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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 712



No. 202400980 A5

Royal Courts of Justice

Friday, 10 May 2024

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE JAY

MRS JUSTICE THORNTON

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

BAB

**REPORTING RESTRICTIONS APPLY
Sexual Offences Amendment Act 1992**

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MS S PRZYBYISKA appeared on behalf of the Applicant.

MS L JONES appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

- 1 This is an application by His Majesty's Attorney General for leave to refer a sentence which she regards as unduly lenient under s.36 of the Criminal Justice Act 1988.
- 2 The offender was born on 1 April 1965 and is now 59 years old. On 13 February 2024 he was convicted on one count of rape following a trial before Mr Recorder David Allen and a jury sitting in the Crown Court at Nottingham. He was sentenced by the recorder on 16 February 2024 to a term of 54 months' imprisonment, that is to say four and a half years.
- 3 In summary, the offender and victim were solicitors in a firm of which the offender was the senior partner. The victim was a more junior colleague, aged 41 at the time. They worked in different offices. He had previously made repeated suggestions that they should marry, which she had politely rebuffed. He asked her to meet him at the office on a Saturday evening for a client meeting and thereafter to review the files from her office, which was their weekly practice. After the meeting, he telephoned an Imam and the two of them tried to persuade the victim to enter into an Islamic marriage over the telephone. She refused. After this the offender raped her on a table in the office.
- 4 The circumstances in a little more detail were these. The victim had practised as a lawyer in Pakistan before coming to England in her late twenties in 2011. She had a husband and two young sons. She started studying to gain the dual qualification which she needed to practice as a solicitor in England and Wales.
- 5 Her husband was violent towards her. She left her husband in 2011 or 2012, despite her father and brothers pressurising her to stay in the marriage for fear of bringing "dishonour" to the family. At that time, she had contacted the offender for legal advice about the separation because the offender was a family friend of her brother.
- 6 A number of years later, she completed her qualification and joined the firm in about July 2020, some four months before the offence took place. The offender had offered her an arrangement under which they were to be partners and she would have an equal share in the profits, but this had not yet been formalised by any form of written contract.
- 7 The offender worked in the Birmingham office of the firm and she worked in the Nottingham office. Once a week, he would come to review the files that she was working on. In the period prior to the commission of the offence, the offender told the victim about his personal life and about his three wives and children. She was not interested in a personal relationship with him and was intent on keeping matters professional. He, however, had suggested marrying her which initially she took as a joke. During a discussion about a written contract formalising their business partnership he suggested that he would include a condition that, if she planned to marry, then he would have a right of first refusal. Again, she took this to be a joke. The offender kept on asking about marriage, making jokes about being business partners and marriage partners. She felt uncomfortable about this and embarrassed, and reluctant to speak plainly to him about it.
- 8 On Saturday 28 November 2020 the offender messaged the victim to tell her that he would be coming to the office at 5 p.m. to see a client and thereafter to review the files. She met him there. After the client meeting and when they were alone at the office, the offender made a telephone call. He said that he was calling the Imam of a mosque. He knew that she was a religious woman. He said to her that he wanted to "do Nikah", which is a religious

ceremony for a Muslim couple to be legally wed under Islamic law. He put his telephone onto speaker mode. The man at the other end of the telephone introduced himself as an Imam and asked if the offender was proposing to the victim. The offender said that he was. The Imam then asked her if she accepted and wanted to do Nikah. The victim realised that they were serious. She did not want to make them angry and so played for time, saying that she wanted to think about it. The Imam kept asking her to repeat the words for Nikah after him, but she refused. The Imam told the offender to give her “Haq Mahr”, which is a payment traditionally made to the bride as part of Nikah. That did not happen. The call ended with the Imam telling the offender to give her five minutes.

- 9 After the end of that call, the offender told the victim that he respected her and that he wanted Nikah so that he could have a relationship with her. She tried to distract and deflect him by discussing their work. He, on the other hand, persisted and tried to persuade her to agree and tried to give her money as Haq Mahr. Then the offender called the Imam again. The offender and the Imam both tried to persuade her to accept the proposal. The offender put his arms around her. He said that, if she was not ready for Nikah, she should just accept his proposal of engagement. She did then accept that proposal. She later explained that she had done so because it was late, she wanted to get home to her children, and she thought it was a way of deflecting him.
- 10 The offender then began to kiss her face. She pulled away from him repeatedly. He lifted her up onto a table, he stood in front of her and took off her cardigan and then her trousers. She was trying to put her clothes back on. He pulled up her dress to expose her breasts. He kissed and sucked her breasts. He took his trousers down and he raped her, penetrating her vagina with his penis. She was crying loudly during the course of intercourse as it was so painful. The offender did not react to that behaviour by the victim. At no stage did he ask if she was all right or if she wanted to have sex with him. The victim recalled that the penetration lasted a few minutes. He ejaculated inside her. After he had finished, he said, “I don't know what happened to me.”
- 11 She quickly left. She was persuaded by a friend to report the matter to police that night. A medical examination revealed some abrasions to her back, neck and vagina. The offender was arrested the following day, 29 November, and his mobile telephone was seized.
- 12 He was interviewed under caution. He said that he was a religious man who suffered from erectile dysfunction and had no real interest in sex. However, he admitted that they had had sex that night, but said that she was the instigator. He said that he had wanted to call his Imam to perform Nikah, as he did not want to have sex without it. He maintained that account at trial.
- 13 There was some delay in the matter coming to trial, which the recorder treated as not being through any fault on the part of the offender. The offender only appeared at the magistrates' court on 6 January 2022, some considerable time after the offence, and the matter was sent to the Crown Court. Following pleas of “not guilty” and a trial date being set, there were a number of adjournments attributable partly to the offender's health and partly to the disclosure process. Ultimately, the trial took place at the end of January and in early February of this year.
- 14 The offender had no previous convictions or cautions. The court heard positive testimonies to his good character from witnesses at the trial. There was also evidence of his medical problems in the form of hypertension, intermittent vascular pain in his calves, which

restricted his ability to walk longer distances, and a benign enlarged prostate. He had also had repeated surgeries for complex perianal fistula. There was no pre-sentence report available.

15 The victim had made two victim impact statements. The first was dated 27 January 2022, some 14 months after the incident. She explained that she had felt depressed, emotional and broken, and had felt suicidal. As the offender had raped her without using a condom, she was given the morning-after pill in case of pregnancy and medication in case of infection with hepatitis and HIV. She was very anxious about having become pregnant. She had thought that she would end her life if she became pregnant as a result of the rape. She explained that her culture and society considered rape to be a source of shame to the victim, and she knew that her family would consider her “cursed”. She lost her work as a result of the offence, having to take three months off and then having to start her own practice. She had felt unable to explain to her clients why she was no longer working at the offender's firm. She had become distant from her two sons, now teenagers, from whom she felt she had to conceal what had happened, and to whom she did not feel able to explain her changed behaviour. She retreated into personal isolation at home, not wanting to see anyone. She said that she wished that the offender had killed her after the rape and that she still felt suicidal and suffered from nightmares. This was 14 months on from the incident. She said, “This incident is too much to handle. I still feel I wish I could finish my life and get rid of this unbearable feeling.”

16 In a further statement dated 16 February 2024, she explained that she was still traumatised and suffering from mental health problems, now over three years after the offence. She felt unable to form a close personal relationship and felt that she would never have a physical relationship with a man again. Her GP had prescribed different medication to help with the reaction to trauma, but nothing was helping. She also explained that the effect on her had had an adverse effect on her children, because she had become withdrawn to an extent which prevented her from fulfilling a normal maternal role in bringing up her now teenage sons. This was in a variety of ways which she described in some detail in the statement. She also said:

“He knew from my previous circumstances that I would never tell this to anyone if he did that to me because he knew my situation with my brothers and family and he knew how women in my circumstances would never be supported by family and accepted by society back home.”

17 The Sentencing Council guideline for rape provides for three categories of harm and two of culpability. Category 3 harm applies where none of the factors in Categories 1 or 2 apply. Category 2 harm factors include, “Severe psychological or physical harm,” and, “Victim is particularly vulnerable due to personal circumstances.” Culpability is Category B unless any of the Category A factors are present. Category A factors include, “abuse of trust”. The Attorney General does not suggest that the relationship engaged that factor in this case. Category B2 has a starting point of eight years and a range of seven to nine years. Category B3 has a starting point of five years and a range of four to seven years.

18 Prior to the sentencing hearing, prosecuting counsel uploaded a sentencing note making the following submissions. The offence fell into Category 3 harm under the guideline, the Category 2 factors being absent, but the victim was said to be “vulnerable, if not particularly so”, as she was a subordinate business partner to the offender, and the offender knew that she had previously been subject to domestic abuse as a consequence of “honour-based

pressure” and because of the isolated circumstances of being alone in the office in the evening with the defendant “whom she was fearful of challenging”. It was said that it was a matter for the court whether the combination of these factors elevated the harm to Category 2 or whether they constituted other aggravating factors to be taken into account at step 3 of the sentencing exercise.

- 19 In oral submissions, prosecuting counsel amplified this, referring to the impact statements which made clear the victim's isolation and her fear of challenging the offender. The offence was said to fall into Culpability B, the Culpability A factors being absent. The aggravating factors were said to be ejaculation and the matters previously referred to in relation to vulnerability and the location of the offence, if not taken into account for the purposes of categorisation.
- 20 Defence counsel uploaded a sentencing note making the following points amongst others. It was said that the offence fell into Category 3 harm. The victim was not “particularly vulnerable.” She and the offender were in a business partnership. Although the victim had been a victim of previous abuse, her outward presentation displayed no apparent vulnerability. It was said that there was no evidence that the victim had been isolated by design. The sole aggravating factor was said to be ejaculation. The offence was said to be out of character, having regard to the six testimonial witnesses who spoke of the offender as a supportive, kind and generous leader. Reference was made to the offender's suffering from health conditions requiring regular medication, and it was said that prison would be a more difficult experience for him than for a younger, healthier offender.
- 21 At the sentencing hearing, the recorder invited defence counsel to address the issue of premeditation or persuasion/coercion in the context of calls with the Imam. Defence counsel submitted that there was no planning or coercion and that, in any event, the collusion between them could only have been part of a plan to have consensual sex at most, not to carry out a rape.
- 22 In his sentencing remarks, the recorder referred to the offender, according to the evidence which he had heard at the trial, as someone of exemplary good character. He described the offer of partnership to the victim as a very tempting career opportunity for someone in her position and one which she was understandably very keen not to lose. There had, he said, been apparent agreement to such partnership although, several months on, there was still no written contract of employment or written contract of partnership and, as a result, “her position continued to be precarious professionally.” In relation to the offender's behaviour towards her in the period prior to the day in question, by way of flirtations and unwanted attentions, the recorder concluded that the offender:

“... identified that [the victim] was not able or willing to stand up to what I characterise as your overbearing, somewhat bullying behaviour by way of persistent flirtation towards her and that led to these events on 28 November 2020.”

- 23 The recorder went on:
“... I am also satisfied that there was some effort between you ... and [the imam] to persuade [the victim] to take part in what amounted to a sham Nikah ceremony or similar. Whatever your feelings ... it seems to me that this was not part of a genuine intention that you were going to spend your lives together as man and wife, otherwise you would not

have attempted to conduct that ceremony over the telephone at 9 p.m. on a Saturday evening in your office.”

- 24 The recorder said that he had regard to the two victim personal statements; and to the fact that the offender had no cautions or convictions and was a man of positive good character, as set out by the six witnesses who gave evidence at the trial. He said he had regard to the medical letters and information, which indicated that the defendant had vascular and neurological problems, which he described as, “perhaps not unusual for a man in his late fifties.” He also referred to a letter making reference to particular concerns and the involvement of specialists in relation to the consequences of hypertension. He observed that the offender's medical problems would be treated as well within the prison system as outside it.
- 25 The recorder concluded that the case fell into Category 3, the aggravating features for Categories 1 and 2, as he described them, being absent. His reasoning was expressed as follows:
- “Now, I say that, appreciating that [the victim] has been deeply distressed by this, but sadly that is all too common in offences of rape which is why those offences are treated so seriously by the courts.
- “Secondly, in terms of vulnerability, what is required for a higher criterion, as Miss Jones has said, is a victim who is particularly vulnerable. These offences are sometimes committed against particularly young or elderly victims or those with a mental illness. [The victim], being a professional woman in her early forties at the time, does not fall into those obvious categories of particular vulnerability. As has been said, there was evidence of earlier domestic violence, although the details were disputed, and it was not appropriate or necessary to go into those details but, in any event, it was many years previously. As Miss Jones says, this offence was committed when [the victim] was alone, but such offences, again, are very commonly committed when the victim is alone and somewhat isolated. Again, that is another reason why they are treated so seriously.”
- 26 As to culpability, the recorder said that there was some premeditation in the involvement of a second person in the sham ceremony which was attempted to be procured before the sexual activity, but that this was “... not the significant degree of planning for the rape, which would characterise offences in the higher category of culpability.”
- 27 Having taken the Category B3 starting point of five years, he identified as aggravating features: (1) ejaculation; (2) some degree of premeditation for the purported ceremony to encourage the victim to engage in sexual intercourse; and (3) the weeks of flirtatious and unwelcome comments. He identified the mitigating features as being: (1) the absence of previous cautions and convictions; (2) the positive good character evidence; (3) the delay; (4) the offender's age and medical problems, which would mean that, as a first offender at his age, he would be bound to find prison more of an adjustment than for a younger man; and (5) the fact that the conviction would lead to a loss of ability to pursue his chosen profession as a solicitor. He said that he also took account of what was said in *R v Ali* [2023] EWCA Crim 232, [2023] 2 Cr App R (S) (25) about the stretched resources of the

prison service and the need for sentencing judges to make sure that sentences are no longer than required.

- 28 The recorder concluded that the mitigating factors meant that he could impose a sentence below the starting point for offences of this nature, and accordingly, he determined upon a sentence of four and a half years.

Submissions

- 29 On behalf of the Attorney General, it is submitted that the recorder was wrong to conclude that the victim's circumstances were not such as to render her "particularly vulnerable." Although the matter had been put in the alternative by prosecuting counsel, namely either the matters were relevant to categorisation or were relevant as aggravating factors, the factors did indeed render her particularly vulnerable. The factors which did so were identified as being that she was a subordinate business partner to the offender; she was fearful of challenging him; the offender had arranged to meet her alone in their office at the weekend; and she was isolated more generally as her family had ostracised her after she suffered abuse in her marriage, as the offender knew.
- 30 Alternatively, it was submitted that the recorder failed properly to balance the aggravating and mitigating features, wrongly taking into account some features as providing mitigation and, in any event, failing to recognise that the aggravating factors far outweighed those in mitigation, and failing to take into account vulnerability as a serious aggravating factor if it did not reach the threshold of particular vulnerability so as to amount to a categorisation factor causing the offending to move into Category B2.
- 31 On behalf of the offender, Ms Jones, who appeared at the trial and the sentencing hearing on his behalf, submitted that the recorder was justified in treating the victim as not being particularly vulnerable. This was not, she emphasised, a case in which it was alleged that there was any abuse of trust, and the business relationship, being one of partners, made her subordinate only in her experience of law. She was not a young victim; she was an outwardly impressive 41-year-old who had dually qualified and was a campaigner for women's rights on social media with a large social media following. The vulnerability of being alone was inherent in many rape offences. She had not been deliberately isolated and her difficulties with her husband were many years in the past. Ms Jones submitted that the recorder gave appropriate weight to the aggravating and mitigating features which involved an evaluative judgment. The result was well within the proper ambit of his sentencing discretion. It was not a sentence which was lenient, alternatively, if lenient, was not unduly lenient.

Analysis

- 32 This was not an easy sentencing exercise by reference to the particular factors identified in the guideline. We recognise that the recorder had the benefit of having seen and heard both the victim and the offender during the course of the trial and being in a position to use that experience to form a judgment about the balance of power between them and about the extent to which their relationship gave rise to vulnerability on her part in the particular circumstances in which they found themselves on that Saturday evening.

- 33 However, we think that the recorder became distracted by a rigid exercise of categorisation and failed to consider all the features of the case in the round. There are four aspects in particular which have led us to that conclusion.
- 34 First, vulnerability is a matter which is relevant both to harm and to culpability. We have already referred to particular vulnerability being a harm categorisation factor. The guideline also states when it comes to aggravating features that “specific targeting of a particularly vulnerable victim” is an identified aggravating feature and, as the rubric under that passage identifies, that is because it can go to culpability.
- 35 In this case, the recorder found that the offender had, himself, identified that she was not able or willing to stand up to his overbearing and bullying behaviour by way of persistent flirtatious behaviour towards her. That suggests that the offender thought that she would be less likely to resist or report his unwanted physical advances, just as she had not done so in response to his intrusive non-physical advances, which is exactly what the victim describes in her first victim personal statement quoted above. Being fearful of standing up to him in that way is a feature which goes to vulnerability both as a matter of harm and culpability because the offender was aware of it. She was also isolated and alone in the office on a Saturday evening which increased her vulnerability.
- 36 In our view, it is not helpful to focus closely on whether these aspects of her vulnerability made her “particularly” vulnerable for categorisation purposes. If they did not reach the category threshold for particular vulnerability, they certainly increased her vulnerability and brought her close to it. They needed to be treated as a seriously aggravating feature if they were not treated as bringing the case into Harm Category 2. Having decided that the case fell within Category 3B, the recorder seems to have lost sight of this and to have left this out of account entirely, having chosen the starting point for Category 3B.
- 37 Secondly, although this was not a case of abuse of trust in the technical sense in which that term is used for categorisation in the guidelines, there was a very real and important imbalance in the relationship between the offender and the victim, which is an aggravating feature for the same policy reasons as underpin abuse of trust, strictly so called, as a category factor increasing culpability. She was a more junior colleague who respected the offender as the senior partner. In correspondence, she addressed him as “sir”. As the recorder found, she had neither a contract of employment nor partnership, and her position was therefore precarious. She needed to avoid antagonising the offender to be sure of continuing to work for the firm with, moreover, the attractive prospect, not yet fully secured, of an equal share in the partnership profits. It is clear from what she said that she was reluctant to express herself in clear terms to him and was deflected from doing so by these considerations.
- 38 Whilst this might be characterised as vulnerability due to her personal circumstances, it is perhaps more readily characterised as the kind of abuse of a position of “trust” in the non-category sense, of abusing an imbalance of power through which a defendant can take advantage of trust reposed in them by the victim.
- 39 We would accept Ms Jones’ submission that the other aspects which are relied upon for the victim having vulnerability have little weight, but the recorder appears to have failed to give either of these aspects the significant aggravating weight which they required.

- 40 Thirdly, although the recorder stated that he had taken into account the victim impact statements, he appears to have treated them as involving psychological harm which was no greater than is inherent in any offence of rape. That was not the case. The victim was still having suicidal ideation some 14 months after the event. It had caused particular damage to her in her own eyes and those of her family and in her whole cultural environment, because being raped was treated as a cause of shame for the victim.
- 41 Moreover, the offence had had a serious impact on her parenting and therefore the lives of her children, which is lasting and irremediable. That was another permanent source of grief to her as well as damage to them. It was not argued before the recorder, or indeed before us, that this amounted to severe psychological harm so as to elevate the case to Harm Category 2. Nevertheless the injury to the victim was an important feature of the case, which constituted another weighty aggravating feature in what the recorder treated as the least serious category of rape, B3 and, if not relevant to categorisation, should have been taken account of as such an aggravating feature at that stage.
- 42 Fourthly, we accept the submission on behalf of the Attorney General that the recorder simply cannot have attributed the proper weight to the various aggravating and mitigating factors. We have already identified three important features which form significant aggravation in relation to the culpability and harm of the offending, even if, when taken individually, no one of them would have taken the offending into a higher category.
- 43 In addition, there were two further aggravating features. Firstly, the dishonest and premeditated trickery, as the recorder found, in seeking to persuade the victim to have consensual sex by engaging in a sham marriage ceremony, sham in the sense that the offender had no intention of their spending their lives together as man and wife.
- 44 Secondly, the aggravating feature of ejaculation, whose aggravating potency is illustrated by the anxiety which it caused to the victim in this case about pregnancy and the steps she took to avoid it.
- 45 Against these, there were the mitigating features of his clean record and the delay. The delay did not carry very great weight. His good character was less important in the context of this offence than it might have been in other offending because of the seriousness of the offence. The guideline makes clear that:
- “Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which would normally be attributed to this factor.”
- 46 The remaining matters identified by the judge as mitigation had either little or no weight. The offender's medical condition was not serious or one requiring “urgent, intensive or long-term treatment”, to use the words of the guideline identification of a medical condition constituting a mitigating factor. The recorder himself said that his medical problems would be treated as well within the prison system as they would outside it. The fact that the conviction would lead to a loss of ability to pursue his chosen profession as a solicitor was brought upon himself by the offending and did not constitute mitigation. What was said in *R v Ali* was concerned primarily with short sentences and the ability to suspend them.

- 47 Therefore, in our view, to treat the mitigating features as outweighing the aggravating features, using a Category 3 starting point of five years, as the recorder did, was outside the range of evaluative judgments which a sentencing judge could properly reach, by a very considerable margin.
- 48 Standing back and looking at the matter in the round, we think that the offence required a sentence of at least eight years. Whether this is reached by recategorizing the offending or taking the balance of the aggravating features over the mitigating features as elevating it into another category would be a sterile debate and would be an example of the oft quoted and deprecated approach of treating the guidelines as tramlines. What matters is the appropriate sentence for all the circumstances of the offence.
- 49 It follows that, in our view, the sentence was unduly lenient. We grant leave, we quash the sentence of four and a half years and we substitute one of eight years' imprisonment.

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This transcript has been approved by the Judge.