NCN: [2019] EWCA Crim 145
No: 2018 03433 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 31 January 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE ELISABETH LAING DBE

HIS HONOUR JUDGE BURBIDGE QC
(Sitting as a Judge of the CACD)

R E G I N A
v
KAPIL DOGRA

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Ms Laura Wilson appeared on behalf of the **Appellant**
Mr Simon Heptonstall appeared on behalf of the **Crown**

J U D G M E N T

JUDGE BURBIDGE:

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 that offence.

2. On 2nd October 2017, in the Crown Court at Reading, the appellant was convicted after trial by a jury of four offences, all committed on 12th April 2017. Count 1 was the oral rape of 'A', contrary to section 1 of the Sexual Offences Act 2003; count 2 was assault by penetration, whereby the appellant penetrated A's vagina with his fingers, contrary to section 2 of the same Act; count 3, a further assault by penetration, whereby he penetrated A's anus with his fingers; and count 4, causing A to engage in sexual activity with him without consent, namely causing her to masturbate his penis. That was contrary to section 4 of the same Act.

3. On 3rd November 2017 the trial judge imposed sentences as follows: on count 1, an extended sentence of fifteen years' imprisonment, comprising of a thirteen-year term of imprisonment, to be served with an extension of two years, pursuant to section 226A of the Criminal Justice Act 2003; counts 2 and 3, eight years' imprisonment, concurrent on each and concurrent to the sentence on count 1; and on count 4, four years' imprisonment concurrent. Having been convicted of an offence listed in Schedule 3 of the 2003 Act, the appellant was also required to comply with the provisions of Part 2, and therefore to notify his address indefinitely. Having been convicted of an offence

specified in the Schedule to the Safeguarding Vulnerable Groups Act 2006, the appellant was told that he will or may be included in the relevant list by the Disclosure and Barring Service.

4. The appellant renewed his application for an extension of time (256 days) in which to apply for leave to appeal against sentence after refusal by the Single Judge. Having heard oral submissions from Miss Wilson on 18th January 2019, we granted leave in respect of the extension of time to appeal against sentence. Given the nature of the case, we adjourned in order to allow the prosecution to be in a position to respond to the application to appeal against the sentences. We have had that response in writing by Mr Blake, the Senior Crown Advocate who appeared in the court below; and also Mr Heptonstall represents the respondents at court today.

5. The facts are as follows. At 22.36 pm on 12th April 2017 police received a telephone call from an 'RW', who reported that he had been on the telephone to his girlfriend 'A' when she suddenly told him to call the police, before the line went dead. Police met RW in the centre of Datchet and they began to search for A. She was found on Majors Farm Road shortly after. She was distressed and told officers that a male had grabbed her, told her he had a knife and forced her into some bushes, before sexually assaulting her.

6. It appeared that A had arrived in Datchet by train at 10.15 pm that evening. Upon leaving the station she telephoned RW (her boyfriend), who was due to meet her halfway. As she walked along London Road, the appellant made an effort to speak to her, but she was wearing headphones - and there was disputed evidence as to whether he did. But he

followed her, before taking a different path, which ran parallel to the one taken by A. As the two paths joined, the appellant walked closely behind her; and, without warning, he put his hand over her mouth, threatening her with violence if she tried to scream. She managed to shout for help down her mobile telephone, before the applicant snatched it away.

7. She was taken to a small wooded area. He threatened to rape her if she did not masturbate him, which she was made to do. While she was on her knees, the appellant then forced his penis into her mouth. He then forcibly digitally penetrated her vagina and anus. This caused A significant pain. The applicant then left A alone at the scene, where she remained for a short time, before calling further for help.

8. The appellant was seen on closed circuit television following A from the train station. He was first interviewed by police on 14th April 2017. His account was that he had gone to purchase cocaine and, whilst walking around, had bumped into A, who was previously unknown to him. He claimed they chatted for a little while, before sharing a line of cocaine. The appellant then said they had engaged in consensual sexual activity, before A told him that she had to meet her boyfriend. He denied threatening A or sexually assaulting her. This lying account he developed at the trial.

9. The sentencing judge had the advantage of a victim personal statement from A which had been video recorded. It was dated 14th August 2017. It is a model for assisting the court for it indicates, without, it would seem to us, the use of any over-exaggeration in its contents, the effect this dreadful experience had upon her and would have helped the

court enormously, as it has helped us, in understanding the devastating nature of these offences upon her and her wider family. It has caused her sleep deprivation, eating problems, a feeling of paranoia and being unable to go out on her own; she has lost trust in people. Understandably there has been wider adverse effect on the family. She has a younger sister; her parents are anxious for them both when they go out. She herself is anxious about the wellbeing of her younger sister because of this experience. Her anxiety has increased and increases especially when she goes out. She was then and is now engaged in studies, but her concentration levels are affected. Her part-time work was also affected.

10. In the judge's sentencing remarks he detailed some of the facts to which we have referred. In particular he said that, on the date in question, A (aged then only 18) was travelling to Datchet to meet her boyfriend. She was still at school, studying for her A levels and had a part-time job. She had been at work in that part-time job that evening. Usually her boyfriend would meet her at the train station, but had injured himself at the gym and so planned to meet her halfway. The judge said, regrettably, the appellant had also travelled to Datchet that day, intending to purchase cocaine. He went to a hotel, where he had a drink and took some lines of that cocaine in the hotel toilet. He then walked to the train station; and this is when he first saw A. It was then approximately 10.15 pm. The judge said he was in no doubt the appellant formed a plan to follow A, with the intention of sexually assaulting her in some way. He followed A through Datchet out into a semi-rural area approximately three-quarters of a mile from the train station. It was then that A was on the telephone to her boyfriend when the appellant put his hand over her mouth, dragged her to some nearby woodland and threatened to stab her if she did not

do as he said.

11. The judge indicated how A was sexually assaulted in the four different ways in which she was, namely that she was forced to masturbate the appellant, who then pushed her on to her knees and forced her to give him oral sex. He digitally penetrated her vagina and then her anus, causing her extreme pain. During the assault the appellant had taken away A's mobile telephone to ensure she could not call for help at that time; then he fled. The judge said A was terrified. She ran away, leaving a number of her possessions in the woodland. The sentencing judge said that he had seen body worn footage of her moments later. It was clear, he said, that she was left in extreme shock.

12. The appellant was identified from closed circuit television footage of the area. He was asked through family contacts to hand himself in, but he did not. He was eventually arrested at a tube station. During the police interview, as we have indicated, he asserted that this was a consensual sexual experience in the woods.

13. The judge referred to the fact that the appellant had a number of convictions, but none for sexual offences. The court, he said, proposed to treat all offences as one incident. So the sentence on count 1 for rape would be aggravated by counts 2, 3 and 4 - although they were each, especially counts 2 and 3, extremely serious in their own right. The judge said he would, and did, consider the guidelines. He had read the victim impact statement, a pre-sentence report and a reference on behalf of the appellant.

14. There were a number of features to place the rape offence within Category 2, said the

judge in his remarks: the threats of violence that went beyond the use of violence inherent in offences of rape; A was particularly vulnerable: she was alone, late at night, in a secluded area, she was dragged from a path to nearby woods; and in his view it was a sustained incident, lasting between 20 and 22 minutes. There were elements of the case, said the judge, that were extreme in nature. Therefore, he said, it fell between the top of Category 2 and the bottom of Category 1.

15. The judge then went on to conclude, in consideration of culpability, that there had been a significant degree of planning, given the period of time over which A was pursued. He referred to the closed circuit television, indicating that the appellant had followed A through Datchet, separated from her, looked through the woodland to see where she had gone, and overtook her, before doubling back to attack her from behind. That, said the judge, placed the offence within culpability A.

16. The judge agreed with the assessment of the pre-sentence report that the appellant was of a high likelihood of sexual reconviction and posed a high risk of serious harm to the public, particularly females. The judge concluded that he posed a significant risk of serious harm, occasioned by the commission of further serious specified offences. Thus he considered an extended sentence appropriate and that was the order that he eventually made.

17. Grounds of appeal in this case have been settled in writing by Miss Wilson and were supported by a short, focused and helpful skeleton argument. Her oral submissions today have also been extremely helpful and focused, and therefore of benefit to the court. She

did not appear in the court below. She asserts that the sentence imposed is manifestly excessive. In support of that she asserts that the learned judge had erred when determining culpability in deciding that there was a significant degree of planning on the facts, and also, when assessing the factors relevant to harm, determined that one or more of them were extreme, and therefore consequently placed the offence into the wrong level within the sentencing guidelines. She submits that the offence falls within Category 2B and not 2A, which was where the sentencing judge had placed the offence. In those circumstances the starting point should have been eight years, not ten, before consideration of any further elevation.

18. It should be noted, it has not been claimed in any ground of appeal nor any oral submission to us by Miss Wilson that the appellant is other than a *'dangerous offender'*, within the terms of section 226A of the Criminal Justice Act, namely that he is an offender who the court considers that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences. Nor is it suggested that a determinate sentence of length would be suitable to protect the public from that risk. We commend counsel's realism in this matter and thus as we have said the focused submissions to this court.

19. The judge said (at page 3D of his sentencing remarks in the transcript):

> "In relation to culpability, the issue that I have been looking at is whether there was a significant degree of planning in this case; there clearly was a degree of planning. In my view, when one assesses the period of time over which you followed A from the station, following her up around the back of Datchet; separating from her, as we saw on the closed circuit television; looking through the woodland to see where she had gone; overtaking her just

> before that in order no doubt to have a proper look at her, and then taking the opportunity to double back so that you came up behind her again, as was clear on the closed circuit television, before then attacking her, in my view, that amounts to a significant degree of planning."

20. Miss Wilson states these facts, as the judge found them to be, are suggestive of *some planning* (our emphasis) but, only a small degree of such and does not reach the "significant threshold" that would be required by the categorisation of culpability A.

21. We have now had the advantage of seeing the full transcript of the exchange between counsel and the sentencing judge as to this issue and generally as to what category within which the judge should place this offending. Mr Blake (then for the prosecution) raised with the judge the fact that the author of the pre-sentence report had said there was no evidence of preplanning. Mr Blake rightly said to the sentencing judge:

> "Clearly the question of planning and how far the offending was preplanned, is a matter for the court having seen all the evidence, and to some extent it is perhaps a question of degree; clearly there is preplanning that can be many days before an offence, as opposed to planning just before an offence is committed."

22. He went on to say that the court could find that A was targeted from arrival at Datchet Station, which was at 10.15 pm. There was then a walk, first past the green in Datchet, then down London Road, until the point at which she was dragged into the wooded area, where there was cover and a dark area for the offence to be committed. Thus, said the prosecution, he had calculated where to launch his attack upon A. This is a submission that Mr Heptonstall repeats to us today, indicating that the closed circuit television material in the case that the judge saw showed the appellant had followed A for around three-quarters of a mile, at one point overtaking the victim, then doubling back to get

behind her, then walking on a parallel axis road on the other side of the hedge, and could be seen pausing, looking through a hedge until she drew close, which was about 30 minutes after first seeing her. He then accosted her, having selected a location suitable to attack her, dragging her into a small piece of woodland. The respondents submit that this is *significant planning*.

23. In addition, the respondent said at the time, and have repeated in their response, that A was *abducted*. It is said by the respondents that by being taken into the wooded area the offence was *sustained*, as the victim's ordeal lasted some twenty minutes, and that there were threats of violence beyond that which were inherent in the offence.

24. The respondents maintain that there was significant planning, with a sustained attack, and where the level of harm caused was such that the judge would be entitled to raise the level of harm to that of Category 1 in the guidelines, given the extreme nature of one factor or a combination of factors in Category 2, as the judge had expressed.

25. Counsel who acted for the appellant at the sentencing hearing and at trial made points to the sentencing judge similar to that advanced on behalf of the appellant today by Miss Wilson. She asserted that the offences fell within Category 2, and made the point that for the offences to fall within Category 1 there either had to be a combination of Category 2 factors which caused extreme impact or if one or more of the factors were extreme in nature that could then elevate the matter into Category 1.

26. It has been contended that there was no prolonged detention; that the psychological harm

and physical harm caused to A, though "significant", would not be described as "severe", and that the contention by the prosecution that this was a case involving 'abduction', whilst accepting that A was dragged from the path for a few metres into a wooded area, would be an incorrect terminology within the guidelines.

27. Miss Wilson does accept that A was a *vulnerable* victim, by reason of the circumstances; albeit she indicates that A has no personal traits, such as disability, that may have made her more vulnerable. Moreover, Miss Wilson's principal submission to us is that, although there was some planning, it was not the significant planning again contemplated by the guidelines. So the submission is made that the starting points were too high and there were no extreme factors.

28. We remind ourselves that the sentencing judge was the trial judge, and would have had the facts and A's evidence (which he would have seen and heard) well in mind at the date of sentence. Undoubtedly the offences committed by the appellant and the circumstances in which he committed them are of the utmost seriousness. However, a central question for this Court is whether the judge was justified in approaching the categorisation in the way that he did, particularly, on the facts of this case, notwithstanding the extreme seriousness of what the appellant did, whether that can or should be described as "significant planning", because that may inform the issue of whether the sentence is manifestly excessive.

29. There was undoubtedly a pursuit, with the appellant contemplating his moves within that pursuit of his victim. It was a protracted pursuit, calculated and determined from when

he first saw her. In effect he 'stalked' her - that term not used in any legal sense, but to describe the nature of that pursuit - perhaps even 'hunted' her down. Prior to him seeing the victim at the railway station, there is no evidence of any prearrangement of or thoughts to pursue a sexual assault, but, rather, that his thoughts were apparently formed from that moment on.

30. The stark reality is, having made a purchase of drugs and consumed them, he saw a young woman on her own, he walked some considerable distance for a considerable period of time, and there was no doubt a degree of foresight in what he determined to carry out, for he awaited until they were some distance from the railway station, in a reasonably remote or out-of-the-way spot, ensuring, as he had to, that no one was about. He had diverted his own route so he could better view the victim and be in a position to attack her from behind. He approached her from behind, pounced upon her and forcibly moved her - in reality dragging her into the area of woodland from where he would be less likely to be seen. He put his hand over her mouth to stifle her screams and threatened to stab her if she did not submit in accordance with his wishes. She was raped by him, by forcing her head on to his penis with a lot of force, and she suffered other serious sexual assaults for his sexual gratification.

31. As to whether this grave conduct amounts to "a significant degree of planning" within the terminology of the Sentencing Council Definitive Guidelines on Sexual Offences cannot be regarded as a mere matter of semantics because it is a term that categorises whether the culpability of the offence falls potentially within Category A or Category B, which in turn have starting points: if 1A to 2A, a five-year difference ; or if 2A to 2B, four years'

difference.

32. What then is *significant planning* in this context, given that the applicant, obviously in his pursuit by the actions captured on closed circuit television, made a calculation as to how and at what stage and when he could carry out his attack? The words themselves, of course, do not require further definition. Each case must be considered on its own facts. However, some assistance may be afforded by looking at the other matters of culpability that places an offence into Category A, that is to say creates that higher degree of culpability when consideration is given to this most serious of sexual offending. Those matters include: that an offender acts with others to commit the offence; that there is use of alcohol or drugs on the victim to facilitate the offence; that there has been previous violence against the victim; that the offence is committed in the course of burglary; or that the offence is motivated or demonstrates hostility for particular reasons. Whilst these are all self-contained issues that raise culpability, they are matters that provide a clear indication of what may amount to raised culpability and may give some indication of the threshold envisaged. In cases of sexual abuse there may, as a matter of inevitability, be some planning, such as the locking of a door on a victim or a short pursuit, but the determination of when a degree of planning reaches that higher level of culpability denoted by a *significant degree of planning* has to be a matter of judgment based on all the facts of the case.

33. As Miss Wilson for the appellant contends in this case, it is not suggested, for example, that the appellant had got on the same train as the victim at a distant station waiting until she got off to pursue her; nor that he had espied her and stalked her on some day or days

before biding his time to attack; or had previously carried out recognisance trips; or deliberately and with aforethought taken and carried with him a weapon of offence or some form of restraint to be better able to carry out an attack on finding a victim; nor was there any evidence that he carried a disguise to use. Without determining any of these factors to be definitively descriptive of "a significant degree of planning", they *may be* indicative of such.

34. We are also reminded by Miss Wilson that the sentencing judge at one stage in his remarks (page 2B of the transcript) said:

> "It was very unfortunate that [the applicant] and [the victim's] paths crossed when they did and it was not until that moment when he saw her that he formulated the intention to assault her sexually."

35. Counsel submits that that comment is more illustrative of an opportunistic encounter followed, than by some planning.

36. We are not convinced the instant case is a clear case that can be categorised by the factor "a *significant* degree of planning" as determinative of culpability. That being so, the categorisation of the case is as to culpability B, for it is not contended any other factors of culpability applied in the case. Nonetheless the pursuit of this victim was significant in a different way: he pursued her for some time and determined to attack her.

37. We next turn to the categorisation of harm. The judge started at Category 2, for he said that the victim was vulnerable because she was young, alone and it was dark (and, we would add, she was attacked in a relatively isolated area). Moreover he said that it was

a sustained incident. Whilst the facts of this case might not easily fall within the terminology of a further factor relating to harm of the victim being abducted, undoubtedly the victim was deliberately and forcibly removed from a more public place to a wooded area so that she was isolated even more - in itself a most terrifying ordeal for the victim. Then she was subject to the threat that a knife would be used upon her if she was not compliant. No knife was produced; but she was not to know how she was then to be treated. The judge, as we have said, indicated in his sentencing remarks that he determined there were elements of the case that were extreme in nature. Thus in his view it fell somewhere between the top of Category 2 and the bottom of Category 1. The guideline indicates:

> "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."

38. The judge, it would seem to us, was not placing this case firmly in Category 1. We find it unnecessary, therefore, to consider whether there were one or more elements that can be described as *extreme in nature*, for we agree with the judge's analysis due to the number of harm factors identified.

39. In a Category 2B and 1B offence this means that the cross -over range is of the order of nine or ten years. This was the basis for a single offence of rape. A was not only raped, but she was subject to other degrading sexual acts over and above the rape. Whilst it was entirely appropriate to make those crimes - serious in themselves - concurrent to the principal offence of rape to encompass the overall offending, it did require a substantial increase to the sentence on the principal offence to determine the appropriate overall sentence, albeit not increasing the principal offence by the full effect of any term

applicable to any other offence.

40. In our judgment the increase of sentence, even accepting an original starting point from Category 2B with a movement to the highest point of that range - thirteen years and a two-year extension period - cannot be criticised as manifestly excessive for this terrifying attack. The increase beyond such a position of three to four years with an extension, bearing in mind the other significant criminal offences, could not be criticised. There were no mitigating factors of any degree of weight of which the appellant could avail himself. Whilst he had no previous convictions for sexual offences, he has a not insignificant antecedent criminal record. He had consumed cocaine a little time before he committed these offences; this itself is a further aggravating factor specified in the guidelines. The pre-sentence report indicated, because of his stance at trial and subsequently, he showed little remorse or empathy - although that fact would additionally inform the judge and indeed this Court that this appellant was indeed a *dangerous offender*, rather than increase the sentence from any appropriate starting point. In those circumstances, whilst the sentences imposed would be regarded as being at the very highest end of the range, we dismiss this appeal for we do not determine them to be manifestly excessive.