[2020] EWCA Crim 1641
2019/03421/B1 & 2019/034212/B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 17th June 2020

B e f o r e:

LORD JUSTICE BEAN

MRS JUSTICE CHEEMA-GRUBB DBE

and

MR JUSTICE HENSHAW

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**R E G I N A**

**- v -**

**JAMES KIPPS-BOLTON**

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**Mr L Marklew** appeared on behalf of the Applicant

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**J U D G M E N T**
**(For Approval)**

Wednesday 17th June 2020

**LORD JUSTICE BEAN:**

1. On 16th August 2019, following a trial in the Crown Court at Warwick before Mr Recorder Butterworth and a jury, the applicant, James Kipps-Bolton, was convicted of two sexual offences: assault by penetration (count 1) and sexual assault (count 2). Both counts arose out of the same incident. He was sentence on count 1 to nine years' imprisonment and to a concurrent term of three years' imprisonment on count 2, making nine years' imprisonment in all.

2. The applicant renews his application for leave to appeal against conviction, following refusal by the single judge; and appeals against sentence by leave of the single judge.

3. The complainant, whose identity is entitled to protection pursuant to the Sexual Offences (Amendment) Act 1992, was a student in her first year at university. On the evening of Friday 25th November 2016, she went out for a meal and drinks with friends. She was on prescribed medication for anxiety and depression, and the day before the incident her medication had been changed.

4. On 26th November the complainant woke up in a bed in the applicant's home. He was a stranger to her. Her evidence was that she did not remember what had happened to get her there. Her last memory of the Friday evening was being on a bus with friends. A friend of the complainant, Lydia, gave evidence that during the early hours of 26th November she received a call from the complainant who was distressed. She indicated to Lydia that she had been separated from the people with whom she had been out and had no money to get home. Lydia heard male voices in the background during the phone call. A man came on to the phone and

offered to help. After some discussion, he said that the complainant could sleep on his sofa and that there would be no "funny business". That man was the applicant. He gave Lydia his phone number. At 1.37am on 26th November, Lydia sent him a text message thanking him for helping the complainant. He responded at 1.45: "She's going to sleep now".

5. Following the incident, the complainant spoke to Lydia again and to her brother. On Wednesday 28th November, she telephoned and attended the Blue Sky Centre Assault Referral Centre following advice from her GP. She spoke to a crisis worker and told them what had happened. She provided the applicant's telephone number. She said that the applicant had committed an assault by penetration on her and also another, less serious sexual assault.

6. The complainant was interviewed by the police on 16th December 2016.

7. The applicant voluntarily attended the police station for interview on 1st April 2017. During the interview he was asked to provide the police with his mobile phone. That was subsequently examined. Among the saved images were six of the complainant, taken between 2.41 and 2.45am on 26th November. They showed the complainant's vagina and torso. In one of the photographs the applicant's hand was touching the complainant's bottom. In another his fingers were penetrating her vagina. Those two matters were respectively count 2 and count 1 when the case went to trial.

8. During a second interview on 13th July 2017 the applicant identified the images as being of the complainant.

9. An analysis of the applicant's internet search history revealed a large amount of adult pornography, including visits to sites with videos and images of sexual acts being performed on

sleeping females. Those visits to sites were made in the months after the incident, that is between 14th January and 30th March 2017.

10. The prosecution relied at trial on the evidence from the complainant, including that she did not remember what had happened and that when she woke the next morning in the applicant's flat, he told her that they had had sex. The prosecution also had the supporting evidence which we have outlined from Lydia about the phone call shortly before 01.37 on the night in question, and the complaint to Lydia the day after the incident. There was also evidence from the complainant's brother about a phone call he received from the complainant on the day after the events in question. The prosecution also relied on the applicant's photographs of the complainant on the night in question and they applied to the Recorder to adduce evidence of the internet visits as evidence of misconduct or bad character under the provisions of section 98 of the Criminal Justice Act 2003.

11. The applicant gave evidence at trial. He denied that the complainant had been visibly drunk and incapable. He thought that she was calm, lucid and talkative. She asked him whether she could stay at his house as she could not get home. It had not been his idea, but he thought that it was the right thing to do. When they arrived at his flat, the complainant took off her top and performed oral sex on him, during which he inserted his fingers into her vagina. The complainant fell asleep, but when she woke later and saw him masturbating, she offered to participate. On being told that he was interested in pornography, she offered to pose while he took photographs of her.

12. He was asked why, in his first interview, he had not told the police about the photographs he had taken of the complainant. He said that this had been on legal advice.

13. He was convicted by the jury and sentenced by the Recorder to nine years' imprisonment on the count of assault by penetration, and to a concurrent term of three years for the sexual assault.

14. The first and most significant ground of appeal on which the renewed application for leave to appeal against conviction is made is that the learned Recorder should not have allowed the prosecution to adduce the sleeping pornography evidence (as we shall call it). Mr Marklew first argues that this evidence should not have been admitted because it was used to bolster a weak case. We do not agree that the prosecution case, without the disputed evidence, was a weak one. It did not rely simply on the testimony of the complainant, but also on the photographs taken of her by the applicant, and further, on the contents of her phone call to Lydia on the night in question, and on the fact that the applicant had said at 1.45am in a text message to Lydia that "she [the complainant] is going to sleep now" about an hour before he took photographs showing her apparently asleep. There was clearly a case to answer based on that evidence alone.

15. The next point taken about the sleeping pornography evidence is that the Recorder originally ruled (in the absence of the jury) that it was evidence of propensity to commit non-consensual sexual acts generally. That, potentially, would have been a significant misdirection had the jury been directed in those terms; but after hearing submissions from counsel, the Recorder gave a much more tailored direction of law in terms which, we understand, were agreed, telling the jury that they could, if they thought fit, rely on this evidence as demonstrating that the applicant had an interest in sexual activity with sleeping women. On that basis the evidence, in our view, was properly admissible. We do not agree with Mr Marklew's submission that its prejudicial effect outweighed its probative value. The jury were entitled to regard it as relevant and probative, and it was well within the discretion of the Recorder to allow them to evaluate it for themselves on its merits.

16. The next ground of appeal is that if the sleeping pornography evidence on the applicant's phone was to be admitted, the Recorder should at least have required the prosecution to omit those items whose titles indicated that they depicted acts of an incestuous or paedophilic nature. We do not think that the Recorder was required to instruct the prosecution to edit the material in this way. It does not appear that any specific reference was made to such items during the evidence or that reliance was placed on them by the prosecution.

17. The third written ground of appeal against conviction is that the Recorder was wrong to give the jury a section 34 direction on the adverse inferences which they could draw from the applicant's failure to mention the fact that he had photographed the complainant when he was first interviewed by the police. Mr Marklew did not include that in his oral submissions – rightly, in our view. But since it is there in the grounds of appeal, we will mention it briefly. The prosecution do not appear to have pressed for a section 34 direction on this point, but the Recorder was, nevertheless, entitled to give one. When he gave evidence, the applicant was cross-examined about his failure to mention the photographs – as well he might be. In those circumstances, the jury could properly, as a matter both of law and of common sense, hold that against him. The terms of the direction, once the Recorder had decided to give it, were unobjectionable. Accordingly, there is nothing in that ground.

18. In those circumstances, the renewed application for leave to appeal against conviction is refused.

19. We turn to the appeal against sentence, for which the single judge gave leave and on which we have heard submissions from Mr Marklew today. The definitive guideline for the offence of assault by penetration has two steps to determining the category range and the culpability level which is applicable to the relevant offence. The Recorder treated this as category 2A offending.

The basis on which it was categorised as category 2 was that in the Recorder's view the victim was "particularly vulnerable due to personal circumstances". As to culpability, there was the recording of the offence. Mr Marklew does not object to the description of the offence as culpability A; it is the category 2 to which he objects.

20. In passing sentence the Recorder said this:

> " You saw [the complainant] outside the nightclub. You saw that she was obviously and very seriously incapacitated, no doubt you thought that she was drunk. The truth was that she was mentally ill with anxiety and depression and was suffering from the effects of combining alcohol and her strong medication. You saw a sexual opportunity for yourself. I reject the notion and submission in written mitigation that you at any time wanted to help this young woman. I also reject for the same reasons that your offence was in any way opportunistic. You hid your true intentions when speaking to her friend, Lydia ...
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> … At no time, I am completely satisfied, did she flirt with you; at no time did she make any sexual approach to you but was completely incapable; was soon unconscious and utterly vulnerable in your bed. You then waited an hour. You have a sexual interest, a fetish in pornography which involves sleeping women. You took your opportunity to satisfy that fetish on this young woman. You photographed her whilst penetrating her vagina with your fingers and you touched her bottom in a way which I am satisfied was intended to display her anus to you.
>
> The following morning you lied to her, telling her that there had been sexual intercourse between you. – a lie which I am satisfied was intended to see whether you could encourage her to take the view that she might, therefore, have some sexual contact with you that morning, but of course she would not. That lie has preyed very heavily on her and has, I have no doubt, greatly increased the emotional harm and damage you have caused her.
>
> Your offences and lies have combined to shatter her self-confidence and her self-regard. Her years at university which should have been happy and rewarding became an emotional battle because of your conduct and your crimes. I have read her personal statements and observed her giving evidence. Her appearance has altered very obviously from the lively, young woman we all saw in her video recorded interview of 16th December 2016. …"

21. The Recorder then said that he had been sufficiently anxious about the case to consider adjourning it to obtain reports about dangerousness. He concluded that it was unnecessary to do so because a significant determinate term would be sufficient to protect the public. He then continued:

> "… I have taken the view that this offence – and I shall take the first offence, that of assault by penetration – as the principal offence for sentencing purposes falls into the category which provides for a starting point of sentence for that offence alone of eight years' imprisonment with a range of between five and thirteen years' custody because you, I am entirely satisfied, committed these offences upon a victim who was particularly vulnerable due to her personal circumstances; that is her mental illness, anxiety and depression which brought her to way she was that evening, outside the Neon nightclub."

22. He referred to the appellant's good character and his work for four years in a caring profession. He then continued:

> "In my judgment the starting point for your sentence which is reduced by the mitigating factor as I have referred to of your character, but it is increased by virtue of the fact that I have to sentence you for two offences. In the circumstances on count 1 there will be a sentence of nine years' imprisonment; on count 2 there will be a sentence of three years' imprisonment; … concurrent …"

23. We take the view that the Recorder was entitled to treat the complainant in this case as particularly vulnerable due to her personal circumstances. This is not dependent on the fact that she was suffering from a degree of anxiety and depression bordering on mental illness, although that did in fact lead to her suffering greater harm than might otherwise might have been expected. Even without that factor, it must have been plain to the appellant, when he saw the victim outside the nightclub, that she was "seriously incapacitated". The Recorder found that the

appellant got the complainant into his flat, waited for her to lose consciousness and then committed the offences. That combination of factors was sufficient, in our view, for the victim to be treated as particularly vulnerable and for the Recorder accordingly to have put the case into category 2A, with its starting point of eight years' custody.

24. We do not, however, consider that the Recorder was right to increase the sentence on the ground of there being a second offence. The offence of sexual assault consisted of the appellant touching the complainant's bottom in the same sequence of events, which lasted no more than a few minutes and included the assault by penetration (count 1). We do not think that, in reality, it added to the overall gravity of the incident. We therefore accept the submission that it was wrong for the Recorder to go above the starting point for a category 2A offence.

25. We shall therefore allow the appeal to the extent of quashing the sentence of nine years' imprisonment on count 1 and substituting a sentence of eight years' imprisonment on count 1. The concurrent sentence of three years' imprisonment on count 2 and the restraining order imposed by the Recorder remain unaffected.

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