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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202102466/A1



Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 12 November 2021

LADY JUSTICE MACUR DBE

LADY JUSTICE CARR DBE

MR JUSTICE MURRAY

REGINA

V

SJAYQUAN PEMBERTON

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)

MR C BAILLIE appeared on behalf of the Appellant.

J U D G M E N T

1. LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. 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 the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction

2. On 15 April 2021 in the Crown Court at Wood Green before HHJ Holmes ("the Judge"), the appellant (then aged 24), pleaded guilty to a single offence of sexual assault contrary to section 3 of the Sexual Offences Act 2003. On 9 July 2021 the Judge sentenced him to 3 months' imprisonment, suspended for 24 months, with requirements of 100 hours of unpaid work and rehabilitation activity of up to 10 days. A compensation payment order was made in the sum of £750 and the appellant was also made subject to notification requirements for a period of 7 years.
3. This is his appeal against sentence, for which purpose he has had the benefit of representation by Mr Baillie, as he did below.

The Facts

4. On Sunday 13 October 2019 "AB", an actress and filmmaker, attended the closing night of a film awards ceremony as a nominee. An after-party was held at the H Club, located on Endell Street in the City of London. The appellant had been invited to the event, which had an open bar. There he drank to excess and became intoxicated.
5. He first approached AB to have a photograph taken with her. AB described his behaviour as "pushy" but was prepared to brush it off. However later, at around 9.45 pm, he again approached AB, who was now in conversation with two other males, from behind. He put his arms around her neck and shoulders in a relaxed fashion, as if he was her partner, and proceeded to lick the back of her neck. The other males remonstrated with the appellant and pushed him away. A few minutes later the appellant approached AB yet again. This time he grabbed her genital area before her friends again interceded. The appellant was at this stage ejected from the venue.
6. AB reported the incident to the event organiser who contacted the guest connected to the group in which the appellant had attended. This guest apologised by email to AB for the appellant's actions. AB, having by then identified the appellant from an Instagram photograph, reported the offence to the police. CCTV footage was obtained; this did not show the index offence itself but did show the appellant deliberately brushing his hands against the bottoms of several other women.
7. The appellant was interviewed on 21 April 2020 and gave "no comment" to all questions.
 - a. He entered a not guilty plea at the Magistrates' Court and the matter was sent to the Crown Court for a pre-trial and preparation hearing. A copy of the Instagram post by which AB had identified the appellant was requested. At the PTPH on 25 March 2021 that request was repeated and time requested for the appellant to view it and take advice. A Goodyear indication was requested and the matter was

adjourned for a month to 15 April 2021. On that day, a written basis of plea having been provided, the Judge gave a Goodyear indication to the effect that the offending fell within category 3B of the relevant Sentencing Council Guideline and the sentence would be either a community order or a suspended sentence. Thereupon the appellant pleaded guilty and a pre-sentence report was ordered.

8. The Judge had before him a full victim personal statement. This described AB's shock at what had happened to her. She had suffered a subsequent panic attack and emotional and mental repercussions including depression and anxiety. Dealing with her medical situation had left her with chronic fatigue. She had suffered dramatic weight gain and a general lack of self-confidence, affecting both her professional and personal life and altering her formally very positive outlook on life.

9. ***Sentence***

10. The Judge placed the offending towards the higher end of category 3B offending within the relevant Sentencing Council Guideline. The appellant's intoxication was an aggravating feature. The Judge also took into account the repeated nature of the offending and its impact. By way of mitigation, the appellant was to be treated as effectively of good character and had shown remorse. The Judge took a notional post-trial term of 4 months' imprisonment; after credit of 25% for guilty plea the appellant was sentenced to 3 months' imprisonment with conditions as set out above.

Grounds of Appeal

11. Mr Baillie raises three grounds:
12. first, that the operational period of the suspended sentence order was manifestly excessive;
13. secondly, that it was wrong in principle not to have given the appellant full credit for his guilty plea. This was a case, it is said, where the appellant needed to be advised whether he was in fact and law guilty of the offence. Reliance is placed on R v Creathorne [2014] EWCA Crim 500 (“*Creathorne*”), where this Court considered that in a case involving an offence of causing death by careless driving, when over the prescribed alcohol limit, and where the appellant was suffering from amnesia at the time of trial and could not recall the events in question, because of the injuries that he had sustained the appellant was entitled to legal advice before pleading guilty. This was an approach consistent with the judgment of Lord Hughes LJ (as he then was) in R v Caley [2012] EWCA Crim 2821, at [14], where it was stated that in cases where the defendant had no recall of the events in question the first reasonable opportunity to plead guilty might be the point in time when his advisers were able to provide proper advice. Mr Baillie submits that the appellant here was genuinely incapable of remembering the alleged offence. It was not unreasonable to expect him to receive proper advice as to plea only when the key evidence (said here to be the Instagram photograph) was provided. He was thus entitled to full one-third credit;
14. thirdly, balancing the conduct of this offence and its impact on AB against the appellant's age and maturity, his genuine remorse, his positive character references, his early guilty plea, the inexplicable delay in bringing the case to trial and the encouraging pre-sentence report, this is said not to have been a case so serious as to pass the custody threshold.

The submission is that the Judge erred in concluding that it did. In any event, a sentence of imprisonment was not unavoidable. A community order could provide sufficient restriction on the appellant's liberty by way of punishment whilst addressing the rehabilitation of the offender to prevent future crime. In this context, we note the updated probation officer's report, which confirms that the appellant is working, has stable accommodation and is currently compliant with the conditions imposed upon him.

Discussion and analysis

15. We turn first to the question of the length of the operational period of 24 months. The Sentencing Council Guideline on the Imposition of Community and Custodial Sentences states:

"The time for which a sentence is suspended should reflect the length of the sentence; up to 12 months might normally be appropriate for a suspended sentence of up to 6 months."

16. The Judge did not refer to the Guideline in this respect, nor did he, and nor can we, identify any factors why it would be contrary to the interests of justice to heed its gist. Absent any such reason, we have concluded that an operational period of 24 months was indeed manifestly excessive. An appropriate operational period would be a much more limited one of only 12 months.

17. As for credit for guilty plea the Sentencing Council Guideline on Reduction in Sentence for a Guilty Plea was considered recently by this Court in R v Plaku [2021] EWCA Crim 568; [2021] 4 WLR 82. Had the appellant indicated a guilty plea at the Magistrates' Court he would have been entitled to a full credit of one-third (see [15]). He did not do so. There will be very few occasions when the sentence of a defendant, who has not pleaded guilty at the first stage of the proceedings and who cannot bring himself within one of the exceptions can properly be reduced by more than one-quarter (see [27]). The Guideline draws a clear distinction between the first stage of the proceedings and any later stage. One of the exceptions is F1:

"Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea **sooner than was done**, a reduction of one-third should still be made.

In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal."

18. There is, in our judgment, no proper basis for appellate interference with the Judge's

careful assessment that it was not unreasonable to expect the appellant to have indicated a guilty plea sooner than he did. The appellant did not need sight of the Instagram post in order to know whether he was guilty in fact or law: he knew he was at the after-party; he had seen the CCTV footage showing his behaviour, even if only in general terms, and also had disclosure of at least one of AB's statements in which she described how she identified him through the Instagram post by the clothing that he was wearing. The Instagram post, as the Judge himself commented itself, simply confirmed that AB was right. The facts here are very far removed from those in *Creathorne*. Amongst other things, the appellant there was suffering from amnesia at the time of the proceedings and the Crown conceded that the appellant had been entitled to wait for proper advice after service of all of the evidence before plea. No such concession was made here. On the contrary the Crown's position was that reflected in the Judge's sentencing remarks.

19. Finally, there is the question of whether or not the custodial threshold was crossed. We do not consider that the Judge was wrong to find that it was. This was a serious incident, causing not only very serious distress at the time but also lasting harm. It involved a sustained assault with the appellant approaching AB not once but twice, and after his first unwanted approach for a photograph. It was aggravated by the appellant's intoxication. The Judge took full account of the mitigation available to the appellant including his limited offending history, character references and remorse. The Judge was entitled to conclude that a community order could not provide sufficient restriction on the appellant's liberty by way of punishment whilst addressing rehabilitation.
20. In conclusion, to the limited extent that we have identified above, namely that the operational period of the suspended sentence of 24 months will be reduced to one of 12 months, the appeal is allowed. In all other respects it is dismissed; all other elements of the sentence below remain in place unaltered.

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: rcj@epiqglobal.co.uk