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IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
[2023] EWCA Crim 1344



No. 202302116 A3

Royal Courts of Justice

Tuesday, 24 October 2023

Before:

LORD JUSTICE WILLIAM DAVIS  
MR JUSTICE HOLGATE  
HER HONOUR JUDGE DE BERTODANO

REX

v

JAMIE RUSHTON

**REPORTING RESTRICTIONS APPLY**  
**(Sexual Offences (Amendment) Act 1992)**

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Transcript prepared from digital audio by  
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**J U D G M E N T**



MR JUSTICE HOLGATE:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's life time, 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. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.
- 2 On 9 December 2022 in the Crown Court at Wood Green before His Honour Judge Ezzat, the applicant changed his plea to guilty on one count of sexual assault contrary to section 3 of the Sexual Offences Act 2003. On 30 May 2023 he was sentenced by the same judge to a term of 18 months' imprisonment. A second count of voyeurism was ordered to lie on the file in the usual terms. He applies for an extension of time of 27 days in which to renew his application for leave to appeal against sentence following refusal by the single judge. The issue of whether time should be extended depends upon whether we consider the proposed appeal to be arguable.
- 3 The applicant and the complainant were colleagues working at a veterinary practice. On 24 June 2017 they and other colleagues attended an annual conference organised by their employer. The events ended in a black tie dinner. The applicant was a veterinary surgeon. The complainant had started out as a receptionist at the practice but she undertook training and became a veterinary nurse. The two of them worked together. They had a close and friendly working relationship.
- 4 On the night of 24 June, the complainant attended the black tie dinner. During the course of the evening she drank heavily. She did not recall the evening coming to an end. She next remembered waking up on the morning of 25 June in the applicant's bed, still wearing the red dress that she had worn the evening before. He was sitting on the opposite side of the room. The complainant concluded that she must have been drunk at the end of the evening and that the applicant had given up his bed for her. She went to breakfast with her friends and gave little further thought to the events of that night.
- 5 In 2019 the applicant's then wife found both moving and still images on a memory stick. These showed a woman in a red dress passed out or asleep, and the applicant touching her and adjusting her body so that he could see and feel her genitalia. It then took two years for the police to be able to establish who the person in the red dress was. It was the complainant.
- 6 The applicant was charged in relation to his behaviour on 2 February 2022. He initially denied the offence. He said that he had derived no sexual gratification from his actions and had reasonably believed that the complainant consented to his behaviour. He subsequently pleaded guilty three days before the date set for his trial, on a basis which asserted that he and the complainant had been involved in a consensual sexual relationship. That led to a *Newton* hearing, which took place on 15 May 2023. The judge rejected the applicant's contentions.
- 7 The applicant was aged 45 at sentence. Before this offence he was of previous good character. We have read the pre-sentence reports. The author said that the applicant is very articulate. He presents as an intense character and had bombarded her with huge amounts of information. It was clear that he was extremely anxious and did not want to be perceived as a sexual predator. However, in the view of the probation officer he intellectualised issues and she was not sure how much he truly understood the impact of his actions.

8 The author referred to images which have been found on devices belonging to the applicant. The applicant maintained that the photographs were not for sexual gratification. The author disagreed. The PSR also referred to the applicant's obsessive compulsive disorder and we have read a series of psychological and psychiatric reports in relation to the applicant.

9 In his sentencing remarks the judge referred to the delay in the case and said that this was attributable to the time it took for the images to be discovered on the applicant's phone, and for the victim to be identified. Any further delay thereafter had resulted from the way in which the applicant had conducted his defence.

10 In relation to the mitigation advanced on the applicant's behalf, the judge drew particular attention to the insight he had gained in listening to the applicant's evidence at the *Newton* hearing. He said that he did not detect any real remorse in the applicant. This was in part because he got the impression that the applicant did not really think he had done anything wrong. The guilty plea was an acceptance he had broken the law, but it was not an acceptance that what had happened was wrong. The judge referred to the serious effect the prosecution had had on the applicant's career, but he said that this was simply the result of his own conduct.

11 The judge then said this:

"You said in your evidence that you did not want to commit a sexual assault, you wanted to capture a moment of someone you cared deeply for. It is clear from your evidence that you remain in denial about your offending. Your basis of plea accepts that you gained sexual gratification from these actions; this was previously denied by you.

What provides a telling insight in relation to your behaviour are the other images that were discovered on your device; there are many images of women covertly filmed at work, in shops or on public transport; pictures of women's bottoms. You were not capturing a moment of someone you deeply cared about when you were taking those photographs of colleagues or strangers whilst they went about their daily lives."

12 The judge then explained that the offence fell within category 2A, and how he arrived at the length of the custodial term. He made it clear that he did not hold in any way against the applicant the outcome of the *Newton* hearing. On the question of whether the sentence should be suspended, the judge said that whilst the applicant was a man of previous good character, the offending was so serious that only an immediate term of imprisonment was appropriate.

13 The grounds of appeal, initially settled by counsel, raise two issues. First, it is said that in rejecting the applicant's personal mitigation, the judge failed to have regard to the absence of any further offending over a five year period since the offence took place, together with the evidence from psychologists of issues affecting the applicant and needing to be addressed, and which would be better addressed in the community. Second, it is submitted that the sentence should have been suspended.

14 In refusing leave to appeal against sentence, the single judge said this:

- "1 The sentence of 18 months' imprisonment is not challenged. What is challenged is the judge's decision to make it an immediate sentence rather than suspending it.
- 2 There clearly was an amount of material, including the psychological reports, bearing on the issue of suspension of sentence. The applicant was also of previous good character. I would not necessarily say that the judge would have been positively disentitled from imposing a suspended sentence but that is not the issue. The issue is whether he was arguably disentitled from imposing an immediate custodial sentence.
- 3 The applicant took gross advantage of the intoxicated complainant. The judge, who had seen and heard the applicant give evidence at the *Newton* hearing, assessed no true remorse and no true acceptance that he had done wrong. His motivation was selfish sexual gratification, the victim being so intoxicated as to be completely helpless and unknowing. The judge reviewed the facts. He reviewed the psychological evidence. The judge expressly took account of the relevant Guideline relating to community and suspended sentences. In all the circumstances, the judge's evaluative conclusion that the offending was so serious that only an immediate term of imprisonment was appropriate was, in my view, one reasonably and properly open to him. There is no sufficient basis for an appellate court interfering with that decision."

15 The applicant has subsequently submitted to the court grounds of appeal of his own composition in support of his renewed application. They are 31 pages long, and somewhat diffuse. We have considered them. In summary the applicant advances the following four points:

- (1) The sentence should have been suspended for the reasons set out in his document;
- (2) His personal mitigation was either overlooked by the judge, or undervalued;
- (3) The circumstances and conduct of the *Newton* hearing infringed his right to a fair hearing. The judge erred by allowing hearsay evidence to be introduced;
- (4) The terms of the sexual harm prevention order infringed his rights under Article of the ECHR and the restrictions are not proportionate.

16 Those third and fourth grounds are entirely new grounds of appeal. According to *R v James* [2018] 1 WLR 2749 they should have been the subject of an application to amend the notice of appeal, with sufficient reasons identified to justify allowing such amendments. We have, nonetheless, considered whether either or both of those grounds are arguable.

17 As regards ground 3, this is misconceived. The judge made it clear in his sentencing remarks that he did not hold the fact that the applicant was unsuccessful in the *Newton* hearing against him. That did not prejudice him as regards the sentence imposed. In any event, the judge's findings on lack of remorse are not open, sensibly, to challenge.

- 18 Ground 4 relates to the sexual harm prevention order which lasts for a period of 10 years. It was considered by the judge at the sentencing hearing. Leading counsel who then appeared for the applicant made limited submissions about only two of the provisions in the draft order. The judge accepted those submissions in the applicant's favour. It does not appear that there was any other criticism by counsel of the terms of the order. Nevertheless, we have reviewed those terms. They are provisions which frequently appear in orders of this nature. They arose out of the specific circumstances of this offence to which the applicant pleaded guilty, together with the images to which we have referred. In our judgment there is no conceivable basis upon which it could be argued that any of those terms were disproportionate, or otherwise inappropriate.
- 19 That simply leaves the first two proposed grounds of appeal. Despite the extensive submissions which the applicant has put forward in support of those arguments, we consider that there is no merit in them, essentially for the reasons given by the single judge. Accordingly, this renewed application for leave to appeal against sentence, together with any informal application for leave to amend the notice of appeal, are refused.

LORD JUSTICE WILLIAM DAVIS: Thank you very much.

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**CERTIFICATE**

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This transcript has been approved by the Judge.