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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101817/A4

NCN: [2021] EWCA Crim 1240

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 22 July 2021

LORD JUSTICE HOLROYDE

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE MURRAY

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

REGINA

v

MATTHEW ROBERT HUSBAND

Computer Aided Transcript of Epiq Europe Ltd,  
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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR J POLNAY appeared on behalf of the Attorney General.

MR M DACEY appeared on behalf of the Offender.

**J U D G M E N T**

1. LORD JUSTICE HOLROYDE: This case concerns a sentence imposed for sexual offences against a 13-year-old girl, whom we will call "V". She is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.
2. After a trial in the Crown Court at Luton before HHJ Lucie and a jury, Matthew Husband was convicted of offences of rape (count 1) and assault by penetration (count 2). On 18 May 2021 he was sentenced to concurrent terms of 6 years 6 months' imprisonment on count 1 and 3 years' imprisonment on count 2. Her Majesty's Solicitor General believes the total sentence of six-and-a-half years to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
3. For present purposes, a brief summary of the facts is sufficient. Mr Husband was aged 28 at the time of the offences, a married man of previous good character, living with his wife and in good employment. We understand that V (aged thirteen-and-a-half at the relevant time) had some communication difficulties associated with anxiety and trauma and also displayed some signs of Autistic Spectrum Disorder, but that she did well at school. She is a member of the extended family of Mr Husband and his wife and had stayed with them on a few occasions. She did so during a school holiday in February 2019. The offences were committed one evening during that visit.
4. On that evening, both Mr Husband and V were drinking alcohol. It is not suggested that Mr Husband was deliberately getting V drunk, but V in fact drank so much that she vomited. Mr Husband's wife went to bed. It seems that V lay down, perhaps on the sofa, and Mr Husband lay next to her. He thought she was asleep but she was in fact awake. He digitally penetrated her vagina. V was too frightened to let him know that she was awake. Mr Husband then left the room for a short time. On his return he put on a condom and raped V vaginally. After that he carried her to bed. It seems clear that he thought V had been asleep throughout.
5. V quickly reported these offences. At trial, she gave evidence with the assistance of an intermediary. Mr Husband denied any form of sexual activity with V. He gave an explanation for the finding of the used condom, which the jury must have disbelieved. He was convicted of the two offences which we have mentioned.
6. The judge was assisted by a pre-sentence report and a helpful report by a consultant psychologist, Mr Graham Rogers. Both reports address the issue of dangerousness. Mr Rogers assessed Mr Husband as being of below average intelligence and potentially borderline disability, and as lacking sophistication in his thinking and reasoning. His opinion was that Mr Husband was an opportunistic offender, whose thinking appeared to be linked to his low intelligence and social inadequacy. Mr Husband maintained his innocence to the authors of both reports, but Mr Rogers was able to see very early stages of Mr Husband beginning to acknowledge his offending behaviour.
7. In addition to those reports, which each member of this Court has read, we have been provided with a report from Mr Husband's offender manager. This indicates that Mr Husband has attained enhanced status in prison, has been given a trusted position and has positive entries in his record reflecting his voluntary assistance of others.
8. The judge was also assisted by victim personal statements made in March 2021 (more

than 2 years after the offences) by V and by her mother. V described her overwhelming feeling as that of being scared. She said that she was scared to socialise or to trust anyone and sometimes felt unable even to leave her bedroom. Her mother described V's change from being a sociable, happy young lady to someone who had lost all trust in people, especially men and boys. She said that V continued to struggle and her education had been badly affected. V had experienced panic attacks when spoken to by male teachers or pupils and had spent a lot of time away from school. V's mother also referred to the harm caused to the wider family, some of whom had believed Mr Husband's account.

9. Mr Husband's mother and a work colleague had provided letters in his support. It is clear that Mr Husband, to his credit, had succeeded in overcoming his limitations to the extent that he was a valued employee at his place of work.
10. The judge did not find Mr Husband to be a dangerous offender. He assessed the offence as opportunistic, an act of "complete and utter madness on your part" lasting just a few minutes. He noted that the offences had not involved any use or threat of violence. He concluded that the evidence did not prove that V had suffered serious psychological harm but that the offences involved a gross abuse of trust because Mr Husband was "in effect acting as [V's] parent" at the relevant time. He agreed with the submission of both counsel that the offences fell within category 3A of the relevant sentencing guidelines, giving a starting point in respect of count 1 of 7 years' custody, with a range from 6 to 9 years, and a starting point in respect of count 2 of 4 years' custody, with a range from 2 to 6 years.
11. The judge identified Mr Husband's intoxication at the time of the offences as an aggravating feature. He felt that other possible aggravating features should be regarded as aspects of the abuse of trust which he was already taking into account in treating the offences as involving high culpability.
12. As to mitigating factors, the judge referred to Mr Husband's previous good character, though noting that the guidelines make clear that this should not normally be given any significant weight in the context of offences such as these. He regarded as more important Mr Husband's mental health and learning disabilities as described by Mr Rogers. He also took into account the difficult prison conditions in which Mr Husband would serve his sentence as a result of the pandemic. The judge then imposed the sentences to which we have referred.
13. In his submissions on behalf of the Solicitor General, Mr Polnay does not challenge the judge's conclusion that he could not be sure that V had suffered severe psychological harm. Mr Polnay does however submit that the offences involved category 2 harm and should therefore have been placed in category 2A, with starting points of 10 years and 8 years' custody respectively. He accordingly submits that both prosecution counsel and the judge were in error in placing the offences in category 3A. Relying on cases in which this court has held that a person who is asleep is "particularly vulnerable due to personal circumstances", he submits that V, although not asleep, was particularly vulnerable because her personal circumstances were that she was young, intoxicated and sleepy.
14. In the alternative, Mr Polnay submits that if the offences were correctly categorised, the judge failed to give sufficient weight to four aggravating factors: V was vulnerable due to her intoxication and tiredness; Mr Husband believed she was asleep; V was young, and

there was a significant difference in age between offender and victim; and Mr Husband was himself under the influence of alcohol. Mr Polnay submits that those important features of the offending had to be taken into account at some stage. Mr Polnay accepts the mitigating factors found by the judge, but submits that the total sentence did not sufficiently reflect the seriousness of the offending.

15. Mr Dacey, appearing for Mr Husband in this court as he did below, submits that the sentencing was not unduly lenient. The judge, having presided over the trial, was in the best position to assess culpability and harm and Mr Dacey submits he made no error of categorisation. Mr Dacey accepts that if prosecution counsel did make an error in his submissions, then the Solicitor General would not be bound by that error. But, he submits, the fact that experienced prosecution counsel who had conducted the trial approached the sentencing as he did, is an indication that the judge was entitled to place the offences into category 3A. Mr Dacey submits that the breach of trust considered by the judge at Step 1 of the sentencing process encompassed the features of V's youth and intoxication and it would have been improper double counting to treat them as additional aggravating features.
16. We are grateful to both counsel for their very helpful written and oral submissions.
17. This was, in our view, a difficult sentencing process for the judge. On the one hand, the offences were very serious and had caused considerable harm. On the other hand, Mr Husband was a man of previous good character, who deserved credit for the way in which he had made a successful career for himself and whose offending was found to have been opportunistic rather than planned.
18. In R v Chall [2019] EWCA Crim 865; [2019] 2 Cr App R(S) 44, this Court made clear that a victim personal statement may provide evidence of severe psychological harm and that formal medical evidence is not always necessary before such a finding can be made. Reading the victim personal statements in this case, we are bound to say Mr Husband could have had no complaint if the judge had been satisfied by them that V had suffered severe psychological harm. We accept, however, that it was open to the judge to reach the conclusion that he did.
19. We accept that a victim of a sexual offence, who is asleep when the sexual activity begins, is particularly vulnerable for the purposes of the guidelines. Her personal circumstances are that she does not know what is happening, is unable to protest and may not even be able to report what has happened after the offence. That is so whether the victim is simply asleep or is also, to a greater or lesser degree, intoxicated, although the latter feature may affect how quickly she may wake. We also accept that a combination of factors may have the overall effect of justifying the assessment of a victim as particularly vulnerable due to her personal circumstances.
20. We are not however persuaded by Mr Polnay's first submission, that the only conclusion properly open to the judge was that V was particularly vulnerable. She was not in fact asleep, nor was she so intoxicated that she did not know what was happening. The judge might well have regarded the combination of factors as leading to the conclusion for which Mr Polnay contends, but we are not persuaded that he was bound to do so. In our judgment, it was open to the judge to find that the harm fell into category 3 and not category 2. We therefore reject that primary submission.
21. We do however see greater force in Mr Polnay's alternative submission. With all respect to the judge, he did, in our view, fall into error by failing to adjust the starting point for

the rape offence so as properly to reflect the overall seriousness of the offending. The following matters are, in our view, important.

22. First, whilst concurrent sentences were appropriate, both offences had to be reflected in the sentence for rape. They were both serious examples of their kind. Although there is some overlap between the various aggravating factors, it must be remembered that the abuse of trust would have been a culpability A factor, even if V had been rather older, wide awake and entirely sober. Her young age, sleepiness and intoxication were therefore significant additional aggravating features which had to be taken into account.
23. Secondly, although V was awake, the fact that Mr Husband thought she was asleep was another significant aggravating factor, because it shows that he was engaging in sexual activity with V when he thought she would not know what was happening and would not be able to protest or to report him.
24. Thirdly, whilst Mr Husband has some intellectual limitations which may have made him more likely to engage in opportunistic sexual offending, it cannot be said that his mental health significantly reduced his culpability. He must have known how seriously wrong it was to assault and rape an adolescent girl whom he knew was intoxicated and thought was asleep. He must deliberately have taken shameless advantage of her whilst his wife was sleeping in another room. Having committed one serious offence, he must have made a deliberate decision to leave the room, equip himself with a condom and return before going on to commit a yet more serious offence.
25. Fourthly, although the judge was, as we have said, entitled to conclude that the evidence fell short of proving serious psychological harm, it was clear that V had been badly affected by the offences.
26. We accept that there was personal mitigation available to Mr Husband, as we have already noted. Mr Husband clearly has many good points and we recognise that his first experience of imprisonment must be very difficult for him. For the reasons given in the guideline however, his previous good character can only be given limited weight in these circumstances and, as the judge recognised, the particular difficulties caused in prison by the pandemic can only be given limited weight when the seriousness of the offending requires a substantial sentence.
27. With all respect to the judge, we are unable to agree with his conclusion that the balancing of aggravating and mitigating factors resulted in a total sentence which was below the guideline starting point for the rape alone. That conclusion simply failed to reflect the fact that two distinct offences were committed, each of them serious. It was a conclusion which, in our judgment, was not properly open to the judge. The total sentence was therefore unduly lenient.
28. In our judgment, the least total sentence which was appropriate for these offences was 8 years' imprisonment. We recognise, of course, that one consequence of increasing the sentence on count 1 to that length will be that Parliament requires two-thirds of the sentence rather than one-half to be served in custody before release on licence.
29. For those reasons, we grant leave to refer. We quash the sentence of 6 years 6 months' imprisonment imposed on count 1 and substitute for it a sentence of 8 years' imprisonment. In all other respects the sentencing remains as imposed below.
30. The consequence of our decision is that the total sentence is increased to 8 years' imprisonment, of which Mr Husband must serve two-thirds before being released on licence.

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