

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202303233/A5

Neutral Citation Number: [2024] EWCA Crim 520

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 1 May 2024

Before:

LORD JUSTICE LEWIS

MR JUSTICE GOSS

HER HONOUR JUDGE MONTGOMERY KC

(Sitting as a Judge of the COURT OF APPEAL (CRIMINAL DIVISION))

REX

V

MARK WINTERBURN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR D HALL appeared on behalf of the Appellant.

J U D G M E N T

1. LORD JUSTICE LEWIS: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Consequently, no matter relating to the person against whom the offence has been committed shall, during that person's lifetime, be included in any publication, if it is likely to lead members of the public being able to identify that person as the victim of that offence.
2. On 7 July 2023, in the Crown Court at Leeds, the appellant, Mark Winterburn (now aged 33), was convicted of an offence of rape. On 21 August 2023, he was sentenced to an extended determinate sentence of 19 years, comprising a custodial element of 14 years and an extended licence period on release of 5 years. He appeals against sentence with leave of the single judge.
3. The facts can be stated shortly. The victim was a woman who had a number of vulnerabilities relating to her health and she had also struggled with alcoholism. The appellant knew the victim. On a date in about March 2021, the appellant had been drinking with the victim at her home. The victim had not consumed alcohol for some time. When those caring for the victim became aware of what was happening, they gave the appellant £10 to persuade him to leave the property. The victim by then was very intoxicated. The carers put her to bed, secured the property but they left a window open. The appellant returned. He got into the property and he went into the bedroom. The victim was asleep. He got on top of her and inserted his penis into her vagina. She woke up and pushed him off and went to the living room. The appellant got up and behaved as if nothing had happened.
4. We have read the victim's personal impact statement. The rape understandably left her feeling helpless and vulnerable and she felt unsafe in her own home. Fortunately, following the conviction of this appellant, things have improved for her, and she has been

able to make positive changes in her life.

5. The appellant has a long criminal record with 41 convictions comprising 52 offences, although none of the offences were sexual offences. Many were burglaries and theft, committed to fund the appellant's own drinking. The pre-sentence report identified him as a person who presented a high risk of serious harm to vulnerable females particularly those who befriended him.
6. In his sentencing remarks, the judge found that this was a category 1B offence within the meaning of the Sentencing Council's Guidelines on Rape. Dealing with harm, the judge identified that there were two category 2 harm factors present. Firstly, there was the uninvited entry into the victim's home, and secondly, there the victim was particularly vulnerable due to the fact that she was intoxicated. The judge considered that the combination of those two factors justified elevating the harm to category 1. He also found, and it is accepted, that the appellant's culpability was category B under the guidelines. Under the Sentencing Guidelines, the starting point for a category 1B offence is 12 years' custody, with a sentencing range of 10 to 15 years' custody. However, if it had been a category 2B offence, the starting point is 8 years' custody with a range of 7 to 9 years' custody.
7. Having placed the offence within the higher category (category 1B), the judge took as the starting point a period of 12 years' custody. He considered there were aggravating factors, in that the appellant had previous convictions and had committed this offence whilst on bail. In addition, the timing and location of the offence were aggravating factors. The offence was committed at night, in the victim's own home. He adjusted the sentence upwards to 14 years' custody. In addition, he was satisfied that the appellant was dangerous in the sense that that word is used in the Sentencing Act 2020. He

therefore imposed an extended determinate sentence of 19 years which comprised 14 years' custody and then an extended licence period of 5 years.

8. In his focused written and oral submissions on behalf of the appellant, Mr Hall advances one principal ground of appeal, namely that the judge erred in placing this within category 1B rather than category 2B so far as harm is concerned. The Sentencing Council Guidelines provide that the extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may justify elevating the offence to the higher category 1. Mr Hall submitted however that that did not apply in this case. Consequently, he submitted the judge was wrong to place the offence in category 1B. He should have placed it within category 2B, which had a lower starting point of 8 years' custody and a lower range of 7 to 9 years' custody.
9. We accept Mr Hall's submission. The Sentencing Council Guidelines provide, in relation to category 1 harm, 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 to category 1. There were two category 2 factors here - the uninvited entry into the victim's own home and the fact that the victim was particularly vulnerable as she was intoxicated. There is nothing to indicate that either of those factors was extreme, in the sense that that word is used in the guidelines. There is nothing to suggest that the combination of the two factors caused an extreme impact. The judge did not address the issue of the nature of the factors or why he considered the impact of the combination of those factors was extreme.
10. In the circumstances therefore, the offence should have been categorised as a 2B offence. The starting point for that category is 8 years' custody. The sentence here would have to be adjusted to the very top of the range, that is 9 years given the aggravating factors, that it was committed whilst the appellant was on licence, his previous convictions and the

location and timing of the offence, which occurred, as we said, at night and in the victim's own home. The judge was entitled to conclude that the appellant was dangerous, in that he presented a significant risk to members of the public of serious harm, and to impose an extended determinate sentence with an extended 5-year licence period. In the circumstances therefore, we allow the appeal. We quash the extended determinate sentence of 19 years and we substitute an extended determinate sentence of 14 years, comprising a custodial element of 9 years and an extended licence period of 5 years. To that extent, this appeal is allowed.

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

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk