



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 21
HCA/2024/000153/XC

Lord Doherty
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Crown Appeal against Sentence

by

HIS MAJESTY'S ADVOCATE

Appellant

against

BARZAN NAWSHOWANI

Respondent

Appellant: Lord Advocate, D Bain KC; Crown Agent
Respondent: W Culross; John Pryde & Co (for Amer Anwar & Co, Glasgow)

15 May 2024

Introduction

[1] On 2 February 2024 at the High Court at Glasgow the respondent was convicted of the following charge:

“(002) on 7 August 2022 at Duke Street and within KS Turkish Barbers, 438 Duke Street, both Glasgow you BARZAN NAWSHOWANI did abduct and assault [the complainer] ... and follow her from your car into Duke Street, thus placing her in a state of fear and alarm, and cause her to enter said KS Turkish Barbers, your place of work, and thereafter activate electric shutters whereby she was unable to leave

and thus detain her against her will, touch her on the body, kiss her on the mouth and neck, kiss her breast, lift her onto a worktop, pull down her lower clothing, penetrate her vagina with your fingers, turn her around, push her onto said worktop and penetrate her vagina with your penis and you did thus rape her; CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009”.

There was a docket to the indictment in the following terms:

“on 2 August 2015 at Trongate, Alexandra Parade, and a secluded area near to Todd Street, all Glasgow and elsewhere in Glasgow you BARZAN NAWSHOWANI did pretend to LO ... that you were a licensed private taxi driver, induce her to enter your motor vehicle registration number YK08 TZP and drive her to said secluded area and, whilst she was intoxicated and unable to give or withhold consent, you did repeatedly seize her hand and compel her to touch your penis, attempt to kiss her on the mouth, and while she was asleep or unconscious due to intoxication you did pull her top up and pull her bra down and touch her breast and cause her pants to rip”.

The evidence

[2] LO was aged 28 in August 2015. Her evidence was that she had been on a night out in Glasgow city centre. She became very drunk. She could hardly walk. She was refused service at a bar. She approached the respondent's car and asked if it was her taxi to Alexandra Parade. The respondent said that it was. She got into the car and quickly fell asleep. When she awoke the respondent was committing the assault described in the docket. She eventually managed to push him away and he drove off. In his evidence the respondent accepted that LO had been in his car in the early hours of the morning, but he denied pretending to be a taxi driver or assaulting her.

[3] CS was a friend of the complainer. She gave evidence that on Monday 1 August 2022 she and friends had been out drinking in Glasgow city centre. She became drunk. Between about 4.00am and 5.00am she and a friend wished to get a taxi to Govan where they both lived. She flagged down a car driven by the respondent which she thought was a taxi. The respondent asked if she had cash. He drove them to Govan. He dropped off CS's friend

first and then drove CS to her destination. She paid the fare. He gave her his phone number and said she should call him if she needed a lift again.

[4] The complainer was a student. She was 20 years of age. On 6 August 2022 she went on a night out in Glasgow city centre with CS. Both women were drinking for several hours. The complainer was intoxicated. Shortly after 2.00am they wished to go home. The complainer was staying in Dennistoun and CS's home was in Govan. CS texted the respondent and he came to pick them up. The complainer believed she was getting into a taxi. The respondent drove to Govan first where he dropped off CS. He then drove to Dennistoun. While driving he complimented the complainer on her appearance. He did not drive to the address which she had given him but parked outside his barber's shop in Duke Street. When the complainer got out of the car, he got out too and followed her. He encouraged her to go into the shop with him. She described it as a "weird" situation. She did not want to go in, but she did so out of fear in order "to keep the peace". Plainly, the jury were satisfied that the respondent's conduct put her in a state of fear and alarm and that it caused her to enter the shop. Once they were inside the respondent closed the electric metal shutters, preventing the complainer from leaving. He switched off the shop's CCTV cameras. When he made sexual overtures towards her she made clear that she did not want them, but he proceeded nonetheless, using force to rape her. She cried and repeatedly said "No" while this was happening. The respondent did not wear a condom. He ejaculated inside her vagina. After the rape he opened the shutters, switched the CCTV cameras back on, and left the shop with her. She made her own way home, which was nearby. She quickly became very distressed and called and texted friends to come to her assistance.

The sentence

[5] On 26 February 2024 the respondent was sentenced to 6 years' imprisonment, backdated to 25 August 2022. The trial judge assessed the respondent's culpability on the basis that there had been a significant degree of planning (but also an element of opportunism) and there had been abduction. The harm caused was serious, as was plain from the complainer's victim impact statement. The respondent continued to deny the offence, maintaining that what had occurred had been consensual. Mitigatory factors were that the respondent had a good work record; there was no analogous previous offending; and that he had had adverse experiences before and after his arrival in the UK as an Iraqi Kurd refugee in 2008. When young he had been struck in the leg by debris from a nearby explosion. Later he had had to serve for 5 years in the army, which had been harrowing. He had been granted asylum in the UK a few months after his arrival. His parents and five of his siblings had been killed in Iraq during terrorist attacks in 2013 and 2014.

The appeal

[6] The Crown appeals against the sentence, maintaining that it was unduly lenient (Criminal Procedure (Scotland) Act 1995, sections 108(1)(a) and 108(2)(b)). The trial judge erred in several respects. He ought to have assessed the respondent as having greater culpability and of having caused more serious harm. The sentence did not adequately reflect the premeditated and predatory nature of the attack on a vulnerable young woman, the features of abduction and detention, the force used, and the harm the attack caused her. Nor did it sufficiently serve the purposes of protection of the public; of marking the court's disapproval of the conduct; and of deterring others from offending in a similar way. The judge ought to have identified an appropriate sentencing range. He was wrong to treat the

respondent as being of previous good character. He had previous convictions in Scotland for road traffic offences and for failing to appear at court while on bail. Moreover, he had self-disclosed to a social worker that he had two previous convictions in England and Wales for road traffic offending. The judge also erred in treating the respondent's adverse experiences in Iraq as being a mitigatory factor. If regard was had to the Sentencing Council for England and Wales guideline for rape an offence such as this was a category 2A offence where the sentence range would be 9 - 13 years' imprisonment and the starting point 10 years. The criminal justice social work report had recommended that consideration be given to a period of post-release supervision: that would be appropriate in the circumstances. The report had observed that the respondent had serious issues in respect of underlying attitudes, perceptions and values which facilitated his involvement in an offence of this nature: and that those issues may require sustained, focused intervention and treatment in order to reduce the likelihood of further offending and the risk of serious harm to others, primarily adult females. Given the judge's errors the court should allow the appeal and pass a more severe sentence.

[7] In response counsel for the respondent submitted that the trial judge had not erred in any material respect. He had applied his mind to all of the relevant factors. The sentence which he selected did not fall outside the range of sentences which a judge at first instance could reasonably have considered appropriate. If it was lenient, it was not unduly so.

Decision and reasons

[8] The respondent's lack of previous analogous offending and his adverse experiences before and after his departure from Iraq were both matters which the judge was entitled to have regard to when considering his circumstances, but in a case such as this we would not

expect significant weight to be attached to either of them. Although the judge indicates that he attached more weight to the second factor than the first, we do not understand him to have given it significant weight. It was not suggested that the judge required to have regard to the English sentencing guideline. He did not err in choosing not to do so. Nor are we persuaded that in the circumstances of this case he was obliged to articulate a sentencing range (*HM Advocate v GH* 2024 JC 95, paras [14] - [15]). However, in our view the judge did err in other important respects.

[9] It is clear on the evidence that on more than one occasion the respondent held himself out as being a taxi driver during the early hours of the morning in Glasgow city centre. On these occasions he gave lifts to vulnerable young women when they were in a state of intoxication.

[10] The respondent was aged 37 at the date of this offence. The complainer was 20. She got into the respondent's car because she believed him to be a taxi driver. He chose to take her companion home to Govan (a longer journey) before he took the complainer to Dennistoun. The trial judge points out that there may have been some logic in doing that because the respondent lived about 5 minutes by car from Duke Street. The difficulty which we have with that explanation is that other aspects of the evidence suggest there was a sinister motive. First, during the journey in the taxi the respondent complimented the complainer's appearance. Second, rather than drop her at her destination he stopped outside his barber's shop where he persuaded her to go in with him. He would not have been alone with her to do that if he had not gone to Govan first. His behaviour was not opportunistic. It was calculated and predatory.

[11] In our view the sentence passed did not adequately reflect the premeditated and predatory nature of the attack by a man of mature years on a vulnerable young woman,

the features of abduction and detention, the force used, and the harm the attack caused her. It is clear from her victim impact statement that the attack's effects on her have been very serious. We also consider that the sentence did not sufficiently serve the purposes of protection of the public; of marking the court's disapproval of the respondent's conduct; and of deterring others from offending in a similar way. Women are entitled to feel safe when they travel by taxi. Those who prey upon vulnerable women who require a taxi and sexually assault them should be in no doubt that the courts will take a very serious view of that behaviour.

[12] The judge's errors caused him to under-estimate the seriousness of the offence. The sentence of 6 years' imprisonment is unduly lenient. It falls outside the range of sentences which, had the judge applied his mind correctly to all of the relevant factors, could reasonably have been considered appropriate (*HM Advocate v Bell* 1995 SCCR 244, at page 250). In the whole circumstances we consider that an extended sentence of 11 years' imprisonment, made up of a custodial term of 8 years and an extension period of 3 years, is required in order to satisfy all of the relevant sentencing purposes. The sentence is an extended one because we consider that the period for which the respondent would, apart from section 210A, be subject to a licence would not be adequate for the purpose of protecting the public, and in particular, women, from serious harm from him. We shall allow the appeal, quash the sentence which the judge imposed, and substitute that extended sentence. Like the previous sentence, it will be backdated to 25 August 2022.