IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA CRIM 1296

No. 202100492 A3

Royal Courts of Justice

Tuesday, 27 July 2021

Before:

LADY JUSTICE CARR
MR JUSTICE SPENCER

REGINA
V
JOSHUA BRIAN LOCKLEY

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REPORTING RESTRICTIONS:
THE PROVISIONS OF THE SEXUAL OFFENCES (AMENDMENT) ACT 1992 APPLY

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Miss. S. Mahmood appeared on behalf of the applicant.
The Crown were not represented.

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J U D G M E N T

NOTE: this is the final revised version of the judgment and replaces the unrevised version previously published in error, which has been withdrawn.

MR JUSTICE SPENCER:

1 This is an appeal against sentence brought by leave of the single judge.

2 On 21 January 2021 in the Crown Court at Stafford the appellant, who is now 32 years of age, was sentenced by his Honour Judge Gosling to a total of 7 years, 10 months' imprisonment. On count 1, controlling or coercive behaviour in an intimate or family relationship, contrary to section 76 of the Serious Crime Act 2015, the sentence was 2 years 10 months' imprisonment. On count 4, assault occasioning actual bodily harm, there was a consecutive extended sentence of 5 years' imprisonment, comprising a custodial term of 4 years and an extension period of 1 year. On count 3, assault occasioning actual bodily harm, the judge imposed no separate penalty, the penalty for that offence being reflected in the sentence on count 4.

3 The appellant entered guilty pleas to these three counts on 12 November 2020 on the second day of the trial. The judge allowed five per cent credit for his guilty pleas.

4 The grounds of appeal are, first, that the custodial term of 4 years on count 4 for the assaults was manifestly excessive and was inflated to facilitate a finding of dangerousness and the imposition of an extended sentence; second, that the judge was wrong to allow only five percent credit for the guilty pleas. There is also a complaint that the sentences should not have been made consecutive and that the judge gave inadequate consideration to the impact of the Covid-19 pandemic on prison conditions.

5 We are grateful to Miss Mahmood for her written and oral submissions. We also have the advantage of a detailed respondent's notice, as directed by the single judge, setting out the history of the proceedings relevant to the second ground of appeal (credit for plea) settled by prosecuting counsel at the trial.

6 Because there was also a charge of rape, count 2, in respect of which ultimately the prosecution did not proceed, this is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead to the identification of the victim of these offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

The factual background

7 Our summary of the facts of the offences is taken largely from the judge's sentencing remarks. The appellant met the complainant early in 2019. At first, their relationship was intense and healthy. He often stayed at her flat and they went out every night. However, from very early on, things deteriorated. The appellant let it be known that he wanted to resume a relationship with his ex-girlfriend with whom he had a 12 month-old son. The appellant carried on a sexual relationship with both women. The complainant was suspicious and extremely jealous. The appellant was also suspicious of the complainant seeing other men, although his fears were groundless. He became increasingly argumentative and abusive, especially in drink. He would drink to the point of passing out and would wake up affecting to recall nothing of the events, or apologising that he never meant it and it would never happen again.

8 The abuse turned to damaging items in the complainant's flat, and quickly escalated to violence. The complainant was still infatuated with the appellant. Despite his treatment of her, she endured his extreme mood swings, abuse and violence. The allegations of controlling or coercive behaviour were set out in a schedule of particulars of count 1 of the indictment. They spanned the period of seven months between April and November

2019. Examples included damaging items in her flat, punching a wall, shaking her out of bed, causing her to bang her head, and going into a rage when they encountered her ex-boyfriend whom the appellant beat up and chased. During that fight the appellant bit the complainant and later, back at the flat, threatened to kill her if she ever contacted her ex-boyfriend again. In a hotel in Stockport the appellant drank himself into oblivion and argued with the staff, smashed up a hotel room, urinated in the lift, and spat at the complainant, humiliating her during sex and calling her “disgusting”. The next day he vomited all the way back home on the journey, blaming her for ruining the weekend.

9 After a brief period of peace between them, the appellant got drunk, called the complainant a "slag" and a "slut" and kicked her on the floor before he collapsed drunk. A few days later he accused her of sleeping with other men and smashed the entire contents of her flat. He hit her in the face, broke a plate over her head and blamed her, calling her "a fucking mess" who spent the whole time crying and would not have sex because she was seeing other men. She hid her phone to provide herself with a lifeline.

10 When he told the complainant he would end their relationship, she welcomed it, which led to pathetic pleas by the appellant to continue the relationship, and wild expressions of affection. She was to tell the police later that she knew the relationship was not normal but had no idea how to get out of it and was terrified of what would happen if she left him. On one occasion, the appellant demanded her car keys so that he could visit his son. She refused because the appellant could not drive. He hit her in the face and threatened to throw her off the balcony. Her response was, "I'm sick of all the arguing and fighting. Go on. Throw me off."

11 When they went on holiday to Morocco, the appellant was obsessed with the idea that she was looking at other men and showing off in her swimsuit. There were repeated incidents of violence and abuse. In one such incident he fractured her finger. He blamed her for ruining the holiday. On the flight out he had got very drunk at the airport and had a blazing row with her, throwing her down a flight of stairs, which led to the police becoming involved. She put the police off for fear of worse repercussions. When they returned to England, on the drive home he threatened to grab the wheel of the car and kill them both if she breathed a word about his treatment of her.

12 During the relationship, the complainant was using the contraceptive pill. The appellant wanted a child. He emptied her pills down the lavatory. When she resisted attempts to have sex, he beat her up and blamed her for cheating on him.

13 All these matters formed the subject matter of count 1, controlling or coercive behaviour.

14 The assault in count 3 took place on 3 November 2019. He punched the complainant full in the face which left her with a large bruise to her face and eye. He forbade her from leaving the flat for a week, knowing that the injury was so obvious that it would lead to questions being asked. She had to lie to her employers because he would not let her go to work, to make sure that he was not cheating on him at home. When he himself was at work, he compelled her to phone him regularly and show him on her phone camera what she was doing in his absence. Throughout this period, he was still having an affair with his ex-girlfriend. When the complainant challenged him about this, he said, "Yes, I cheated on you." The appellant told him to leave. He refused, telling her, "I'm not going back there. She's dog shit. You're dog shit and I'm better than you both."

15 Count 4 was the most serious of the assaults. It took place on 8 November, five days after the assault in count 3. The complainant had become pregnant. She told him she was considering a termination. He went into a rage. His suspicion was that she was having

an affair and this increased his suspicion. She was so frightened of him that she spent the night in the bathroom. He was shouting through the door and threatening to kill her. The next day she hid his door key so that he would not be able to get back into the house after work. He went into a rage and put his fist in her stomach. He threatened to kill the baby. She was so terrified that she gave him the key. He called her a "fucking liar", then kicked her twice in the stomach before leaving for work. She called the police. She was taken for a medical examination because she was bleeding. It was feared that she had lost the baby, but fortunately, she recovered and the baby was unharmed.

16 The appellant was arrested later that day. When interviewed about the two specific assaults and the history of controlling and coercive behaviour, the appellant denied all the allegations.

17 His arrest for the present offences did not deter him. Whilst on bail, he breached his bail conditions by contacting the complainant on three occasions in March 2020, on each occasion beating her up, abusing and intimidating her. For these assaults on 18, 20 and 30 March he was sentenced on 8 April by the magistrates to a term of 15 weeks' imprisonment, suspended for 12 months, and a restraining order was made. Between 18 and 21 April he breached the restraining order. On 5 June the magistrates activated the suspended sentence in full, imposing a further 8 weeks' imprisonment, consecutive, for the breach offence, making a total sentence of 23 weeks.

18 There was a victim personal statement from the complainant, dated 15 October 2020. She had lost her job through non-attendance and poor performance, attributable to the pressure she had been under through the appellant's behaviour. On one occasion she had tried to take her own life. Even in October 2020, nearly a year after the last assault, she was still taking medication to help her sleep and was suffering from nightmares. She had lost two and a half stone in weight during the relationship through the emotional stress she endured. She was petrified of what the appellant would do when released from custody. During the police investigation, he had continually asked her to retract her statement. She described the complete change in her life since meeting the appellant. She had no confidence, she hated herself, she did not trust her own family or friends. Because she lost her job, she had got into debt and had nearly lost her home.

19 The appellant had a history of abusive relationships with women and had previous convictions for violence. In August 2012 he was made the subject of a community order with a supervision requirement and an unpaid work requirement for offences of battery and criminal damage. He had punched, kicked and bitten his girlfriend and damaged her car. In January 2013 he was made the subject of a further community order with supervision and unpaid work requirements for offences of battery and criminal damage. In May 2016 he was sentenced to 26 weeks' imprisonment for assault occasioning actual bodily harm. At the conclusion of a similar abusive relationship, he tried to reconcile with that girlfriend, but, in a heated argument, strangled her until she was passing out. He then punched her in the face before punching himself and claiming to the police that it was she who had assaulted him.

20 There were character references from the appellant's father and from a long-standing family friend which showed a different side to the appellant They referred to the difficulty he had faced in coming to terms with the deaths of his mother and his grandmother, and spoke of his remorse.

21 There was a pre-sentence report dated 12 January 2021, which painted a very different picture of the appellant’s attitude to his offending. Despite his guilty pleas, the appellant was still suggesting that the complainant's allegations were malicious and that she was

seeking revenge for his having sexual relations with his ex-partner. He claimed that the complainant had physically abused him, and that he was in fear of her rages. He lacked any victim empathy, he minimised his actions and blamed the complainant, saying the allegations were outrageous. Despite the evidence of his past convictions, which demonstrated that he had displayed violent behaviour towards two previous partners, he maintained that he was not an angry person and did not inflict any form of physical violence on his partners. He viewed himself as the victim. It was the view of the probation officer that the present offences were indicative of an established pattern of behaviour. The appellant had a complete disregard for the emotional and physical harm he caused the complainant. It demonstrated his attitude of male entitlement. The appellant was assessed as posing a high risk of serious harm to known adults and to future intimate partners. He was also assessed as posing a medium risk of emotional and psychological harm to children witnessing his domestic violence.

The history of the proceedings

22 In view of the second ground of appeal, challenging the very limited discount for plea, it is necessary to set out briefly the history of the proceedings. Miss Mahmood takes no issue with the detailed chronology in the respondent's notice.

23 On 5 June 2020 the appellant was sent by the magistrates for trial at the Crown Court. We note that the Better Case Management form completed at that hearing indicated that all the offences were denied: "Did not happen." The first appearance in the Crown Court was on 3 July 2020. The appellant entered not guilty pleas to all four counts, which at that stage included the allegation of rape. A trial date in November 2020 was identified. At a pre-trial view on 29 October 2020 the November trial date was confirmed and all the indications were that it was a definite trial on all counts.

24 On the first day of the trial, 11 November, the jury were sworn and the case was opened. The complainant had not attended court that morning but had been warned to attend in the afternoon. As it was, there was no prospect of her being reached in cross-examination that afternoon, so she was sent home and warned to attend the following day. On the afternoon of the first day, her ABE interview was played to the jury as her evidence-in-chief, and the case was adjourned overnight.

25 It is apparent from the respondent's notice, and Miss Mahmood confirmed, that during the first day of the trial she indicated to prosecuting counsel that if the prosecution were prepared not to proceed with the count of rape the appellant was likely to plead guilty to the remaining counts on the indictment. Because that proposed resolution required prosecuting counsel to take instructions at a senior level from the Crown Prosecution Service, no decision could be made that day. This, we note, was the first time any such proposal had been made on behalf of the appellant. It was the first time any indication had been given, even conditional, that guilty pleas would be entered. The follow morning it was confirmed that the proposed course of action was acceptable to the prosecution. The appellant was re-arraigned on counts 1, 3 and 4, and pleaded guilty. The jury returned formal verdicts of guilty. The jury were discharged from returning a verdict on the count of rape, and a formal verdict of not guilty was entered. Sentence was adjourned to 21 January 2021 for the preparation of a Pre-sentence Report in relation to the issue of dangerousness.

26 At the hearing on 21 January the judge did not require the case to be opened again. He had heard a full opening at the trial.

The judge’s sentencing remarks

27 In passing sentence, having recited the facts, the judge observed that it was only when the relationship ended that the complainant discovered she was the last of the appellant's girlfriends to be treated in exactly the same way. The appellant, the judge said, was a very large, well-built man, who maintained his physique by regular work-outs at the gym and prided himself on that as a means of controlling his partners. The judge referred to the appellant's convictions for assaults on two previous girlfriends. Both those women were frightened and intimated by his behaviour, which was characterised by extreme abusive possessiveness and jealousy. The judge observed that by the time of the present trial, the defendant was subject to two lengthy restraining orders, both of which he had breached.

28 The judge considered the Sentencing Council Guidelines for intimidatory offences. In relation to count 1, controlling or coercive behaviour, he was satisfied that the case fell at the very top of the range in category 1, justifying a sentence close to the five-year maximum.

29 Turning to the assaults, the judge considered the relevant Sentencing Council guideline. Count 3 involved a significant injury, as the photographs taken five days later showed. The offence was aggravated by the domestic context in which it was committed in the complainant's own home, and by the steps he took to make sure she kept away from the gaze of others. His previous convictions were also an aggravating factor. The judge accepted, however, that in itself, the assault in count 3 was a category 2 offence because there was no factor of higher culpability.

30 By contrast, the judge was satisfied that the assault in count 4 was a category 1 offence and at the top of the range. The injury had to be regarded as very serious. The judge observed that in assessing harm he was required to have regard to the harm which was intended or might foreseeably have resulted. The appellant brutally kicked the complainant in the stomach, having stated his intention to kill the baby, something he plainly foresaw and meant. She suffered bleeding. She did not lose the baby, but the potential harm was severe. His culpability was increased, the judge said, because he delivered the blows with a shod food and immediately went to work, leaving the complainant alone and injured. The judge noted that the psychological effect of all this on the complainant had been profound, as her impact statement had demonstrated. She had come close to taking her own life. The judge considered that count 4 merited a sentence beyond the upper end of category 1, which was 3 years, and called for a sentence of 4 years' imprisonment.

31 The judge then considered the question of dangerousness, counts 3 and 4 both being specified offences. The judge referred to the many incidents of violence and intimidation towards three girlfriends, all arising from the appellant's ability at first to captivate a woman's interest and then to subject her to prolonged psychological and physical abuse. The judge had no hesitation in concluding that the appellant presented a significant risk of serious harm occasioned by the commission of further specified offences, in particular towards women with whom he was in a relationship.

32 The judge observed that his conclusion was reinforced by the pre-sentence report. The appellant had no appreciation at all of how or why he behaves as he does. He denies it and blames his partners. That attitude, the judge said, is delusional and adds to the risk. The judge had to assess the custodial term of the extended sentence which was imposed. The maximum sentence for assault occasioning actual bodily harm was five years' custody. In order to pass an extended sentence, the aggregate custodial term of the sentence attracting such an order would have to be four years, at least. The judge was satisfied that it was appropriate to aggregate the offending in the two counts of assault. He allowed credit of approximately five per cent for his very late pleas of guilty and only when he knew that the complainant had come to court to give evidence and after her evidence-in-chief had been

played to the jury. He took into account totality. The appropriate sentence for the assaults was four years. There would, therefore, be an extended sentence of 4 years on count 4, reflecting the two assaults, with an extension period of 12 months.

33 In respect of the offence of controlling or coercive behaviour, count 1, the judge considered that the appropriate sentence, allowing for totality would have been 3 years. With a reduction for the very late guilty plea the sentence would be 2 years 10 months. The total custodial term was, therefore, 6 years 10 months with an extended licence period of 12 months.

The first ground of appeal – excessive sentence for assault, count 4

34 On behalf of the appellant, Miss Mahmood argues, first, that in respect of count 4 the judge was wrong to conclude that the complainant was particularly vulnerable due to her pregnancy and for that reason the judge wrongly put the offence in category 1 with greater harm. Miss Mahmood submits that the complainant was in the early stages of pregnancy and, despite that, showed strength of character in the text messages exchanged between herself and the appellant. Miss Mahmood submits that the injuries the complainant actually suffered were not serious within the meaning of the guideline, as they did not leave any long-lasting impact. She submits that the judge imposed a sentence on the basis of his own assessment of the facts, which was not borne out by the evidence. She submits that the judge contrived to arrive at a sentence of 4 years on count 4 so as to be able to impose an extended sentence which would not otherwise have been available.

35 We wholly reject this latter suggestion. We think the judge was fully entitled to impose a sentence of 4 years on count 4, reflecting the criminality of the two separate assaults in counts 3 and 4. Count 3, it is conceded, was a category 2 offence, with a starting point of 26 weeks' custody and a range up to 51 weeks. In itself, with the aggravating factors, it amply justified a sentence of at least 12 months after trial. Count 4 was, in our view, plainly a category 1 offence, for the reasons the judge explained. There was greater harm because the judge was entitled to conclude on the facts that the complainant was particularly vulnerable because of her personal circumstances. The judge rightly noted that the statutory definition of harm embraces not only harm caused but also "harm which the offence was intended to cause or might foreseeably have caused": see section 143 Criminal Justice Act 2003, now re-enacted in section 63 of the Sentencing Act 2020. By kicking the complainant in the stomach and expressing his intention to kill the baby she was carrying, the appellant's actions plainly carried a high risk of serious harm. Fortunately, she did not lose the baby, but she could easily have done so. It was not simply a case of assaulting a woman who happened to be pregnant. The assault was specifically directed at her vulnerability, the unborn child.

36 In this regard, we have in mind the approach of this court in *R v Angliss* [2019] EWCA Crim 1815; [2020] 1 Cr App R (S) 37, where a similar issue arose. This court concluded that a woman who was four to six weeks pregnant was not necessarily and invariably to be regarded as particularly vulnerable for the purposes of the Sentencing Guideline. It was a determination to be made in the circumstances of each case. In not dissimilar circumstances, however, on a charge of section 20, inflicting grievous bodily harm, the court concluded that the sentencing judge in that case had been correct to assess the assault as a category 1 offence under the guideline.

The second ground of appeal- inadequate credit for plea

37 The second ground of appeal is that the judge wrongly took the view that only minimal credit could be afforded to the appellant for his guilty pleas, "…as he waited to see if the

complainant would attend before offering pleas" (quoting from the grounds). Miss Mahmood contends in her written submissions that this was a factually incorrect premise, the offer of resolution having been made on the first day of the trial before the complainant had attended court. The Crown were obliged to discuss the offer with the reviewing lawyer and with the complainant herself. That was not done until the complainant attended court on the morning of the second day of the trial. Although her ABE interview had been played to the jury on the afternoon of the first day, that was simply so as to not delay the trial if the offer of pleas was not accepted.

38 As Miss Mahmood acknowledged in her oral submissions when the court put the point to her, the judge did not in fact say that the appellant "waited to see if the complainant would attend before offering pleas". What he said, quite correctly, was that the pleas had not been "entered" until the appellant knew that she had come to court to give evidence and after her evidence-in-chief had been played to the jury.

39 In the respondent's notice prosecuting counsel sets out the detail of how the offering and entering of the guilty pleas came about. Miss Mahmood accepts that the first overt offer of guilty pleas came during the lunchtime adjournment on the first day of the trial after the jury had been sworn and after the case had been opened albeit before any evidence had been called. It is accepted by the prosecution that during the course of the first day of the trial the judge was informed that a resolution was possible but that instructions from the Crown Prosecution Service and the views of the complainant were awaited.

40 We are unimpressed by this ground of appeal, although Miss Mahmood developed the point attractively in her submissions. We bear in mind that section 144 of the Criminal Justice Act 2003 provides that in determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings, a court must take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which the indication was given. The fact is that until the appellant had heard the case against him opened to the jury, no offer of any guilty pleas had been made. The trial had begun. Under the Sentencing Council Guideline on reduction for a guilty plea, it is stated that normally a maximum of ten per cent credit will be allowed for a guilty plea indicated on the first day of trial and that credit should normally be decreased further, even to zero, if the guilty plea is entered during the course of the trial. It was open to the appellant to enter his guilty pleas on the first morning of the trial. The judge was entitled to infer that his decision not to do so was motivated, at least in part, by the appellant's hope that the complainant might not attend to give evidence. That would have been entirely consistent with his conduct and denials throughout. She did attend on the first day, albeit only in readiness to give evidence if required and, on the second day, to be consulted about the proposed course of action on the count of rape. Only then were his guilty pleas entered.

41 We cannot see that the judge was in any way in error in reducing credit for plea here to five per cent. Part of the relevant background was that the appellant had denied his guilt throughout the proceedings, even as recently as the pre-trial review two or three weeks earlier, no doubt increasing the anxiety of the complainant that she would be required to give evidence in the face of cross-examination. Indeed, Miss Mahmood confirmed and acknowledged in her oral submissions that the complainant had been required to watch her ABE interview at some stage prior to the trial so as to be ready for cross-examination, had the guilty pleas not been entered. That, we imagine, must have been a distressing experience for her, having to re-live the events which she was describing.

42 We emphasise that there is a distinction between "offering" guilty pleas on a conditional basis and "entering" or "indicating" those pleas on an unequivocal basis. It is the latter

which is the critical factor which is required in order to obtain discount in accordance with the guideline (see, for example, *R v James* [2011] EWCA Crim 2630).

Other grounds of appeal

43 Finally, although they are not advanced as separate grounds of appeal, Miss Mahmood asserted in her written submissions that the judge was wrong to make the extended sentence for the assaults consecutive to the sentence for controlling or coercive behaviour because those assaults were effectively part of the allegation of that controlling or coercive behaviour. She also submitted that the judge did not properly consider the impact of serving the sentence during the Covid-19 pandemic.

44 We have considered those submissions, even though they were not pursued in oral argument before us today. We reject both those submissions. Although the judge did not expressly mention the pandemic in his sentencing remarks, we have no doubt that Miss Mahmood would have referred to it during her plea in mitigation. The judge, sentencing in January 2021 at the height of the pandemic, would have had the guidance in *R v Manning* [2020] EWCA Crim 592 very much in mind. However, the more serious the offence and the longer the sentence, the less the pandemic can weigh in the balance in favour of a reduction. The impact is likely to diminish as the pandemic recedes: see, for example, *R v Whittington* [2020] EWCA Crim 1560. In keeping the custodial term as low as he did, and in reducing the length of the sentence on count 1 for totality, we are satisfied that ample allowance was made for the impact of the pandemic.

45 As to whether the judge was wrong to make the sentences consecutive, the two assaults came at the very end of the period of the relationship during the last week, whereas the controlling or coercive behaviour set out in the particulars of count 1 covered the period 1 May to 8 November 2019. We note, for example, at paragraph 13 of the particulars that it is stated in terms that there were physical assaults on the complainant in order to cause her to spit out pills on two occasions between 1 May and 8 November, other than those specified in counts 3 and 4. In other words, the particulars made it clear that counts 3 and 4 were not to be regarded as part of the course of conduct in count 1. In any event, the criminality in counts 3 and 4 was confined to those two assaults. The lengthy course of conduct described by the judge in his sentencing remarks, which we have recited in this judgment, plainly required a significant consecutive sentence in order to reflect the overall criminality of the appellant's offending against the background of similar conduct towards two previous girlfriends.

Conclusion

46 In our view, this was a very bad case of its kind. The sole issue is whether the total custodial sentence of 6 years,10 months was manifestly excessive. We are quite satisfied it was not. It was just and proportionate in all the circumstances. The judge set out his reasoning with admirable clarity.

47 For all these reasons, and despite Miss Mahmood's able and tenacious submissions, this appeal against sentence is dismissed.

CERTIFICATE

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