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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2022/02163/A3

**[2022] EWCA Crim 1863**



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Friday 26<sup>th</sup> August 2022

**B e f o r e:**

**LORD JUSTICE FULFORD**

**MRS JUSTICE EADY DBE**

**MR JUSTICE HILLIARD**

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**ATTORNEY-GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E G I N A**

**- v -**

**MOHSEN GHEIBI**

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Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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**Miss C Pattison** appeared on behalf of the Attorney General

**Mr J Lucas** appeared on behalf of the Defendant

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## JUDGMENT

Friday 26<sup>th</sup> August 2022

**LORD JUSTICE FULFORD:**

1. This is an application by Her Majesty's Attorney General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which she considers to be unduly lenient. We grant leave.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply in this case. When a sexual offence has been committed, no matter relating to any victim shall during his or her lifetime be included in any publication if it is likely to lead to his or her identification by members of the public as the victim of the offence. That prohibition applies in the present case unless waived or lifted in accordance with section 3 of the Act.

3. On 10<sup>th</sup> June 2022, following a trial in the Crown Court at Bristol, the offender was convicted of an offence of rape (count 2), contrary to section 1(1) of the Sexual Offences Act 2003 ("the SOA 2003"). He was acquitted of sexual assault (count 1), contrary to section 3 of the SOA 2003 and anal rape (count 3), contrary to section 1(1) of the SOA 2003. On the same day he was sentenced by His Honour Judge Hart to six years and nine months' imprisonment.

4. The offender, to whom we refer as the defendant for convenience in the course of this judgment, is Mohsen Gheibi. He is aged 48. He was born in Iran and travelled to the United Kingdom as an asylum seeker in around 2002. In May 2019 he worked in a fish and chip shop in Bristol and was single.

5. In May 2019 the victim, "J", who was aged 21, lived, worked and studied in Bristol. J described her sexual orientation as "gay". Her most recent sexual interaction with a man had

occurred some time ago when she was 18 years of age.

6. On the evening of 2<sup>nd</sup> May 2019 J worked in a bar, completed a set as a DJ in a club, and then met up with friends at a club in Bristol. By the early hours of 3<sup>rd</sup> May 2019, J had consumed alcohol and smoked cannabis. The combination of alcohol and cannabis made her feel unwell. She experienced symptoms of paranoia, nausea, dizziness and her vision became blurred. She left her friends and started to make her way home. She indicated that she was walking fast, albeit that sometimes she was stumbling. J has very little recollection of her journey home. She did not know the defendant and does not now recall how or why the defendant accompanied her home.

7. CCTV footage timed at 2.25 am on 3<sup>rd</sup> May 2019 captures J as she began her journey home. As we have indicated, she described herself as being unsteady on her feet. The footage reveals a figure in the distance and a short time later it shows the defendant with J. The defendant is holding J's hand and has one arm around her waist as they walked along the pavement. The last of the relevant sections from the CCTV footage at 3.18 am captures the defendant and J walking up a road that leads towards J's home.

8. J entered her accommodation, a property that she shares with others. It is suggested by the Attorney General that the defendant, uninvited, followed her inside. J was worried and scared. She did not see or hear any of her housemates. J went into her bedroom and again the defendant followed.

9. J undressed, intending to go to bed. She said that she was scared and felt out of control. She knew what the defendant wanted. She felt that she could not resist him; her feelings of paranoia and fear persisted. The defendant vaginally raped J. He did not wear a condom and he ejaculated. He left a few minutes later, at J's request.

10. J told her family and friends about what had had happened, and reported the incident to police on 6<sup>th</sup> May 2019.

11. Intimate swabs taken from J were submitted for forensic analysis. Traces of semen were recovered. The defendant's DNA was found on a sample taken from one of these swabs.

12. The defendant was arrested on 12<sup>th</sup> May 2019. In reply to caution he said "I haven't raped anyone". When interviewed, he said that J had instigated the sexual intercourse and that it was consensual.

13. The offence, it is suggested, was aggravated by the fact that it occurred late at night at the victim's home, which she felt compelled to leave, and by the fact that the defendant had ejaculated.

14. The principal mitigation was that the defendant had no relevant offending history. Indeed, his only conviction was dated 15<sup>th</sup> July 2003, when aged 29, for two unrelated offences of fraud, committed on 22<sup>nd</sup> December 2002 (the importation or exportation of prohibited cigarettes). A three-year conditional discharge was imposed. We note that he has otherwise seemingly led an honest and industrious life. In this regard the judge had been provided with character references from the defendant's brother and two former employers. His employers described aspects of his background and previous employment, and highlighted his positive qualities.

15. However, we need to emphasise that for the purposes of the guideline for the offence of rape, positive good character, as opposed to a lack of previous convictions, should not normally be given significant weight.

16. J's Victim Personal Statement set out the significant impact of the rape on her and her family. In the immediate aftermath of the offence, she was particularly anxious about seeing the defendant again. She was unable to sleep in her bedroom or cope with her job, which she left. As a result, she moved away from her friends, her home and her life in Bristol, and went to live with her mother in Devon. What happened has had an adverse impact on her mental health, her work, her studies, her social life, her sense of self-worth and her ability to trust others. It has eroded her self-esteem and her ability to form relationships. She has planned suicide attempts and has observed "... the thought of being dead felt more alive than being alive ... The only thing that brought me moments of relief was alcohol and hard drugs". In the event, she has been diagnosed with PTSD, depression and anxiety.

17. After hearing submissions, the judge sentenced the defendant on the basis that the case fell within category 2B, giving a starting point of eight years' custody, within a narrow range of seven to nine years. The judge had originally considered that the case came within category 3B, but he changed his mind, noting:

"... the factor of uninvited entry into the victim's home and the vulnerability of the victim and it seems to me therefore that, having initially thought [this] might be a category 3B case at the top end, it would in fact fall somewhere in the range of a category 2B case."

18. Notwithstanding that observation by the judge in relation to the victim's vulnerability, he otherwise consistently indicated that in his view severe psychological harm had not been caused. It is clear from the repeated statements of the judge during the sentencing exercise that he considered that on the basis of the psychological harm alone, the offending fell below the borderline between category 2B and 3B. During submissions the judge observed:

"... this seems to me not to be a category 2 case on the basis of severe psychological harm because the guideline takes into account a basic level of psychological harm. This is a case, on [the victim's] account, greater than the basic level but not what I regard as severe psychological harm, so it is an aggravating feature of a category 3 case, is the way I see it."

When passing sentence, the judge observed:

"I look at first the category of harm. Category 2 covers cases of severe psychological harm and it is provided that the sentence levels in the guideline take into account a basic level of psychological harm which is inherent in the nature of the offence. In my judgment, this is not a case where the level of psychological harm is at a basic level, nor is it as high as severe psychological harm in the sense in which I would interpret it in this sort of case."

Finally, to the jury immediately after sentencing, the judge stated that the psychological harm fell "slightly short" of severe.

19. It is emphasised by Miss Pattison on behalf of the Attorney General that the judge acknowledged, therefore, that the offence fell within category 2B, for which the starting point, as we have already particularly emphasised, was eight years' custody, with a narrow sentencing range of seven to nine years.

20. The judge identified a starting point of seven years and six months' imprisonment. He assessed the circumstances as falling at the lower end of category 2B. This categorisation is the subject of particular criticism by Miss Pattison. It is argued that, instead of identifying a starting point below eight years, there should have been a significant upward adjustment to reflect the multiple factors that are said to have increased the level of harm, most particularly the uninvited entry into the victim's home, along with her vulnerability as a young female adult walking alone whilst undergoing the adverse effects of alcohol and cannabis.

Furthermore, it is suggested that she had experienced considerable psychological harm, along with the other significant consequences for her of this offending, such as having to move house and losing her job.

21. It is submitted that the harm that had been caused merited putting the case higher up the 2B category. Furthermore, it is contended that the judge paid no or insufficient regard to the other aggravating factors (*viz.* the fact that the defendant ejaculated, the location and timing of the offence, the fact that the victim needed to leave her home, and the targeting of a particularly vulnerable victim (albeit the court needs to avoid double counting this last factor, given that it potentially comes into play as regards the categorisation of harm)). Overall, it is suggested that on the basis of those factors the sentence is unduly lenient.

22. Mr Lucas, on behalf of the defendant, advances the following principal arguments. First, and in particular on the basis of the Achieving Best Evidence interview and the statement from the victim's mother, he submits that there was no forced or uninvited entry into the victim's home. We will turn to the detail of this in a moment. Second, it is submitted that the victim was not particularly vulnerable due to personal circumstances. Third, it is argued that the fact that she was a young female adult walking alone in the early hours of the morning did not make her a vulnerable victim. Fourth, it is contested that this was a case of severe psychological harm, and it is highlighted that there are other cases with victims who suffer much greater psychological harm than was present in the instant case. Finally, reliance is placed by Mr Lucas on the defendant's lack of convictions and his positive good character.

23. In considering these submissions it needs to be borne in mind that the guideline takes into account a basic level of psychological harm which is inherent in the nature of the offence. The Victim Impact Statement is undoubtedly powerful. It sets out a variety of factors which are, at least potentially, indicative of severe psychological harm.



24. We have well in mind that the assessment of psychological harm is for the sentencing judge who saw the victim give evidence during the trial. As was made clear in *R v Chall and Others* [2019] EWCA Crim 865; [2019] 2 Cr App R(S) 44, the judge must act on the evidence, and this is an assessment for him or her alone. We have already indicated that the judge repeatedly explained that in his view the evidence in this case fell just short of attaining the necessary level of severe psychological harm. We have not heard the evidence. However, on any view, the psychological harm in this case meant that the case, at the very least, was close to the borderline between categories 2 and 3. This offending has had an undoubted and significant impact on the victim, which has resulted in a wide range of deeply upsetting and long-lasting consequences which are likely to be pervasive and enduring. If the judge had concluded that there had been severe psychological harm, it is likely that that would have been a decision with which this court would not have interfered.

25. The judge was faced with a complicated and difficult sentencing exercise. In our view, it would have been of benefit for the judge to have paused after the delivery of the verdicts and counsel's submissions before sentencing to take at least a short opportunity for reflection, even potentially overnight. A number of difficult decisions fell to be made, particularly as to the application of the guideline, which required some substantive, if brief, explanation. Two matters especially stand out in this regard. First, this was not a situation in which the victim appeared to have been rendered insensible through drink or drugs, or close thereto (see the statement of Mr [S] as to the lack of indications of this in the club). She was making her way home, walking fast and only occasionally stumbling. However, as set out above, the victim described being significantly adversely affected by the substances she had consumed earlier in the evening. In circumstances such as these, a judge will need to reflect carefully on whether the fact that a woman is out alone at night, even if she has consumed some alcohol or drugs (or both), reaches the high standard of being **particularly** vulnerable due to her

personal circumstances. The level of inebriation, for instance, would need to be sufficiently marked for this to apply. Regrettably, the judge provided no analysis as to why he reached this conclusion.

26. Second, the issue of whether there had been forced or uninvited entry into the victim's home, required careful analysis. As the victim made clear to Ms [B] (her mother), she let the defendant into the house ("she didn't want him to come into the house and is angry and confused as to why she let him in ... The only way the male could have got into the house is because she let him in"). To a Miss [A], the victim described the position somewhat differently, namely that she left the door open, but also said that she did not want him to enter. In her ABE interview, she simply refers to the defendant following her into the property and that they then went together into her room, without anything being said on her part. However, she made it clear that she did not invite him in.

27. Again, on this issue, we consider that the judge needed to provide at least a brief explanation as to why he concluded that the defendant's entry into the property was uninvited.

28. Although the judge stated, in a single, short sentence, that the method of entry and the victim's vulnerability took the case into category 2, we do not conclude that he was, at the end of the day, wrong on either issue. The entirety of the victim's description of the difficulties she was labouring under as she headed home provided a sustainable basis for determining that she was particularly vulnerable that night due to her personal circumstances. Similarly, given the jury's verdict on the offence of rape, which involves a finding of lack of consent, on the evidence before the judge, it was open to him to have concluded that the defendant was uninvited and that, moreover, he would have known this.

29. It follows that this was a category 2B case, with a starting point of eight years' custody

with, as we have already indicated, a narrow range of seven to nine years. The judge took a notional starting point of seven years six months (just below the starting point in the guideline). Whether or not that was arguably a low starting point, there is no doubt that there needed to be movement up in the category to take into account the ejaculation, without protection, the timing and location of the offence, the need for the victim to move home, and the overall consequences for her of this offending on the basis of all that we have described extensively above. Set against that, there is the defendant's lack of convictions. That results in a sentence above eight years' imprisonment, in our view a sentence of eight years and nine months' imprisonment. Is a sentence of six years nine months imprisonment unduly lenient in those circumstances?

32. This, for us, has not been an easy decision but we are of the view that this sentence was unduly lenient. If the sentence should have been no less than eight years and nine months' imprisonment, a sentence that is two years below that is unduly lenient.

33. Accordingly, we grant the Attorney General's application. We quash the sentence imposed in the court below and we substitute a sentence of eight years and nine months' imprisonment.

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**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: [rej@epiqglobal.co.uk](mailto:rej@epiqglobal.co.uk)

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