[2021] EWCA Crim 412

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002773/A2

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 11 March 2021

Before:

LORD JUSTICE BEAN

MRS JUSTICE WHIPPLE

MR JUSTICE CALVER

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

REGINA

V

OLAWALE HASSAN

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 P JARVIS appeared on behalf of the Attorney General.

MR M BAGNALL appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE BEAN: We have before us an application by the Attorney General for leave to refer a sentence passed on the offender, Olawale Hassan, as being unduly lenient.

We shall not name the victim of the sexual offences in this judgment but for the avoidance of doubt her identity is protected in the usual way under the Sexual Offences (Amendment) Act 1992.

Olawale Hassan was born on 31 October 1986. He stood trial in the Crown Court at Basildon in September 2020, before Mr Recorder Collery QC and a jury, on three counts of the vaginal rape and one count of assault by penetration. All four offences took place on 26 February 2017, within the space of about half-an-hour, and were committed against the same victim.

The sentences which the Attorney seeks to refer were concurrent sentences of 10 years and 2 months' imprisonment on each count of rape and 7 years and 10 months' imprisonment on the count of assault by penetration, all concurrent. There was also an order for disqualification from driving for 8 years and 9 months and a restraining order of indefinite duration to prevent Mr Hassan from contacting the victim.

The aspect of the sentence which the Attorney seeks to refer is not the length of the sentence as such, namely 10 years and 2 months, but the fact that it was a determinate sentence. Mr Jarvis submits that the judge should have imposed an extended determinate sentence pursuant to the dangerousness provisions of the Criminal Justice Act 2003, as amended.

The facts were as follows. On the evening of 25 February 2017 the victim and her friend went out for the evening in Southend. They spent the evening in different bars and nightclubs drinking and dancing. The offender encountered the victim and her friend in one of the bars. He was alone. Over the course of several hours he bought them a number of alcoholic drinks including shots. CCTV footage from inside one nightclub showed him

dancing with the victim between around 1.15 and 2.30 am. The offender kept asking the victim if she would go to a hotel with him but she refused. At around 2.30 am she broke away from him and started to dance with other people. He continued to hover around her. She left to go to another nightclub. He went with her. It was very crowded inside the second nightclub, but still he stayed very close to her. By this stage her friend had left. Indeed the offender escorted the friend to her car.

The victim had refused a lift home with her friend. After the friend had left Mr Hassan approached the victim and offered to drive her home. She was reluctant to go with him. He persuaded her that, because he had been with her for most of the night, she could trust him. With some hesitation she accompanied him to his car and got in. He then drove off. The victim gave him directions towards her home. At one point he stopped the car so she could get out to urinate. She got back into the car. He drove off. She began to fear for her safety. She tried to open the passenger door but it was locked. By now she was tearful. She was also under the influence of alcohol and clearly so.

Mr Hassan started to smoke cannabis, apparently in the hope that this would stupefy her further by exposure to the smoke. He stopped the car close to a casino. He grabbed her head and pulled it towards his legs saying, "Please God, she's mine now. Please take the devil away from her. The devil will not harm her". He reclined the victim's seat and forced her backwards. He opened her upper clothing to expose her breasts and removed her leggings and underwear. She begged him to stop but he carried on. She was terrified. He inserted his fingers into her vagina. She was lapsing into and out of consciousness. He removed his trousers and climbed on top of her. He vaginally raped her three times over the next 20 minutes or so, ejaculating once inside her. She was crying and repeatedly asked him to stop but he carried on. In between the rapes he paused to call a friend of his

and send text messages. Once he had finished that he resumed the rape.

The offender took the victim's bank card from her purse and took photographs of the front and back of it with the intent of using those photographs later to commit fraud. At some point he helped her to get dressed. He drove her to her home address and let her out of the car - by now the time was about 7.00 am. Later that day, after taking time to absorb the enormity of what had happened to her, the victim called the police.

The offender was arrested on 10 March 2017 and interviewed. He denied committing any offences against the victim. He was interviewed twice more over the next two-and-a-half years before being charged on 16 December 2019. The delay in charging him is plainly very regrettable, both from the victim's perspective and the defendants.

He pleaded not guilty. His case at trial was that he had had sexual intercourse with the victim in his car but it had been consensual and she had been a willing participant. Since the jury convicted him of all four offences they evidently disbelieved his account.

He had nine previous convictions from five previous court appearances. The significant previous court appearance was a conviction in September 2007 of two offences of sexual assault and one offence of causing a female to engage in sexual activity without consent. The offences took place in July 2006 when he was 19 years old. His sentence was one of 6 months' detention in a young offender institution.

The facts of the previous offences were explored at trial and the judge was well aware of them because they formed the subject of a bad character application by the prosecution on which he had to rule. In the 2006 incident the offender lured that victim away from her friends and took her to an unoccupied address. He sexually assaulted her over a period of several hours before she was allowed to leave. There were apparently no reports in that case; at any rate none were made available to the judge in the present case.

Returning to the facts of the present case, the victim made a victim personal statement after the jury had returned their verdict and we are told that sentence was adjourned in order to allow that to be obtained. She wrote that at the time of the offence she felt scared and confused, humiliated and degraded. She could not scream and she could not move. She went to sleep as soon as she got home; it was only upon waking that she recalled the horror of what had happened earlier that morning.

The experience of making her complaint to the police and going to court to give evidence about what happened has, in her words, been a nightmare for her. She was tested to see if she had contracted an infection or worse from the offender but thankfully she had not. She felt emotionally overwhelmed by the experience. It put a great strain on her relationship, which came to an end. The victim moved out of the home she had shared with her boyfriend and went to live with her stepfather.

At the time of making the statement she still experienced flashbacks and nightmares. She has lost her confidence and her outgoing personality. In short, the statement said the offences have changed her life forever.

In the Recorder's assessment the harm in this case fell within category 2 of the relevant guideline because the victim suffered severe psychological harm. She was particularly vulnerable owing to her personal circumstances, in particular her drunkenness. The offending was sustained and it involved additional degradation of the victim beyond that inherent in the offences of rape and assault by penetration. The Recorder was also satisfied that it was a case of culpability category A because the offender plied the victim with alcohol earlier in the evening to reduce her inhibitions and to make her less able to resist his physical advances. Accordingly, the case being categorised as a category 2A rape or series of rapes, for which concurrent sentences were plainly appropriate, the starting point was 10

years' imprisonment with a range of 9 to 13 years. The offences were aggravated by the offender's previous convictions for sexual offences, the fact that he was in drink himself at the time and by the fact that he ejaculated inside the victim.

The Recorder in his sentencing remarks said that he saw no sign of remorse in the offender. He did take into account in mitigation the considerable delay in the prosecution of the case, not all of which was attributable to the offender, and he also observed, as was the case by the time this case came to trial, that conditions in prison as a result of the pandemic were a matter he could take into account in the offender's favour. He moved upwards from the guideline starting point of 10 years' imprisonment to 11 years to reflect the aggravating features and reduced that by 10 months to take account of the mitigating factors. Hence, the overall sentence of 10 years and 2 months' imprisonment.

Mr Jarvis, for the Attorney, expressly states in the Reference:

> "It is not submitted that the overall custodial term was unduly lenient but it is submitted that the offender was dangerous and should have been made subject to an extended determinate sentence."

The Recorder did not seek to obtain a pre-sentence report to address the issue of dangerousness. We appreciate, of course, that this was not a sentence on a plea of guilty, it was a sentence after a trial, and that the trial judge had had the opportunity of observing the defendant give evidence in the witness box. We appreciate also that, as to the details of the previous offence, the trial judge was unusually well informed about those because, as we have said, those two were explored at the trial. But it is surprising and, in our view, unfortunate that it was thought unnecessary to obtain a pre-sentence report. In a case of a serious sexual offence or offences, particularly where the offence is rape, it is almost always advisable to

obtain such a report, unless the case is so grave that an indeterminate sentence is inevitable.

Although a trial judge in a contested trial has had the opportunity of seeing the defendant give evidence, a pre-sentence report has particular utility in enabling the judge to know whether the defendant remains in denial following his conviction, and that in turn may be a significant factor in assessing whether there is or is not a high risk of serious harm to the public from future offences. This is certainly not a case where the sexual offences were so minor that no question of a finding of dangerousness could arise.

The prosecution made submissions both in writing and orally at the sentence hearing to assist the judge on sentence. We have seen the sentencing note. It concerns the question of categorisation of the offence to which we have referred. The aggravating features of the offence and the personal mitigation, such as it was, it mentions an application for a restraining order. It also mentions the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019, but only in the context of a submission that a sentence of least 7 years was inevitable and the offender would therefore have to serve two-thirds of any sentence imposed. Nothing is said about dangerousness.

When prosecution counsel was making oral submissions at the sentencing hearing on 6 October 2020, she said this:

> "MISS DAVEY: In terms of dangerousness, your Honour, certainly the Crown, subject to your Honour's comments, don't invite any consideration of an indeterminate sentence.
> RECORDER COLLERY: No, I need to consider it.
> MISS DAVEY: Your Honour needs to consider it of course but ---
> RECORDER COLLERY: But – but I am not at the moment ---
> MISS DAVEY: No.
> RECORDER COLLERY: --- and one would hope that there's nothing in Mr Bagnall's mitigation that's going to push me towards that but I'm not at the moment ---

MISS DAVEY: No.
RECORDER COLLERY: --- minded to go there**."**

In the light of these exchanges Mr Bagnall, quite understandably and properly, did not raise the subject when making his plea in mitigation.

In his sentencing remarks the learned Recorder said this (page 37E):

> "In terms of mitigating, I see no signs of remorse at all. There is plainly no reduction in sentence for assistance to the police or for guilty pleas. Because you have been convicted of a specified offence, rape, I am required to consider the issue of dangerousness, that is whether you present a significant risk of causing serious harm by committing further specified offences. I have carefully considered the matter and whether there is – is a significant risk of the commission of further specified offences and causing thereby serious harm to a member of the public. I am aware this is a higher threshold than whether it is possible those matters may occur and means assessing the risk of those two matters occurring. I note in particular that since 2007 and to – until 2017, there were no other specified offences committed. I am not urged by the Crown to a finding of dangerousness and I have not asked the defence to address me in relation to it. In my view, it is not appropriate to make a finding of dangerousness in this case."

In our view this is a worrying case. The index offences were predatory and manipulative and had all the aggravating features to which we have referred. The previous offences committed in 2006, although they only attracted a sentence on the defendant (then aged 19) of 6 months' detention, were of a similar nature. In those circumstances, we think that the trial judge could not reasonably have limited himself to a determinate sentence unless he had before him a risk assessment in a pre-sentence report which indicated that the defendant did <u>not</u> present a high risk of serious harm to the public. This is therefore a case in which we should grant leave to refer.

We have before us a pre-appeal report which expresses the view that the defendant does indeed present a high risk of serious harm. This is inadmissible on the question of whether the sentence was unduly lenient. since this Court has to consider whether the judge reached an

unduly lenient sentence on the material before him: see *Attorney-General's Reference no. 84 of 2009 (R v Quain)* [2011] 1 Cr. App. R(S) 85; [2010] EWCA 1879 and the passage from the judgment of this court given by Rose LJ in *Attorney-General's Reference no. 19 of 2005 (R v Williams)* [2006] EWCA Crim 785, referred to at [21] in *Quain*. However, once we have granted leave to refer on the grounds that the sentence was unduly lenient on the material before the judge, the report is admissible on the issue of whether we should interfere with the course taken by the judge. If the pre-appeal report had (perhaps surprisingly) indicated that there was no risk or not a high risk of serious harm from future offences, then it would be quite wrong for us to interfere with the sentence imposed by the judge. But the pre-appeal report confirms that the point which Mr Jarvis takes is not simply an academic one.

We therefore conclude that the proper sentence in this case would have been an extended determinate sentence. We quash the determinate sentences on the three counts of rape and substitute extended determinate sentences with a custodial term of 10 years 2 months' imprisonment concurrent in each case and a licence period of 3 years, making a total sentence of 13 years 2 months' imprisonment, and take the same course with the concurrent sentence of 7 years 10 months imprisonment in respect of the assault by penetration.

Email: rcj@epiqglobal.co.uk