IN THE COURT OF APPEAL

CRIMINAL DIVISION

**[2023] EWCA Crim 1001**

No. 202301831 A1
Ind. No. T20237006

Royal Courts of Justice

Friday, 28 July 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE BUTCHER
HIS HONOUR JUDGE LICKLEY KC
(Sitting as a Judge of the High Court)

A REFERENCE BY HIS MAJESTY'S SOLICITOR GENERAL
UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

AHA — Respondent

---

Transcript prepared from digital audio by
Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

---

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person'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. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

ANONYMISATION APPLIES

MR B HOLT (instructed by Government Legal Department)
appeared on behalf of His Majesty's Solicitor General.
MR O SADDINGTON (instructed by Kellocks Solicitors) appeared on behalf of the Offender.

---

**J U D G M E N T**

LORD JUSTICE WILLIAM DAVIS:

1. On 31 January 2023, in the Crown Court at Preston, the offender pleaded guilty at the PTPH to one offence of rape and one offence of assault by penetration. No indication of plea had been given at the magistrates' court when the case was sent for trial.

2. On 5 May 2023, he was sentenced to four years, 10 months' imprisonment for the offence of rape. A concurrent sentence of three years' imprisonment was imposed in relation to the offence of assault by penetration. His Majesty's Solicitor General now applies, pursuant to section 36 of the Criminal Justice Act 1988, to refer those sentences as being unduly lenient.

3. The offender is 29. On 31 December 2022, he joined a party organised by RS and her husband to celebrate New Year's Eve. RS is 25. She is married with three children. Although close in age to the offender, she is his niece. As well as the offender, RS invited four of her friends. The group went together from RS' home into Preston City Centre. They went to different bars and clubs. The group were drinking alcohol throughout the evening.

4. Shortly after midnight, they went back to RS' home in a taxi. Two of RS' friends had planned to spend the night at her house. It was decided that the offender would do likewise. By about 2 a.m., those who were staying the night at the house were in the living room. RS became unwell. She went to the downstairs loo to be sick. She was assisted by her husband and one of her friends. She was in the loo for about 15 minutes. She was then taken up to bed. She said she was going to be sick again. A bucket was left by the bed in case she needed it.

5. At around 2.30 a.m., a takeaway food delivery was made. More drink was consumed. The offender at this point drank six shots of vodka. At about 3.30 a.m., RS's husband and the two friends who were staying the night fell asleep on a sofa bed in the dining room of the house. RS was still upstairs in bed. She was asleep. The offender went upstairs and went into her bedroom. She was sleeping under a duvet. He reached under the duvet and took off her pyjama bottoms. He raped her vaginally. He then performed oral sex on her penetrating her with his tongue. He then put his penis into her vagina again.

6. RS woke when the offender began raping her, but she was still half asleep. After a minute or so, as she put it, she "zoned out". She then was aware of oral sex being performed on her under the duvet. When the offender put his penis into her for a second time, he emerged from under the duvet. RS by now was awake. She realised what was going on. She got away from the offender, she grabbed her telephone and ran downstairs. She woke her husband and her friends, shouting "Someone has touched me". The husband and one of the friends went up to RS's bedroom. The offender was in RS's bed. They challenged him about what RS had said. He pretended not to understand what they were saying.

7. The husband and friend went back downstairs, where the other friend was comforting RS, who was clearly upset. The offender followed soon after. When he came into the dining room, RS shouted "That's him, get him out". The offender went outside. The police had already been called. They arrived when the offender was still outside the house. He was arrested.

8. When interviewed the next day, he said that he had gone upstairs to go to bed. He had chosen RS's room to sleep in because it was the nearest. He accepted that RS was in bed and asleep. He said that he had got into the bed. RS had started to cuddle him. This had progressed to full sexual intercourse and other sexual activity. It had been consensual throughout.

9. There was no victim personal statement from RS. The officer in the case reported that this was because it was too upsetting for her to think about the incident. She was starting to get on with her life and she did not wish to re-live what had happened to her.

10. The pre-sentence report set out the offender's account as given to the probation officer. He told her that he had fallen asleep at the foot of RS's bed. He had then woken to find RS cuddling him and touching his penis. They undressed each other. He performed oral sex on her and then penetrated her vagina with his penis. He then froze as he had realised what he was doing. He said that he believed that RS consented to the sexual activity. She had initiated it. However, he accepted that RS was not in a fit state to consent and that she probably thought that he was her husband.

11. The author of the report noted the difference between that account and the evidence of RS. She acknowledged that the offender could be seen as seeking to minimise his culpability. However, she considered that he had taken full responsibility for what he had done. If he was minimising his behaviour somewhat, that was attributable to shame. In her view, the offender was extremely remorseful for what he had done.

12. The pre-sentence report also detailed various issues in the offender's life. He had been bullied at school, though he had eventually left with good qualifications. He had been the victim of a serious assault when he was aged 21. He had taken some time physically to recover from this. He continued to suffer from severe depression. That was in part due to the loss of close family members.

13. There were two character references, one from the offender's mother and the other from his older sister. The older sister set out in some detail the effect she considered that the serious assault had had on her brother's mental health. The offender had no previous convictions.

14. When sentencing the offender, the judge set out very briefly the nature of the offending. He noted that the offender no longer put forward the account he gave to the probation officer. The sentence was to be imposed on the basis of the account given by RS. He accepted the submissions of counsel that the case fell into category 2B of the Sentencing Council Guideline in relation to rape. Harm was category 2. RS was particularly vulnerable due to her personal circumstances, namely, she was asleep and heavily intoxicated. There were no culpability factors which involved higher culpability. The starting point in the Guideline was eight years' custody.

15. The judge said that the offence was aggravated by the fact that the offender was drunk and by the fact thay he had raped his niece in her own home in her own bed. She would have believed that she would have been safe there and the offender had violated that safe place.

16. In relation to mitigation, the judge accepted that the offender's remorse was genuine. He noted that the offender had no previous convictions. He said that the offender had many positive qualities which were to his credit in the sentencing exercise, even though they would not reduce the distress and sense of betrayal on the part of RS.

17. The judge's conclusion was that, after weighing the aggravating and mitigating factors, the sentence after trial would have been six and a half years. The reduction for the plea of guilty at the PTPH was 25 per cent. Thus, the sentence to be served was four years, 10 months' imprisonment in respect of the offence of rape. The judge imposed a concurrent sentence of three years in relation to the assault by penetration. He gave no explanation of his sentence by reference to the Sentencing Council Guideline. That Guideline identifies for a category 2B offence the starting point of six years, with a range of four to nine years.

18. His Majesty's Solicitor General argues that the judge erred in his balancing of the mitigating and aggravating factors. The aggravating factors outweighed the mitigating factors. His assessment that the proper sentence after trial for the offence of rape was six and half years. This was a gross error, given that the category range is seven to nine years. The Solicitor General also relies on the failure of the judge to reflect the quite separate offence of assault by penetration in the sentence for the lead offence.

19. On behalf of the offender, Mr Saddington, who appeared at the court below and has appeared before us to make submissions on behalf of the offender, relies on the stringency of the test for a sentence to be considered unduly lenient. He cites what was said in the recent case of *McCusker* [2023] EWCA (Crim.) 70 at para.17:

> "References under s.36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of wide-spread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type… We remind ourselves that the hurdle is a high one. For appellate interference to be justified the sentence in question must be not only lenient but unduly so."

20. Mr Saddington argues that this was a sentence imposed by an experienced judge who considered the matter with care. His submission is that there were substantial mitigating factors which justified a significant downward adjustment from the starting point. In his written submissions, he cites remorse, good character, experience of trauma, bullying, mental health difficulties and a low risk of re-conviction. In his brief oral submissions, he pointed to the fact that the sentence after trial identified by the judge was only six months lower than the lower end of the category range for a 2B offence. As such, it could not be described as "unduly lenient".

21. The correct formulation of what amounts to an unduly lenient sentence is still that provided by the then Lord Chief Justice in *Attorney General's Reference (No.4 of 1989)* [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

In this case, we must ask whether it was not reasonably appropriate to identify a sentence after trial of six and a half years' custody.

22. The category range for a category 2B offence of rape is narrow. Many offences of rape will fall into this category. Whilst a sentence judge may move outside the category range, whether upwards or downwards, if the nature of the aggravating or mitigating factors makes that appropriate, we consider that the nature of those factors must be at least unusual

for the judge to take that step. If it were otherwise, there would be inconsistency in sentencing for an offence which of its type is relatively common.

23. The aggravating factors were: the fact that RS had been raped in her own bedroom, where she was entitled to feel safe; the breach of trust given the familial relationship albeit falling short of the abuse of trust within the high culpability factors; the fact that the offender was drunk. These were significant aggravating factors which required an uplift from the starting point of eight years' custody. In addition, the offence of rape was treated as the lead offence. The sentence on that count had to take into account the offence of assault by penetration. That offence was committed as part of a single course of conduct. A consecutive sentence would have been inappropriate. However, it was a separate piece of offending. The sentence in respect of the offence of rape should have reflected that separate offending, which, by reference to the relevant Guideline, had a starting point of six years' custody.

24. In his sentencing remarks, the judge referred to two mitigating factors, namely, the offender's remorse and the good character of the offender. He did not refer to the offender's experience of trauma or his mental health difficulties and he made no mention of the low risk of re-conviction. We are satisfied that the judge was right not to take into account those matters. There was no evidence that any mental health problems suffered by the offender had any relevance to the offences with which the judge was concerned. In the absence of any medical evidence, there was no basis on which the judge could have concluded that the offender's problems were sufficient to mitigate the inevitable custodial sentence.

25. In relation to the low risk of re-conviction, this was an opinion expressed by the probation officer in the context of a dangerousness assessment. The low risk did not mitigate the offence. Further, the probation officer also assessed the offender as posing a medium risk of harm to females. If a low risk of re-conviction were of any relevance, it would follow that the extent of any risk would also be relevant as an aggravating factor. The reality is that both issues were irrelevant to the determinate sentence to be imposed on the offender.

26. The judge said that the offender's remorse was genuine. We are not in a position to interfere with that conclusion in relation to the situation as at the date of sentence. It is pertinent to observe that the offender told the police that all sexual activity had been consensual. He did not indicate any plea at the first appearance at the magistrates' court. He gave an account to the probation officer which did not reflect the truth of what he had done. The offender's remorse came rather late in the day. We consider that its effect was substantially less than it would have been had it been expressed from the outset. We note that remorse indicates regret, which is not the same as shame, which is how the probation officer in her report categorised the feelings of the offender.

27. The lack of previous convictions will always be a mitigating factor. That was something applicable to the offender. Good character is not the same as the absence of previous convictions. In this case, the offender was someone with "many positive qualities", as the judge gleaned from the letters written by his mother and sister. In relation to the offences of rape and assault by penetration, the Sentencing Council Guideline is clear as to the effect of good character.

> "Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence the less the weight which should normally be attributed to this factor … In the context of this offence, previous good character/exemplary conduct should not normally

be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence".

28. It follows that the mitigating factors were of relatively modest significance. They fell far short of being of such an unusual character as to justify the judge departing from the category range. Moreover, they were outweighed by the aggravating factors. The judge concluded that the opposite was the case. He did not explain how he had reached that conclusion which had led him to reduce the sentence after trial below the category range. Although the judge imposed a separate sentence in relation to the offence of assault by penetration, he gave no indication that he had reflected this offence in the sentence imposed for the offence of rape. In our view, looking at the entirety of his sentencing remarks, he did not do so. That was an error.

29. In our judgment, taking all of those matters into account, the least sentence after trial should have been nine years' custody. The aggravating factors in relation to the offence of rape should have taken the sentence after trial to the top of the category range. The need to reflect the quite separate offence, the assault by penetration, required an uplift beyond the category range. The relatively modest mitigating factors did not justify the level of reduction applied by the judge. By that route, a sentence of nine years' custody after a trial should have been the outcome. The reduction for the plea of guilty was 25 per cent. That would have led to a sentence in relation to the offence of rape of six years, nine months' imprisonment, that sentence reflecting the entirety of the offender's conduct.

30. Applying the test for an unduly lenient sentence, we consider that it is satisfied in this case. To adopt what was said in *McCusker*, the judge in this case departed to a substantial extent from the norms of sentencing generally applied to offences of rape. We do not consider that it was reasonably appropriate for him to do so; the approach of the judge led to an unduly lenient sentence.

31. Mr Saddington submitted in writing that, even if we were to reach that conclusion, we should show mercy and decline to interfere with the sentence in view of the mitigation taken into account by the judge. The proposition that we retain the discretion urged upon us by Mr Saddington is not in doubt. However, we see no reason to exercise that discretion in this case.

32. We give leave to His Majesty's Solicitor General to bring this application. We quash the sentence of four years, 10 months' custody in respect of the offence of rape. We substitute in its place a sentence of six years, nine months' imprisonment. The sentence in respect of the other offence will remain unchanged.

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by* ***Opus 2 International Limited***
*Official Court Reporters and Audio Transcribers*
***5 New Street Square, London, EC4A 3BF***
***Tel: 020 7831 5627 Fax: 020 7831 7737***
***CACD.ACO@opus2.digital***

This transcript has been approved by the Judge.