IN THE COURT OF APPEAL (CRIMINAL DIVISION)
[2023] EWCA Crim 1558

No.
202202371/B4
202203076/B4

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 September 2023

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE LAVENDER

MR JUSTICE BRYAN

B E T W E E N :

REX

- v -

OMAR ALI

REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992

THE CROWN was not represented.
MS L SWEET KC appeared on behalf of the Appellant.

A P P R O V E D J U D G M E N T

MR JUSTICE BRYAN:

1 The provisions of the Sexual Offences (Amendment) Act 1992 will apply to the offending under consideration. Under those provisions, where a sexual offence has been committed against a person, no matter relating to the victim shall during their lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. This judgment has been anonymised accordingly.

2 On 29 June 2022, in the Crown Court at Kingston Upon Thames following a trial before Mr Recorder Benjamin and a jury, the applicant (then aged thirty-two) was convicted of six counts of rape (Counts 1-5 and 7) committed between 2011 and 2014; one count of assault occasioning actual bodily harm (Count 6) committed in 2013, and one count of sending an electronic communication with intent to cause distress and anxiety (Count 8) committed in 2017, all against the same complainant, GL.

3 On 23 September 2022, the learned judge sentenced the applicant to fifteen years' imprisonment on each of the counts of rape (concurrent), twelve months' imprisonment on the ABH (concurrent), and six months' imprisonment (consecutive) on the electronic communication count; a total sentence of fifteen years and six months' imprisonment.

4 The applicant sought permission to appeal conviction and sentence. Following refusal by the single judge, the applicant renews his application before us.

5 Turning to the facts, the applicant and GL (the complainant) were both students aged eighteen when the applicant met the complainant via his sister. They developed a long

distance relationship when they went to different universities. Their relationship was beset by difficulties from the outset as they both belonged to different Muslim sects. There was an on/off relationship between 2011 and 2014. Neither sets of parents approved of the relationship outside their own branch of the Muslim faith. As a result, their relationship was kept secret. There were rare opportunities for them to be at home. "Dates" and meetings were held outside the home. Sexual contact between them had to be away from home and often took place in a car or in hotels.

6 In 2014, the relationship was ended. Months after the relationship had ended, the complainant confided in a close friend, MGA, that she had been sexually abused by the applicant.

7 In 2017, the complainant received a series of messages via Snapchat which, on their face, came from an account called "AliciaNikes". Within the messages, there were inferential but clear threats to disclose "nudes". The complainant suspected that the messages had come from the applicant.

8 On 20 January 2020, the complainant reported the incidents to the police. The applicant was arrested and interviewed on 3 February 2020. In the interview he denied ever physically assaulting the complainant or having sex with her without her consent.

9 The prosecution case is that the applicant raped the complainant on six occasions during the course of their relationship, between June 2011 and December 2014, when the applicant ended the relationship, and assaulted her on one occasion in September 2013. The messages the complainant received via Snapchat in January 2017 were from the applicant and were sent intending to cause her distress and anxiety. The jury found the applicant guilty on all such counts.

10 Turning to Counts 1 and 2 (vaginal and anal rape respectively), following a visit to a Shisha Bar in Wembley on 1 June 2011, the applicant told the complainant to get into his car and he drove them to another car park. He tried to kiss her but she told him she was not in the mood. The applicant became aggressive, raised his voice and ordered the complainant into the back of his car. She fought him off and told him she did not want to. Having got her into the back of his car, the applicant pulled her jeans down, lifted her legs and said he wanted to have sex. The complainant said she did not want to and continued to fight him off. The applicant penetrated her vagina with his penis (Count 1).

11 After withdrawing from her vagina, the applicant told the complainant he wanted to penetrate her anus. The complainant refused. The applicant pushed the seat lever so that the seat moved forwards. The complainant cried and screamed that she did not want to do it. The applicant then "forcefully" penetrated her anus and continued until he reached ejaculation (Count 2). He was not wearing a condom. His actions caused the complainant to bleed from her anus. The applicant then accused her of defecating on his penis. He told her to get out and said she was disgusting. He drove her back to her car and, as she was about to leave the car, he asked her for kiss. When she leaned in to do so, he slapped her face and started to laugh.

12 Count 3 was a count of vaginal rape in the toilets in a Shisha Bar in early 2012. The applicant talked to the complainant in a derogatory manner. She left the table and went to a unisex toilet. The applicant followed her, pinned her against the wall, grabbed her by the throat and ordered her to stop crying. He kissed her while he had her pinned to the wall. He then pushed her over the sink and vaginally penetrated her from behind. He continued until he reached ejaculation. When he had finished, he told her to fix herself and return back.

13 Count 4 was a count of vaginal rape at a holiday village, which the applicant and the complainant visited in June 2012. The applicant took a photograph of the complainant wearing lingerie while they were there. At one point the applicant pushed the complainant onto the bed, causing her to sprain her neck. The complainant was upset and told him she could not move. The applicant refused to call for medical assistance and accused her of exaggerating her condition. As she lay there crying, the applicant told her that he wanted sex. She refused and told him she was in too much pain but he insisted. The applicant pulled her tights down and vaginally penetrated her until he gave up.

14 Count 5 was a count of vaginal rape committed at the applicant's home during Ramadan in July or August 2012. The applicant invited the complainant to his home, telling her that his family were working. The complainant had a heavy and painful period at the time. The applicant asked her for oral sex but she told him she did not want to because it was Ramadan. The applicant grabbed her head and pushed her to the floor, so that she was on her knees, and she sucked his penis. He then asked her to have sexual vaginal sex. She said no because she was on her period and she was in a lot of pain. The applicant pulled her upstairs and onto the landing floor. The complainant pushed and kicked at him. He held her arms down and tried to put his legs on top of hers to stop them moving. He then penetrated her vagina with his penis. As he did so, he told her that he knew that she was enjoying it. She told him that she was not, that she was in pain and to stop. He continued to ejaculation. He went into the bathroom and threw the complainant some tissues and told her to clean herself up and make sure that there was no blood on the floor. He then told her that he needed to leave to go to his aunt's home to see his family and break his fast with them.

15 Count 6 related to the applicant assaulting the complainant on 21 September 2013. By 2013, the applicant had become controlling of the complainant and threatened to send videos of her having sex to her family. The applicant picked up the complainant from her

workplace on his motorbike. He kissed her and accused her of smoking, which he hated. He slapped her and called her a liar when she denied smoking. They rode until they reached a bridge and got off the bike. The applicant pinned the complainant against a wall, squeezed her neck almost to the point of strangulation, pulling her to her knees and demanded oral sex. But it did not take place as people approached.

16 They rode to a café. The complainant took off her helmet and the applicant told her he had not given her permission for her to do so. He then hit her in the face with his motorcycle helmet. She tried to leave but the applicant held on to two of her fingers, squeezed them and bent them back causing her pain. She later attended Kingston Hospital's Emergency Department as a result of the injury, where her fingers were strapped.

17 The final vaginal rape (Count 7) occurred in a car behind a Shisha Bar in 2014, where they had a row. The complainant got into the applicant's car and he began to kiss her. She told him she was not in the mood. The applicant pinned her against the side of the car. The complainant's legs were up, her head was down by the footwell of the passenger seat and she was crying. The applicant was on the driver's side but facing the passenger's side in a kneeling position. He penetrated her vagina. She cried throughout and when he had finished he apologised to her.

18 The final count on the indictment, Count 8, is a count of sending electronic communications with intent to cause distress and anxiety. In 2017, after the relationship had ended, the complainant received a series of messages via Snapchat from an account in the name of "AliciaNikes". The communications started off with the words "I have your nudes" and went on to make veiled threats, asking whether her family and new boyfriend had seen the sexual images. One threat said: "I can mess your life up." The complainant asked the

applicant if he was threatening her, to which he replied: "I'm just warning you." The jury, by their verdict, found it was the applicant who sent those messages to the complainant.

19 To prove its case, the prosecution relied upon the evidence of the complainant, the evidence of the complainant's friend, MGA, the evidence of a relative of the complainant, KBD, who gave evidence of complaint and the relationship between the applicant and the complainant and recalled seeing abusive messages from the applicant on the complainant's phone. The evidence of a friend of the complainant who gave evidence of the relationship between the applicant and complainant, and of one occasion when the complainant had told her the applicant had nude pictures of her, which the applicant threatened to distribute. There was evidence of the complainant's visit to Kingston Hospital on 21 September 2013 with an injury to her right index finger, and the evidence of the complainant's older brother who recalled being told by his sister that she had been in a relationship with the applicant which had turned violent, that the relationship was sexual and that she had been forced into doing things against her will, including instances of forced intercourse. Also some acts between her and the applicant had been recorded by him.

20 In contrast, the defence's case was that all the sex that occurred had been consensual and that the applicant was not violent or controlling towards the complainant. So far as Counts 1 and 2 were concerned, the applicant agreed they engaged in vaginal and anal sex in the car. He said that such activity was all consensual. He said they had discussed the idea of anal sex previously and when it took place, the complainant had guided him through it. When it hurt, she asked him to pause, which he did, but then she asked him to continue.

21 So far as Count 3 was concerned, the applicant denied having sex with the complainant, consensually or otherwise, in the toilets. The applicant challenged the complainant's

account by showing images of the venue and the location of the toilet, suggesting the size and location meant sex could not have taken place inside.

22 In relation to Count 4, the applicant agreed that they visited the holiday village for the weekend but he denied that he had raped the complainant and he denied taking photographs of the complainant wearing lingerie. He said that the sex that took place between them was all consensual.

23 As to Count 5, the applicant agreed there had been an occasion where they had sex in his family home but it had been consensual and took place in the bedroom. He denied that he had had sex with the complainant during her period. He said sex had never taken place on the landing, as any mess on the floor would have upset his mother who was very house proud. He said that he did not have sex during Ramadan for religious reasons.

24 As to Count 6, the applicant denied any assault and challenged the complainant's account. He never collected her from work on a motorcycle. He stated that he had owned four motorcycles during their relationship but three of them did not have a pillion seat and so there would have been nowhere for her to sit.

25 So far as Count 7 was concerned, the applicant denied raping the complainant and he said that her positioning, with her head in the footwell and her legs in the air, was both ridiculous and embarrassing to look back on, which is why she had described it as rape.

26 Finally, in relation to Count 8, the applicant's evidence was that he and the complainant had not communicated since 2015 and he denied sending the Snapchat messages to the complainant.

27 For his part, the applicant relied on evidence from his sister who spoke of the relationship between the applicant and the complainant; the applicant's brother-in-law, who occasionally saw slight disagreements between the applicant and the complainant but certainly there were never raised voices, sharp words or physical force used. There was an employee of the Shisha Bar in 2012 who said he never saw any incidents of physical abuse, nor noted any issues between them, and from a friend of the applicant, who never saw the applicant being physically or verbally abusive towards the complainant.

28 Following the convictions, the Learned Judge ordered a pre-sentence report. The applicant continued to deny his offending. The view of the author was that the offending was motivated by the applicant's sexual desire and patriarchal and perhaps cultural belief of male entitlement in that his partner must acquiesce to all his demands and that women had certain roles and responsibility and which he should police, and a submissive attitude to women that was further evidenced by the applicant's previous caution for ABH against his sister, whereby he reportedly slapped and scratched her and pulled her hair because he disapproved of the boy she was seeing. The author of the pre-sentence report said the applicant's risk of further conduct of offending against women was high and an immediate risk of serious harm to the complainant and his current partner.

29 The Learned Judge also had a victim impact statement from the complainant. She said that she had suffered from ill health, low self-esteem, a lack of confidence in her childhood and the applicant was her first boyfriend. What she had hoped would be a trusting and loving and everlasting relationship turned out as an emotionally and physically abusive relationship in which she feared the person she loved and was left emotionally scarred for life. The applicant took advantage of her every vulnerability. She was manipulated and she was belittled. Physical abuse was a way of keeping control and after the first rape she lost all dignity and self-worth. After the relationship ended, she struggled with future relationships.

She could not focus on her studies and many years after she still feels broken, lacking in confidence and with suicidal thoughts.

30 The Learned Judge considered all the rape allegations together. There was no obvious defence. The various rape offences were serious in different ways. Most rape offending would have to be 2B offending with a starting point of eight years' custody, and a range of seven to nine years' custody. There were threats of violence. There was severe psychological harm. In particular cases there was additional degradation/humiliation (the comment following the anal rape and the rape whilst the complainant was on her period). The complainant was particularly vulnerable in the context of the holiday village rape and there had been previous violence against her on occasions where the Learned Judge found that the ejaculation was an aggravating factor in relation to those offences.

31 Overall, and whilst the individual rapes were each separately summarised and categorised under the Rape Guidelines with reference to their particular facts, the Learned Judge considered that taken together they amounted to Category 1A offending due to the number of offences, the period over which they were committed, the specific acts and the violent circumstances, coupled with the severe psychological harm to the complainant. Category 1A has a fifteen year starting point with a range from thirteen to nineteen years' custody.

32 The Learned Judge passed a sentence of fifteen years' imprisonment on each of the rape counts concurrent to reflect the totality of the rape offending and, in doing so, also treated the ABH as an aggravating factor thereto (making a concurrent sentence of twelve months' imprisonment), and passed a separate sentence of six months' imprisonment in relation to Count 8 (sending an electronic communication with intent to cause distress and anxiety).

33 Following refusal by the Single Judge, the applicant renews his application for leave to appeal against conviction and sentence.

34 As for the former, the applicant alleges that the convictions were unsafe in that the Learned Judge failed to give any direction to the jury in relation to delay and as a result the convictions are unsafe. As to the latter, in grounds drafted by counsel other than Ms Sweet KC, who appears before us today on behalf of the applicant, the applicant submits that the Learned Judge placed most of the rape offending at too high a position within the Rape Guideline and/or insufficient account given as to the applicant's age and immaturity and/or proper regard was not had to totality and, in consequence, it is said that the total sentence passed was manifestly excessive.

35 We are grateful to Ms Sweet KC, who was not trial counsel, for the quality of her assistance and her oral submissions on the renewed application. Her submissions were focused on the appeal against conviction, as will appear.

36 As to the appeal against conviction and whether a delay direction should be given, it is submitted that the Learned Judge and trial counsel erred in not providing such a delay direction to the jury. Whilst acknowledging that whether a direction regarding the impact of delay was necessary and, if so, what sort, depends on the facts and issues in every case, she submits that in this case such a delay direction was needed.

37 With the greatest respect to the quality of Ms Sweet's submissions, we do not agree that any delay direction was necessary on the facts of the present case. The applicant never claimed or suggested that his defence had been negatively impacted by the complainant's delay in reporting the incidents or that it had prejudiced his trial. It is clear that it did not do so. In this regard it is noted that the PTPH form recorded (rightly in our view) that the "Real Issues" were "denial of events to some allegations – consent to others". This can be seen

from the applicant's responses to the various allegations as summarised above. In relation to none of them was his riposte "no recollection of events due to the length of time". This was not, in our view, a delay case at all. Rather, the central and only real issues or whether the acts had taken place and whether there was consent thereto.

38 We also agree with the reasons given by the Single Judge in refusing permission to appeal against conviction, which were as follows:

> "A single point is made on your behalf which is that the judge should have given the jury a direction explaining that [the complainant's] delay in reporting her allegations to the police could have placed you at a disadvantage in countering those allegations.
>
> There is no realistic prospect of the court finding that the absence of such a direction in the circumstances of this case meant that your conviction was unsafe. There are a number of factors which combine to lead me to that conclusion.
>
> First, your barrister at the trial did not ask for such a direction. By itself this is not conclusive as to whether the failure gives rise to a tenable appeal but it is significant. That is because it indicates that the view of those acting for you at the time was that you had not been placed at a disadvantage and that such a direction was not necessary.
>
> Next and similarly, there was no suggestion in your Defence Statement that the passage of time had prejudiced your ability to respond to the allegations.
>
> Third, the allegations related to your actions in the course of your relationship with [the complainant]. It is apparent that you were able to give detailed evidence about the nature of that relationship and to address some of the allegations in marked detail although your response to others was in more general terms.
>
> Fourth, the position in your case was very different from a case of historic allegations where a defendant is unable to recall much about the dealings with the complainant and can only give a response of denying the wrongdoing. Here the relationship had lasted from about 2011 to 2014 and you were able to set out in some detail a positive case in response to the allegations.
>
> Finally, the disadvantage you are said to have suffered is speculative at best. It is said that you lost an opportunity to trace

> witnesses who would have spoken to the nature of your dealings with [the complainant] on the particular occasions and that the passage of time meant that you could not obtain such witnesses. There is no suggestion that you are aware of particular witnesses who are unavailable because of the delay. It is inherently unlikely that there were witnesses who could have said whether particular sexual activity between you and [the complainant] was or was not consensual. In any event it is significant that you did call witnesses who gave evidence as to the general nature of the relations between you and [complainant] at the time of the allegations.
>
> It follows that there is no realistic prospect of the court concluding that your conviction was unsafe and permission is refused."

39 We consider that each of these reasons is apposite and has force. We regard the final reason given by the Single Judge as particularly relevant. During the course of her oral submissions, Ms Sweet hypothesised as to what evidence there might have been if there had been a complaint to the police the day after an incident, such as CCTV in the car park or at the holiday village. We regard such suggestions as unrealistic and unlikely to yield evidence of any particular worth. No CCTV would be likely to show what went on in the car or in the bedroom of the holiday village. Equally, any evidence which could be said to go to demeanour would be highly speculative in the context of what was admitted to be an "on/off relationship" between the applicant and the complainant. Sight should also not be lost of the fact that the parties were, indeed, in such an ongoing "on/off relationship". The chance of the complainant making a complaint immediately after an incident was far less likely in the context of such relationship.

40 We do not consider that there was any necessity for a delay direction in this case and we do not consider that the convictions were unsafe due to the fact that no such direction was given. In such circumstances, we refuse permission to appeal against conviction.

41 In relation to the renewed application for permission to appeal against sentence, we can be even shorter. Those grounds were not drafted by Ms Sweet. She leaves the court to

consider whether any of those grounds are of merit. That was a realistic approach and we do not consider that they are. We are satisfied that the Learned Judge correctly categorised the rape offending and was entitled to make the findings he did as to the matters on which he was sure. The applicant was between 21 and 25 at the time of offending and, whilst the Learned Judge took proper account of the applicant's age, we do not consider the applicant was particularly immature or that there should be a further reduction because of his age.

42 Nor do we consider that the Learned Judge arguably erred in relation to totality. The judge was right to treat the rape offending as a whole as Category 1A offending and adopting the starting point for such offending as fifteen years' imprisonment. The Learned Judge did not arguably err as to the total sentence passed which was just and proportionate to the totality of the applicant's serious sexual offending. Equally, there can be no valid criticism of the six months' consecutive in respect of Count 8.

43 Accordingly, and in addition to dismissing the renewed application for permission to appeal against conviction, we also dismiss the renewed application to appeal against sentence.

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