Neutral Citation Number: [2019] EWCA Crim 2174

Case No: 201900379 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BLACKFRIARS
Ms Recorder Gill
T20177185

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before :

LORD JUSTICE DINGEMANS
MRS JUSTICE LAMBERT
and
HIS HONOUR JUDGE MARK BROWN, RECORDER OF PRESTON

- -

Between :

Jose Sepulvida-Gomez	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Ailsa Williamson (instructed by **S&O Partnership Ltd**) for the **Appellant**
Tim Devlin (instructed by **CPS**) for the **Respondent**

Hearing date : 20 November 2019

- -

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is an appeal against both conviction and sentence. The appeal against conviction raises a point about the effect of inadmissible opinion evidence given by prosecution witnesses on the safety of the conviction. The appeal against sentence raises issues about the meaning of "forced/uninvited entry into victim's home" and "victim is particularly vulnerable due to personal circumstances" for the purposes of factors indicating harm category 2 of the Sentencing Council Definitive Guideline for the offence of assault by penetration.

2. On 22nd June 2018 in the Crown Court at Blackfriars (Ms Recorder Gill and a jury) the appellant was convicted unanimously of the offence of assault by penetration contrary to section 2 of the Sexual Offences Act 2003 and two counts of sexual assault contrary to section 3 of the Sexual Offences Act 2003 which had occurred in the early morning of 31st August 2016.

3. On 1st August 2018 the appellant was sentenced to 8 years imprisonment on count 1 and 18 months imprisonment, concurrent, on count 2, giving an overall sentence of 8 years. A Sexual Harm Prevention Order was made. The Appellant was required to comply with the notification to the police requirement.

4. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to the complainant ("A") shall during A'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.

A summary of the cases

5. On 30th August 2016, a party was held at a flat which belonged to B (whose name is not given to protect A's identity) who was A's boyfriend. He shared this flat with two other men and they were also present with their girlfriends and there were 12 or 14 persons in all at the party. They were all part of a music band. This included the appellant, known as 'Tito', who the evidence showed to be a talented musician.

6. There was a barbecue on the balcony and when the party moved indoors there was dancing and playing of musical instruments. The appellant's case was that there had been "a moment" when the appellant was singing and A had looked at him. This was denied by A and other prosecution witnesses at the trial.

7. A estimated that during the evening she had drunk about half a bottle of wine and then went to bed between about 0100 and 0200 hours in her boyfriend's bedroom in the flat. The party continued and there appears to have been a considerable amount of drinking. A's boyfriend continued partying and later went to sleep on the sofa in the sitting room of the flat.

8. Other guests left but the appellant remained. It was common ground that the appellant went into B's bedroom. It was not his case that he had been invited into the room. A's case was that she thought her boyfriend was coming into the room,

she said "Babe" addressing her boyfriend, "did you find my phone" and then someone who she assumed to be her boyfriend got into bed beside her. She was still asleep or half asleep and the person stroked her breasts (count 2), inserted his fingers into her vagina (count 1) and licked her vagina (count 3) before she realised that it was not B. She had sat up and said she had to go, the appellant had held her arm but she had manged to leave and went to the lavatory. When she came out of the lavatory the appellant was still in the flat, so she had gone to lie on top of her boyfriend on the sofa. The appellant then left the flat and as soon as he had left, A had woken up B, reported what had happened and he had taken her home. A also made a complaint to a friend, and A reported the matter to the police on 1 September 2016.

9. The appellant's case was that A had consented to the sexual activity that took place. A had been giving the appellant the eye all evening and knew perfectly well that he was the one who was in bed with her. When the intimacy became more serious she changed her mind and that was why she used the words 'I have to leave now' rather than the word 'stop'. The appellant said that he had gone into the room and he had been asked about the mobile phone and he had replied using his normal voice, so that A must have known that it was him and not her boyfriend. He had started stroking her breast to which she had responded and he had gone downwards inserted fingers into her vagina and then licked her vagina, before she had said she had to go. He had left the flat shortly afterwards. The appellant was arrested and interviewed on 7th September.

10. The appellant's case was that he had a sex addiction which caused him to seek sexual relations with as many partners as possible, which had interfered with his long term relationships. All of his sexual relations had been consensual. He had responded to a text sent by A's boyfriend B the next day saying "Yes, I failed you. I have a sex addiction that's unmanageable for me with alcohol …" but he was apologising only for having consensual sexual relations with A behind B's back, and not for any non-consensual activities. The reality was that A had consented at the time and had only complained because she was concerned that her boyfriend's flatmates may have seen the appellant go into the room in which she was in bed. The appellant's case was that the driver for the prosecution was A's boyfriend who had turned everyone else in the band against him.

The appeal against conviction

11. The Appellant raises 6 grounds of appeal. These are: (1) The jury heard inadmissible opinion evidence from the witnesses Jane Cocklin and Gary Lee containing speculation and their opinions as to whether A would have consented to sexual activity with the appellant; (2) The jury heard evidence of his bad character from the witness Gary Lee without a bad character application being served by the prosecution; (3) The jury also heard evidence of his bad character from the witness Juliana de Souza. This evidence was given during cross-examination. No application to discharge the jury was made and the Recorder failed to direct the jury as to how they should treat this evidence; (4) The Recorder wrongly exercised her discretion by declining to give a good character direction limited to the propensity limb; (5) There was a failure to call character witnesses who could give evidence in relation to the appellant's lack of propensity to commit sexual offences. These witnesses are the appellant's girlfriend, Ms Crivello; the

appellant's former girlfriend Ms Dykes; and the appellant's mother Ms Gomez; and (6) the Recorder wrongly exercised her discretion by deciding to give the jury a cross-admissibility direction.

12. The prosecution accepted that inadmissible opinion evidence had been given by both Ms Cocklin and Mr Lee but said that this had not affected the safety of the conviction. The evidence given by Ms De Souza and Mr Lee was not bad character evidence, but if it was it was admissible because the defence had wanted it to be adduced and there was no need to give additional directions to the jury. The judge had been right not to give a modified good character direction. The appellant had been properly represented at trial. The cross-admissibility direction was not necessary but there was nothing wrong in giving it.

13. In view of the nature of the grounds criticising his previous legal representatives the appellant was invited to waive privilege and he did so on 15th February 2019. The Registrar thereafter sought comments from trial representatives. Trial counsel responded in a letter dated 17th March 2019 and trial solicitors responded in a letter dated 15th March 2019 and 22nd March 2019 enclosing correspondence with trial counsel.

Material parts of the evidence at trial

14. A and B gave evidence and were cross-examined. Jane Cocklin who is a close friend of A gave evidence about the recent complaint made by A.

15. In re-examination Ms Cocklin said A had never mentioned that she fancied the appellant and she herself had never seen anything to suggest she did. Prosecuting counsel then asked the judge if she had any questions. However after a reply which was inaudible on the transcript prosecuting counsel then summarised the evidence just given by Ms Cocklin and then went on to ask:

> "Q. So if it was suggested that she would consent to this or anything with Tito, what would you say about that, from what you heard?
>
> Defence: She can't, she can't.
>
> I would say that that didn't happen.
>
> Q. Right. All right.
>
> Defence: She can't.
>
> Q. No, I'm just asking based on what she told you.
>
> Defence: Yeah. She can't
>
> Defence: She's not in a position to.
>
> Q. All right. Thank you, Your Honour. Is there any other question?

> Judge: Thank you very much. The witness is not in a position to answer that question.
>
> Q. No
>
> Defence: Not the last question
>
> Judge: It is only what she has seen or heard.
>
> Q. Only what she can see and hear and what she's been told, I agree.
>
> Defence: Only two people in the room?"

16. It was common ground at the appeal that this was inadmissible opinion evidence from the witness. It is also right to note that after defence counsel intervened the judge said the witness was not in a position to answer the question, "it was only what she has seen or heard".

17. Juliana De Souza gave evidence that she used to be part of the group. She had known the appellant for about 2 ½ years. He offered to help her with her drumming which she gladly accepted. She was not present at the barbecue. She gave evidence about an exchange of messages with the appellant and a photograph, which had been located, showing A and others with a balloon in their mouths as if it was a penis.

18. Ms De Souza gave evidence which was said to be bad character evidence about the appellant. In cross-examination she said she stopped being friends with the appellant when he became too flirty and inappropriate. She agreed that he had never touched her or tried to kiss her. Her evidence was that towards the end of 2015 the appellant had referred to photos of herself which he had found on her Facebook page with comments such as "Mmm nice beach". It was a holiday picture of' when she went to Rio in 2014, and the appellant sent an emoticon suggesting masturbation which she found distasteful. It was then suggested that she was applying double standards to the appellant because she had not found the photographs of the others putting the balloon into their mouths to be distasteful.

19. Evidence was also given by Eloise Mott and one of B's flat mates.

20. Gary Lee also gave evidence about texts sent to him by B and the appellant during which he gave his opinion about whether A had consented to sexual relations, and he gave evidence referring to the appellant's sexual adventures which was also said to be evidence of bad character. Mr Lee said that the day after the party he had received several text messages. The first one was from B at about 1030 hours who told him that something had happened at the party. He then had a conversation with the appellant who told him that he felt bad as he had tried it on or had a thing with A and had betrayed his friend B. He had got into bed with her while she was asleep. The appellant did not go into the details but Lee gained the impression that it was something more serious than his usual adventures with women. The appellant also told him about his adventures with women and didn't mind holding

back. He also said "his wife didn't stop until a certain point, she should take the blame also".

21. Mr Lee was cross-examined on the basis that the prosecution had been driven by B. Mr Lee continued his evidence in re-examination saying his concern was that the appellant was messing with two of his closest friends and said: "Because I think when he said that she didn't stop at a certain point I feel that that is, that situation she was either asleep and so she couldn't". Prosecution counsel then said "This is your opinion, is it". Mr Lee replied "this is my opinion" and prosecuting counsel replied "people's opinions on what may have happened – all right? – are not relevant. The jury has got to make their decision" to which Mr Lee replied "sure". The exchange continued:

> "Q. – on the evidence. But what you could help us with please is what you know about D. Yes?
>
> A. True
>
> Q. I mean tell us what you know about [A] and her lifestyle, if that will assist you to tell us what you want to tell us about your sure view on what has happened.
>
> A. Yeah. Will, I think this all stems from how close the sort [A] and [B]'s connection and their love for each other, so for her to do anything outside of that and, well, I knew that's not something she would choose to do.
>
> Q. All right.
>
> A. I think it's a case of abuse of a comfort zone situation where it's been abused basically, that its's just been that [inaudible] and that sort of relaxed situation has been somewhat abused. I think that's what I meant when I said about the –
>
> Q. Okay. Now
>
> A. – messing with two of my closest friends or, yeah, just a genuine good person, who I just know that she wouldn't do something like that."

22. Janet Gordon gave evidence about the party.

23. The appellant gave evidence and was cross-examined. He maintained his case.

24. The Appellant's previous convictions were adduced in evidence on his behalf. Before the events of 31st August 2016 he had had only one caution, but by the time of the trial (which had been delayed by the need to carry out a download and examination of various phones) the appellant had been convicted for a domestic assault on a girlfriend. The conviction was adduced because the Appellant wanted to show that he had not been convicted of any sexual crime beforehand.

The split summing up and speeches

25. The judge gave a split summing up. In the first part she gave a direction on cross admissibility. There was also a direction on the appellant's character where the judge said: "As you have heard, the defendant has some previous convictions. He has a previous conviction for battery, that was a domestic offence. In March 2018, he had a conviction for destroying property worth £70 and playing an instrument without permission on the roadway. Since these are not sexual offences, they cannot show any tendency to commit any of the offences that you are considering during this trial. So you must not hold those previous convictions against him in any way."

26. Prosecuting and defence counsel then both made speeches. Towards the conclusion of his closing speech prosecuting counsel reminded the jury of the evidence saying A could not consent because she was asleep or somewhere between consciousness and unconsciousness and the fact that it was only in his evidence before the jury that the appellant had suggested that A went off to bed smiling. Prosecution counsel continued saying "isn't the reality of the situation exactly as Gary Lee told you? It was a very strong relationship between [B] and [A]. He'd seen them many times together. He knew them far better than any of us ever will and in his opinion, she would never do that. She would never consent to it", before continuing on to ask the jury what reason was there for rejecting what A had said.

27. In the defence closing speech much was made of the fact that A was making this false complaint because others would have seen the appellant go into B's bedroom at a time when A was there and B was asleep on the sofa in the living room. Much was made of the fact that it was B who was actively contacting people including Mr Lee and that "he was the person who wanted this matter reported from the very beginning". The defence stressed that the appellant was attending Sexual Addicts Anonymous and was addicted "to consensual sex. Not forcing women that did not want to engage with him."

28. The judge then reminded the jury of the evidence. In the course of summing up the facts the judge reminded the jury of Mr Lee's evidence saying "He was asked about [A] and her lifestyle. He said `I know how close [A] and [B] were and their connection. That is not something she would do. I just know she would not so something like that'. He was asked about the defendant's adventures with women and how would you describe that from what he had heard from the defendant."

Inadmissible opinion evidence from Cocklin and Lee (ground 1)

29. It is apparent from the extracts from the transcripts set out above that both Ms Cocklin and Mr Lee gave their opinion on whether A would have consented to sexual activity with the appellant. It was common ground that this was inadmissible opinion evidence. This was because Ms Cocklin and Mr Lee were not present and were therefore speculating on the issue for the jury. The evidence should not have been adduced before the jury.

30. It is right to note that the judge did tell the jury after Ms Cocklin gave her opinion that "it is only what she has seen or heard", and defence counsel pointed out that

Ms Cocklin was not there. No one referred again to that evidence and we cannot see that that evidence had any effect on the trial.

31. So far as Mr Lee's opinion was concerned it is right to note that prosecuting counsel did attempt to stop Mr Lee from giving his opinion saying "people's opinions on what may have happened – all right? – are not relevant. The jury has got to make their decision". However we also note that prosecuting counsel did go on and ask another question which caused Mr Lee to give his opinion. We also note that prosecuting counsel referred to Mr Lee's opinion in his closing speech, and the judge reminded the jury of Mr Lee's evidence about this without explaining to the jury why it was not evidence on which they could rely. We will return to this issue when we consider the safety of the verdict.

Evidence from Ms de Souza and Mr Lee properly before the jury (grounds 2 and 3)

32. The first issue was whether the evidence that the appellant made sexual innuendoes to Ms de Souza in the hope of entering into consensual sexual relations and evidence that he had reported sexual adventures to Mr Lee was evidence of "bad character" for the purposes of the Criminal Justice Act 2003 ("CJA 2003"). Section 98 of the CJA 2003 provides that references to evidence of a person's bad character are "to evidence of, or of a disposition towards, misconduct on his part". "Misconduct" is defined in section 112 of the CJA 2003 to mean "the commission of an offence or other reprehensible behaviour".

33. It was not suggested that either piece of evidence was evidence of the commission of an offence. It has been established that what is capable of constituting reprehensible behaviour is fact specific, see *R v Palmer* [2016] EWCA Crim 2237 at paragraph 29 and Blackstone at F13.6. Further as noted in Archbold at 13-13 "whether conduct constitutes `reprehensible behaviour' is, at its outer limits, a matter of opinion on which views may legitimately differ". In this case neither prosecution nor defence suggested at trial that the evidence was bad character in the sense of constituting reprehensible behaviour, but we are prepared for the purposes of the appeal to assume (but not decide) that it was reprehensible behaviour for the purposes of the CJA 2003. However we are sure that even if it was reprehensible behaviour and so should have been the subject of an application to adduce bad character, the evidence was properly admitted. This was because all the parties agreed that the evidence was admissible and so it could be admitted pursuant to section 101(1)(a) of the CJA 2003. This was because it was part of the defence case to show that the appellant was addicted to numerous consensual sexual encounters to explain why he ventured into the bedroom in which A had gone to sleep without express invitation, but that he always respected proper boundaries. The judge gave proper directions about the defence case in this respect. In this case there was no basis for suggesting that the appellant's past consensual sexual behaviour might count against him, and the jury were properly told that the defence relied on this evidence to show that all this sexual activity was consensual. Indeed in the judge's summary of the appellant's evidence the jury were reminded of his evidence that "he had had a good amount of consensual sex to know if someone was asleep or not. She did not fall back asleep. She was awake throughout". These were sufficient directions.

The judge was entitled not to give a good character direction (ground 4)

34. It was common ground that the relevant law is now set out in *R v Hunter* [2015] EWCA Crim 631; [2015] 2 Cr App R.9. It was common ground that the appellant had previous convictions, and that none of those previous convictions was for a sexual offence. It was submitted that the judge should have given a good character direction, limited to the fact that the appellant did not have a propensity to commit sexual offences.

35. It was also common ground that whether to give such a character direction was a matter of discretion for the judge. In our judgment it is not possible to say that the judge exercised her discretion on a wrong basis or came to an irrational conclusion. We note that the judge had properly reminded the jury that none of the previous offences were offences involving sexual offences in the summing up.

There was proper representation by former trial counsel (ground 5)

36. We can see nothing in any of the grounds advanced which suggest that former trial counsel did not conduct the defence on behalf of the appellant with proper care and skill. The suggestion that trial counsel or the solicitors acted in breach of duty in failing to call character witnesses is without foundation. This is because it is apparent from the materials before us that the appellant's former solicitors had asked the appellant for details of character witnesses on five separate occasions and no details of witnesses were given by the appellant. Further trial counsel specifically asked the appellant about character witnesses but the appellant stated that he did not have any witnesses on which he could rely to advance his case.

37. It does appear that supporters of the appellant, including a former girlfriend from whom he had separated, attended the trial. They have now provided witness statements speaking of the appellant's qualities as a person. However in circumstances where the appellant had introduced into evidence his sexual addiction, there were obvious difficulties in calling a witness who had had a relationship with the appellant at the time that he was pursuing sexual opportunities elsewhere as a result of this addiction. At the very least the jury might have been left with a more negative impression of the appellant's activities and its effects on others than he had conveyed in his evidence. Therefore even if this evidence was fresh evidence before us, it would not have affected the safety of the conviction.

The direction on cross-admissibility (ground 6)

38. In the summing up the judge gave a direction on cross-admissibility. The terms of the direction were not criticised but there was criticism of the decision to give the direction in circumstances where the jury might have convicted the appellant on the first count in time (count two for the touching of the breasts) on the basis that A was asleep at the time, but may have accepted that A woke up and consented to the further sexual contact.

39. We do not consider that a direction on cross-admissibility was helpful to the jury in this case, because the three counts related to one person in the same place and in a very short period of time. It was certainly possible for the jury to come to different

verdicts on the separate counts, as the judge properly reminded the jury, but a direction on cross-admissibility increased the complexity of the directions without any real advantage. However we do not consider that giving the direction affected the safety of the conviction in any way. This was because the direction was in proper terms. The direction made it clear to the jury that if they had convicted the appellant on count two, that would show a tendency to commit such offences. The jury were told that the appellant should not be convicted just because of the conviction on count two and the jury should consider the evidence on each separate count and consider each count separately. In these circumstances giving the direction did not render the conviction unsafe.

The conviction is safe

40. We have thought very long and hard about whether this conviction is safe given the inadmissible opinion evidence which was adduced. The appellant can point to the fact that inadmissible opinion evidence about whether A consented to the sexual activity was given by Ms Cocklin and Mr Lee. The appellant can also point out that prosecuting counsel saw fit to repeat part of the inadmissible opinion evidence from Mr Lee.

41. The prosecution can point to the fact that after the first inadmissible opinion evidence was given the judge did tell the jury that the opinion was not relevant, and prosecuting counsel did try and stop the second piece of inadmissible opinion evidence from Mr Lee. Further the judge made it clear that the facts were for the jury to determine. The prosecution also submitted that this was an overwhelming case against the appellant. This was because it was plain that there was no consent in circumstances where it was common ground that: nothing had been said by A to suggest any willingness to undertake sexual activity; no arrangement had been made for the appellant to visit A in the bedroom; and A had asked "did you find my phone babe" when the appellant came in which showed that she thought that the person entering the room was her boyfriend B. Further there were compelling contemporaneous complaints made by A. For these reasons the prosecution submitted that the inadmissible opinion evidence had no effect on the trial. As to this submission, it might be thought that if the prosecution referred to the inadmissible opinion evidence in a closing speech, presumably on the basis that it might influence the jury, it hardly lies in the mouth of the prosecution to say that the case was overwhelming and reliance on the inadmissible evidence made no difference.

42. However in the final event we were all sure that this conviction was safe. This is because if the jury were going to be influenced by the opinions of Ms Cocklin and Mr Lee, the jury must have accepted the factual evidence of Ms Cocklin and Mr Lee, and therefore rejected the defence case that this prosecution was set up by A to keep her boyfriend B happy, that the contemporaneous complaints by A to both B and Ms Cocklin were false, and that the prosecution had been driven by B who had pressured all of the others to support the case against the appellant. In such circumstances the conviction of the appellant would inevitably follow, and the inadmissible opinion evidence would add nothing to the case.

The sentencing remarks

43. The Appellant was born on 18 September 1990 and is now aged 29 years. He had been before the courts on two previous occasions in respect of five offences. In March 2017 he received a community order for two offences of battery (which occurred when he pushed his then partner when she was holding a baby) and two offences of criminal damage. In June 2017 the community order was varied for failure to comply with the requirements. There were nine character references in support of the appellant.

44. There were two statements from A about the effects of the offences. There was also a pre-sentence report. The author of the report indicated that there were time constraints upon the interview due to the appellant being presented late for the interview when he was in custody. The appellant did not accept full responsibility for the offences. The appellant was said to lack insight into his offending behaviour and sought to blame others for his actions (Offender Assessment). He was assessed as posing a low risk of reconviction and a medium risk of further sexual offending. He was assessed as posing a high risk of serious harm to the public, namely adult females. A custodial sentence was inevitable.

45. The Judge rehearsed the circumstances surrounding the offences. She did not consider that these justified a finding of dangerousness for the purposes of the Criminal Justice Act 2003. In her judgement a determinate sentence, in accordance with the guidelines, would be sufficient when coupled with a Sexual Harm Prevention Order and the fact that the appropriate notification requirements would apply to address the risks the appellant posed. Whilst the offences were committed against women he knew, there was no other link and nothing to suggest an escalation of offending in terms of sexual assault. She referred to his previous convictions but did not agree with the author of the pre-sentence report that they were relevant to the sentences she intended to impose.

46. This was not a case where there was severe psychological or physical harm. The victim did suffer psychological harm but it could not be said that it was severe harm in the context of these types of cases. This was a case where there was uninvited entry into the victim's home, considering that factor in a sensible and practical way. The room she was in was effectively her home. She felt secure in her boyfriend's bedroom. He was not invited into that room and was therefore not invited into her home. This was a sensible interpretation of the guideline. Further this was a category 2 offence in terms of harm due to A's vulnerability. It was not properly an abuse of trust situation and for that reason, in relation to count 1, it would be a 2B category albeit at the high end of 2B.

47. In relation to the sexual assaults and counts 2 and 3, the level of harm was category 2 because of the presence of two factors: the touching of naked genitalia or naked breasts, and the fact that the victim was particularly vulnerable due to her personal circumstances. In relation to culpability, this was also a category 2B, once again at the high end.

48. The aggravating and mitigating factors appeared to be the same for all counts. The court did not apply the factor of specific targeting of a particularly vulnerable victim as that would be double counting. The location and timing of the offence

did apply and the offence was committed whilst under the influence of alcohol. He was convicted after trial so there was no credit for plea. The offences were so serious that a non-custodial sentence could not be justified. He would be sentenced to a term of imprisonment which was the shortest which matched the seriousness of the offence and took into account the mitigating factors and the period he would spend on licence following release.

49. In relation to the Sexual Harm Prevention Order the following conditions were necessary and proportionate. He was prohibited from taking any employment, freelance or otherwise, or occupation which involved him being alone in a room with any female, without providing 24 hours' notice to his offender management team, unless in the course of normal life. This was necessary taking into account that one of the witnesses at trial gave evidence that he made sexual advances to her when she was receiving private music lessons from him. He was also prohibited from contacting the victim in any way. The order would last until further order.

The appeal against sentence

50. The grounds of appeal against sentence raise the issues of whether there was "forced/uninvited entry into the victim's home" and whether the victim was "particularly vulnerable due to personal circumstances". Ms Williamson submits that this was a category 3B case with a starting point of 2 years and a range of high level community order to 4 years custody. Ms Williamson also submitted that even if this was a category 2B case (with a starting point of 6 years and a range of 4 to 9 years custody) the judge was wrong to take a starting point at the high end of category 2B, this was an offence at the low end of category 2B, and reference was made to sentences imposed in what were said to be similar cases. It was further argued that the judge should have adjourned to obtain a forensic psychosexual report and one of the prohibitions in the Sexual Harm Prevention Order ("SHPO") was wrongly imposed. The prosecution submitted that it was a category 2B case but it was accepted that it was not at the high end. The prohibition in the SHPO was based on Ms De Souza's evidence and the appellant was free to make an application to remove or vary that provision.

Offence category 2B of the guideline

51. Sentencing courts must, save where it is contrary to the interests of justice, follow any sentencing guideline relevant to the offender's case, see section 125(1) of the Coroners and Justice Act 2009. The relevant guideline for both assault by penetration and sexual assault include as category 2 harm factors "forced/uninvited entry into victim's home" and "victim is particularly vulnerable due to personal circumstances".

52. The authorities establish that the meaning of the factors is to be interpreted as they were finally produced without reference to consultations about the proposed guidelines, and according to the words used, see *Attorney General's Reference No. 51 of 2015 (Whitmore)* [2015] EWCA Crim 1699 at paragraph 18. We are satisfied that in this case the judge was wrong to say that in this case there was "forced/uninvited entry into victim's home". This is because A was asleep in a bedroom in a flat to which the appellant had been invited for a party. It is true that he went into B's bedroom where A was asleep without permission, but that is

different from "forced/uninvited entry into victim's home" because the appellant had been invited into the flat. This was not a case of entering into a separated one room flat or bedsit.

53. On the other hand we are sure that the judge was right to find that A was "particularly vulnerable due to personal circumstances". The personal circumstances were that A had drunk half a bottle of wine and was asleep in her boyfriend's bed in his bedroom. A person in such circumstances is particularly vulnerable because they are defenceless, compare *R v Bunyan* [2017] EWCA Crim 872 at paragraph 25. This means that the judge was right to place this in category 2B, although when compared to some cases in category 2B it would be at the lower end of the category.

54. It appears that the judge took account of the fact that there were two factors in category B in placing this offence at the top of category 2B, whereas we have found that only one factor applied. We do not consider that this offence, as serious as it was, could properly be placed at the high end of category 2B, and it is right to record that Mr Devlin for the prosecution did not maintain that the judge had been right to put it at the high end of category 2B. No complaint is made about the sentences imposed in relation to the sexual assaults of 18 months which were ordered to be concurrent. In order to reflect the whole of the criminality of the appellant's actions, and have proper regard to the principles of totality, we consider that a sentence of 5 years ought to be imposed for the assault by penetration. The other sentences will remain at 18 months each, concurrent with count two and each other.

The Sexual Harm Prevention Order

55. So far as is material a SHPO cannot be imposed unless it is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant, see section 103A of the Sexual Offences Act 2003. The guidance given in relation to Sexual Offences Prevention Orders ("SOPO") in *R v Smith* [2011] EWCA Crim 1772, [2012] 1 WLR 1316 still applies. The order must be necessary, and it must be workable.

56. In our judgment a condition without limit in time prohibiting the appellant from taking any employment, freelance or otherwise, or occupation which involved him being alone in a room with any female, without providing 24 hours' notice to his offender management team, unless in the course of normal life, is an onerous condition. It was said to be necessary and justified on the basis of Ms De Souza's evidence about feeling uncomfortable with the appellant's Facebook messages, and it was suggested that the appellant could apply to vary the condition. We do not consider that the condition is appropriate. The conduct to Ms De Souza made her feel uncomfortable but it was not suggested that it was criminal. The conduct took place over Facebook and not in person but the condition is drafted to address physical presence. The condition imposed a substantial burden on the appellant and the offender management team. The condition was likely to lead to further applications to court to vary or remove it. It is not an answer to say that the appellant can apply to have the condition varied, that rather suggests that the condition is either unworkable or should not have been imposed. In our judgment this condition was not necessary and should not have been imposed.

57. It is common ground that the other condition in the SHPO was both necessary and should remain.

Conclusion

58. For the detailed reasons set out above we dismiss the appeal against conviction. We allow the appeal against sentence to the extent of substituting a sentence of 5 years imprisonment on count one for the original sentence, leaving undisturbed the sentences of 18 months concurrent on counts two and three. We quash the condition prohibiting the appellant from taking any employment, freelance or otherwise, or occupation which involved him being alone in a room with any female, without providing 24 hours' notice to his offender management team, unless in the course of normal life, as contained in the SHPO, but leave the other condition intact.