Neutral Citation Number: [2024] EWCA Crim 815

Case No: 202202611 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SNARESBROOK CROWN COURT
His Honour Judge Del Fabbro
Ind. No. T20207402

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2024

Before :

LORD JUSTICE DINGEMANS
MRS JUSTICE CUTTS
and
HER HONOUR JUDGE NORTON

- -

Between :

Tarjit Singh	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Ms Bex KC & Mr Witcher (instructed by the **Registrar of Criminal Appeals**) for the **appellant**
Mr Patterson KC and Mr Hardy (instructed by the **Crown Prosecution Service**) for the **respondent**

Hearing date : 2 July 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 17 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans :

Introduction and issues

1. The appellant was convicted on 24 and 25 May 2022 after a trial of three counts of assault by penetration against three separate complainants, six counts of assault occasioning actual bodily harm against two of those complainants, and one count of making a threat to kill against one of those complainants. On 25 May 2022 the appellant was sentenced to an extended sentence comprising a custodial term of 10 years imprisonment and an extended licence period of 3 years on count 1 of the indictment, with other concurrent sentences. A statutory surcharge of £100 was imposed which it is common ground was unlawful because some of the offending predated 1 October 2012. The complainants each have the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992 and have been referred to as C1, C2 and C3 in this judgment.

2. This is an appeal against sentence brought with leave granted by the full court on 14 June 2023. One of the issues raised by the appeal is whether the sentence is manifestly excessive in circumstances where the appellant had gender dysphoria which, it is submitted on behalf of the appellant, lessened his culpability. The respondent prosecution contends that the appellant deliberately deceived the complainants for his own sexual purposes and that the sentence was proportionate and justified.

3. The appellant was described in the expert evidence before this court as a 36 year old transman or transgender male. He was born female. The expert evidence before the court showed that the appellant has gender dysphoria. His parents did not live together, and social care records showed that the appellant's mother had become pregnant while in an abusive relationship with the appellant's father, who was related to the appellant's mother. Both parents had mental health disorders. The appellant suffered abuse as he grew up. The appellant was taken into care at the age of 11 years. He was given a supported housing placement at the age of 14 years. The appellant moved between places, and social care records show that the appellant lived in 40 placements, many of which had broken down because of the appellant's challenging behaviour. The appellant then stopped engaging with public services.

4. When leave was granted by the full court directions were made for medical or psychological evidence and evidence in reply from the respondent, but it is not apparent whether formal leave for all the further evidence that the parties wished to rely on was granted. The parties sought to adduce as fresh evidence on the appeal on behalf of the appellant: reports from Dr H. Eli Joubert, a chartered clinical psychologist, dated 9 December 2023 and 1 July 2024; on behalf of the respondent: reports from Dr Martin Lock, a consultant forensic psychiatrist, dated 29 April 2024; 10 June 2024; and 24 June 2024; a report from Dr Leslie Valon-Szots, a consultant clinical psychologist, dated 18 June 2024; a joint report from Dr Lock and Dr Valon-Szots dated 1 July 2024; and three witness statements from Nicola Gravett, the head of safety, CSU and equalities at HMP Downview. We heard oral evidence from Dr Joubert, Dr Lock and Dr Valon-Szots. The witness statements from Ms Gravett were agreed. We read and heard this evidence on a de bene esse basis, to determine whether to admit it. There were oral submissions from Ms Bex KC on behalf of the appellant and Mr Patterson KC on behalf of the Respondent, and we were very grateful to them and their legal teams for all of their helpful written and oral submissions.

5. After the hearing the court was sent an email on behalf of the appellant which recorded the comments of Dr Catherine Durkin, a consultant forensic psychiatrist and clinical lead for women's services in health and justice at the Central and North West London NHS Trust. Dr Durkin had diagnosed the appellant as suffering from Attention Deficit Hyperactivity Disorder (ADHD), a diagnosis with which Dr Lock had not agreed in his reports and evidence to the court. Dr Durkin had described the method by which the appellant had been assessed, which she had described as "gold standard practice". Dr Lock had responded by email noting that Dr Durkin had not commented on the multi-disciplinary team meeting on 16 January 2024 where professionals had thought that the appellant's impulsivity might have a different cause from ADHD.

6. There had been expert reports in the Crown Court for the purposes of sentencing. These were from Dr Melora Wilson, a chartered clinical psychologist, who had produced a report on the appellant dated 25 November 2021 and from Dr David Baird, consultant forensic psychiatrist, who had produced a report dated 29 March 2021. Neither of these experts was called by the parties.

7. By the conclusion of the hearing it was apparent that the following matters were in issue, whether: (1) the reports and oral evidence from Dr Joubert, Dr Lock and Dr Valon-Szots, the witness statements of Ms Gravett, and the further comments by Dr Durkin and Dr Lock should be admitted as fresh evidence; (2) the appellant's culpability was reduced by the fact that he had gender dysphoria, or by reason of theory of mind deficits or mind blindness; (3) the Judge failed to reflect the impact of the appellant's acquittal on various counts; (4) the appellant's sentence should have been further reduced to take account of his mental disorders; (5) the appellant's sentence should have been further reduced to take account of the difficulties that the appellant faced in prison; (6) the judge was wrong to find that C1 was "particularly vulnerable due to personal circumstances" for the purposes of finding "Category 2 harm" in the offence specific guideline; (7) the judge was wrong to find that in relation to C1 there was a "significant degree of planning" for the purposes of finding "Culpability A" in the offence specific guideline; and (8) the judge was wrong to find that the appellant was dangerous.

Factual background

8. The appellant's birth name was Hannah Walters. His name is now Tarjit Singh. When each of the three complainants first encountered the appellant they understood that the appellant was a man. The appellant presented himself as a man, wore men's clothing and used a man's name. In relation to each complainant, the relationship developed quite quickly into sexual intimacy. The complainants all gave similar accounts of what transpired when that happened.

9. Count 1 was assault by penetration and related to C1, who was then aged 16 years. C1 had been having problems with her family and met the appellant on Facebook through a mutual friend towards the end of June 2010. C1 said in her victim personal statement that at the time she met the appellant, she was in a very vulnerable place in her life, and felt that the appellant had taken advantage of this and manipulated her. They first met in person on 28 June 2010.

10. It was a few days later, at the appellant's flat in Manor Park, that sexual intimacy developed. The appellant was fully clothed and C1 was naked. It was about 6 pm and

dark and the curtains were drawn. The appellant left the room when intimacy was developing. When the appellant returned the appellant had, unknown to C1, put on a strap on dildo and penetrated C1's vagina. C1 said that she did not know when the appellant used the strap on that he was in fact a female. She said that penetration went on for about 20 minutes with the appellant pretending to ejaculate. The appellant then went straight to the bathroom.

11. C1 said she had to pretend she was happy during the relationship because she was frightened of the appellant, who obliged her to fend off enquiries from her family by getting her to tell them how happy she was and that she did not want to see them. C1 wrote letters or notes, referred to by the judge as a diary, which referred to the difficulties C1 had had with her family, and her dependence on the appellant.

12. After about 9 months the appellant went to prison in relation to unrelated offending. The appellant said that he was in a women's prison and that was because the authorities had made a mistake.

13. Counts 3 to 5 related to C2. There was one count of assault by penetration and two counts of assault occasioning actual bodily harm. C2 first met the appellant in 2013 at a chicken shop in Hoxton. They progressed to WhatsApp messaging. About two weeks later they met for drinks and about four weeks later there was intimacy at the appellant's flat.

14. The appellant was fully clothed and did not want to take off his clothes. He said that he was shy. It was the middle of the night and it was dark. As intimacy was developing the appellant went to the bathroom. When the appellant returned the appellant had, unknown to C2, put on a strap on dildo and penetrated C2's vagina. C2 did not see what her vagina had been penetrated with. It lasted about 5 minutes and then the appellant rushed off to the bathroom. C2 had been confused about the intimacy and said it did not feel right. She thought the appellant had used a sex toy on her during sex. This was count 3, assault by penetration.

15. The second time there was any intimacy the appellant said that he had something to tell her. He said "what do you think I have not got?" C2 replied that she had gathered that. The appellant claimed that he had been born a boy, had a sex change to become a woman and now wanted to be a man again. About four or five months into the relationship things started getting difficult. The relationship lasted about a year. C2 said that there was a lot of violence and the appellant would cause her bruises. This was count 4, assault occasioning actual bodily harm. The appellant also punched C3 in the eye causing her a black eye, which was count 5, assault occasioning actual bodily harm.

16. Count 6, assault by penetration, counts 8, 9, 11 and 13, assault occasioning actual bodily harm, and count 12, making a threat to kill, all related to C3. C3 reported matters to the police in March 2016. C3 said she had been in a relationship with the appellant for about two years and that on 22 February 2016 she had walked out of the appellant's address in Enfield having decided she no longer wanted to be in the relationship.

17. C3, who had severe dyslexia and learning difficulties, said that she first met the appellant on 3 March 2014. She got a message on the Plenty of Fish dating website from him. Everything about the appellant's profile suggested to C3 that the appellant

was a man. He had a picture of children on his profile who, when asked, said that they were his. They arranged to meet for a drink on 16 June 2014. C3 accompanied the appellant home on the bus and they stayed talking until about 11 pm. They spoke about the appellant's work and children. They kissed and arranged to meet again on 18 June 2014.

18. On that day C3 went back to the appellant's house and they watched television in the bedroom. They were talking, kissing and hugging. C3 ended up on top of the appellant. The appellant said that he needed to go to the toilet. He left the room, which was dark apart from the light from the television. When the appellant returned he got into bed and they resumed kissing. The appellant undressed C3 but the appellant refused to take off his own clothes, saying he was cold. The appellant inserted what C3 thought was a penis into C3's vagina, which was the assault by penetration as count 6. C3 thought it felt strange because it was very hard and was causing her discomfort. She told the appellant that it really hurt. The appellant asked if she wanted to stop and C3 said it was ok and to carry on. At one stage C3 tried to initiate oral sex on the appellant but he grabbed C3's arm and said no. The vaginal sex continued and then ended because they were tired. The appellant went to the toilet again. They cuddled and went to sleep.

19. The next day C3 went back to the appellant's house. The appellant told C3 that he loved her but said that he did not think they should have sex for a while. From then on they started seeing each other every day. Shortly after the appellant announced that he was having a sex change. C3 was astonished. She went round to the appellant's house on the day of what she was led to believe was the operation. She could see that the appellant had breasts under his t shirt. She had expected him to be in a great deal of pain, but he seemed fine.

20. In August 2014 the appellant grabbed C3 by the arms and threw her across the room. He prevented her from leaving and slapped her face and punched her arms. C3 fled to her mother's but was persuaded to resume the relationship when the appellant apologised. Despite the relationship becoming more volatile C3 and the appellant got engaged on 9 September 2014. That did not end the violence and at the end of the month the appellant smashed a telephone into C3's nose, which was count 8. About 8 days later C3 went for treatment at hospital, she had to have an operation and her nose re-set.

21. In November 2014 there was another violent encounter in which the appellant kicked, punched, bit and scratched C3. C3 sustained a cut lip. At the end of November there was another incident when the appellant hit C3, punched her, kicked her, set her bag on fire and bit her. C3 had bite marks, scratch marks and bruising on her body. The appellant sprayed lighter fluid on C3. This was count 11. During the course of this attack the appellant said to C3 "I was born a girl you dumb fucking bitch" and also "we're going to die together". This was the threats to kill, as count 12. The next day C3 went to see her GP.

22. On 21 or 22 December 2014, or 24 January 2015 according to 999 records and records relating to the cut on C3's head, there was another fight which ended with the appellant pushing C3 so that she lost her balance and fell onto the television unit. She started bleeding profusely from her head and an ambulance was called. This was count 9. The cut was glued at hospital.

23. In June 2015 the appellant had grabbed C3's head and hit it against a cupboard, dragged her towards the sofa and threw her on it and attacked her. This was count 13. The neighbours called the police. The Police attended and C3 gave an account, however the appellant blamed the attack on a fictitious woman and at the time C3 had felt that she had no option but to fall in line with the appellant's story and the police had left.

24. The appellant was arrested on 3 March 2016. In interviews the appellant provided prepared statements and then made no comment to the majority of questions. The appellant said that the first time he had sex with C3, C3 knew that the appellant was female and that C3 had always known the truth. The appellant denied committing the assaults on C3 and said that C3 had made this all up because she was jealous about other girls. The appellant denied the other assaults by penetration, saying any sexual relationship was entered into with consent of the other party who had knowledge that the appellant was a female.

The sentencing

25. The appellant had, before the sentence which is the subject of this appeal, four convictions for eight offences between 2008 and 2016. These included assault occasioning actual bodily harm and false imprisonment for which he was sentenced to 33 months imprisonment on 23 November 2010. On 14 November 2016 the appellant was sentenced to four years imprisonment for offences of perverting the course of justice, going equipped for burglary, possessing a prohibited weapon and administering a noxious substance. That sentence was increased to 7 years and 3 months imprisonment on 31 January 2017 following a reference by the Attorney General, reported as *R v Walters* [2017] EWCA Crim 2658. The appellant also had cautions, including for common assault in 2009.

26. The judge had the reports from Dr Wilson and Dr Baird. These showed a difficult upbringing, recognised mental health concerns, a history of suicidal ideation, and gender dysphoria. The appellant had an emotionally unstable personality disorder, as diagnosed by Dr Baird.

27. There were victim personal statements from C1 and C3. There was a Pre-Sentence Report (PSR) which set out the appellant's background and difficulties as a child. The PSR concluded that the appellant had a high risk of causing serious harm, and referred to a period on licence.

28. There were sentencing notes produced on behalf of the prosecution and the appellant. The appellant referred to *R v McNally* [2013] EWCA Crim 1051 which pre-dated the Sentencing Council Guidelines, and a decision in the Crown Court of *R v Newland*. It was submitted on behalf of the appellant that the fact that the appellant was a trans man who had not disclosed his biological sex to a partner was not anticipated by the offence specific guideline for assault by penetration, and that reduced the appropriate sentence for each offence. The note on behalf of the appellant also raised issues of delay and the impact on the appellant of prison.

29. When sentencing the judge referred to the circumstances of the offence. The judge referred to the appellant's previous convictions. The judge found that C1 was estranged from her family and her naivety was plain to see from her evidence and what she was writing at the time. C3 had special educational needs and was struggling with life

generally. C2 had not provided a personal statement but had been diagnosed with borderline personality disorders, and suffered from chronic depression for most of her adult life. The judge said that each of the complainants had suffered because of the appellant's cruel and calculating controlling behaviour.

30. The judge referred to issues of totality and took count 1 as the lead offence as it involved a 16 year old who was particularly vulnerable, which meant that this was harm category 2 for the guideline. The judge found that there was a significant degree of planning, meaning that it was culpability A for the guideline. This gave a starting point of 8 years for the offence, with a range of 5 to 13 years. The judge found aggravating factors that the appellant had targeted C1 as a young, vulnerable female, and then kept her from her family.

31. So far as C2 and C3 were concerned the judge was "not entirely persuaded" that there was particular vulnerability and he was not satisfied that there was significant planning in relation to those offences. The judge said that those offences would have been at the top of their range, which must have been to category 3B, which had a starting point of 2 years and a range from a high level community order to 4 years custody.

32. The judge found that the assaults occasioning actual bodily harm were 1A offences with a starting point of 2 years 6 months. The judge referred to a prolonged persistent assault. The judge found that the threat to kill had a starting point of 3 years, but did not refer specifically to the offence specific guideline.

33. The judge referred to the mitigation advanced on behalf of the appellant, and that the offending had to be considered in the context of the personality disorder from which the appellant had suffered for most of his adult life, the delays in starting the trial, the impact of recall to prison, and the fact that prison life is particularly difficult with reference to gender and being misgendered.

34. The judge found that the appellant was dangerous, noting repeated acts of serious sexual violence against three different female victims, repeated assaults and threats to kill. The judge then imposed the sentence set out in paragraph 1 above. Although it seems that the judge had intended to impose an extended sentence on count 1, as well as on counts 3 and 6, it appears from the transcript that the extended sentence was only pronounced on count 1. Although the record from the Crown Court shows an extended sentence on counts 3 and 6 this appears to have been carried out administratively, and is therefore of no effect, see generally *R v Leitch and others* [2024] EWCA Crim 563 at paragraph 6. We can therefore confirm that the extended licence period of 3 years applies only to count 1.

The admission of fresh evidence (issue one)

35. Section 23 of the Criminal Appeal Act 1968 provides that a court may "if they think it necessary or expedient in the interests of justice" receive any evidence which was not adduced in the proceedings from which the appeal lies. The Court shall have regard in particular to "(a) whether the evidence appears to the Court to be capable of belief; (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal; (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and (d)

whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

36. It is apparent that all of the evidence appeared to be capable of belief. This was because it was from expert psychologists and psychiatrists. The evidence might afford a ground for allowing the appeal because it raises issues about culpability and how the appellant would cope in prison conditions. The evidence would have been admissible in the sentencing proceedings below. This is because it was relevant to the length of sentence imposed. As to whether there was a reasonable explanation for the failure to adduce the evidence below, it is apparent that the evidence could have been obtained before the sentencing hearing, and expert evidence had been adduced before the judge. That said the new expert evidence was directed to the appellant's gender dysphoria and issues of culpability. Both parties sought to rely on the fresh evidence. We will admit the fresh evidence in order to determine the appeal as fairly as we can, with the benefit of the evidence from the experts and Ms Gravett.

37. We should record that although the parties had sought to adduce expert evidence, they had not considered whether the experts should have a pre-hearing discussion of expert evidence, pursuant to the Criminal Procedure Rules 19.6. In this case it is apparent that such a discussion would have assisted the parties to prepare for the hearing. It was for these reasons that we will also admit the further evidence from Dr Durkin and Dr Lock. This is because the issue relating to ADHD became clearer during the course of the evidence.

Whether the appellant's culpability was reduced (issue two)

38. We had the opportunity to read the reports from Dr Joubert, Dr Lock and Dr Valon-Szots and to hear them give evidence. Dr Joubert is a clinical psychologist who had worked in the UK from 2010. He had carried out psycho-sexual assessments at the Maudsley hospital from November 2010 to May 2015, and had worked in a gender clinic from July 2017. Dr Lock was a consultant forensic psychiatrist who had experience with the parole board and Mental Health Tribunals. He had seen over 8,000 patients, a few hundred of which had raised gender issues. He had seen and commented on over 1,900 pages of medical notes relating to the appellant. Dr Valon-Szots was a chartered clinical psychologist who had been working with people with gender dysphoria for a long time and was the gender lead for her service. This had included diagnosing, supporting and providing therapy to those with gender dysphoria.

39. It was apparent that all of the experts were doing their best to assist the court, and there was much common ground between them. So far as was relevant to the issues raised by the parties, it was common ground that the appellant had gender dysphoria, code 302.85 of the Diagnostic & Statistic Manual of Mental Disorder, Fifth Edition (DSM-5), and had personality disorders. The evidence also showed that the appellant's case was complex, and he had received nine separate diagnoses from medical professionals. There was some overlap between some of the conditions, which meant that there could be difficulties in identifying the exact diagnosis.

40. The evidence also showed that the appellant, living as a man but being anatomically female, would find prison conditions in a female prison difficult. This is because of the effect of misgendering, which would happen from time to time, and the absence of any way of walking away from the situation. This is notwithstanding the existence of a

transgender policy which had been updated in January 2024, Transgender Local Case Boards, the training provided for staff, and all of the matters set out in Ms Gravett's witness statement. The appellant had made 72 complaints while at HMP Downview, 11 had been upheld, 4 had been partially upheld, and 55 had been investigated and reported to be not the subject of further action. It was also apparent that the fact that the appellant had exhibited challenging behaviour in custody meant that some opportunities to ameliorate his conditions had been lost.

41. There was a dispute between the experts as to whether the appellant had been properly diagnosed with ADHD or had been diagnosed with Autistic Spectrum Disorder (ASD). There was also a dispute about whether the appellant's culpability for the offending was reduced by what Dr Joubert termed theory of mind deficits or mind blindness.

42. As far as ADHD was concerned, Dr Joubert adopted the approach that he would accept all of the diagnoses from other medical professionals unless there was something to indicate that was not correct. Dr Joubert therefore accepted the diagnosis of ADHD made by Dr Durkin.

43. Dr Lock did not consider that the appellant fitted the criterion for ADHD and noted changing symptoms when the appellant was happier. Dr Lock also pointed to the fact that the multidisciplinary team had thought the appellant's impulsivity had another cause which was not ADHD. Dr Valon-Szots had not thought it necessary to administer tests for ADHD, because there had not been indications in the appellant's presentation suggesting that he suffered from ADHD.

44. As far as ASD was concerned, Dr Joubert had also recorded that the appellant had ASD, based on the appellant's report to Dr Joubert. It was not apparent from the medical notes that ASD had ever been diagnosed. Dr Lock and Dr Valon-Szots had not seen anything to justify a diagnosis of ASD.

45. As far as theory of mind deficits or mind blindness was concerned, Dr Joubert said that an offender with theory of mind deficits or mind blindness would lack empathy or understanding of another's point of view, and might consider that because the offender knew something, so would the other person. ASD was relevant to this, because a person with ASD was more likely to have theory of mind deficits. This meant that in the appellant's case because the appellant's father continued to use the appellant's female name, and because sexual relations continued after disclosure, from the appellant's point of view there would be no need for any further disclosure to anyone.

46. Dr Joubert confirmed in cross examination that he had not been aware that the appellant had lied about having children to one complainant, that he had talked about condoms to another complainant, and that he had pretended to ejaculate in the course of the assault by penetration. Dr Lock considered that the appellant's antisocial personality disorder and anger played a more significant part than gender dysphoria, and did not accept that the appellant's mental disorders affected his culpability, because they did not explain what he did. Dr Valon-Szots did not accept that gender identity was related to culpability, stating that the gender dysphoria provided the context but not the explanations.

47. In the submissions before us, there was reference to the Sentencing Council's Overarching guideline on "Sentencing offenders with mental disorders, developmental

disorders, or neurological impairments". It is clear that the fact that a defendant has an impairment or disorder should always be considered by the court, but it will not necessarily have an impact on sentencing. Culpability may be reduced if a defendant is suffering from an impairment or disorder such as those listed in annex A. These include ADHD and ASD. At paragraph 11 of the guideline it is noted that culpability will only be reduced if there is sufficient connection between the defendant's impairment or disorder and the offending behaviour.

48. Dr Joubert accepted the appellant's report that he had been diagnosed with ASD, but we do not find that the appellant suffered from ASD. This is because there is no expert evidence in the medical notes to support such a diagnosis. The appellant has been an inconsistent historian about some of his diagnoses and symptoms, and the appellant did not give evidence about this to this court.

49. We do not find that it is necessary to determine whether the appellant suffers from ADHD. This is because it is apparent that the appellant has many symptoms that are consistent with ADHD, whether they have another cause or not, and because it is apparent that we have not heard detailed evidence about the diagnosis. It is apparent that the appellant suffers from impulsivity, but the cause of that divides the experts.

50. We do not find that the appellant had theory of mind deficits or mind blindness that mitigated his culpability. This is because the appellant's actions showed that he was actively deceiving the complainants by pretending to have children, by referring to a condom, and by pretending to ejaculate. If the appellant had had the mind blindness considered by Dr Joubert, he would not have practised such deceits. This would have been because he would not have appreciated the need to do so.

51. We do find that the appellant has gender dysphoria and personality disorders, as was common ground between the experts. We do not, however, find that the appellant's culpability was reduced by the fact that he has gender dysphoria or personality disorders. This is because there was not sufficient connection between the appellant's impairment or disorder and the offending behaviour. As to the gender dysphoria, it is clear that the appellant would not have been motivated to commit the sexual offences against the complainants if he did not have gender dysphoria, but the existence of that diagnosis does not explain or mitigate the appellant's deceit of the three complainants, or his assaults on two of the complainants or the threat to kill one of them. All of the experts accepted, and it is obvious, that the fact that a person has gender dysphoria does not mean that such a person would deceive complainants into being penetrated by a dildo. It is apparent from all the information before the Court that the fact that the appellant has gender dysphoria has caused real difficulties for the appellant. The fact, however, that the appellant has gender dysphoria does not mitigate the appellant's actions in deceiving the three separate complainants into being penetrated without their consent.

52. As for the personality disorders, there is nothing to show that these disorders were linked to the offending so as to reduce culpability, and none of the experts suggested that they were so linked.

Whether the judge failed to reflect the impact of the acquittals (issue three)

53. It is apparent that the judge only sentenced the appellant for the offences of which he had been convicted. Ms Bex was right to point out that the jury's verdicts, and the evidence, showed that after the initial deceit of the complainants and the disclosure that the appellant was not anatomically a man, sexual relations had continued with all three of the complainants. We do not, however, find that this fact lessens either the harm caused by the appellant's offending, or his culpability in this case. The fact that consensual sexual relations may take place after offending behaviour is not an unknown phenomenon, as is apparent from cases involving a marital rape. The fact that there was subsequent violence in the relationship, even at the same time as consensual sexual relations, is also well known to the courts. It is for the sentencing judge to assess, on the material before the judge, what was the harm and culpability in each case, and to apply fairly the offence specific guideline.

54. We have noted the cases of *McNally* and *Newland* which were referred to the judge, but although there were some similarities, as well as some differences, in the factual circumstances in those cases, they did not lay down any point of principle.

Whether the appellant's sentence should have been further reduced to take account of his mental disorders (issue four)

55. It is apparent that the judge did refer to the effect of the appellant's mental disorders as a mitigating factor. There is nothing in the original materials, or the further materials before us, which would justify a further or greater reduction.

Whether the appellant's sentence should have been further reduced to take account of the difficulties that the appellant faced in prison (issue five)

56. Again, it is apparent that the judge did refer to the fact that the appellant would face difficulties in prison as a mitigating factor. It is apparent that some of those difficulties have materialised, and it is apparent that the appellant's behaviour has contributed to some of the difficulties that he faces. There is evidence that the appellant's interests are being properly considered. We have considered the adjudications from the prison, but we do not consider that the judge should have given a greater discount.

Whether the judge was wrong to find that C1 was "particularly vulnerable due to personal circumstances" (issue six)

57. This was a finding of fact which was made by a trial judge who had heard the evidence. We can see no basis on which we could interfere with the finding of fact made by the judge, who had had the opportunity to see C1 give evidence. We have also had the opportunity to consider C1's contemporaneous writing in what the judge called her diary. There was evidence on which the judge was entitled to conclude that C1 was particularly vulnerable due to personal circumstances. She was aged 16 years. She was having substantial difficulties at home and had just left her family to live with the appellant.

Whether the judge was wrong to find that in relation to C1 there was a "significant degree of planning" (issue seven)

58. Again, this was a finding of fact made by the trial judge who had heard the evidence. It is apparent that the judge only made the finding in relation to the assault by penetration of C1, and not in relation to the same offence against C2 and C3. It is not apparent why the judge did not make such a similar finding in relation to C2 and C3, although it is fair to note that the judge had decided to take the offence against C1 as the lead offence to ensure that the principles of totality were reflected in the sentence and it remained proportionate. The finding of fact was a finding that the judge was entitled to make in circumstances where the appellant had remained clothed in the dark, and then gone to the bathroom as sexual relations had become more intimate and had, unknown to C1, put on a strap on dildo.

59. Ms Bex complained that the judge had not gone beyond the bare fact of the offence in making that finding. It is right that the judge had not gone beyond the bare facts of the offending against C1, but it is clear that an assault by penetration can be committed in very many circumstances, not all of which require the significant degree of planning demonstrated in this case.

Whether the judge was wrong to find that the appellant was dangerous (issue eight).

60. This was a finding made by the trial judge, who had seen the appellant throughout the trial. The appellant had committed the offence against three separate complainants. It is right that there was a gap between some of the offending, and that there had been a period on licence without offending. On the other hand there was clear evidence from the offences and the PSR that the judge's findings were properly made. The fresh evidence shows that the appellant has continued to cause difficulties in prison. The finding of dangerousness was one that the judge was entitled to make.

Conclusion

61. As noted above it is common ground that the statutory surcharge was unlawful. We will therefore allow the appeal to the extent that we quash that unlawful surcharge. Save to that extent, we dismiss the appeal against sentence for the detailed reasons given above.