IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/00391/A4
[2021] EWCA Crim 1729

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 14th October 2021

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Burnett of Maldon)

MRS JUSTICE CHEEMA-GRUBB DBE

MR JUSTICE HENSHAW

R E G I N A

- v –

AMRO BADAWI

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 T Horder appeared on behalf of the Appellant

J U D G M E N T

Thursday 14th October 2021

THE LORD CHIEF JUSTICE: I shall ask Mr Justice Henshaw to give the judgment of the court.

MR JUSTICE HENSHAW:

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. It follows that during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify the complainant as a victim of any of the offences involved in this case.

2. On 18th December 2020, following a trial in the Crown Court at Southampton, the appellant was convicted of one count of attempted rape, contrary to section 1(1) of the Criminal Attempts Act 1981 (count 3), and one count of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (count 2). He was acquitted of one count of rape (count 1) arising from the same incident.

3. On 21st January 2021, the appellant was sentenced by the trial judge on count 3 to an extended sentence of 13 years, comprising a custodial term of eight years and an extended licence period of five years; and on count 2 he was sentenced to a concurrent term of five years' imprisonment.

4. The appellant appeals against sentence by leave of the single judge.

5. The facts in outline were as follows. The appellant worked as a barman at a bar and restaurant in Southampton. The complainant was one of the appellant's managers. The owners of the bar also owned property above the premises and the appellant had moved in to live in one of the rooms. The complainant also sometimes stayed in one of the rooms after working late. Both the appellant and the complainant were working at the bar on 10th August 2018. After work, the complainant, the appellant, another member of staff and the complainant's friend went to another bar in Southampton, but after arrival, the complainant and her friend became separated from the appellant and the other member of staff.

6. The complainant went on to several other bars and drank alcohol to the point where she was somewhat drunk but not out of control. She returned to the flat above the bar at around 3.30am and went to sleep. The appellant returned to the flat some time later to discover that the complainant had locked him out by leaving her key on the inside of the door, and so he shouted for her to let him in, which she did.

7. The complainant went back to bed and fell asleep. She then felt as if she were having sex with someone in a dream. She woke up to discover that someone was fingering her from behind. She then felt the person trying to enter her vagina with his penis, so she pushed him off. She realised that it was the appellant and told him to get out. The appellant left the room. The police were called later that day, attended and took evidential samples from the complainant and the underwear she had worn that night. DNA analysis later confirmed traces of the appellant's DNA and semen on vaginal swabs, and traces of the appellant's semen on the inside and outside of the gusset area of the complainant's underwear.

8. The appellant was arrested on 12th August 2018. In interview, he denied raping the complainant and described what he thought had been a consensual sexual encounter. He said that they had been kissing, that he had fingered her, and that the complainant had been awake and had been consenting. It went on for a little while, he said, and then she told him to stop which he did. She told him to leave the room and so he did. He accepted that he had been

drinking and had taken some cocaine earlier that evening.

9. The appellant was interviewed again on 7th July 2019 and was asked about the DNA findings. He maintained the account he had given previously. He said that he thought he had kept his boxer shorts on, that he had not taken his penis out of them, that he had not ejaculated, and that there had been consensual digital penetration but nothing else. The appellant maintained that account at trial.

10. The appellant was aged 25 at the time of the offence and 28 when he was tried and sentenced. He had received a warning for battery in 2007 and had a caution dating from 2013 for possession of cocaine.

11. In sentencing the appellant the judge applied the sentencing guideline for rape, but clearly had in mind the need to adjust for the fact that the appellant had been convicted of attempted rape, rather than the completed offence.

12. When considering the harm caused, the judge took account of the Victim Personal Statement provided by the complainant. It made clear how the appellant's offending had irreversibly transformed her life, and had left her almost a shell of her former self. The judge also had the advantage of seeing the complainant give evidence both in a pre-recorded interview and during the trial. The judge was satisfied that she had suffered severe psychological harm as a result of the offence. In addition, the offence had involved uninvited entry into the complainant's bedroom, where she ought to have been safe. Both of those factors made this a category 2 harm offence.

13. As to culpability, the judge did not consider any of the category A factors to have been present. He therefore treated the offence as falling into category 2B in the sentencing guideline, which has a starting point of eight years' custody and a category range from seven to nine years' custody. The judge bore in mind that this was an attempt and not the full offence and considered it appropriate to adjust the starting point to six years, before considering the aggravating and mitigating factors.

14. The first of the aggravating factors to which the judge referred arose from a previous trial in 2016 in which the appellant had been acquitted of an alleged rape said to have occurred the previous year. This was a matter which the Crown had not sought to adduce in evidence but which was mentioned in discussion of jury directions. It was not touched on during the appellant's trial for the present offence, but the judge requested further detail in advance of the sentencing hearing. Accordingly, the prosecution included reference to it in their note for sentence. The note provided the following details of the previous allegation and the answer which the appellant had given to it:

> "Complainant was 21 years of age, had been out for the evening in Southampton and had attended [name of café] (this location was mentioned during the course of our trial), complainant drinking alcohol during the evening she became separated from her friends. She recalls sitting on a wall, unsure of where she met two males who were there with her, she had no recollection of returning to a house, or being in a house, she just remembers waking up with a guy on top of her with his penis in her vagina, she pushed him off. There were three other males in the room, she was in shock and stood up, she put her pants and jeans on. She asked for a post code of where she was and called a friend to collect her, complainant then attended police station to report. She was in shock. A male suspect was

> identified ... This male was arrested and upon providing an account of his movements this lead officers to his home address whereby a number of males were arrested – [the appellant] being one of them.
>
> [The appellant] in his police interview confirmed going out and drinking alcohol, meeting a girl on the way home with a friend. returning back to his friends address where they sat on the sofa, his friend drifted off to sleep and [the appellant] and the girl kissed. they participated in mutual masturbation and he inserted his finger into her vagina. He felt she consented even though there was no conversation. He pulled down his jeans and pulled the girls pants and trousers down a little way, he inserted his penis into her vagina a little way but not fully before the girl said "NO" and with withdrew his penis immediately."

15. In the present case the judge opened his sentencing remarks by referring in summary form to these matters, before he continued:

> "You are absolutely not to be sentenced for a matter which you have been found not guilty by a jury, but that particular behaviour has relevance both to your culpability and to any assessment of dangerousness which may have to be made in a moment."

16. The judge considered it an aggravating factor that the appellant had comparatively recently been acquitted of an offence said to have been committed in very similar circumstances. Its relevance was that at the time of the present offence, the appellant must have been acutely aware of the absolute imperative of securing the consent of a woman with whom he proposed to have sexual intercourse. The judge added that the complainant on the present occasion was actually asleep, so there was not even room for misunderstanding.

17. The judge considered that there were also other aggravating factors. There was evidence that the appellant was under the influence of drink and/or drugs when he committed the offence. There was evidence of ejaculation, although the judge considered that factor more marginal. More significantly, the appellant had targeted a victim who was vulnerable because she had taken drink and was asleep, as the appellant must have known.

18. The judge also took account of mitigating factors, although he regarded the aggravating factors to overshadow them: in particular, the appellant's subsequent steps to address his underlying misuse of drugs and alcohol, and the position of his fiancée who suffers from a debilitating disease and for whom the appellant cared on a day-to-day basis.

19. Balancing these considerations, the judge concluded that the appropriate sentence was one of eight years' custody, prior to any consideration of dangerousness.

20. The judge then went on to assess the danger which the appellant posed to the public. In order to assist him in that regard, a pre-sentence report, dated 20th January 2021, had been provided. The author of that report did not at that stage know about the events surrounding the appellant's previous acquittal. However, on the morning of the sentencing hearing (the following day), the court requested that the probation officer consider those events. That led

to an updated report being uploaded, apparently a few minutes before the start of the hearing.

21. The original version of the report indicated that the appellant accepted the finding of guilt, albeit he continued to say that he was "*under the impression that it was consensual until she said 'No'", and that "[it] was just a sexual encounter that went very badly wrong*". The author of the report expressed some concerns about the appellant's thinking and assessed him as presenting a risk of harm to adult women whom he might identify as being vulnerable, but felt unable, absent antecedent criminal behaviours, clearly to evidence dangerousness.

22. The only change of substance in the amended version of the pre-sentence report was that the specific comment on dangerousness was changed to indicate that the assessment of dangerousness was not straightforward:

> "as it is for the court to assess the relevance or otherwise of non-conviction antecedents. Accepting this, the [National Probation Service] is tasked with public protection. It would seem to me remiss to disregard non-conviction behavioural precedents in meeting this duty. … it would be difficult for [the appellant] to argue that he was unaware that his actions were not consensual, given his prior experience of contested proceedings. On the balance of probability, I think [the appellant] took informed and considered decisions to commit the current offences. There is a predatory element to [the appellant's] behaviour. As such, I could identify no scope to argue against an assessment of dangerousness."

23. The judge, when assessing dangerousness, began by making reference to the events of 2015/16. The first reason he gave for regarding the appellant as representing a significant risk of serious harm from further specified sexual offences was that the circumstances in which this offence was committed "*are so very similar to the circumstances in which the other matter, unproven, was said to have been committed and involved an unconscious complainant, incapacitated through alcohol and/or sleep*". The judge said that he considered that to be important because, despite having been through the experience of an allegation and a trial, the appellant remained disinhibited in August 2018 and his behaviour was unconstrained by that experience. He went on:

> "In addition, it is arguable that what you did to [the complainant] was opportunistic and predatory behaviour. That you should do it twice seems to me to make it perfectly plain that that is exactly what this was."

24. The other matter which led the judge to consider the appellant to be dangerous was his attitude to the instant offence. The impression which the appellant had left on the author of the pre-sentence report, even in its original form, was that his offending amounted to no more than an injudicious sexual encounter, a misreading of the signals, and a misunderstanding of the complainant's situation.

25. In the result, the judge concluded that the appellant was a dangerous offender and that an extended licence period of five years should be imposed.

26. The appellant appeals on the grounds that the judge erred: (1) by imposing a manifestly excessive custodial term of eight years, having wrongly regarded the events surrounding the appellant's previous acquittal as an aggravating factor, and by failing to have sufficient regard to mitigating factors, including the delay between the offence and sentence; and (2) by wrongly concluding that the appellant was dangerous by placing undue weight on the circumstances of the previous acquittal.

27. The appellant has been represented today by Mr Tom Horder of counsel, who also appeared at trial. We are grateful to Mr Horder for his clear, cogent and realistic written and oral submissions.

28. Under section 280(1)(c) of the Sentencing Act 2020 (formerly section 226A of the Criminal Justice Act 2003), the court may impose an extended sentence where (i) it is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, and (ii) in respect of a defendant who has not previously been convicted of a specified offence, the appropriate custodial term is at least four years.

29. Section 308 of the Sentencing Act relates to the assessment of dangerousness. Section 308(2) provides that, in making that assessment, the court:

> "(a) must take into account all the information that is available to it about the nature and circumstances of the offence,
>
> (b) may take into account all the information that is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,
>
> (c) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (b) forms part, and
>
> (d) may take into account any information about the offender which is before it."

30. The general principles to be applied to the assessment of dangerousness were set out in detail by the Court of Appeal in *R v Lang* [2005] EWCA Crim 2864. It has been said that it will be a rare case in which an appellate court, which has not conducted the trial and seen the offender, would overturn an exercise in judicial discretion in relation to an assessment of dangerousness: see *R v Howlett* [2019] EWCA Crim 1224 at [27]. The Court of Appeal will not normally interfere with a finding of dangerousness unless it can be shown that the sentencer has failed to apply the correct relevant principles, or reached a conclusion to which he or she was not entitled to come on the material before him or her: see *R v Chowdhury* [2016] EWCA Crim 1341 at [23].

31. In *R v Considine* [2007] EWCA Crim 1166, it was held that the "*information*" referred to in what is now section 308 of the Sentencing Act 2020 was not restricted to evidence. Information bearing on the assessment of dangerousness could take the form of material adverse to the offender which was not substantiated or proved by criminal convictions: a criminal conviction is not necessarily a prerequisite to using material in the context of assessing the future risk posed by a defendant. However:

> "… the judge should not rely on a disputed fact unless it could be resolved 'fairly' to him. One example of unfairness would arise if, notwithstanding the availability of evidence to justify prosecution for a serious offence, the defendant was undercharged on the basis that if convicted of the less serious offence, the prosecution could then supply the court with all the 'information' relating to the more serious offence. If the defendant were then treated as if he had been convicted of the offence, that would be unfair to him just because he might end up convicted, or effectively convicted in the course of the sentencing decision, in effect, without due process." ([27] *per* Judge LJ)

It seems to us that the same considerations of fairness apply when considering, in the context of sentencing, the disputed facts of a previous acquittal.

32. In the present case, the judge's references in his sentencing remarks to the circumstances of the appellant's previous acquittal, and to their great similarity to those of the present offence, would be logical only on the footing that the previous complainant's account was accurate. The appellant's own version of the previous incident was that both parties were fully awake and consenting. On that version of events, none of those remarks by the judge was apt in circumstances where no fair opportunity had been provided to challenge the reliability and accuracy of the account given by the previous complainant. (Equally, we see no indication that the appellant was re-interviewed or otherwise given a chance to comment before the pre-sentence report was amended to take account of the prior incident.) We further doubt the logic of the judge's suggestion that the previous events were an aggravating factor because they meant that the appellant must have been acutely aware of the imperative of securing consent. The real issue in the present case was not whether the appellant thought consent important, but whether or not he reasonably believed he had it.

33. In our view, the judge ought not to have had regard in the way that he did to the appellant's previous acquittal and its circumstances. The question then becomes what difference it makes.

34. We deal first with the eight year custodial term. The appellant makes no criticism of the judge's decision to treat this as a category 2B case, and to start at six years' custody on the basis that it was a mere attempt. For the reasons we have given, the judge erred in treating the previous episode as an aggravating factor. However, there were other significant aggravating features, as we have outlined and as the judge indicated. Moreover, the judge must, in our view, have been correct to observe that, although the appellant was acquitted of a substantive rape and found guilty only of attempt, that must have been by a fine margin, given the forensic evidence. That factor, it seems to us, is also relevant when considering the seriousness of the offence.

35. The judge rightly took account of mitigating factors. Here the appellant takes specific

issue with the judge's approach to the delay between the commission of the offence in August 2018, his being charged in September 2019, and the successive postponements of the trial due to the Covid-19 pandemic, which led ultimately to sentencing only in January 2021. The appellant points out, first, that the delay led him to a state of depression. Secondly, the appellant points out that during that period his life had changed significantly: he had become engaged, and assumed significant caring responsibilities for his partner.

36. In his sentencing remarks, the judge said the fact that there had been delay should not be taken as a mitigating feature when it had been open to the appellant to enter a guilty plea at an earlier stage. He regarded the delay as being neither an aggravating nor a mitigating factor. The appellant submits that that was at odds with the Sentencing Council's *"General guideline overarching principles"*, which indicates that where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence if the delay has had a detrimental effect on the offender, noting specifically that *"[n]o fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case"*. We would be inclined to accept that to the extent that the judge took into account, in this context, the appellant's failure to admit guilt, he was incorrect to do so. We are also persuaded that the delay in this case did have a detrimental effect on the appellant for the reasons to which we have just alluded.

37. Our overall assessment of this aspect of the appeal is that there were significant aggravating factors which served to a degree as a counterbalance to the available mitigation. However, some of the mitigation was of weight, including in particular the impact of the delay, and the impact of the sentence on the appellant's partner, for whom he had acted as a carer. Once one discounts the circumstances surrounding the previous acquittal, which we feel must to a degree have coloured the views of the judge, we are not persuaded that the balance of aggravating and mitigating factors would properly lead to a sentence of eight years' custody for the attempted rape. In all the circumstances of the case, we consider that the appropriate sentence was one of six years and six months' imprisonment. We see no basis on which to question the judge's concurrent sentence of five years' imprisonment on count 2 (assault by penetration).

38. We turn to the finding of dangerousness. It is clear that the judge relied heavily on the views he formed about the previous incident. As we have already summarised, the original pre-sentence report did not conclude that the appellant crossed the dangerousness threshold, although it did express a number of areas of concern. Both the amendment to the report and the judge's assessment of dangerousness were heavily influenced by conclusions drawn from the events of 2015/16. If those events are discounted, as in our view they should have been, we consider there to have been insufficient basis on which the conclusion could properly be drawn that the appellant was a dangerous offender such as to justify the five year extension period. As a result, we consider that that part of the sentence must fall away.

39. For these reasons, we allow the appeal to this extent. We quash the extended sentence of 13 years on count 3 (attempted rape), comprising a custodial term of eight years and an extended licence period of five years, and we substitute a determinate sentence of six years and six months' imprisonment. The concurrent sentence of five years' imprisonment on count 2 (assault by penetration) remains unchanged.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk