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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 2020 01141 A3



Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 10 December 2020

Before:

LORD JUSTICE SINGH

MR JUSTICE EDIS

HIS HONOUR JUDGE MARTIN PICTON

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

REGINA
V
IAN DAVID VACCIANA

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MR JONATHAN POLNAY appeared on behalf of the Solicitor General
MR NADEEM AULLYBOCUS appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1. This is an application on behalf of the Attorney General for permission to make a reference to this court under section 36 of the Criminal Justice Act 1988 ("the 1988 Act").
2. On 6 February 2020, at the Crown Court at Snaresbrook, the respondent was convicted by a jury of various offences.
3. On 16 March 2020 he was sentenced as follows by His Honour Judge Alex Gordan.
4. On count 1, which was an offence of attempted rape, there was a sentence of 4 years' imprisonment.
5. On count 2, an offence of causing grievous bodily harm with intent, there was a sentence of 5 years' imprisonment.
6. On count 5, another offence of causing grievous bodily harm with intent, there was also a sentence of 5 years' imprisonment.
7. On count 4, assault occasioning actual bodily harm, there was a sentence of 20 months' imprisonment.
8. On counts 7 and 9, which were two offences of common assault, there was no separate penalty imposed.
9. On count 10, which was a multiple instance count alleging at least two offences of rape, there was a sentence of 8 years' imprisonment.
10. The judge regarded the most serious offence as being that in count 8, which was an offence of rape. Accordingly, the judge made the other sentences concurrent and imposed the longest sentence on count 8. He imposed an extended sentence under section 226A of the Criminal Justice Act 2003 of 17-and-a-half years, comprising a custodial term of 13-and-a-half years and an extension period of 4 years.

11. The total sentence therefore was one of an extended sentence of 17-and-a-half years, comprising a custodial term of 13-and-a-half years and an 4-year extension period.
12. Relevant ancillary orders were made, including an indefinite restraining order under section 5 of the Protection from Harassment Act 1997. The offender was placed on the sex offenders register for an indefinite period and the appropriate statutory surcharge was imposed.

Factual Background

13. The offender and SJ began a relationship in 2017. They lived together in the offender's flat. SJ is Latvian and speaks only poor English. In February 2018 the offender and SJ had an argument. The offender attacked her. Following a violent struggle, he tore her underwear off and forced her on to her hands and knees. He then attempted to penetrate her anus with his penis. This was the subject of count 1, attempted rape. She had not previously experienced anal intercourse. SJ fought back furiously. She screamed at the top of her voice. She managed to get her dressing gown and escaped.
14. On 20 March 2018 SJ came downstairs and found the offender drinking beer with another woman. She became jealous and threw a slipper at him, which hit him in the face. He chased her back upstairs. He caught her at the top of the stairs and pushed her back down by her spine. She landed at the bottom of the stairs on her left ankle, causing a fracture. This was the subject of count 2, causing grievous bodily harm with intent. He then followed SJ down the stairs. She begged him to leave her alone as she was lying on the ground. Nevertheless he beat her with his fists and tried to drag her out of the flat by her hair. The other woman in the flat intervened and the offender stopped. SJ escaped and hobbled to a hospital. She was covered in bruises. She lied to doctors to protect the offender, saying that she had accidentally fallen down the stairs.
15. On 4 September 2018 the offender and SJ had an argument. He struck her and pushed her to the floor. He then stamped on her ribs. She attended hospital. She was found to be covered in bruises and had a fractured rib. This was the subject of count 4, assault occasioning actual bodily harm. SJ told the police that the offender had attacked her, although she declined to provide a witness statement. The offender was arrested for this attack on 18 September 2018. When interviewed he answered "No comment" to all questions. He was not charged with any offence at that time.
16. During the latter stage of their relationship the offender would come into SJ's room and rape her. These rapes did not involve specific violence, but SJ did fear that were she to resist she would be assaulted. This was the subject of count 10, which was pleaded as occurring on at least two occasions when rape was committed.

17. On 21 May 2019, following an argument, the offender grabbed SJ by the hair. He then took her left arm and smashed it against a banister with extreme force. This was the subject of count 5, causing grievous bodily harm with intent. SJ suffered excruciating pain and believes she may have passed out. When she came too, the offender was still beating her. Her arm was red and swollen. She did not stop working or get medical attention as she had already had time off work for her broken ankle. When she went to Latvia she sought medical attention. It was discovered that her left arm had a fracture to the distal radius. It was put in a cast and sling.
18. On 11 July 2019 the offender grabbed SJ by the hair and dragged her around the room, causing a large clump of hair to come out. This was the subject of count 7, common assault.
19. On 16 July 2019 the offender and SJ were again at home. They had an argument during which SJ slapped the offender. He pushed her on to the bed, against the radiator, and held her good arm behind her back. She was unable to fight back because her other arm was still in a plaster cast and sling. The offender then dragged SJ into another room, backwards by her hair, where he bent her over a mattress. He forced her face on to the mattress with a degree of force that meant she could not breathe. He then began to strangle her. She panicked. She was able momentarily to free herself before he got hold of her again. He forced her on to her back and prised her legs open using his own hands and legs. He violently penetrated her and ejaculated inside her. This was the subject of count 8, an offence of rape. He laughed at her as she cried. She suffered extensive bruising and a sore neck.
20. On 17 July 2019, when SJ entered the house quietly so that the offender would not notice her, he shouted at her before throwing her on to the bed and pushing her on to the floor. He pulled her head so hard she felt "goose bumps" come out on her head. He then strangled and choked her. This was the subject of count 9, common assault. SJ then called 999. She suffered difficulty breathing, and her neck was in severe pain and had to be braced.
21. The offender was arrested on 24 July 2019. He submitted a prepared statement in which he denied committing all of the offences alleged against him and accused SJ of providing a false and malicious account.
22. The offender was born on 18 September 1962. He has ten convictions for nineteen offences. Of particular relevance, on 26 May 2010 he was convicted of rape and sentenced to 6 years' imprisonment. The background facts were that, on 12 July 2009, he had met a young woman, taken her back to his flat and violently raped her.

23. His other offending took place between 1980 and 2007, including offences of dishonesty, possession of drugs and motoring offences.
24. A pre-sentence report assessed the offender as posing a high risk of serious harm to known adults. The author of the report said that the offender consciously or unconsciously targeted the victim because of her particular vulnerabilities, that she had little understanding of English and was isolated from others. His motivation for committing the offences was assessed to be the "need to exert dominance over the victim".
25. The sentencing judge also had the benefit of a victim personal statement from SJ. This gave evidence of the long-term physical and psychological effects of the respondent's offences against her.

The Judge's Sentencing Remarks

26. In his sentencing remarks the judge said that he would pass a sentence on count 8 which would be aggravated by the existence of the other counts, for which he would pass shorter concurrent sentences or no separate penalty at all. He also said that he had regard to the principle of totality.
27. On count 1 the judge concluded that this was a category 3 case. He did not find that severe psychological or physical harm was caused to SJ, nor that the incident was sustained or that considerable violence was used. For such a case the definitive guideline recommends a starting point of 5 years' custody, with a range of 4 to 7 years for the completed offence. The judge imposed a sentence of 4 years.
28. On count 2 the judge said that this fell towards the bottom end of category 2 harm and culpability was the lower of the two available categories. Accordingly, the guidelines suggest a starting point of 6 years' custody, with a range of 5 to 9 years. The offence was aggravated by the presence of another person who witnessed the beating and the fact that the offence was committed at home. The judge imposed a sentence of 5 years.
29. On count 4 the judge found that there was greater harm, but that a weapon had not been used since there was no evidence as to what the offender had on his feet at the time. The offender did deliberately do more than was necessary for the commission of the offence and so his culpability was higher culpability. In those circumstances the guideline recommends a starting point of 18 months' custody, with a range of 1 to 3 years. The judge imposed a sentence of 20 months.

30. On count 10 the judge placed this in category 3 so far as harm is concerned and category A culpability. For such cases, the Definitive Guideline recommends a starting point of 7 years' custody, with a range of 6 to 9 years. The judge had regard to the aggravating feature of the offender's previous conviction for rape. He imposed a sentence of 8 years' imprisonment.
31. On count 8 the judge concluded that there was a combination of severe psychological and physical harm and furthermore the offence was of a sustained nature. The offender had used violence which was more than was inherent in the commission of the offence. Accordingly, the harm was in category 2. The culpability fell into category A because of his previous violence against the victim. Accordingly, the Definitive Guideline recommends a starting point of 10 years' custody, with a range of 9 to 13 years. The aggravating features were that the offender had a relevant previous conviction for rape, the location of the offence and the fact that he ejaculated.
32. The judge said that if he had only been passing sentence in relation to count 8 it would have been a sentence of 10 years and 6 months' imprisonment. That was slightly above the starting point recommended in the guideline. Having regard to the fact that the judge had to impose sentences for the other matters, he concluded that the least period of imprisonment he could have imposed would have been one of 13 years 6 months' imprisonment. That was outside the category range because of the aggravation of the seven other counts.
33. The judge concluded that the offender met the criteria for dangerousness. He did not consider that a life sentence was necessary, but he concluded that a determinate sentence would not be sufficient to protect the public. Accordingly, he imposed an extended sentence to protect the public in the future. As we have mentioned, that extended sentence comprised a custodial term of 13-and-a-half years and an extension period of 4 years.

Relevant Sentencing Guidelines

34. The Sentencing Council has published a Definitive Guideline for offences of rape in the case of offenders aged 18 or over who are sentenced on or after 1 April 2014. A Category 1A offence has a recommended starting point of 15 years' custody, with a range of 13 to 19 years. A category 2A offence has a starting point of 10 years' custody, with a range of 9 to 13 years. The guideline states that offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate. The guideline also states that a case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features.

35. Finally, the guideline states that the extreme nature of one or more category 2 factors, or the extreme impact caused by a combination of category 2 factors, may elevate the case into category 1.
36. The relevant guidelines include the Definitive Guideline in relation to cases that involve domestic abuse which applies to all offenders aged over 16 who are sentenced on or after 24 May 2018. The guideline states that the domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship.
37. Our attention has also been drawn on behalf of the Attorney General to the decision of this court in Joseph [2001] 2 Cr App R (S) 88 in which HHJ Hyam QC gave the judgment of the court and said "... we must bear in mind ... that attempted offences usually carry a lesser sentence than that imposed for the commission of the full offence, but in this instance that is not a potent factor because the seriousness of this offence was that it was only the determination of the victim that prevented him from being robbed of his computer". In the present case it is submitted on behalf of the Attorney General that the offender persisted in his attempts to rape his victim under count 1. The fact that he was unsuccessful was only due to the fact that his victim fought him off.

Submissions for the Attorney General

38. On behalf of the Attorney General it is submitted by Mr Polnay that the sentences passed were unduly lenient, in that, first, given the number and weight of aggravating features and determinants of harm in count 8, the judge ought to have imposed a sentence for that offence alone at the very top of (if not above) the range recommended in category 2A of the Definitive Guideline. In particular, he submits insufficient regard was had to the fact that the offender had previously been convicted of rape.
39. Secondly, he submits the sentence imposed by the judge did not sufficiently reflect the fact that the offender was to be sentenced also for two offences of causing grievous bodily harm with intent, two further offences of rape, an attempted rape and other serious assaults. In those circumstances it is submitted that the overall sentence was unduly lenient, and permission should be granted to make a reference under section 36 of the 1988 Act.

Submissions on behalf of the Respondent

40. We have had submissions from Mr Aullybocus on behalf of the offender. He submits that the judge was in a strong position, having presided over the trial, properly to weigh the aggravating features and other aspects of this case. The judge was well aware of the offender's previous conviction for rape and it is submitted appropriate weight was given to it. Mr Aullybocus submits that the judge was entitled to place the various offences in the categories of harm and culpability which he did, having heard the submissions and considered the evidence as a whole. He also submits that the judge was entitled to take account of the age of the previous conviction for rape, the personal mitigation available to the offender and the principle of totality.
41. In that regard he submits, in particular, that there were mitigating features, and two are drawn to this court's attention in particular. First, that the offender had recently suffered bereavement because his mother had died. In our view, this can only be given limited weight in the circumstances of the present case. Secondly, he submits that now at least, if not at the time the sentence was passed, the court is aware of the current pandemic and appropriate weight should be given to the effect of that and in particular the severe restrictions in prisons which have ensued. We will return to that issue in due course.
42. Finally, Mr Aullybocus submits that the judge adopted the course which was suggested to him by the prosecution at the sentencing hearing. That is to make count 8 the "headline" offence and pass shorter concurrent sentences on the other counts. He also points out that it was the prosecution case before the judge that count 8 fell within category 2A rather than 1A in the Definitive Guideline on rape.

The approach to be taken by this court

43. In giving the judgment of this court in Attorney-General's Reference (No 4 of 1989) (1990) 90 Cr App R 366, Lord Lane CJ said at page 371:
- i. "The first thing to be observed is that it is implicit in the section [section 36] that this Court may only increase sentences which it concludes were *unduly* lenient. It cannot ... have been the intention of Parliament to subject defendants to the risk of having their sentences increased -- with all the anxiety that this naturally gives rise to -- merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. ... it

must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature" [emphasis in original].

44. Lord Lane went on to state that even where this court considers that a sentence was unduly lenient it has to a discretion as to whether to exercise its powers.

45. On behalf of the respondent particular emphasis has been placed on the following passage in the judgment of Lord Lane CJ:

- i. "Without attempting an exhaustive definition of the circumstances in which this Court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned."

46. In the present case, Mr Aullybocus submits that this court should have regard to the Covid 19 pandemic, which he submits renders at least a part of the sentence more severe than it otherwise would have been. He invites this court to take that fact into account in concluding that the sentence should not be regarded as unduly lenient "in these unprecedented times".

Conclusions

47. We do not consider that the judge's categorisation of the main offence in count 8 as falling within category 2A of the Definitive Guideline relating to offences of rape can be upset by this court; indeed, at the hearing before us Mr Polnay did not suggest that this court should upset it. In any event the judge was better placed than this court can be to make that assessment, in particular because he had heard all of the evidence at the trial.

48. The principal complaint, as we understand it, that is made on behalf of the Attorney General is that there were so many and such serious other offences for which concurrent sentences were passed that the custodial term in respect of count 8, which had been deliberately made the "headline" offence, was simply far too short. We recall that the

sentence for count 1, an offence of attempted rape, was 4 years' imprisonment. Counts 2 and 5, which were two separate offences of causing grievous bodily harm with intent, attracted sentences of 5 years' imprisonment each. Count 10, which was an allegation of at least two rapes, attracted a sentence of 8 years' imprisonment. Count 4, which was an offence of assault occasioning actual bodily harm, led to a sentence of 20 months' imprisonment. It would have been quite wrong for those sentences to be made consecutive. They were rightly made concurrent, but that had the consequence that the custodial term imposed for the main offence (count 8) had to be sufficient to reflect the true extent and gravity of the respondent's overall offending. This could not be done in a mathematical way by adding up the various sentences passed because a very substantial reduction in the overall length of the sentence was necessary in order to reflect the principle of totality. Nevertheless, we have come to the conclusion that the custodial term of 13-and-a-half years was simply too short in the circumstances of this case.

49. We are not persuaded by the submission for the respondent that any reduction is warranted on the facts of this case by reason of the current pandemic. In that context we have had regard to the decision of this court in Attorney-General's Reference (R v Manning) [2020] EWCA Crim 592; [2020] 2 Cr App R (S) 46 in the judgment of Lord Burnett of Maldon CJ at paragraph 41; and Whittington [2020] EWCA Crim 1560 in the judgment of Julian Knowles J at paragraphs 26-30. In the present case the sentence was passed before the first "lockdown" was imposed in late March 2020. On any view the time which the respondent will have to serve in prison will be a long period. In those circumstances the current pandemic does not have any material impact on the appropriate sentence.

50. In all the circumstances of this case, we consider that the minimum custodial period which should have been imposed in a case of this gravity to reflect the overall offending of the respondent was a term of 18 years. Taking into account the principle of totality, that is the minimum custodial term that was reasonably required and would be just and proportionate. We do not consider that the other sentences including the extension period need to be disturbed by this court. We therefore grant permission to the Attorney General to make a reference under section 36 of the 1988 Act. We quash the sentence which was imposed on count 8 and substitute for it an extended sentence comprising a custodial term of 18 years and an extension period of 4 years. That makes a total extended sentence of 22 years.

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