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[2023] EWCA Crim 317

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 202300372/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 14 March 2023

Before:

LADY JUSTICE CARR DBE
MR JUSTICE JEREMY BAKER
HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

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

REX
V
FARRELL HUBAND

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MR J POLNAY appeared on behalf of the Attorney General
MR G JOHNSON appeared on behalf of the Offender

J U D G M E N T

LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as a victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of that Act.

Introduction

1. We have before us an application by the Attorney General for leave to refer a sentence which she regards as unduly lenient.
2. The offender, now 27 years of age, pleaded guilty on 25 October 2022 to an offence of attempted rape, contrary to section 1 of the Criminal Attempts Act 1981. On 12 January 2023 he was sentenced by His Honour Judge Gold KC sitting in the Crown Court at Lewes to two years' imprisonment suspended for two years with the following conditions:
 - i) Rehabilitation activity requirement for a maximum of 40 days;
 - ii) The "New Me Strengths" programme requirement for 43 days.
3. The offender was made the subject of a restraining order prohibiting him from making direct or indirect contact with the victim, whom we shall call X, save through solicitors in relation to child access arrangements for a period of 10 years. A Sexual Harm Prevention Order was also imposed for ten years. That order prohibited the offender from engaging in any sexual relationship with a female without informing his nominated public protection VISOR management team within three days of any sexual encounter of the name and contact details of the female concerned. The offender was also made subject to notification requirements and a statutory surcharge was imposed.
4. The offence took place in 2016 when the offender attempted to rape X, his then girlfriend, whilst she was unconscious through drink. At the time he was 20 and she was 19. In summary, the Attorney General submits that, given in particular the fact i) that X was unconscious; ii) that the context was one of domestic abuse; and iii) that the offender's voluntary intoxication played an important part in the offending, the sentence imposed did not sufficiently reflect the seriousness of the offence.
5. For the offender it is submitted, given in particular his intellectual difficulties, that the sentence, whilst perhaps lenient, was not unduly so.

6. We grant leave.

The facts

7. The offender and X met in 2015 when they were attending the same college. They began a relationship and in 2016 they had a child together, although they remained living in separate addresses.
8. On 17 September 2016, X attended the address of the offender's mother, arriving there in the afternoon. Whilst there, the offender and X consumed vodka and coke, something which they often did together. By the late evening X described herself as being very drunk.
9. When in the offender's bedroom, X turned on her iPad to record them both performing to music. After a while, however, she put the iPad down and passed out. At this stage the offender checked that she was completely unresponsive. The iPad footage recorded that over the next 15 minutes he took his own clothes off and undressed X. He manipulated and moved X's body into a series of sexual positions whilst he engaged in sexual contact with her, rubbing his penis against her. He touched her vagina. Whilst masturbating himself he pulled back her T-shirt and touched and kissed her breasts. He placed a condom on his erect penis and then made thrusting motions in the area of her vagina, the camera angle not indicating whether or not penetration was in fact achieved.
10. Towards the end of this assault, X began to show signs of distress, as if she were experiencing a nightmare. When it appeared that she might be waking up, the offender stopped his activity and moved the iPad away.
11. The following day X left the premises, having no idea what had occurred to her. The two continued their relationship and had a second child in 2017. Their relationship came to an end at the end of that year.
12. In January 2018, X saw the footage that had been recorded on the iPad for the first time. By February 2019 she had contacted the police about a separate issue involving the offender and during a police interview she revealed to the police what she had seen on her iPad.
13. The offender was arrested in the same month, interviewed under caution and largely went "no comment" to questions he was asked.

The chronology of proceedings

14. On 3 December 2020 the offender was charged by way of postal requisition. There followed several hearings addressing the question of whether or not he needed an intermediary and, more fundamentally, whether he was fit to plead. A speech and language therapy assessment in January 2019 had reported severe deficits in working memory, language, understanding and concentration difficulties.
15. A large number of expert medical reports were produced in this context. In a report of April 2021, Dr David Morton, a consultant forensic psychiatrist, concluded that the offender was not currently suffering from any signs of a serious mental disorder. On the night of the offending he had been drinking heavily. There was nothing to indicate that the offending was due to any mental state abnormality. Dr Morton had, however, significant doubts over the offender's fitness to plead based on his ability to participate in the trial process.
16. A week or so earlier Dr Robert Halsey, a chartered consultant psychologist, had assessed the offender as having a verbal IQ score of 78 points but a working memory score of 58 points, consistent with a schooling history of placement within special educational needs establishments. Dr Halsey opined that these intellectual difficulties were likely to cause the offender difficulty in functioning independently in situations that required judgment or decision-making. The offender would need considerable assistance in the form of special measures and an intermediary in order to be fit to plead.
17. Dr Morton produced an addendum report in May 2022, agreeing with Dr Halsey that the offender had significant intellectual impairment. Dr Morton remained concerned as to his fitness to plead.
18. Dr Rafiq, a consultant forensic psychiatrist, reported in June 2022, agreeing with Dr Morton, that the offender did not suffer from a severe or enduring mental disorder. He lived independently, had not required input from learning disability services or come to the attention of any other mental health service. He was able to travel independently and manage his finances and had had periods of successful employment in the past. Dr Rafiq was of the view that the offender met the criteria for a mild learning disability. He considered the offender fit to plead. Dr Morton responded, noting the similarity of their conclusions. Neither doctor believed that the offender suffered from a serious mental disorder. Dr Rafiq diagnosed a mild learning disability. Dr Morton opined that he had a borderline intellectual impairment and some deficits in adaptive learning.
19. A third consultant forensic psychiatrist, Dr Charles Forbes, produced a report in October 2022 noting that the offender had been able to communicate satisfactorily in interview and showed some ability to use and understand reasonably complex words. Again, there were

no signs of a serious mental disorder. The offender however became distracted towards the end of the interview.

20. The offender, being deemed fit to plead, was arraigned for the first time on 25 October 2022 and pleaded guilty. The matter was then adjourned for sentence.

The sentence

21. The offender had no previous convictions or cautions. By the time of sentence he had three children, two with X and one with another partner. He was now in a further new relationship. He had previously worked as a refuse collector and in the hospitality industry but was currently unemployed.
22. The author of a pre-sentence report opined that the offender needed further assistance to develop his understanding of the rules of engaging in lawful sexual activity. They formed the opinion that the offender had a higher sex drive than X, was pre-occupied with having sexual intercourse with her and set about meeting his perceived sexual needs by plying her with alcohol. The offence could not simply have been an accident and it was noted that the offender put a condom on, hence intending to ejaculate and not having wanted his offending behaviour to be detected.
23. Due to his learning difficulties, the author considered the offender's maturity to have been affected so far as "temperance, responsibility and perspective" were concerned. Overall, the author assessed the offender as posing, among other things, a medium risk of causing serious harm to X, a high risk of causing serious harm to his current partner and a medium risk of causing serious harm to the public in the shape of future partners. It was said that, if the offender was sent to custody, the prison estate would need to ensure that vulnerable prisoner protocols were activated.
24. A victim personal statement dated December 2022 from X was available. She described her shock upon discovering the recording on her iPad. She stated that, upon being challenged, the offender was very dismissive to her and said that she had no proof - indeed she was lying. This really upset and frustrated her. It would, she said, have made her feel a lot better had he taken responsibility earlier, not least given the footage available.
25. In the course of the sentencing hearing, the judge commented that, whilst not in any way justifying the offending, the overall picture was nevertheless the background of a relationship, with X regularly staying and drinking at the address in question and with "an expectation of potential sexual activity". He said that he wondered whether X was vulnerable in the sense envisaged in the Sentencing Council Guideline on Sexual Offences ("the guideline"). He stated it was a very difficult case to fit within the guideline; his

provisional view was that this was Category 3B offending. He indicated to defence counsel that, despite the gravity of the offending, this was in his judgment one of those "very small category of cases where justice demands that I suspend the inevitable sentence of imprisonment." He accepted the defence submission that a full one-third credit for guilty plea should be granted.

26. His actual sentencing remarks were extremely brief, no doubt reflecting the need to accommodate the offender's learning disabilities. He said:

" ... before you engage in sex with a woman, it's very important that you make sure that they agree to what you are doing. The reason you're in trouble is because X didn't agree on the day because she was asleep, and a sleeping woman cannot agree.

... And that's why you're in trouble and why you're here before me today.

As I've already said to your counsel, I can take an exceptional course in your case and not send you to prison today. As far as the offence is concerned, it's what I regard as a 3B offence under the sentencing guidelines and, by the time I make the appropriate reduction for your guilty plea, and for your significant intellectual impairments, for your learning difficulties, that just reduces it to two years, which I shall suspend for two years."

Updating material

27. We have before us a report dated February 2023 from the Probation Service indicating that the offender's attitude towards X has been very poor since sentence. He has blamed her and attempted to justify and minimise his actions. He has attended on probation seven times in total, but no offending-focused work has yet been carried out. Concerns were expressed that the offender was replicating his offending behaviour with his new fiancée. There were still clear deficits in his thinking and behaviours. His learning difficulties were interlinked with attitudinal deficits and there was concern expressed about him being targeted if in custody, due to his neuro-diverse diagnosis.
28. A report from Dr Morton dated 7 March 2023 confirms the offender's ongoing intellectual impairment with a statement of special educational needs. Dr Morton states that the offender would be vulnerable within the prison system as a result of his intellectual impairment and there was a high risk of him being bullied. But the offender still had no significant history of any severe mental illness, depression or deliberate self-harm. Dr Morton commented that prisons have systems in place to support vulnerable prisoners such as the offender.

Submissions

29. Mr Polnay for the Attorney General, having made helpful written submissions, focussed orally on what he described as being the two key issues before us, namely the correct categorisation of this offending, and secondly, the weight to be given to the mitigating factors in play.
30. As for categorisation, X was completely unconscious at the time of offending. This was, it is submitted, unquestionably Category 2B offending, carrying a starting point under the guideline of eight years' imprisonment. To that there was scope for an uplift to take account, for example, of the domestic context and the involvement of alcohol.
31. As for the second question, namely what adjustment needed to be made for the offender's developmental disorders, Mr Polnay emphasises that the offender's guilty plea meant that it was accepted that the offender, despite his difficulties, did not reasonably believe at the time of the offending that X had consented. The judge did not focus in his analysis, it is said, on the need for a connection between any developmental disorder or learning disability and the offending itself. There was no scrutiny of how the difficulties affected the offender's culpability.
32. Mr Polnay points out that, in order to get to the judge's term of three years before credit for guilty plea, the starting point of eight years had to be more than halved. Whilst the offender's learning difficulties reduced culpability, they did not extinguish it. The custodial term of two years reached by the judge in the end result was simply not only lenient, but unduly lenient.
33. In response to questions from the court, Mr Polnay says that this type of case is one commonly before the courts. The judge was not entitled, nor did he in fact appear to, ignore the guideline in the sense of putting it to one side on the facts of the case and simply seeking to do justice. There was, in Mr Polnay's submission, no sufficient evidential basis to ignore the starting points and ranges contemplated by the guideline.
34. Mr Johnson for the offender emphasises in his written submissions his own grave concerns as to the offender's fitness to plead and his own impression of the offender's ability to engage. He submits that it was open to the judge not to follow the guideline if satisfied that it would be contrary to the interests of justice to do so. He points to the comments of this court in *R v Butterworth* [2022] EWCA Crim 1821 at [27] to the effect that the Sentencing Council Guidelines are not to be treated as statutes. It is said that the judge carried out a careful analysis. A categorisation at 3B was reasonably open to him. Reliance is placed on the case of *R v AWA* [2021] EWCA Crim 1877. Alternatively, Mr Johnson submits that, because of the very unusual factors in play (in terms of the offender's intellectual difficulties), it was open to the judge to take a different approach, unconstrained by the

guideline. Mr Johnson emphasises the Probation Service's references to the difficulties facing the offender in terms of temperance, responsibility and perspective. He directs us to paragraph 15 of the Sentencing Council Guideline for Sentencing Offenders with Developmental Disorders or Neurological Impairments and suggests that the answers to the questions there posed point heavily in favour of a significant reduction in the offender's culpability.

Discussion

35. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type: see *Attorney General's Reference No 132 of 2001 (R v Johnson)* [2002] EWCA Crim 1418, [2003] 1 Cr.App.R (S) 41 at [25]. We remind ourselves that the hurdle is a high one, as was emphasised recently in *R v Mohammed Arfan* [2022] EWCA Crim 1416 at [34] to the effect that sentencing is an art and not a science, and leniency itself is not a vice. For appellate interference to be justified the sentence in question must be not only lenient, but unduly so.
36. The judge did not have the benefit of a written sentencing note from the defence, and that provided by the prosecution did not refer to either the relevant guidelines or authorities.
37. There can in our judgment be no doubt that this was Category 2 offending for the purpose of the guideline, as in fact both prosecution and defence had agreed below. Whether or not a victim is "particularly vulnerable due to personal circumstances" for the purpose of the guideline will always be a fact-specific question. As the court stated in *AWA* at [33], it does not automatically follow that where a victim of rape is asleep they are particularly vulnerable within the meaning of the guideline. That will depend on an assessment of all the relevant circumstances.
38. The judge was not taken to any of the relevant authorities, including *R v BN* [2021] EWCA Crim 1250, or, for example, *R v Austin Gacheru* [2022] EWCA Crim 1090 at [31]. In *BN*, Holroyde LJ at [25] reviewed the authorities, including *R v Behdarvani-Aidi* [2021] EWCA Crim 582. He rejected the submission that a victim is only "particularly vulnerable" where there is a combination of intoxication and sleep:

"We are unable, however, to accept a submission that a sentencer could only find a victim to be particularly vulnerable where there is a combination of intoxication and sleep. ... We find it difficult to see how a child or adult who is asleep when the sexual activity begins, and therefore does not know what is happening and so is powerless to resist or to protest, could generally be

said to be anything other than particularly vulnerable due to their personal circumstances."

39. That particular debate is immaterial here, since at the time of this offence X was unconscious through drink. She could hardly have been more vulnerable. She left the premises the next morning completely oblivious to what had happened to her. She had no idea of the index events until she saw the iPad footage over a year later. The fact that she was in a house that was familiar to her and where she regularly drank alcohol, or that the offender was her then partner and there may have been, as the judge put it, an "expectation of potential sexual activity", did not in any way mean that she was not vulnerable due to her personal circumstances.
40. So far as material, the decision in *AWA* does not point to any different outcome. Ignoring the unusual background facts in that case, the extent to which the victim there was under the influence of drink or drugs at the time of the offending was not known and the victim there was awoken by the offender's actions and able to tell him to stop.
41. As a result of our conclusion that this had to be category 2 harm, a finding of Category 3 harm was precluded (as identified in *BN* at [26]). As for culpability, no issue is taken by the Attorney General that this was not culpability B offending. The recording by the offender was at least possibly accidental. Nor is it suggested that there was any abuse of trust, following the guidance in *R v Forbes* [2016] EWCA Crim 1388 at [16] to [18].
42. The starting point for Category 2B offending within the guideline is eight years' imprisonment with a range of seven to nine years' imprisonment.
43. This was of course an attempt and a sentence for an attempted offence will ordinarily be less than a sentence for the substantive offence itself. The degree of reduction will depend on the circumstances, including the stage at which the attempt failed and the reason for non-completion. Here only a limited reduction was available and the judge rightly did not consider otherwise. The offence itself was almost completed. The offender had undressed both himself and X and placed a condom on his erect penis and then made thrusting motions by X's vagina. The offender only stopped when it appeared that X might be waking up. In terms of aggravation, whilst being careful not to double-count, there was the domestic context, with violation of the trust and security normally existing between two people in a relationship. This was also a relatively prolonged incident, as we have already identified, and the offence was committed under the influence of alcohol.
44. In terms of mitigating factors, the offender was of previous good character, although this factor does not normally justify a reduction in the context of this type of offending.

45. Most obviously, and as Mr Polnay for the Attorney General concedes, there was strong mitigation in the form of the offender's learning disabilities. In terms of connection with the commission of the offence, the offender did not have any mental disorder but it is clear that his learning disabilities and mild intellectual difficulties were likely to cause him problems in situations such as this, requiring judgment or decision-making. Thus there was undoubtedly strong mitigation as a result of those difficulties, albeit that there was still the index involvement of voluntary intoxication.
46. Standing back, in our judgment a custodial term of not less than six years before credit for guilty plea was required. Following a one-third reduction for guilty plea, one arrives at a custodial term of four years.
47. Seen in this light, the custodial term of two years reached by the judge was far outside the range of options reasonably open to him. The judge may have been influenced by his view expressed during the course of the sentencing hearing that he could and should suspend the sentence, in which case the custodial term could only ever have been no more than two years.
48. We have asked ourselves, having raised the matter in the course of submissions today, whether the facts were such that the judge would have been entitled to depart from the guideline altogether, even though that is not what in his sentencing remarks he purported to do. In our judgment and for the reasons given by Mr Polnay, the circumstances of the offending, even taking into account the offender's learning disabilities and difficulties, were not such as to justify a complete departure from the relevant range and starting point identified in the guideline. This was very serious offending, involving almost complete commission of the offence of rape.

Conclusion

49. For these reasons we will allow the Reference. We quash the sentence of two years' custody and substitute it with a custodial term of four years. The offender will serve up to half of this sentence in custody before being released on licence and will then serve the remainder of that term on licence. We quash the victim surcharge order of £140 which requires variation to the appropriate level in the light of our decision, and the notification requirements will now be indefinite.

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

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