Neutral Citation Number: [2023] EWCA Crim 1192

Case No: 202301340 A4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT BRISTOL**
**His Honour Judge Cullum**
**52SB0566922**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2023

**Before :**

**LORD JUSTICE HOLROYDE**
**(Vice-President of the Court of Appeal, Criminal Division)**
**MRS JUSTICE MAY DBE**
and
**MRS JUSTICE ELLENBOGEN DBE**

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**Between :**

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| **LEON AUSTIN** | **Appellant** |
| **- and -** | |
| **REX** | **Respondent** |

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**V Cornwall** (instructed by Reeds Solicitors) for the **Appellant**
The **Respondent** did not appear

Hearing date : 05 October 2023

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# APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 16/10/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

WARNING: Reporting restrictions apply in this case, as stated in paragraph 1 of the judgment, because the case concerns sexual offences. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

**Mrs Justice Ellenbogen DBE:**

1. **The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences to which this judgment relates. 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 section 3 of the 1992 Act.**

2. On 23 March 2023, in the Crown Court at Bristol (His Honour Judge Cullum), the appellant received an extended sentence of imprisonment, comprising a custodial term of 20 years and an extension period of 5 years, following his pleas of guilty to six offences relating to two complainants. On 14 November 2022, he had pleaded guilty to two counts of rape — one oral and one vaginal — of complainant AB, contrary to section 1(1) of the Sexual Offences Act 2003. On 20 January 2023, he had pleaded guilty to one offence of attempting to choke, suffocate, or strangle with intent to commit an indictable offence (rape), contrary to section 21 of the Offences Against The Person Act 1861; and to three offences, respectively of vaginal, anal and oral rape. Each of those offences had been committed against complainant CD. The judge imposed the same sentence on each of the six counts, all to run concurrently.

3. With the limited leave of the Single Judge, the appellant appeals against his sentence, contending that it was manifestly excessive, for one or more of the following reasons — the judge had: (1) double-counted as aggravating certain factors which he had found to have justified the categorisation of harm; (2) in relation to all counts, given no, or insufficient, weight to the appellant's mitigation; and (3) made insufficient reduction for totality. At the end of the hearing on Thursday, 5 October, the appellant was informed that his appeal would be dismissed, for reasons which would follow. Those reasons are set out in this judgment.

## Factual background

4. Given the nature of this appeal, we set out the facts in some detail.

*The offences against AB*

5. AB had been 17 on 25 October 2018, when the offences against her had been committed. She had been a 'looked after' child (that is, one under the care of the local authority) and had been living in supported accommodation. On the evening of 25 October, she had travelled to Dursley, by train, with a view to meeting a friend, who had cancelled their meeting after she had set off. AB had decided to go to Dursley anyway and, en route, had texted friends to see whether she could meet up with others instead. During the early evening, she had been drinking and had been seen by staff in a petrol station to have been obviously drunk — giggly, wobbly on her feet and slurring her speech. Whilst she had been at the petrol station, the appellant, whom she had known, had telephoned her, suggesting that they meet up and smoke cannabis. AB had said that she could not get hold of any. The appellant had collected her from the petrol station, in his van and they had then driven around trying to contact someone who would sell them cannabis. Whilst in the van, they had kissed and taken a line of cocaine, before travelling to buy cannabis and then driving around. In the dark and in

her intoxicated state, AB had not known where they were. At one point, she had told the appellant that she needed to get home, as she had to be up early to go to work the following day. The appellant had suggested that they go to his home, to smoke cannabis, and had told her that he would drop her back early the next morning. AB had said that she would see what she wanted to do after they had smoked some cannabis.

6. The appellant had then driven AB back to his home; a mobile trailer situated in a remote location, several miles from the nearest railway station. Once there, they had smoked cannabis and the appellant had given AB more alcohol. They had sat on a sofa and had kissed. The appellant had then stood in front of AB, pulled down his trousers and underwear and forced his penis into her mouth. She had said that she was tired and wanted to go home and that they could *'do it another time.'* The appellant had then become angry, accusing her of leading him on and telling her that she could not now say no to him. AB had begged him to take her home. Whilst she had been able to hear cars on the road, they had been too far away and she had felt unable to leave. The appellant had been angry with her and had forcibly removed her trousers and underwear. She had said, *'No! I don't want to do this'* and continued to ask that he take her home, or to the station. The appellant had then put his hand over AB's mouth, kissed her breasts, taken her to his bed and vaginally raped her, whilst she had been lying on her back. He had then turned her over and continued to rape her. After an initial struggle, AB had given up, conscious of the significant disparity in their size and because she had been scared of the appellant. AB had been unsure whether the appellant had ejaculated, but said that he had *'kept going until he had finished'*. When it was over, she had been in tears. She had told the appellant that he could not treat people like that and that no meant no. He had alternated between apologising and suggesting that it had been AB's fault for having led him on. She had put her clothes back on and, again had asked that the appellant take her home, but he had said that he could not drive because of the cannabis which he had smoked. Not knowing where she was, AB had felt unable to leave on her own. She had eventually fallen asleep on a sofa, waking up when it was light. The appellant had driven her home, but she had been unable to get in. He had then driven her to her place of work. On the way there, AB had told him that he had raped her on the previous night. He had asked her if she would report it to the Police and had told her that he would not be happy, were she to do so, as he would miss out on his daughter's life.

7. At work, AB's colleagues had noticed that something was amiss. When spoken to by a colleague and friend, she had immediately disclosed that she had been raped. The Police had become involved and photographs had been taken of bruising to her arm and inner thigh. A video interview was conducted on 28 October 2018. The appellant was arrested and interviewed on 20 November 2018. In interview, he said that he knew AB because she had had a relationship with one of his friends, and that they had engaged in consensual sex in the course of which he had ejaculated over her body. The appellant had been angry that AB had made an allegation against him and had made various derogatory remarks about her during his interview. He was not charged after the interview or following inquiry. The case was reviewed and reconsidered in light of the subsequent complaint made by CD, some four years later.

*The offences against CD*

8. CD had been 20 years old in August 2022. She had known the appellant for approximately three years and considered him a friend. They had been out together on previous occasions but had not engaged in any sexual relationship. On 27 August 2022, CD had been working during the day at a public house. The appellant had picked her up from work at around 6:45pm. They had gone to a couple of pubs together and had had a number of drinks. They had both taken cocaine. By the end of the evening, CD had been drunk. They had carried on drinking at the house of a friend of the appellant and had taken more cocaine, staying there until around 8 o'clock the following morning. They had left the house in daylight and had got into the appellant's car.

9. The appellant had then started to pester CD, asking if they were going to have sex. Whilst driving, he had persistently grabbed at her thigh and asked her for sex. Eventually, CD had asked him to let her out of the car. The appellant had refused and kept driving. At one point, CD had tried to open the passenger door whilst the car had been travelling at 30 to 40 miles per hour. The appellant had asked CD whether this had ruined their friendship and she had replied that it had and that she never wanted to see him again. In an attempt to get out of the car, she had kicked the window of the passenger door, before realising that she could open it electronically. Having done so, she had attempted to open the door from the outside, because the appellant had centrally locked it on the inside.

10. Eventually, the appellant had stopped the car in a layby, next to a barn near a quarry — an isolated location. He had tried to talk to CD, but she had made it clear that she just wanted to get out of the car. She had put her feet through the open window of the passenger door in an attempt to do so. At that point, the appellant had taken a dressing gown cord from the back of his car and had wrapped it around CD's neck, tying a knot at the back. CD had struggled to breathe and the appellant had pulled her back into the car, forced her to remove her bra underneath her jumper and then pulled her, across the handbrake and gearstick, out of the car, via the driver's door, dragging her across a farmyard and around to the rear of the barn.

11. CD had asked the appellant if he was going to kill her, to which he had replied, *'Not if you keep quiet'*. He had pushed her up onto some very large hay bales. CD had tried to call out, but had been told to shut up, or the appellant would kill her. She had begged him not to do so. The appellant had pushed her onto her back, positioned himself over her and forced his penis into her mouth, periodically pulling the cord more tightly around her neck. CD had been unable to breathe and the appellant had inserted his penis so far into her mouth that she had begun to choke. He had then turned her around, bent her over, pulled down her trousers and underwear and raped her anally, from behind, causing what CD described to have been incredible pain, which she had tried to blank out because she had been fearful that the appellant would kill her. Thereafter, and as she described it, he had flipped her over onto her back and begun to rape her vaginally. Throughout her ordeal, CD had tried to call out but the appellant had either pulled the cord tighter or put his hand over her mouth to stop her shouting. He had also slapped her in the face.

12. Eventually, the attack had come to an end. CD had been unsure whether the appellant had ejaculated. She had managed to drop down one level of hay bales and, at that point, the dressing gown cord had been removed from her neck. She had shouted at

the appellant, telling him that she hoped he knew what he had done. The appellant had grabbed her around the throat with both hands and threatened her again, using words along the lines of, *'If you say shit like that, I'm not going to let you go.'* At that point, CD had managed to escape. She had run to the driver's door of the appellant's car, leaned inside to grab her handbag and then run off and hidden behind a bush. Her bra and telephone had been left in the car. She had heard what must have been the appellant's car driving past her, and then back again, and had continued to hide until it had driven off. She had then tried to call her mother and, several times, to make calls to the Police, using her smartwatch, but the calls would not connect and she had walked into the road and attempted to flag down a car. Having managed to do so, she had immediately told the driver and passenger that she had been raped. She had had hay in her hair and an injury to her lip. CD had been in tears and said that she had thought that she was going to die. There had been visible marks on her neck, caused by the dressing gown cord. She had been in pain and her body had been aching. She had been menstruating at the time of the incident.

13. The Police were called and the appellant was arrested the following evening. When first taken into custody, he said that he had, *'fucked up and done wrong'*, stating that he had been on self-destruct and that he would never see one of his daughters again. In interview, he claimed that CD had told him that she had been 'into' being tied up, and that they had slept together that evening. The appellant used derogatory terms about CD, calling her a *'lying slag'*. Thereafter, he became generally uncooperative.

14. At the time of his offences against AB, the appellant had been 26 years old. He had been aged 30 at the time of his offences against CD.

**The impact upon AB and CD**

15. In her victim personal statement, AB described the enduring and extensive psychological effect of the appellant's offences, including suicidal feelings; feelings of self-loathing; unwillingness to be touched; nightmares, which she characterised as being 'horrifying and extremely scary'; and the exacerbation of pre-existing addictive behaviour. She said that she was haunted by the appellant's *'pure evil'* eyes, which would be the first and last thing she would see each day.

16. In her victim personal statement, CD described her inability to work and the fact that, now five months after the incident, she was taking medication for depression and anxiety and was also self-medicating with cannabis, on which she considered that she had become reliant. She would have good days and bad days, on the latter being unable to leave her room. She, too, had experienced suicidal thoughts. She had had nightmares about the incident and about other issues in her life. Her struggle to talk about what had happened with her general practitioner, or a counsellor, was hampering her ability to come to terms with it and to find healthy coping mechanisms. Her behaviour had changed; she had altered the clothes which she wore; had lost a stone in weight which she had not wanted to lose; and had dyed her hair so that she would not have to look in the mirror at the same woman who had been raped. She had felt unable to celebrate her twenty-first birthday and her circle of friends had contracted. CD described feeling scared of and intimidated by men and how she could not conceive of having a relationship with a man. She considered that the incident would have an impact upon her forever.

## Sentence

17. In his sentencing remarks, the judge described the brutality of each set of offences, and summarised the significant trauma which the complainants had been caused, observing that the appellant had irretrievably altered the life of each complainant and caused her immeasurable pain.

18. The judge began by considering the offences against each complainant in turn, having regard to the sentencing guideline for rape. He noted that there had been two offences against AB and that, for a single offence, the categorisation would have been 2B, having regard to: (1) her vulnerability, by virtue of her personal circumstances; her age; and the fact that she had been clearly under the influence of alcohol on the date in question; (2) the prolonged nature of the incident, whereby, effectively, AB had been kept in the appellant's remote trailer overnight; and (3) albeit to a lesser degree than had applied in CD's case, an element of abduction. As he noted, a single offence so categorised has a starting point of eight years', and a category range of seven to nine years', imprisonment. Aggravating the offences had been the fact that both individuals had taken drugs; the appellant's threats to AB; and ejaculation. On that basis, it was said, the sentence, after a trial, for these offences alone, would have been one of 12 years' imprisonment, reducing to nine and a half years after twenty per cent credit for his guilty plea (a deduction which counsel had accepted to be appropriate, for reasons which the judge recorded and which need not be rehearsed here).

19. Turning to the offences against CD, the judge noted that there had been four, all of which punishable by life imprisonment and qualifying, by different routes, for consideration of dangerousness. He noted that there was no sentencing guideline relating to the choking offence, which he considered to constitute a very significant, extremely serious aggravating factor, as counsel had acknowledged. He assessed the rapes as category 1B, noting that, whilst the consumption of alcohol and drugs by both individuals had constituted an aggravating factor, they had not been used to facilitate the offence. He stated that the extreme impact caused by the large number of serious category 2 factors which had applied elevated the appellant's offending to category 1: strangulation — the attempt to choke; the fact that CD had been raped in every orifice, said to have constituted quite deliberate additional humiliation; the fact of three rapes; abduction; prolonged detention; violence; and threats to kill, which CD had feared he would make good. The judge noted that the starting point for a category 1B offence was 12 years' imprisonment, with a category range of 10 to 15 years' imprisonment. He regarded as a further aggravating factor the fact that the offences had been committed at a time when the appellant had been subject to a community order, albeit one which paled into insignificance when compared with the use of a cord around CD's neck. In all the circumstances, the judge stated, the consecutive custodial sentence which he would have imposed for the offences against CD would have been 16 years, reducing to 12 years after twenty five per cent credit for his guilty plea.

20. The judge then turned to consider totality, noting the appellant's then age (31) and the fact that he had few prior convictions, and none for any offence of such gravity. He reduced the total sentence for both sets of offences, by 18 months; from 21½ to 20

years. Having found the appellant to be dangerous (a finding which is no longer challenged), he imposed the same 25-year extended sentence on each of the six counts of which the appellant had been convicted, all to run concurrently.

## The appellant's submissions

21. In her concise and helpful submissions, Ms Cornwall contended that, for each set of offences, the judge had elevated the relevant starting point disproportionately and had taken no account of mitigation. In any event, he had made no proper adjustment for totality.

22. In relation to the offences against AB, Ms Cornwall acknowledged that the judge had been justified in elevating the starting point to reflect the fact that there had been two offences; the trauma which he had caused AB to suffer; and her vulnerability. He had been wrong to emphasise the age gap between the appellant and AB, which, she submitted, had not been a factor having an impact upon the gravity of the offences or one which was identified in the sentencing guideline, in particular when account had already been taken of AB's vulnerability (which might have encompassed her age), when elevating the starting point, by fifty per cent, above the top of the category range.

23. Acknowledging that the judge had been entitled to assess the rapes of CD as category 1, to reflect the multiplicity of category 2 factors, Ms Cornwall submitted that, here again, the disparity in age had not been an aggravating factor; CD had been 20 years old at the time. Having elevated the category of harm from 2 to 1, to take account of the fact of three rapes and strangulation, the judge had wrongly double-counted, as aggravating factors, the fact that CD had been raped in every orifice, and strangled. The offending which had given rise to the appellant's community order had been a minor public order offence, and, thus, entirely dissimilar. There had been a disproportionate elevation of the starting point, and it ought to have been borne in mind that, whilst CD had been raped three times, each penetration had formed part of a single incident.

24. Ms Cornwall further submitted that, in relation to each set of offences, there had been no reflection of the appellant's personal mitigation. Prior to the index offences, he had been very lightly convicted. A father of three children, he had, until consumed by drugs and addiction in his late twenties, worked as a tradesman. He had been unusually candid in his interview with the author of the pre-sentence report and had demonstrated real insight into, and remorse for, his offending. None of those matters had been taken into account by the sentencing judge.

25. Finally, albeit identified by Ms Cornwall as her primary point, whilst the judge had been correct to reach a total sentence comprised of consecutive elements, the 20-year custodial element of the sentence which he had imposed had not been just and proportionate. Had the matter gone to trial, she submitted, the appellant would not have received a higher sentence than he had received following his guilty pleas.

## Discussion and conclusions

*Age disparity*

26. In accordance with the sentencing guideline, the judge identified the various factors by reference to which he had assessed the harm caused to AB as category 2. Those included AB's vulnerability, which he identified to encompass the fact that AB had been 17 and a 'looked after' child, who had been living in supported accommodation at the time of the offences and obviously drunk when the appellant had picked her up at the petrol station. The judge was right to take account of all such factors. He made no reference to any particular vulnerability when addressing the offences committed against CD. Whilst noting the 10-year age gap between the appellant and each of the complainants, as part of his narrative, the judge did not identify that disparity as a factor which had itself rendered either of them particularly vulnerable for the purposes of assessing harm. There is nothing in this point, in connection with either set of offences.

*Double-counting in relation to the offences against CD*

27. This criticism does not have regard to the careful wording of the judge's sentencing remarks, from which it is clear that he had drawn a distinction between the number of rapes, per se, and their nature and deliberate purpose: *'The fact that you took* [CD] *through every orifice is quite deliberately additional humiliation, in my judgment. But, in any event, there are three rapes to consider…'* Additional humiliation was a factor to which the guideline obliged him to have regard and there was no 'double-counting' in this respect. Similarly, the judge rightly identified the strangulation/attempted choking as an extremely serious aggravating factor which, in combination with other category 2 harm factors, had had an extreme impact warranting elevation of the harm caused to CD to category 1. Moreover, the act of strangulation was an aggravating factor which added to the appellant's culpability as well as to the harm which he had caused to his victim. The assumption underlying Ms Cornwall's submission in this connection is misconceived. It is proper for a judge to have regard to the nature and gravity of those factors which have inclined him to assess the harm caused as category 1 when assessing where in the category range his sentence ought then to fall. That is not to double-count; it is to follow the wording of the guideline: *'A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.'*

28. It is clear that the weight, if any, attached to the pre-existing community order was negligible: *'It is an aggravating feature, though perhaps pales into insignificance compared to the use of the tie around her neck — the cord around her neck.'*

*Personal mitigation*

29. This point, too, may be dealt with shortly. As the rape sentencing guideline makes clear:

> *'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.'*

It is unsurprising that the judge did not apply a reduction in sentence for such personal mitigation as there was. Furthermore, the remorse for the offences against AB on which reliance is placed must be viewed in context, being the appellant's subsequent and more violent rapes of a second victim. He had not been of good character when he had committed the offences against CD; rather, he had yet to be apprehended and prosecuted for his crimes against AB. The most powerful point in the appellant's favour was the fact that he had pleaded guilty to all offences, for which he received due credit, at the relevant sentencing step.

*Disproportionate elevation of the starting point for each set of offences and totality*

30. Thus, no error of principle in the judge's approach to either set of offences has been demonstrated. In relation to each set, the factors identified by the judge amply justified the upward adjustment to the starting point which he made. In relation to CD, the choking offence, taken by itself, was extremely serious, and would have merited a weighty sentence. The judge appropriately treated it as an extremely serious aggravating factor when sentencing for the rapes. Here again, the factors identified by the judge warranted the adjustment to the starting point which he made.

31. That leaves the question of totality. The judge made a downward adjustment of 18 months to the total sentence which he would otherwise have imposed. This was grave offending, against two victims, on separate occasions, for which, we consider, the total sentence imposed was severe but condign. In our judgment, its aggregate length was just and proportionate to the offending as a whole.

32. The total sentence imposed having been neither manifestly excessive nor wrong in principle, the appeal is dismissed.