IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 30

No. 202303157 A5

Royal Courts of Justice

Tuesday, 16 January 2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE CHOUDHURY
HER HONOUR JUDGE ANGELA RAFFERTY KC

REX

V

HENRY SMITH

REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992

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Mr S. J. Gosnell appeared on behalf of the Appellant.
The Crown were not represented.

J U D G M E N T

MR JUSTICE CHOUDHURY:

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Accordingly, no matter relating to the victim 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 section 3 of the Act.

2 On 7 December 2022, in the Crown Court at Leicester before HHJ Brown, the appellant, then aged 39, pleaded guilty to burglary (count 1) and possession of a class B drug (count 2). He pleaded not guilty to rape (count 4) and to one count of controlling or coercive behaviour in an intimate or family relationship, contrary to section 76(1) and (11) of the Serious Crime Act 2015 (count 5).

3 On 15 August 2023, on the second day of his trial in the Crown Court at Leicester, before HHJ Watson, the appellant (then aged 40) pleaded guilty on re-arraignment to counts 4 and 5. He was sentenced on the same day by HHJ Watson to 11 years on count 4, three years consecutive on count 5, two years and five months for burglary to run concurrently and a further one month to run concurrently on count 2. This offending took place during the operational period of a suspended sentence of 10 months which the judge activated in full consecutively. The total sentence was, therefore, 14 years and 10 months' imprisonment.

4 The appellant appeals against sentence with leave of the single judge.

5 The background to this matter can be briefly stated as follows. Between 16 March 2019 and 1 November 2021, the appellant engaged in controlling and coercive behaviour against his then partner (to whom we shall refer as "C"). Shortly after their relationship commenced, he began to control C through fear of violence, particularly when under the influence of alcohol. He was verbally abusive and made racial and homophobic comments about members of her family. The appellant threatened to set her eldest son's car alight and was physically abusive. He spat at C and struck her with items, including an iPad and mobile telephone. There were occasions when he stamped on her back and bit her nose. When C sought refuge in her daughter's bed, he would go and demand she return to their bedroom. C lost weight and had to reduce her working days from five to one per week due to the effects of his behaviour.

6 Between 30 September and 1 November 2021, the appellant raped C. He dragged her behind a bus stop, groped her and then vaginally raped her. All of this was done in broad daylight. The appellant caused additional humiliation by removing C's trousers as she waited to get on an arriving bus.

7 Some months later, on 11 June 2022, the appellant broke into C's home. C left the property around 4 in the afternoon and returned in the evening to find that the fridge/freezer had been pulled away. Her bedroom clothes rail had been tipped over and clothes were left all over the floor, £80 cash had been taken from a chest of drawers and £100 that had been in a small safe. A jacket worth approximately £440 belonging to C's son had also been stolen. The appellant was the immediate suspect. He was found in possession of a small quantity of cannabis upon his arrest. It was while speaking with the police in relation to this offence that C made disclosures about the appellant's offending behaviour towards her. He was subsequently arrested for the offences of rape and coercive and controlling behaviour.

8 The appellant pleaded guilty on the second day of the trial. C's video-recorded evidence had already been played to the jury and C was in attendance at court ready to give evidence and be cross-examined.

9 The appellant had an appalling record with 34 convictions for 64 offences spanning from August 1999 to June 2021. His relevant convictions included offences for racially aggravated harassment in 1999, common assault in 2000 and 2019, dwelling burglary in 2004, dwelling burglary (2005), theft from a dwelling (2006), battery (2007, twice in 2017 and twice in 2018), assault occasioning actual bodily harm (2013), handling stolen goods (2017), affray (2018) and sexual assault in 2021.

10 In sentencing the appellant, the judge considered the guidelines for reducing the sentence for a guilty plea. He noted that the maximum for a guilty plea on first day of trial is 10 per cent. Thereafter, the Guidelines provide:

> "The reduction should normally be decreased further, even to zero, if the guilty plea is entered during the course of the trial."

The judge did not give any credit for guilty plea. He went on to suggest that the advantage to the appellant "has been the acceptance of your plea by [the Prosecution] offering no further evidence on three other rape allegations"**.**

11 As to count 5, the judge found the offending under that count alone would fall within the high culpability bracket with high harm because his conduct persisted over a long period that caused C to fear violence on many occasions. The starting point, therefore, was two and half years. This was aggravated by, amongst other matters, the appellant's previous convictions and in particular his apparent hostility towards C's family members on account of their race and sexuality. The judge stated that on count 5 alone, a sentence of at least three years would be justified. (The transcript says that the judge actually said “two years” but that would appear to be a slip given the starting point identified and the eventual sentence passed.)

12 Count 4 is described by the judge entirely justifiably as a "particularly nasty offence". The judge found it to be a category 2 offence given the humiliation and degradation of the victim. The appellant's culpability was assessed to be high (category A) on account of the appellant's previous violence towards C. The judge noted that this was an offence committed in the context of sustained domestic violence over many months. The starting point was, therefore, considered to be 10 years, with a range of between nine and 13 years. This was aggravated by his previous convictions which included sexual assault.

13 As to the burglary offence (count 1), the judge noted that this was the appellant's third conviction for burglary. There had been previous convictions for burglary in 2004 and 2005. That meant that unless there were exceptional circumstances, the minimum sentence of three years would be imposed with any credit for plea not to reduce the sentence to below 80 per cent.

14 The judge considered totality. He determined the rape offence to be separate and distinct from the offence of controlling and coercive behaviour as these offences were different in kind and in nature. Accordingly, the judge considered consecutive sentences were appropriate. However, in order to make the overall sentence proportionate, the sentence for burglary was to run concurrently.

15 There are three grounds of appeal. The first is that the judge erred in not allowing any credit for plea. The second is that there was also an element of double counting as to counts 4 and 5, in that previous violence was a factor increasing the culpability for rape. It was also a factor in the offence of controlling and coercive behaviour, and the judge, having decided on the harm categorisation for rape, ought to have reduced the sentence for count 5. The third ground is related to the second; it is that insufficient regard was had to totality.

16 These grounds were developed before us today by Mr Gosnell of counsel who also appeared below. We are grateful to him for his careful and concise submissions.

17 We deal first with the credit for plea. This was a plea entered at a very late stage on the second day of the trial in circumstances where the principal witness for the prosecution had had to attend court and endure the anxiety of waiting to give evidence and to be cross-examined before being told of the plea. The guideline permits zero credit to be given for plea in the course of the trial. Whilst some judges might consider that some credit is appropriate where the key witness is relieved of the need to give evidence, there is no error of principle in the judge awarding zero credit in the particular circumstances of this case. That conclusion is not undermined by the judge's reference to the benefit to the appellant of entering a plea. It is clear from the judge's remarks that the judge had decided against credit "applying the guidelines" and by reference to the fact that the plea had not obviated the need for C to attend court. Those matters alone would justify the judge's approach to credit, irrespective of the judge's subsequent remarks about the benefit to the appellant.

18 As to the second ground, we are not persuaded that there was any double counting. It would have been inappropriate to disregard or exclude the existence of previous violence in determining culpability for the rape. Moreover, it is clear from the way in which the rape guidelines are framed that any significant previous violence against a victim of rape, even a single incident, could elevate the culpability to category A. However, as is clear from the facts of this case. the level of frequency of the violence involved in count 5, which extended over a long period and involved multiple acts of violence, were separate and distinct features of the offence of controlling and coercive behaviour. There was, therefore, no necessary equivalence between the elevating factor of "previous violence" on count 4 and the extensive and frequent violence in count 5 so as to give rise to any double counting.

19 As to the final ground, totality, the judge clearly had this in mind as he expressed a number of times in the course of his remarks. The judge gave clear reasons for imposing consecutive sentences on counts 4 and 5, namely that the offences were distinct and separate in kind and nature. The judge is criticised for not reducing the sentence for coercive control on totality grounds, but it is clear that the judge had totality in mind when making the sentence for burglary - three years before discount - concurrent. The application of the totality principles does not require the judge to structure the sentences in a particular way provided that they were applied in order to achieve an overall sentence that was just and proportionate.

20 In our view, the overall sentence of 14 years and 10 months for this serious course of offending against C, aggravated by the numerous factors identified by the judge, cannot be said to be excessive, let alone manifestly so.

21 The appeal is, therefore, dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.