Neutral Citation Number: [2024] EWCA Crim 251

Case No: 202303239 A2

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL CRIMINAL DIVISION
ON APPEAL FROM THE CENTRAL CRIMINAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2024

Before :

LORD JUSTICE HOLROYDE
MRS JUSTICE MAY DBE
HIS HONOUR JUDGE LICKLEY KC

Michael James Young

- and -

REX

Barry White instructed by Allen Hoole Ltd for the Appellant
The Prosecution was not Represented

Hearing date: 12 March 2024

Approved Judgment

HHJ Lickley KC:

Judgment

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 the offences. We shall refer to the victim as V.

2. On 31 August 2023, in the Crown Court at Bristol, the appellant (then aged 38) was sentenced for an offence of attempted rape (count 1) to an extended sentence of imprisonment of 17 years comprising a custodial term of ten years with an extended licence period of 7 years, for an offence of trespass with intent to commit a sexual offence (count 2) to 4 years' imprisonment and for an offence of assault occasioning actual bodily harm (count 3) to 12 months' imprisonment. The sentences on counts 2 and 3 were ordered to be served concurrently to the sentence on count 1. The appellant was also made subject to an indefinite Restraining Order. No Sexual Harm Prevention Order was sought or ordered. The offences all relate to the same incident that took place on 12 February 2023.

3. The appellant appeals against sentence on count 1 only with the leave of the single judge on the ground that the overall sentence passed was manifestly excessive.

4. The facts have been fully set out by the Criminal Appeal Office in a document available to the appellant, for present purposes the following brief summary is sufficient.

5. The appellant and V had previously been in a relationship and had a daughter together, who was nearly 2 years old at the time of the offences. V had ended the relationship around Christmas time 2022. She had blocked contact with the appellant and had told him he was not welcome at her property. The appellant had supervised contact with the child. V described the appellant damaging her flat, arguing, shouting and being aggressive towards her in the past.

6. At around 05.30hrs on 12 February 2023 the appellant attended outside V's home address. She was asleep with her daughter. The appellant appeared to have thought that she had a male in the property. He banged on her bedroom window, and she shouted at him to leave. The appellant then went round to the front of the address, banged on the front windows and door and threw V's wheelie bin over the gate. V again told the appellant to leave, saying she would call the Police. The appellant did not leave. The appellant then smashed the door glass in the front door and entered the property through a ground floor window that he had smashed. By this time V had called the Police and much of the subsequent attack was recorded in her Police call. The call to the police commenced at 05.41 hrs and it lasted for 13.34 minutes.

7. Once the appellant had smashed his way in, V fled to the bedroom where their daughter was sleeping in a cot. The door to this room had been detached from the door frame on an earlier occasion and V tried to use it to block the appellant's entry to the room. The appellant was still able to get in. He then pushed V onto the bed and began punching her to the head, during which time the cot was knocked onto the floor. V sustained bruises to her face and chin. We have seen the photographs of injuries and damage.

8. The appellant began touching V's vulva. She managed to get to their daughter and take her in her arms and she moved through to the lounge, however the appellant continued his attack while V was holding their daughter.

9. During this attack the appellant ripped off V's knickers, damaging them. The appellant touched V's vulva repeatedly and was trying to penetrate her with his fingers. He said he was going to rape her. At times he had his hands down his trousers. V continually begged the appellant to stop, reminding him that their daughter was present. The child was crying.

10. After some time the appellant did stop and went to heat some milk for their daughter when asked to do so. When the Police arrived V was noted to be naked from the waist down and distressed, crying and shaking. She was holding the child in her arms. Upon arrest the appellant, who had remained in the property, lashed out and had to be handcuffed.

11. The recorded phone call to the police has been made available. We have listened to it. In the call V can be heard screaming and shouting and saying '*get off me'* multiple times. One minute into the call there were sounds of a continuing struggle and an argument, during which V referred to the appellant raping her, which he denied. After 2.19 minutes the appellant said '*right fuck me bend down'*. V then said '*your daughter, can't the police come and stop this, he's touching me and everything*'; she was saying *'stop'* repeatedly. At one point the appellant said '*clothes off'*. V told the appellant to get off and to stop because of their daughter. He then said '*put her to bed, me and you'.* The child could be heard to cry. At 5.54 minutes into the call the appellant said '*you would not let me in to see her'* and then '*you and me are having sex'*. When told that was not going to happen he said '*yeah we are'*. V told him he was scaring their child.

12. At six minutes into the call the appellant stated that he had calmed down. Police arrived outside the address at eleven minutes into the call. V said she was scared and terrified of the appellant.

13. The appellant was interviewed on 12th February and made no comment to all questions.

14. Initially the appellant was charged with sexual assault, criminal damage and assault occasioning actual bodily harm; having indicated not guilty pleas the case was sent for trial. He was remanded on conditional bail with a condition of residence subject to tagging. He did not comply and was remanded into custody on 17 February 2023. The PTPH in the Crown Court was on 13 March 2023 when he pleaded guilty to count 3 (ABH) and not guilty to counts 1 and 2. A trial was listed for 16 August 2023. On 26 June 2023 the defence informed the prosecution that the appellant would plead guilty to counts 1 and 2 and he did so on 17 July 2023.

15. The following material was available to the judge at sentence:

    i) In a victim personal statement V said that what the appellant did to her was wrong and he should not have done what he did. She said her life had improved since the appellant was not around and she was glad that she did not have to argue with him anymore. She was still worried about what the appellant would

do when released from prison and that made her feel on edge. She remained in fear that when the appellant was released from prison he would go to her house and cause trouble. She wanted the appellant to get help for his drug and alcohol problems.

ii) The appellant's previous convictions include:

a) In 2016 the appellant was convicted of attempted robbery and being in possession of a knife in a public place. He was sent to prison for two years. He had approached a person on a garage forecourt and demanded money while holding a knife. He was recalled to prison due to concerns that his risks had escalated such that they were no longer manageable when he had relapsed into Class A drug use and lost his tenancy.

b) In 2019 he was convicted of criminal damage. The appellant and V were arguing in a café. He shouted at her to come outside and when she did not he smashed a window of the café and continued to shout.

c) In January 2020 the appellant was convicted of attempted criminal damage and using threatening abusive words or behaviour. Once again, he had argued with V on the telephone and threatened to smash her window. He attended at her address and tried to gain access. He struck the door entry system and the glass in the door with a crutch.

d) In June 2022 he was convicted of two offences of criminal damage and assaulting an emergency worker. He was made the subject of a community order. The offences with which we are concerned were therefore committed during the operational period of that community order.

e) Finally in October 2022 he was convicted of racially aggravated common assault and simple possession of a Class C drug.

iii) A Pre-Sentence Report was prepared dated 31 August 2023.

a) In the report the appellant was noted to have stated that on the day in question he had consumed about a gram of cocaine, drunk a bottle of vodka and then taken Xanax. He stated that he had been ruminating about the end of his relationship with V and was becoming increasingly bitter towards her. His grievance was at not having the contact he wanted with his daughter. The author of the report noted his feelings of anger and hostility towards V such that he wanted to punish her for those feelings for which he considered she was responsible. At the time he was ruminating on his belief that V was sexually active with other men and that was being played out around their child. The author of the report noted that the appellant was aware that V was not consenting to sexual activity. He accepted that V was fearful and concerned for her safety and that was compounded further by the fact that the child was in the room and was distressed.

b) When assessing the risks and likelihood of further offending the appellant was assessed as presenting a high risk of serious harm to known adults. The nature of that risk included re-victimisation, sexual aggression or threat, physical assault or other threats of violence and acts of aggression including the destruction of property. He was assessed as posing a medium risk of serious harm to the public and children were identified as being at a medium risk of serious harm. The author of the report went on to add '*the above risks are of increased likelihood when he is in the community, disinhibited through the use of alcohol or drugs. Whilst his offending can be random and impulsive, there is also concern that it can be targeted and fuelled by rumination, anger, bitterness, a sense of injustice and grievance thinking'.*

c) Finally, the report author stated that on release the appellant was likely to be assessed and managed as presenting a high risk of serious harm to known adults and of medium risk to children and the public.

iv) Character statements and letter. The court was provided with supportive letters from Stuart Leith, a life recovery manager, and the appellant's parents. His engagement with drugs and addiction agencies was noted as was his relapse into drug use after the breakdown in the relationship with V. The appellant's own letter to the court set out his regret for his actions and hopes for the future.

Sentence

16. The judge considered the relevant sentencing guideline Sexual Offences: Definitive Guideline effective from 1 April 2014. The specific offence guideline for the offence of rape contrary to s.1 Sexual Offences Act 2003 provides that the judge should determine the appropriate level of harm. Level 1 is limited to '*The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate to category 1*'. The level 2 factors are listed and include prolonged detention or a sustained incident, violence or threats of violence (beyond that which is inherent in the offence), forced or uninvited entry into victim's home and where the victim is particularly vulnerable due to personal circumstances. Once the level of harm is determined the culpability factors set out in sections A and B are to be considered. The judge considered the submissions of counsel.

17. When sentencing the judge said that he accepted that the harm level 2 factors were not of themselves especially extreme. He went on to say however '*but in my judgement this offending is significantly aggravated by a number of features. It is aggravated by your previous convictions. It is aggravated by the presence of your daughter, and it is aggravated too by the fact that it is an offence which is domestic in nature. Balancing all of those features, I have no hesitation in concluding that this is in effect a sentence in category 1B. I bear in mind Mr White's submission that I must have measured regard to the fact that this is an attempted offence rather than the full offence. I bear that submission in mind but, in my judgement, the particular facts of this case are so unusual that in fact there is very little difference between the full offence and the attempted offence, particularly when seen through the prism of you breaking into your former partner's home in the presence of her child and sexually assaulting her very violently in the presence of your daughter. In my judgement the appropriate sentence following*

a trial in respect of your offending balancing all of the aggravating and mitigating features is one of 13 years imprisonment.'

18. Having considered the mitigation advanced namely that but for the appellant's addiction to drink and drugs the offences would not have occurred, and that the appellant was sorry, the judge reduced the sentence to one of 10 years custody after a guilty plea discount of 20% (the actual reduction was in fact slightly in excess of 20%).

19. The judge then considered dangerousness. The judge referred to the contents of the PSR and the assessment as to the high risk the appellant posed of causing serious harm, the previous convictions and in particular the offending in relation to V. The judge found the appellant dangerous and concluded that the protections afforded by probation involvement for 10 years and a restraining order were not sufficient: '*I remain of the view, on the facts of this case alone, that intimate partners are at significant risk from you. It is necessary in my judgement therefore to pass an extended sentence'.*

Submissions

20. Mr White for the appellant makes the following submissions.

a) First, that the judge incorrectly placed the offending into harm level 1 of the guideline. He submits that having found that none of the level 1 factors were '*extreme in nature'* he must have found a combination of factors caused '*an extreme impact'*. He relies upon the prosecution initial assessment of harm. He says the incident lasted for a relatively short time (about 10 minutes), it was not prolonged and the victim was not particularly vulnerable. He submits that the judge erred in finding that the impact caused by a combination of factors elevated the case to harm level 1. In relation to the aggravating factors he submits that the previous offences against V were not offences of violence, he had not committed these offences when subject to a community order for violence on a domestic partner and although the child was present that is double counting the forced entry in to the home.

b) Second, that the judge failed to make sufficient allowance for the fact that the offence was an attempt during which the appellant had at no time removed his lower clothing or exposed his genitalia. When the police arrived the appellant and V were sitting and talking, with the appellant in the process of making a bottle for the child. It is said that the judge was wrong in these circumstances to find that "there is very little difference between the full offence and the attempted offence".

c) Finally, that the judge erred in finding the appellant dangerous. Reliance is placed on the PSR assessments that while the appellant posed a high risk to the victim he was of medium risk to future intimate partners.

d) No issue is taken with the level of credit afforded for the guilty pleas.

Discussion

21. Having ruled out the enhanced factors in harm level 1 the sentencing framework was that for a 2B offence. That said more than one harm level 2 factor was present, namely it was a sustained incident and there was violence in the form of actual bodily harm and sexual touching, further there was forced entry into the victim's home with damage to gain entry.

22. The judge then found aggravating factors: the previous offences which concerned V, the location and timing of the offence, the presence of the child and drug and alcohol consumption.

23. Assessing the sentence for the attempted rape encompasses the whole of the offending, with concurrent sentences for the associated offences. It is worth noting that the separate offence of trespass with intent to commit a sexual offence has a starting point of 6 years custody with a range of 4 to 9 years.

24. The duty to follow a sentencing guideline is a duty to pass a sentence which falls within the offence range for that offence as specified. The offence range runs from the top of the highest category to the bottom of the lowest category – s.60(2) Sentencing Act 2020.

25. S.60(4) provides:

> *If the offence-specific guidelines describe different seriousness categories—*
>
> *(a)the principal guidelines duty also includes a duty to decide which of the categories most resembles the offender's case in order to identify the sentencing starting point in the offence range, but*
>
> *(b)nothing in this section imposes on the court a separate duty to impose a sentence which is within the category range.*

26. Given the facts here the judge was entitled, in our judgement, to conclude that the seriousness of the case merited moving upwards to the level of a 1B offence for which the starting point is 12 years with a range of 10 to 15 years custody. Having done that the factors justifying the upward movement were not available again to aggravate the case further to 13 years.

27. Mr White contends that the attempted rape was less serious that the full offence and that there should have been a downward adjustment to reflect that. It is right that V has not specifically referred to any significant medical or mental health effect post the events however rape or attempted rape in any context are very serious offences. How an individual reacts to an attack of a sexual nature will vary from person to person and over time. That said, this was an attempt, where the appellant never exposed his penis and where the incident had ended before the police arrived. In these circumstances a downward adjustment to reflect the uncompleted offence was required

28. In our view the appropriate sentence before discount for plea was one of 10 years. Applying a reduction of 20% for plea results in a custodial sentence of 8 years.

29. Turning to dangerousness, s.280(1)(c) Sentencing Act 2020 provides that an extended sentence of imprisonment is available in respect of an offence where the court is of the

opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.

30. The judge correctly took into account the contents of, and assessments set out in, the Pre-Sentence report regarding the high risk posed to known people, the previous convictions, in particular the attempted robbery with a knife, and the offending involving V in 2019 and 2020. He regarded the index offending as a significant escalation in offending. He was satisfied that as long as the appellant remained addicted to drugs there would remain a significant risk to members of the public of serious harm occasioned by the commission by the appellant of further specified offences. The decision was fact specific and one for the judge to make.

31. The judge then weighed up the competing arguments and, having considered the effect of the restraining order and probation involvement in the years ahead, he concluded that an extended sentence was necessary. That decision was again one for him to make and cannot be said to be wrong.

32. As to the length of the extension period, the maximum is 8 years. The judge imposed 7 years. Again, that is a fact specific judgement and cannot be faulted.

Conclusion

33. For the reasons which we have set out, we conclude that the original sentence was manifestly excessive and the appeal will be allowed. We quash the extended sentence of imprisonment of 17 years and substitute an extended sentence of imprisonment of 15 years comprising a custodial element of 8 years and an extended licence period of 7 years. The other sentences remain unchanged and will run concurrently to the extended sentence as originally ordered. All other orders are unaffected.