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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1110



No. 202202457 B5

Royal Courts of Justice

Tuesday, 18 July 2023

Before:

LORD JUSTICE WILLIAM DAVIS  
MR JUSTICE GARNHAM  
HIS HONOUR JUDGE LICKLEY KC

REX

v

LUIZ INACIO DA SILVA NETO

**REPORTING RESTRICTIONS APPLY**  
**Sexual Offences (Amendment) Act 1992**

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Ms S. Bennett-Jenkins KC appeared on behalf of the Appellant.

Mr M. Walsh appeared on behalf of the Crown.

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



LORD JUSTICE WILLIAM DAVIS:

- 1 Mr Da Silva Neto is now aged 36. He has no relevant convictions for the purposes of the offences with which we are concerned. He is a man of effective good character.
- 2 The provisions of the Sexual Offences (Amendment) Act applies 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. In order to give effect to that provision, we have anonymised the names of the victims in this case.
- 3 On 21 January 2022, in the Crown Court at Oxford, Neto pleaded guilty to nine counts of simple possession of a variety of controlled drugs.
- 4 On 1 July 2022, he was convicted after trial of five counts of serious sexual offences and associated offences of administering a substance with intent. He was sentenced on 7 July 2022 as follows. In relation to drugs offences, short determinate sentences of imprisonment were imposed. They were concurrent to the sentences imposed for sexual offending. We need say no more about those matters. Counts 13 and 14 on the indictment were linked. Count 13 was administering a substance with intent. Count 14 was causing a person to engage in penetrative sexual activity without consent. In relation to the second of those counts (count 14), the sentence was 10 years' imprisonment with a concurrent sentence of six years for administering a substance with intent. Counts 18 to 20 were similarly linked. Count 19 charged Neto with rape. On that count he was sentenced to 12 years' imprisonment; that was ordered to run consecutively to the sentence on count 14. The other counts were causing a person to engage in penetrative sexual activity without consent, where the sentence was eight years concurrent, and administering a substance with intent, six years concurrent. The total sentence, therefore, was 22 years' imprisonment. He appeals against his sentence on counts 13, 18, 19 and 20 by leave of the single judge.

- 5 The drugs offences came to light in October 2021 when the appellant was stopped in his vehicle and found to have various drugs in his possession consistent with personal use. Those are the offences to which he subsequently pleaded guilty. The only relevance of the offences is that he was aware from that point that he was under police investigation.
- 6 Counts 13 and 14 concern a man to whom we shall refer as SS. On 9 November 2021 the appellant and SS travelled together from London to Oxfordshire. The intention was to carry out some building and cleaning work on the appellant's cottage there. SS worked for the appellant's partner's firm. The two of them knew each other. At the cottage, each had a few shots of Jägermeister to drink. SS suddenly began to feel very tired. His tiredness became all consuming. He lay down to sleep and did so fully clothed. At some point thereafter he woke up. He realised that now he was naked. The appellant, also naked, was performing oral sex on him and touching himself. SS could not move his legs. He could not stop what was happening. The next morning, he went home. He was convinced that he had been drugged.
- 7 After about nine days, SS made contact with the appellant via WhatsApp. In the course of their WhatsApp conversation the appellant suggested paying some money to SS so there would be no need to report the matter. SS, in fact, contacted the police.
- 8 Counts 18, 19 and 20 concern a man to whom we shall refer as JH. On the evening of 9 December 2021, he was out in London with some work colleagues. The group ended up in a bar in the King's Road. JH got rather drunk. In the early hours of the morning, he came out of the bar. He ordered a taxi on his phone but then cancelled it. That was because the appellant was outside. He had been waiting for a man, any man, who was sufficiently intoxicated that the appellant could persuade him to get into his car. So it was that JH got into the appellant's car. The appellant had spent much of that evening in and around bars in the hope of picking up a man, that being confirmed in video footage later recovered from the appellant's phone.

- 9 JH was driven to the cottage in Oxfordshire. At some point he was given some kind of stupefying drug. In the course of the night, when JH was in a stupefied state, the appellant orally raped JH and also sucked his penis. JH had no recollection of these events. All he was aware of was waking up the next morning stark naked in a strange bed in a place he had never been to before. The appellant had taken photographs and videos during the night showing JH naked and incapacitated. JH got a taxi back to London.
- 10 The appellant was arrested on 12 December 2021. In a wash bag at his flat were some glass bottles containing residue of GBL, a stupefying drug. When interviewed, he said that there was sexual activity between him and SS and JH. He said the activity was consensual. He denied administering any drugs to either man.
- 11 Both SS and JH made victim personal statements in the course of the proceedings. SS said that the night in November 2021 had changed his life forever. He said the feeling of being drugged was horrendous and –

" ... a feeling I will never forget as long as I live. I came to whilst he was doing what he did. That is something that will live with me for the rest of my life. Following what happened, I walked around in a trance for days. It made me feel like I was losing my mind. It is the worst experience I have ever lived through. Even now, eight months later, I have been unable to tell my family or any of my friends about what happened. I live with this alone every day. I'm heterosexual. I'm Catholic. This has had a huge effect on both parts of my life. I feel it will affect future intimate relationships. At the moment I feel unable to get into a relationship. I just don't feel able to socialise with people. I hope one day I will be able to but at the moment I just can't cope with going out and being with people. I have panic attacks, and just struggle to cope with everything."

- 12 JH also made a victim personal statement in which he said this:

"The sense of panic I felt that morning is indescribable. I had never been so terrified in my life. Calling my wife, crying and screaming down the phone is a memory she can never forget and has left her traumatised. The weeks that ensued were incredibly difficult for myself and all those close to me. Sleepless nights and severe anxiety meant that me and my wife had to take time off work. This is something I will have to live with for the rest of my life and will cross my mind every day. I cannot bear the feelings of stress, terror and anxiety it

causes me.”

13 When it came to sentence, the judge rehearsed the facts as we have already outlined them. He observed that the appellant, whilst apparently a decent and hard-working man, regularly abused recreational drugs. He said that the offences had been committed in part because of that drug addiction. However, it was the appellant's choice to take the drugs. Before considering the individual offences, the judge referred to the principle of totality. He said:

"I'm very conscious indeed of the totality principle, because if I were to give you what you deserve on each of these counts looking at them individually then the sentence that I would be imposing would be very, very high and in my view far too high for what you've done but the sentence is going to be substantial, these are very serious offences indeed."

14 The judge then turned to the specific offences, dealing first with the offences in relation to JH. In respect of the rape, by reference to the Sentencing Council guidelines, he identified three category 2 harm elements: severe psychological harm; a sustained incident; the victim being particularly vulnerable due to his personal circumstances. Having identified three category harm factors, the judge considered whether any one of them or their combination justified elevation of harm to category 1. He concluded that it should not. In relation to culpability, he identified two higher culpability factors: first, a significant degree of planning; second, the use of drugs to facilitate the offence. By reference to his analysis, the judge determined that the offence fell within category 2A in the guidelines giving a starting point of 10 years' custody with a range of nine to 13 years. He said that the offence fell at the higher end of the category range and that the appropriate sentence was one of 12 years' imprisonment. He reached that view because of the multiplicity of harm and culpability factors.

15 The same harm and culpability factors applied to the other sexual offence in relation to JH. The sentence imposed on that count was eight years which was the starting point within the guideline for that offence. Likewise, in relation to administering a substance with intent, the judge applied the guideline and imposed a sentence in line with the starting point applicable

to the relevant harm and culpability factors.

- 16 The judge then moved on to the offences relating to SS. He said that the same harm and culpability factors applied as to the offence of rape; therefore, the offence of causing somebody to engage in penetrative sexual activity fell into category 2A with a starting point of eight years and a range of five to 13 years. The judge then said:

"Well, looking at all the facts of this case, and in particular the abuse of trust in what you did, I take a starting point in respect of this count of 10 years and that's the sentence I'm going to impose. It was a completely separate incident and that 10-year sentence is consecutive to the 12 years on the rape count."

He imposed a concurrent sentence in relation to the count of administering a substance with intent.

- 17 The appellant has been represented today by Ms Sallie Bennett-Jenkins KC, for whose submissions we are most grateful. She did not appear at trial. She argues that the sentences for the principal, offences were too high in each case. She further submits that the cumulative effect of ordering the sentences to run consecutively with no apparent adjustment for totality renders the overall sentence manifestly excessive.
- 18 We consider that taken in isolation there can be no criticism of the sentence imposed for the rape of JH. The judge was justified, in our view, in moving up from the starting point because there were three harm factors, each of which was significant, and three culpability factors. In such circumstances a judge is entitled to move up within the category range before considering any other factor. Moreover, when sentencing for two or more offences committed at the same time, a judge is bound to reflect the overall offending in the lead offence. That is what happened here. This was a case of the appellant deliberately targeting JH as somebody on whom he could prey to satisfy his sexual desires. JH was taken to a cottage many miles from his home. The circumstances of the offending were rightly described by the judge as very serious.

- 19 Ms Bennett-Jenkins invites us to consider that there was a number of aggravating factors which were not present. That is entirely true. The sentencing range identified by the Sentencing Council must reflect the multiplicity of culpability and harm factors in any given case. That is what happened here. The fact that other factors were not present simply means the sentence was not longer. We do not accept that there was any double counting. The appellant was charged with administering a substance with intent, but the sentence on that count was ordered to run concurrently. The judge was quite entitled to take into account there had been the use of drugs to facilitate the offence.
- 20 As for the submission that the judge gave no account, or proper account, for the good character of the appellant, in our judgment, the judge properly applied the rubric in the Sexual Offences Guidelines which applies to both rape and causing a person to engage in penetrative sexual activity, namely that "previous good character ... should not normally ... justify a reduction in what would otherwise be the appropriate sentence".
- 21 The sentence on the lead offence in relation to SS had to reflect the same multiplicity of harm and culpability factors as applied to the offence involving JH. The judge was entitled to move up the category range for that reason. We acknowledge that the judge said that he moved from the starting point to 10 years when considering "in particular the abuse of trust in what you did". If this was intended to reflect abuse of trust as a higher culpability factor within the guideline, the judge fell into error. The relationship between SS and the appellant did not come within that term as explained in *R v Forbes* [2016] EWCA Crim 1388, paragraph 18. However, the other factors applicable to the offending against SS were more than sufficient to justify movement up the category range.
- 22 It follows that the individual sentences were not manifestly excessive. Further, there can be no criticism of the judge's decision to order the sentence in relation to the offending against SS to run consecutively to the sentence relating to the offending against JH. The two sets of offences were quite separate and involved different and unrelated victims. However, to find



that the individual sentences were not manifestly excessive and to conclude that consecutive sentences were appropriate is not the end of it.

- 23 The judge was obliged to apply the Sentencing Council's totality guideline as it then was. The general principles within that guideline were two-fold: (1) the total sentence for multiple offending must be just and proportionate; (2) it is usually impossible to arrive at a just sentence for multiple offending simply by adding together notional single sentences. In his reference to totality, the judge appeared to acknowledge the second principle. He said that simply imposing the appropriate sentence on each count, without more, would lead to a sentence that was too high. Yet, the sentences he imposed on the lead offence in each case were, according to him, the sentences appropriate to that offence. He made no adjustment thereafter to either sentence to reflect the principles set out in the totality guideline and thereby to render the overall sentence proportionate.
- 24 It is quite clear that the appellant's offending was very serious indeed. It was very serious in respect of both victims. The effect of the offending on each of them was very substantial as is apparent from their victim personal statements. But, even where each victim has suffered grievously from the offending, the requirement for the overall sentence to be proportionate remains.
- 25 We have concluded that the judge should have adjusted the overall sentence to take account of the principles of totality. Such an adjustment inevitably means that the sentence in relation to a particular victim is less than it would have been had the only offence been one relating to that victim. This is not to be taken as some kind of determination that the relevant offence was not as serious as the victim quite rightly thinks it was. Rather, it is the only means by which the court can achieve proper proportionality in sentencing. This man at the end of 2021 engaged in a brief course of conduct involving sexually predatory behaviour. It had to be reflected by a substantial sentence. In our judgment the sentence imposed failed to reflect the appropriate proportionality that had to be achieved.

26 We conclude that the total sentence should have been 19 years. We achieve that result by quashing the sentence of the 10 years on count 14 and substituting a sentence of nine years. And by quashing the sentence of 12 years on count 19 and substituting a sentence of 10 years. The structure of the sentence will otherwise be unaltered and the sentences on the other counts will not be altered. The sentence on count 19 of 10 years will be consecutive to the sentence of nine years on count 14, thereby giving a total sentence of 19 years.

27 To that extent and that extent only, we allow this appeal.

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**CERTIFICATE**

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

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This transcript is subject to the Judge's approval.