She left the flat. She was in a distressed condition. She had a bleeding lip, which was noticed by one of the people she met outside the flat and she had a tender point on the back of her head due to what had happened during the course of this incident.

The offender pleaded not guilty to this offence. But in order to put that properly in its context, it is fair to him to point out that this was not an all out attack upon the girl's credibility, as one sometimes regrettably finds in these cases, but he was

advancing the proposition that although it may be that she was not consenting, he was firmly and genuinely of the belief that she was consenting and that accordingly what he was doing was not without her consent and approval.

The complainant told a friend what had happened and, to cut a long story short, eventually the police were called in. The offender was interviewed on a number of occasions. He admitted sexual intercourse immediately but denied rape. He said on one occasion he knew that she did not want sexual intercourse, but nevertheless he believed that when it came to it she was not withholding her consent.

The primary defence was, as I have indicated, that he did not realise that she was not consenting. I read a passage from the summing up where the judge is dealing with what the offender himself had said:

> "He said, 'She had tears in her eyes but she wasn't bawling or crying. She never said she didn't want sex and if she had I would have stopped. I got off, she got dressed and left. When she left,' he said, 'I said she had reason to hate me.' He said, 'I said that because I was confused. I didn't think things had gone right. I didn't think she was not consenting. She didn't seem totally happy about the whole thing. If she had told me to stop I would have done.' "

That in brief summary was the situation which the judge had to assess when determining what sentence to pass.

It is submitted by Mr. Bevan, who presents this reference, that the sentence of two years' imprisonment was so far outside the proper limits of what a sentence for this type of crime should be as to merit interference by the Court. On the other hand Mr. Dalgleish submits to us, correctly, that a judge has a discretion and the mere fact that this Court may believe that the sentence is too short, or would have passed a sentence itself more severe than that which the learned judge passed, is not enough.

With those sentiments we agree. What we have to determine is whether this sentence is so far out of line as to be outside the proper limits of a judge's undoubted discretion when sentencing for a criminal offence. That, in our judgment, is what "unduly lenient" in these circumstances means.

It is plain from what the judge said in the sentencing remarks that two cases had been drawn to his attention. Those were the cases which he mentions, of *Stockwell* (1984) 6 Cr.App.R.(S.) 84 and of *Cox* (1985) 7 Cr.App.R.(S.) 422. He mentions a number of cases of "similar facts"—those are the words that he uses—but he does not specify which, if any, of those other cases he had referred to himself or had been drawn to his attention. Mr. Dalgleish's recollection is that those were the only two cases which were mentioned, and also Mr. Dalgleish's helpful recollection is that the judge was not referred to the well known case of *Billam* (1986) 8 Cr.App.R.(S.) 48, or to the other cases to which we have been referred on this reference, namely *Berry* (1988) 10 Cr.App.R.(S.) 13, *Mills* (1988) 10 Cr.App.R.(S.) 369 and *Workman* (1988) 10 Cr.App.R.(S.) 329. It is perhaps necessary in those circumstances—I hope we may be forgiven for doing so—to take a look at some of those cases in order to see what help we can get from previous decisions of the Court.

First of all we refer to the two cases to which the learned judge makes reference, namely *Stockwell* and *Cox*. It should be said at the outset that each of those two cases was decided pre-*Billam*, *Billam* being the well known guideline case in which this Court endeavoured to set out principles by which courts should be guided in dealing with offences of rape.

Stockwell was a case where three years' imprisonment was reduced to two in the case of a man who had raped his wife following their separation after a period of 10 years of marriage. The headnote reads: