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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 689

No. 202401113 A1

Royal Courts of Justice

Friday, 10 May 2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE JAY
MRS JUSTICE THORNTON

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988
ATTORNEY GENERAL'S REFERENCE NO [ ] OF [ ]

(NAVID IQBAL)

REPORTING RESTRICTIONS APPLY
Sexual Offences (Amendment) Act 1992

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 their 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 s.3 of the Act.

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MR B HOLT appeared on behalf of the Attorney General.

MR J MITCHELL appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

1 This is an application by His Majesty's Attorney General for leave to refer a sentence which she regards as unduly lenient under s.36 of the Criminal Justice Act 1988. The offender was convicted following a trial before Mr Recorder James Wood KC and a jury, sitting in the Crown Court at Inner London, of one offence of assault by penetration, contrary to s.2 of the Sexual Offences Act 2003, and of the further offence of battery against an emergency worker. On the former, he was sentenced to two years' imprisonment. On the latter, he was sentenced to three months' imprisonment to run concurrently. Both sentences were suspended for two years with a number of requirements.

2 The facts are these. On 17 July 2021 the victim, V, was on Clapham Common, South West London, at about six o'clock in the evening. It was a hot summer's day and there were many people enjoying the weather. V was socialising with a group of friends. He was wearing boxer shorts and had no top on. He had lain down on the grass and gone to sleep, lying on his chest.

3 The offender approached V, whom he did not know. Initially, he put grass on his shorts for between one and two minutes. This was witnessed by a friend of the victim, HS. She had never seen the offender before and did not know if the victim knew him. HS then saw the offender pick up some grass, lift V's shorts and put his hand down the back of his shorts. V awoke to feel the offender's finger going inside his anus. V jumped up in shock. The offender laughed. V told him not to do that and started to brush off the grass. His underwear was full of grass.

4 V then went to a separate part of the common with HS in order to remove the grass from his clothing. He returned to the area where he had previously been, and again, lay down on his front. The offender had departed but a little while later returned to that area. V became aware of an altercation between his boyfriend, A, and the offender. V and his friends were angry about what had taken place. V pushed the offender away in a forceful manner. There was a scuffle between the offender and V's group.

5 The offender telephoned the police to report that he had been assaulted. Police officers attended. They spoke with all the parties, during the course of which V made the allegation that it was he who had been sexually assaulted. The offender was arrested. He was angry and aggressive towards the officers. He was drunk. He repeatedly used derogatory terms towards the police and made accusations that they were racist. Owing to his demeanour, he was handcuffed. He continued his abusive language towards the police who were detaining him before back-kicking a woman police constable in the leg.

6 In interview, the offender said that he had consumed one 25 ml shot of gin, saying that he was on medication and did not drink anymore. His account was that he had visited the public toilets at the common where he had slipped on a vodka bottle. As he fell, he had grabbed someone and had been starting to apologise to the male but, before being able to do so fully, the male had punched him. He denied putting any grass in anybody's shorts or having committed any assault by penetration. He said that his arrest was a result of institutional racism. He may have lashed out a little, but he had not intended to kick anyone.

7 The offender was 37 at the time of the offence and 40 at the time of sentence. He had two previous convictions. In 2015, he had been given a conditional discharge for a single offence of battery, which followed an altercation in a café when he took exception to being

filmed and had punched a man three or four times. In 2019 he was, again, given a conditional discharge for resisting or obstructing a police constable. On that occasion, the police had been called to a domestic incident where the offender and a female were arguing. The offender had been intoxicated and had been asked to leave the address by the police, and had resisted the officers as they sought to force him to leave.

8 At the sentencing hearing, the recorder had a short-form pre-sentence report. The offender continued to deny the offences despite his conviction. He accepted that he had consumed some alcohol earlier in the day but denied that he was drunk. The only contact with the victim, he said, was when he had inadvertently fallen on him, having slipped over a discarded bottle. In relation to the assault on the police officer, he denied resisting arrest, although he accepted he was "not the nicest person." He continued to maintain that any injuries to the police officer would have been caused accidentally.

9 The report revealed that the offender had endured periods of homelessness and had had periods of "sofa-surfing" but was now residing in accommodation provided by the local council. He had been living there for three years and anticipated that he would lose the address if he were imprisoned. Although he had worked for some time after leaving school, he had been unable to sustain a job, owing to mental health problems, since 2006. He said that his alcohol intake had increased to deal with stress, the suggestion being that he had been binge drinking. He described periods of coping difficulties, citing suicide attempts, the last of which was in 2019 when he attempted to jump off a bridge. Following this, he was referred to mental health services. He was hospitalised before being discharged. He had been prescribed sertraline and other medications to manage his emotional instability.

10 The recorder had some independent evidence about his mental health difficulties in the form of a GP mental health worker patient summary and a Recovery and Stay Well plan. These confirmed the hospitalisation following his suicide attempt and identified that he had been formally diagnosed and treated for emotionally unstable personality disorder since January 2021, and that this condition had exhibited itself in a number of symptoms including panic attacks, often being tearful, having racing thoughts, self-neglect, self-isolation and not being able to get out of bed in the morning.

11 In his sentencing remarks, the recorder said this about the offender's mental health:

> "Having seen you give evidence and your behaviour during this trial, I have been concerned as to your stability and mental wellbeing. I have examined the two documents [those to which I have just referred]. These stretch from the period of your last conviction and show you claiming depression, having been medicated on occasions, having difficulty getting out of bed and having, so it is said, panic attacks..."

12 A victim personal statement was taken from V by way of video-recorded interview in the summer of 2013, some two years after the incident. In this, the victim said that, following the incident, he was "angry" and fixated on the offence. This impacted on his relationship with his partner, and they had separated. He was receiving treatment for depression; for a period, he was not looking after himself, and he had taken prolonged periods off work. He was fearful that the offence could happen again, and that prevented him from visiting locations which he used to attend;. He had suffered financially, paying for treatment and, on occasion, missing work.

13 In addition, there was a brief psychological report on V dated 30 March 2023. V had reported that he had suffered from low mood, poor eating, poor sleep and low motivation since the offence and that his relationships had suffered. His romantic relationship had broken down. There had been a period between January and February 2023 when he had been unable to work because of his mood. There were no symptoms of PTSD. The diagnosis was of a depressive episode, the direct cause of which was the assault.

14 The prosecution and the defence each provided notes for sentencing. The prosecution note contended that the sexual offence fell within in Category 2 harm in the Sentencing Council guideline for three separate reasons:

i. it involved additional degradation/humiliation in that the offender forced grass into the victim's shorts and anus, and it took place in the presence of the victim's partner, A, causing further humiliation;

ii. the psychological report on V showed that he had suffered severe psychological harm; and

iii. there was an implicit threat of violence for the offender towards the victim and his group when he returned to the scene.

Accordingly, it was submitted the offending fell within Category 2B of the relevant guideline, for which the starting point is six years and the range four to nine years' custody.

15 The note contended that the offence was then aggravated by the victim being targeted for his vulnerability, being asleep on his front; the offence being committed in a public place in the presence of others, including the victim's friends; the offender being under the influence of alcohol; and the offender taking steps to disguise what he had done and avoid arrest by himself calling the police and making an accusation of having, himself, suffered an assault.

16 The note went on to identify the assault on the police officer offence as falling within Category 2B of the relevant guideline for that offence, for which the starting point was a low-level community order with a range of a Band C fine to a high-level community order. The recorder treated this as something which aggravated the sexual offence and for which he would therefore impose a concurrent sentence. No criticism is made of that approach. We observe that, although the recorder chose to impose a concurrent sentence of three months, the offence itself, even with the aggravation of the prior conviction for resisting arrest, would not, of itself, have justified a custodial sentence and accordingly, taking it into account as an aggravating feature for the purposes of the s.2 sexual offence, would not have justified any significant increase in the custodial sentence for that offence.

17 The defence sentencing note put the sexual offence in Harm Category 3, contending first that the consequences for the victim did not constitute severe psychological injury. The psychological report was based solely on the victim's own account rather than any medical diagnosis and, in any event, it concluded that there was no more than a depressive episode. The note said that it had to be set against other evidence which pointed away from any significant or substantial psychological injury, including the victim's own evidence that he went back to sunbathing and sleeping after the incident and that he had described the assault in his interview immediately after the offence, purely in physical terms, as neither painful nor discomforting; he had declined to attend the Haven Medical Facility on two occasions arranged by the police, explaining that he wanted to say goodbye to a friend and wanted to

have breakfast; and, during the course of the proceedings, he had been content to sit a few feet away from the attacker whilst the proceedings were taking place in a Nightingale Court which required them to be in that proximity.

18 The sentencing note went on to say that what happened with the grass was not additional degradation or humiliation, nor was the presence of A, who was unaware initially of any offence having been committed. It also submitted that there was no violence or threat of violence. Accordingly, the defence sentencing note contended that the correct categorisation under the guideline was Category 3B which has a starting point of two years and a range of a high-level community order to four years custody. The note went on to challenge the existence, or the weight, of the suggested aggravating features and relied, by way of mitigation in particular, on the offender's mental health issues.

The sentencing

19 In his sentencing remarks, having set out the facts of the offending, the recorder addressed the previous convictions and said that, although the second conviction was an aggravating feature in relation to the battery of the police officer, the offender's record showed that he was a lightly-convicted man with no convictions which had reached the custody threshold.

20 Having referred to the offender's mental health difficulties in the way which I have quoted above, he referred to the report on the victim and his victim impact statement. The recorder concluded that the harm suffered by V was significant but not substantial, and fell short of being severe psychological injury. He took the view that the offence fell firmly within Category 2B, thereby implicitly rejecting the other category factors which had been put forward in the prosecution's sentencing note.

21 He recognised the aggravating features of drink, returning to the scene, the false allegations of assault, and the assault on the police officer for which a concurrent sentence would be imposed. Against those, he set the fact that the offender was lightly convicted with no convictions for sexual offences and his mental health difficulties. He determined that, having carried out the balancing exercise, the appropriate sentence was one of two years imprisonment.

22 The recorder then gave proper and anxious scrutiny to the question whether the sentences could be suspended. He concluded that they should. No issue is taken with that aspect of the decision on behalf of the Attorney General save that it is submitted on her behalf that the two-year sentence was unduly lenient, so that the possibility of suspension should not have arisen. If, however, a sentence of two years is not unduly lenient, it is not suggested that it was wrong to suspend the sentence.

Submissions

23 On behalf of the Attorney General, it is submitted that the recorder made essentially two errors. First, he wrongly failed to categorise the harm in this case as falling within Category 2. Secondly, in any event, he failed to take sufficient account of the much greater weight of the aggravating features over that of the mitigating features, whether that involved taking them into account so as to put the offence in Harm Category 2 or moving up considerably from the starting point if the proper categorisation was Harm Category 3.

24 As to the categorisation error, the argument focused mainly on the Category 2 factor that "the victim is particularly vulnerable due to personal circumstances." It was said that, since the victim was face down and asleep, that made him particularly vulnerable.

25 We disagree that, in the particular circumstances of this case, we can properly conclude that this made this victim particularly vulnerable. Someone snoozing while sunbathing in a large crowd with friends and others around is not necessarily particularly vulnerable. We note that this was not a submission advanced at the sentencing stage by prosecuting counsel who had attended the trial, who is not counsel representing the Attorney General at the hearing before us, nor was it therefore something addressed by the recorder. Both would have been much better placed than we are to assess the degree of vulnerability, which the particular nuances of the situation in which the offender and the victim found themselves would have informed. We accept that a lone victim being asleep may, in other circumstances, fulfil the criteria – see *R v Husband* [2021] EWCA Crim 1240 at [19] – but we cannot properly conclude that this victim did in the absence of any finding by the recorder who had all the advantages of the detailed evidence at the trial, where we have none of that detail in the broad summary which has been prepared for the purposes of the appeal.

26 Whilst dealing with this aspect, we should say that we feel equally unable properly to conclude that it engages the aggravating feature of "Specific targeting of a particularly vulnerable victim", which is a culpability aggravating factor but not a categorisation factor. Having heard the evidence at trial, again, the recorder was best placed to determine whether the offender's motivation included a thought process which targeted the victim as being particularly vulnerable. He made no such finding, despite being invited to do so by the prosecution.

27 We turn to the second aspect of the submissions on behalf of the Attorney General, which focuses on the features said to aggravate the offence which were identified in the prosecution's sentencing note below, which we have already set out. The submissions on behalf of the Attorney General also recognised that there was mitigation available for the offender in his mental health difficulties. Ultimately, the submission made on behalf of the Attorney General was that treating the aggravating and mitigating features as balancing each other out from a starting point in Category 3B was "generous", and that the recorder ought to have arrived at a point towards the upper end of Category 3B or the lower end of Category 2B.

28 It may well be that the characterisation of the recorder's balancing exercise as being "generous" is a fair one, but that is not sufficient to make the sentence unduly lenient. We keep firmly in mind what Lord Lane CJ, said in relation to references under s.36 of the 1988 Act in *Attorney General's Reference No 4 of 1989* [1991] 1 WLR 41 (at 45H). It is oft quoted, but it is worth repeating:

> "The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased with all the anxiety that that naturally gives rise to, merely because, in the opinion of this court, the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to

> reported cases and, in particular, to the guidance given by this court from time to time in so-called guidance cases. However, it must always be remembered that sentencing is an art rather than a science, that the trial judge is particularly well placed for the weight to be given to various competing considerations, and that leniency is not, in itself, a vice. That mercy should season justice is a proposition as soundly-based in law as it is in literature."

29 The reference to guideline cases is now to be taken also as a reference to relevant Sentencing Council guidelines. The passage in Lord Lane's judgment referring to the advantages enjoyed by the trial judge is particularly apposite in this case. It is obvious from the recorder's sentencing remarks, which we have quoted, that he drew on his own observation of how the offender behaved at the trial in his assessment of the effect of his mental health difficulties, as well as the independent medical evidence, and concluded that he was unstable. He had the same opportunity also to observe the victim in the course of the trial.

30 His findings in relation to the offender were consistent with, and supported by, the characterisation which was set out in the pre-sentence report and the medical notes concerning his diagnosed condition of emotionally unstable personality disorder. In addition, the pre-sentence report identified suicide attempts and binge drinking among his problems. It is not, therefore, for this court readily to say that the recorder overestimated the weight to be attributed in mitigation to the offender's particular mental health problems. The probation service had determined that his risk of committing a further serious offence was low and the author of the report stated that he would benefit from a variety of treatment programmes and "could be described as vulnerable."

31 We agree that this sentence was, in its evaluative judgment of the aggravating and mitigating factors, "generous", that is to say lenient. However, we are unpersuaded that it was unduly so, that is to say outside the range which was reasonably open to the recorder.

32 In this connection, we would refer to what was said by Hughes LJ, VPCACD, in *R v Edwards* [2012] EWCA Crim 2746 at [19]:

> "The procedure for referring cases under s.36 of the Criminal Justice Act 1988 is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result. Any case in which the proposition is that a sentence should not have been two years but should have been a little over three, is almost, by definition, unsuitable to a reference under the Act."

33 In this case there was no error of principle in categorisation and there was no gross error in the evaluative task of weighing aggravating and mitigating features. Accordingly, we refuse the application for leave to refer.

CERTIFICATE

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This transcript has been approved by the Judge.