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Neutral Citation Number: [2024] EWCA Crim 836

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2024 01121 A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 23 May 2024

Before:

LORD JUSTICE SINGH

MRS JUSTICE McGOWAN

HIS HONOUR JUDGE LOCKHART KC

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988
REX
v
JOSEPH HEAD

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS JULIA FAURE WALKER appeared on behalf of the Attorney General
MR ROBERT J BRYAN & MS HELEN EASTERBROOK appeared on behalf of the Respondent Offender

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J U D G M E N T
(Approved)

LORD JUSTICE SINGH:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions where an allegation has been made that 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 s.3 of the Act. This judgment will be anonymised accordingly.

Introduction

2. This is an application on behalf of His Majesty's Attorney General for leave to refer sentences to this court under s.36 Criminal Justice Act 1988 ("the 1988 Act") on the ground that they were unduly lenient.
3. The Respondent Offender was born on 30 November 1998. He was aged 19 at the time of the offences and 25 at the date of sentence. He was of previous good character.
4. On 11 October 2023 the Respondent was convicted at the Crown Court at Guildford of four sexual offences. Three were offences of rape (counts 1, 4 and 6 on the indictment). The fourth was an offence of assault by penetration, contrary to s.2 Sexual Offences Act 2003 (count 3 on the indictment).
5. On 23 February 2024 the Respondent was sentenced at the Crown Court at Winchester by His Honour Judge Rufus Taylor to a total sentence of 8 years' imprisonment. That sentence was imposed on each of the counts where there had been a conviction and the sentences were made concurrent. Other appropriate orders were made.

The Facts

6. The facts can be taken for present purposes from the Final Reference submitted to this court on behalf of the Attorney General. In summary, from November 2017, the Offender (then aged 18 to 19) pretended to attempt suicide and to have multiple personalities. He did this to manipulate the victim and to force her to engage in sexual activity. Pretending to be

another personality, he would make the victim choose between engaging in sexual acts or, for example, harm being caused to her or to himself. Against this background, he inserted his fingers, then his whole fist, into her vagina, causing her to cry in pain. That was the subject of count 3.

7. He raped her vaginally and orally on several occasions. That was the subject of counts 4 and 6.
8. During an incident on 22 January 2018 he told her he needed to break her. He then threw her about and pinned her down, causing bruising to various areas, and then raped her vaginally. That was the subject of count 1. The victim reported the abuse to police on the same day. The Offender was arrested after he had deleted messages between them.
9. The facts are set out in more detail in the Final Reference and we will draw attention to some salient parts.
10. The Offender and the victim (whom we will refer to as "V") were students at a college. V assisted the Offender with his social anxiety. When he enrolled in September 2017, she was in her second year. They became close friends. His mother had told her that the Offender was on the autistic spectrum. The Offender convinced V that she was the only one he could turn to for support. He said he only wanted to spend time with her due to being uncomfortable in larger social groups. She felt she was responsible for helping and supporting him.
11. On 21 November 2017 the Offender turned up at V's house and claimed he had taken an overdose of prescription medication, which could be fatal. She took him to hospital. He claimed to have taken eighteen 80 mg tablets of Propranolol. Test results showed that he was asymptomatic. He was discharged on the same day. A toxicologist instructed later would confirm that he could not have taken the number of pills claimed.
12. Furthermore, he claimed he had multiple personality syndrome or dissociative disorder. He said different personalities could take over his body. A psychiatrist would later confirm that the Offender did not have those syndromes.
13. The Offender warned V of the consequences of not complying with the demands made by

these other personalities. Pretending to be another personality, he would introduce games that gave her options, one of the options being to perform a sexual act. Other options included, for example, that she had to hurt him with a knife, or he had to do that to her, or she had to watch him walk in front of a car. She felt the sexual act was the least painful option. In other words, he pretended to have a mental disorder to force her to engage in sexual activity.

14. Count 3 (assault by penetration) was the first of the offences in time. It is likely that the first offence occurred before 11 December 2017.
15. Count 4 was a multiple incident count of vaginal rape committed before 22 January 2018 on dates unknown. The Offender ejaculated inside V more than once. She had to take the morning after pill.
16. Count 6 reflects incidents of oral rape committed in similar circumstances.
17. On 10 January 2018, V messaged the Offender saying that she "really hurt". The Offender was clearly aware of the harm he had caused.
18. Count 1 (the final offence in time) was a rape committed on 23 January 2018. The Offender had stayed the night in V's flat. In the morning, as she was getting dressed, he sat on her bed and claimed he could not see or hear properly. He collapsed on the floor and pretended not to speak. She gave him an envelope to write on. He then feigned the personality "Samaritan", and repeatedly said, "I need to break you now". He demanded she take her top off. When she refused, he said he would rape her. V was thrown about and pinned down, suffering bruising to her ribcage, wrists, and throat. "Samaritan" began the rape, before he changed into another personality, "J". She closed her eyes and was crying. He produced a pair of scissors and made her mark him and then herself with them. He placed an ignited lighter under her chin until it got too hot and she pushed it away.
19. On the same day, 23 January 2018, V went to the police. The Offender was arrested on that day. He was interviewed under caution for the first time on 24 January 2018. He claimed he had only ever engaged in consensual sexual activity with V. He was released under investigation.

20. V gave her first Achieving Best Evidence ("ABE") interview on 31 January 2018.
21. The investigation was delayed for a number of reasons. The initial officer in charge ("OIC") was placed on long-term sick leave from July 2018. The case was allocated to another officer later in 2018, and then to the current OIC in the summer of 2019. V's and the Offender's telephones were not submitted for examination until late 2019. In February 2020 a report was submitted to the Crown Prosecution Service regarding the future progress of the case. In March 2020, the investigation was reviewed, in light of the impact of the pandemic on staffing and resources, and the case was "to be placed on the 'back burner'"; it was determined that more pressing investigations needed to take precedence. Some delay was caused by the victim's family needing to shield during the pandemic. At the end of November 2020, the review of the phone downloads was complete, and revealed evidence corroborating V's account. Further witness statements were then taken.
22. The Offender was interviewed for a second time on 22 February 2021.
23. Following that interview items were sent for forensic examination.
24. The next ABE interview of V was on 17 May 2021.
25. The Offender was interviewed again on 15 July 2021. He was charged on 23 June 2022. He made his first appearance at the magistrates' court on 22 July 2022. He pleaded not guilty at a plea and trial preparation hearing at the Crown Court on 30 August 2022. A trial was fixed for 18 September 2023. He remained on conditional bail until conviction on 11 October 2023, when he was remanded in custody.

The Sentencing Framework

26. The maximum penalty for both the offence of rape and the offence of assault by penetration is life imprisonment.
27. The Sentencing Council has issued relevant offence-specific guidelines for rape and for assault by penetration.
28. The guideline in respect of the offence of rape suggests the following in relation to a category 2 harm culpability A offence. This attracts a starting point of 10 years' custody,

with a suggested range of 9 to 13 years.

29. If harm is category 3 but culpability is A, the guideline suggests a starting point of 7 years' custody, with a range of 6 to 9 years.
30. The guideline makes the following recommendation in relation to a category 2A offence of assault by penetration. The starting point is 8 years' custody, with a range of 5 to 13 years.
31. Also relevant are the following guidelines issued by the Sentencing Council: the guideline on Sentencing offenders with mental disorders, developmental disorders, or neurological impairments; the General Guideline: overarching principles on "delay since apprehension"; and the Totality Guideline.

The Sentencing Process

32. The sentencing judge had, as this court also does, a victim personal statement from V.
33. The judge also had a sentencing note from prosecution counsel. She submitted that the offence of assault by penetration would fall within category 2 harm, on the basis of a particularly vulnerable victim, and culpability category A, because there was significant planning. She identified additional aggravating features: that is the use of a weapon to frighten (that is photographs of a knife being sent, albeit it was conceded this may be double counting); ejaculation; attempts to dispose of the evidence, the Offender having deleted messages and an iPhone note.
34. The judge also had a sentencing note from the defence. Their submissions included that the physical violence only took place on the last morning, leading to the rape reflected in count 1; that there was no evidence of severe psychological harm; in the main, the threats of violence were to the Offender himself rather than to the victim; and there was no additional degradation or humiliation. It was submitted that the offences fell within category 3 harm. Reference was made to mitigating features of age, psychiatric evidence of neurodevelopmental disorder, and delay.
35. The judge also had a pre-sentence report dated 27 February 2024. The author formed the view that the Offender obtained sadistic gratification from exploiting his victim and would

use false personas on occasions where he felt he was losing control. The author noted that following the Offender's arrest, he had kept his job as a self-employed dance teacher. The Offender, according to the report, continued to deny any wrongdoing, and claimed the offences were "fabricated". This showed significant problems relating to his motivation to change and ability to address his offending. The reported concluded that he posed a high risk of serious harm to known adults.

36. During the trial, the judge had heard evidence from two treating clinicians in relation to the Offender's mental health issues, namely Dr Jonathan Prosser and Emma Collins.

37. In addition, after the trial and conviction, the judge had the advantage, as we do, of seeing a report of a consultant forensic psychiatrist, that is Dr Mark Bolstridge, dated 4 January 2024, which was prepared to consider issues of dangerousness and culpability.
Dr Bolstridge noted that there was no reference to a diagnosis of multiple personality or dissociative behaviour in the Offender's medical records. He concluded that the Offender did not display any evidence of a severe and enduring mental illness at the time of preparing the report. The Offender had access to community mental health services after experiencing stress and anxiety from the allegations made against him. He had not generated any concern in prison while on remand. Although Dr Bolstridge did not dispute a previous autism diagnosis, he was "not overwhelmingly convinced" that the Offender suffered from the condition; it was unclear whether he ever received a formal assessment. Dr Bolstridge said that there was a "distinct possibility" that the Offender's neurodevelopmental disorder may have contributed to his offending. However, he concluded that, in terms of culpability, on balance:

> "[The Offender's] neurodevelopmental disorder, namely autism spectrum disorder, does not satisfactorily explain his sexual offending in this case. By his own admission [the Offender] was rather infatuated with his victim but this was not reciprocal. She offered her friendship and support to him, but he instead exploited her good nature by concocting a ruse about being possessed by other personalities who needed to be appeased by her performing sexual acts upon him. Throughout the sessions with his CBT therapist [from May 2019] there is clearly a recurring theme of a need and fascination with controlling and manipulating others on his part. He

> however endeavoured to absolve any responsibility from this by fabricating a false entity within himself which he referred to as 'J' who he considered to be the main perpetrator. There is clearly a strong indication that [the Offender] experienced some kind of sadistic pleasure in controlling and manipulating others including his victim. Furthermore, it seems self-evident from this contact with professionals, and others too, that he wanted to be perceived to be different, whether mentally ill and/or a danger to others and revelled somewhat in the associated infamy that this may have engendered."

38. In his sentencing remarks, after setting out the facts, the judge referred to the victim personal statement, which showed that the offending had had an awful impact on the victim. It had destroyed her confidence. She has been debilitated with anxiety. She struggles with trust issues, and no longer dances.

39. The judge had regard to the relevant guidelines on sexual offences. He placed the rape offences into category 3 harm and noted that it was common ground that culpability was high (category A) because there had been a significant degree of planning and the use of the façade, which the Respondent had constructed, which convinced his victim that she really was saving him from terrible hurt. The rapes were aggravated by the ejaculation and the use of threats. The judge also noted that the s.2 offence fell into category 2A because there was penetration using a large dangerous object, and it was sustained.

40. The judge then considered mitigation. He noted that the Respondent was 19 at the time of the offending and was of previous good character. There had been a six-year delay since. The judge had read the character references which had been placed before the court. The Respondent had been a devoted son and carer for his mother, who suffers from various illnesses. The Respondent was described as being painfully shy when growing up, but very clever. He had been badly bullied at school and had to move. He was well received and respected by the students whom he had taught as a dance teacher.

41. The judge then took into account the psychiatric position. He noted that the Respondent is on the autistic spectrum, but not by much. After his arrest, he had a breakdown and was admitted to a medium secure hospital for a month's treatment. The judge considered the Mental and Developmental Disorder guideline. He carefully considered the psychiatric report of Dr Bolstridge. Having heard the evidence at the trial, the judge concluded that the

Respondent had no empathy at all and had no insight into the effect of his behaviour on his victim. He was socially immature and his culpability was "somewhat reduced". Having said that, the judge was well aware that the Respondent wanted sex with his victim. He is intelligent, he is highly manipulative and a very good actor. He deliberately exploited their friendship and her care for him.

42. The judge considered the issue of dangerousness, as he was required to do. He noted what was said by Dr Bolstridge in his report and also in the pre-sentence report. The Respondent was assessed as posing a high risk of serious harm, but there was an absence of other characteristics which are recognised to increase the risk, such as previous violence, relationship instability, substance misuse or major mental illness, negative attitude and impulsivity. Further, the judge observed that the offending had taken place over a few months when the Respondent was only 19 and six years had since passed without any suggestion of further offending. Accordingly, the judge concluded that an extended sentence was not necessary given the long determinate sentence that he had to pass. The judge concluded that the offences taken together would justify a sentence of 11 years' imprisonment, but because of the delay and the mitigation, he would reduce that to 8 years. The judge explained that the Respondent would be released on licence no later than two-thirds of the way through that sentence, that is after 5-years-and-4-months. The judge did not consider that a sexual harm prevention order was necessary in this case but a restraining order was.

Submissions on behalf of the Attorney General

43. On behalf of the Attorney General, Ms Faure Walker does not criticise the judge's decision to impose a determinate sentence rather than an extended sentence but does complain that the length of that determinate sentence was unduly lenient. Ms Faure Walker submits, first, that the judge fell into error when he concluded that the rape offences fell within category 3 harm and they should have been found to fall within category 2.

44. Secondly, the increase from the starting point was inadequate to reflect the aggravating

features, the number of offences, and the Respondent's overall offending behaviour.

Ms Faure Walker submits that the judge was correct to place count 3 (that is assault by penetration) into category 2 harm. He was also correct to find that all the offences fell into category A culpability. She submits, however, that the offences of rape should also have fallen into category 2 harm. She submits that the indicator "violence or threats of violence (beyond that which is inherent in the offence)" was applicable. Furthermore, she submits that the indicator "additional degradation/humiliation" was also relevant. If that is right, she submits that it would follow that the offences of rape would have had a starting point of 10 years' custody, with a range of 9 to 13 years. It is common ground that the starting point for the offence of assault by penetration was 8 years' custody, with a range of 5 to 13 years.

45. Further, Ms Faure Walker submits that there were aggravating features in this case: use of a weapon to frighten; use of a weapon to injure and frighten during count 1 (that is, the scissors and ignited lighter); attempts to conceal or dispose of evidence; and ejaculation (at least two occasions), covered by count 4.

46. Ms Faure Walker reminds this court that the guideline refers to a single offence of rape. Here there were many more offences for which sentence had to be passed. Although she accepts that the structure of a sentence is ultimately a matter for the judge, the guidance on totality suggests that where there are multiple sexual offences against the same victim, consideration should be given to passing consecutive sentences. If that is not done, she submits then it is necessary to increase the sentence on the lead offence so as to reflect the Offender's overall offending behaviour.

47. Ms Faure Walker accepts that there were mitigating features in this case. The Respondent was young, as the offending started during the month of his 19th birthday. There was evidence before the judge which could lead to a finding that he was immature. There was, she submits, a mixed picture presented by the psychiatric evidence. There was a distinct possibility that the neurological developmental disorder contributed to the offending, but the evidence was that the disorder did not satisfactorily explain that offending. The Offender had a fascination with controlling and manipulating others; there was a strong indication

that he felt sadistic pleasure in this. Ms Faure Walker submits that any reduction, therefore, for neurological developmental disorder should have been minimal.

48. Finally, Ms Faure Walker accepts that delay in this case was long and that parts of it are not accounted for. Nevertheless, she submits that the detrimental impact on the Offender was not identified by the judge. Indeed, according to the pre-sentence report, the Offender had been able to continue to work after the allegations came to light and he was able to engage in treatment in the community.

Submissions on behalf of the Respondent

49. On behalf of the Respondent Mr Bryan, who appears with Ms Easterbrook, submits that the key to understanding this case is that the judge presided over a trial that lasted 18 working days. The judge was in the unique position to make the relevant assessments, and the sentence he imposed was not unduly lenient. There continued to be some factual disputes between the Respondent and the Attorney General, as set out in paragraph 2 of the Respondent's written submissions. Nevertheless, Mr Bryan accepts that the central argument which divides the parties is whether the rape allegations fell into category 2 harm rather than category 3. He reminds this court that, as it is put in **Rook & Ward on Sexual Offences** at paragraph 36.15:

> "... the guideline recognises that all rape is harmful to the victim by making the assumption that there is *always* a baseline of harm" (emphasis in original).

50. Further, Mr Bryan submits that there was no additional degradation or humiliation even if there was manipulation. He submits the two are not the same thing. He submits that the manipulation in this case is consistent with a significant degree of planning, which is a factor going to culpability rather than one going to harm.

51. So far as the aggravating features are concerned, Mr Bryan submits that the circumstances in which the photographs of the knives were sent was not to frighten the complainant. Further, he submits that there were matters alleged by the complainant which were in the end not found to have been proved: for example, a complaint of anal rape. He also submits

that the deletion of the Respondent's side of messages does not warrant being considered an aggravating feature; it was not sophisticated or persistent or particularly significant.

52. Mr Bryan submits that there was unreasonable delay in this case and that the circumstances can be contrasted with those on the facts of **Attorney-General's Reference (Timpson)** [2023] EWCA Crim 453. In particular he draws attention to [23] in the judgment of Williams Davis LJ:

> "The situation here was wholly different to the situation which is all too common in criminal proceedings. Offences are committed, they are reported promptly to the police who investigate them with reasonable expedition. The investigation concludes with evidence available to justify charging of the offender. Then, many months, sometimes years, pass before the offender is charged. That type of delay often will result in some reduction in the eventual sentence, particularly in cases where the offender pleads guilty. We observe that the reduction would be most unlikely to be as great as 25 per cent, particularly where the offences were serious, but some reduction would follow. In this case, the offences were reported to the police in May 2020, the offender was charged in November 2020, he made his first appearance in the Crown Court in January 2021. That chronology does not reveal any significant delay, rather it is the progress to be reasonably expected in a case of this kind."

Mr Bryan submits that in contrast, in the present case there was a delay of over three years between the first and second interviews of the complainant. Charges against the Respondent were not authorised until 21 June 2022, almost 4-years-and-5-months after the complaint was first made and even eleven months after the investigation had been completed.

<u>Our Assessment</u>

53. The principles to be applied on an application under s.36 of the 1988 Act are well established and were summarised in **Attorney-General's Reference (Azad)** [2021] EWCA Crim 1846; [2022] 2 Cr App R (S) 10 at [72] by the Chancellor of the High Court as follows:

> "1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
>
> 2. A sentence is only unduly lenient where it falls outside the range

> of sentences which the judge at first instance might reasonably consider appropriate.
>
> 3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.
>
> 4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'."

54. As Mr Bryan has reminded this court, the seminal judgment on s.36 of the 1988 Act was given by Lord Lane CJ in **Attorney-General's Reference No 4 of 1989** (1990) 90 Cr App R 366, where at page 371 he said, as this court has repeated ever since, that its role is not simply to retake the sentencing decision as if it were the sentencing court. Lord Lane said that mercy is a virtue and does not necessarily mean that a sentence was unduly lenient.

55. We should also mention **Attorney-General's Reference No 132 of 2001 (Johnson)** [2002] EWCA Crim 1418; [2003] 1 Cr App R (S) 41, in which the judgment was given by Potter LJ. At [24] he said:

> "... there is a line to be drawn ... between the leniency of a sentence in any given case and a sentence which is 'unduly' lenient, in the words of the statute. ... The purpose of the system of Attorney-General's References in particular cases seems to us to be the avoidance of gross error, the allaying of widespread concern at what may appear to be an unduly lenient sentence, and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type."

56. Turning to this particular case, we consider that the judge had to perform a difficult and sensitive sentencing exercise. He did so after carefully considering all the circumstances and explaining his reasoning in sensitive and balanced sentencing remarks. We remind ourselves that it is not the function of this court to sentence the Respondent again. The question for us is not whether one or more members of this court would have imposed a higher sentence, but whether the sentence in fact imposed by the judge falls outside the range that was reasonably open to him. We also bear in mind that the judge was better placed than this court can be to make an assessment as to the appropriate categorisation of the offences since he had presided over the trial in this case. We do not consider that this court can properly interfere with the judge's categorisation of the rape offences as falling

within category 3 harm. Nor do we consider that this was a case where the judge has otherwise fallen into gross error. The judge had careful regard to the relevant sentencing guidelines. No complaint is made about his approach to the Guideline on Assault by Penetration. So far as the offences of rape are concerned, the judge took the correct starting point recommended in the guideline for a category 3A offence and was then prepared to increase it substantially to 11 years to take account of the aggravating features and the principle of totality, before then coming down after taking account of the mitigation that was clearly available to the Respondent. Although delay would not have warranted a large reduction in this case, it was clearly too long and was not entirely justified. This was something that the judge was entitled to take into account, as was the fact that the Respondent had not committed further offences in the six years since this offending. We also remind ourselves that sentencing is an art and is not a scientific or arithmetical exercise.

57. So far as the structure of the sentence is concerned, that was very largely a matter for the judge. Although it would have been possible to impose consecutive sentences, it was not wrong for the judge to impose concurrent sentences provided the total sentence reflected the overall gravity of the offending and was just and proportionate.

58. Finally, we remind ourselves that reaching the age of 18 is not a "cliff edge" for the purposes of sentencing: see **Attorney-General's Reference (Clarke**) [2018] EWCA Crim 185; [2018] 1 Cr App R (S) 52 at [5], (Lord Burnett CJ). The judge was, in our judgment, therefore entitled to reduce the sentence that would otherwise have been appropriate to take account of the Respondent's relatively young age and immaturity.

59. We also remind ourselves that the Respondent did have some mental health issues, which the judge properly took into account but gave only limited weight.

60. In all the circumstances of this case, we have reached the conclusion that, while the total sentence of 8 years' imprisonment could be regarded as lenient, it was not unduly lenient.

Conclusion

61. For the reasons we have given, this application for leave by the Attorney-General is refused.

LORD JUSTICE SINGH: May I check if there is anything else?

MS FAURE WALKER: My Lord, just to clarify: does the court reject the application for leave as well as the application itself?

LORD JUSTICE SINGH: Yes.

MR BRYAN: Thank you.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400 Email: Rcj@epiqglobal.co.uk