

NCN: [2019] EWCA (Crim) 1694  
No. 201902545 A1  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 3 October 2019

Before:

LORD JUSTICE SIMON

MRS JUSTICE CHEEMA-GRUBB DBE

and

HER HONOUR JUDGE DHIR QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

---

**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

---

**REGINA**

**- v -**

**NICHOLAS PHILIP**

---

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

*This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

*WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

---

**Mr J Smith** appeared on behalf of the Attorney General

**Mr J Skinner** appeared on behalf of the Offender

---

**J U D G M E N T**

---

**LORD JUSTICE SIMON:**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person 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. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. This is an application by Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which he considers to be unduly lenient.

3. The offender is Nicholas Philip. He is now 34 years of age. On 14 June 2019, in the Crown Court at Inner London, he was sentenced by His Honour Judge Reid. He initially faced two charges: attempted rape, contrary to section 1 of the Criminal Attempts Act 1981 (count 1), and sexual assault, contrary to section 3 of the Sexual Offences Act 2003 (count 2).

4. The matter was listed on 18 December 2018 for a plea and trial preparation hearing. The offender was not arraigned. Directions were made for the preparation of reports as to his fitness to plead.

5. At the adjourned plea and trial preparation hearing on 29 March 2019, the offender pleaded guilty to the charge under count 2. Representations were made to the prosecution in relation to count 1, as a result of which count 3 was added to the indictment. Count 3 charged committing an offence (false imprisonment) with intent to commit a sexual offence, contrary to section 62 of the Sexual Offences Act 2003. On 3 May 2019, the offender pleaded guilty to count 3. The pleas to counts 2 and 3 were acceptable to the Crown and the case was adjourned for the

preparation of reports.

6. On 7 June 2019, the matter was listed for sentence. After hearing the opening, the judge adjourned the case for enquiries to be made of the offender's clinician as to whether he could receive Clozapine in custody; as to the terms of mental health treatment available to him as part of a community order; as to any restrictions which might be imposed on the offender under the Mental Health Act 1983; and as to the treating clinician's view of what might be done to address the risk posed by the offender.

7. On 14 June 2019, the matter was listed again before the judge. The offender was sentenced on each of counts 2 and 3 concurrently to a community order of three years, with a three year Mental Health Treatment Order, a 60 hour rehabilitation requirement and a six months curfew. A Sexual Harm Prevention Order and a Restraining Order were also made.

8. The indictment reflected an attack, false imprisonment and a sexual assault on a stranger at about 8pm on Saturday 2 December 2017 outside her workplace. The victim worked as an arts and crafts co-ordinator at an adventure playground in London. She had gone into work to make preparations for a workshop on the Monday morning. It was dark. She unlocked the gate to the adventure playground, and looked up to see the offender standing there. He asked her to let him in. She refused. She told him that she was not allowed to let anyone in. As she opened the gate and stepped in, he stood so that she could not close the gate behind her. She realised that something was wrong, but still thought that he wanted her to let him in. She tried to push him back so that she could close the gate. The offender said, "Don't push me". She had her phone in her hand and threatened to call the police. The offender warned her not to. He then grabbed her around the upper body and dragged her into the playground. She tried to scream, but found it hard to breathe. He dragged her a considerable distance from the gate to a path which runs

alongside the main building, along the full length of the path and on past a football pitch – a distance of around 60 to 70 metres. The offender held on to her and dragged her with both arms. She dropped her legs to make herself heavier to drag. She was screaming and struggling to free herself but was unable to stop him. She believed that he was going to rape her. At that stage he said nothing at all. It was very dark. She kept on screaming so that anyone listening would realise that she needed help.

9. When they reached an area away from the main road she tried to pull away, but the offender dragged her back by her jacket, ripping the pocket. He began to put his hands all over her and in between her legs. He tried to pull down her trousers. He tried several times to pull down the waistband of her jeans, but did not manage to open the button. She was kicking, pulling at his hands and screaming. She managed to pull off his watch during the struggle.

10. The offender climbed on top of the victim. She could not breathe and thought that he was going to kill her. He said, "Let me come". She realised that she still had her phone in her hand. She tried to call the police, but the offender noticed, grabbed the phone and threw it away from her. She was still screaming. She could see the lights of cars in the nearby supermarket car park and hoped that someone might hear her. In fact, members of the public there did hear her screams and called the police.

11. The offender remained on top of the victim. He tried to put his tongue into her mouth. She was asking him to let her go, trying to appeal to "his simple-mindedness, like you would a child". She felt that something was wrong with his reasoning. He did not react to anything she said or did, and was too heavy for her to push off. She then bit the offender on his upper lip as hard as she could and did not let go until he got off her. When he did, he said "Why did you bite me?" He looked around briefly and then ran back towards the gate and out of the playground.

She described the offender's reaction to being bitten as "not very logical" and that he appeared surprised.

12. The victim sought the help of a friend and colleague who lived nearby, who called the police. The offender was seen by witnesses in the supermarket car park. He was wide-eyed and had some sort of injury to his lips.

13. At about 10pm he was arrested in nearby Denmark Hill. He had mud on his trousers and trainers, and an apparent bite mark to his upper lip. In his pocket were five condoms, although CCTV footage showed that he had purchased condoms after the attack – between the time of the offence and his arrest.

14. In interview he made no comment.

15. In a Victim Personal Statement which was before the court, the victim described her physical injuries in the form of large bruises over her legs and back and some scratches which had healed. She stated that the incident had caused her considerable stress and worry, and had affected her emotional wellbeing. She suffers from episodes of palpitations and dizziness, and has had to visit hospital as a result. She feels less safe at work and has been unable to carry on with work which involves her staying at the Centre on her own.

16. The offender was of previous good character.

17. There was a pre-sentence report before the court. The offender had attended his meeting with the author of the report with his mother. He told the author that he had vague recollections of the offending. He recalled asking the victim for the keys to the adventure playground, but

had no recollection of a sexual assault and "in his own mind, a sexual assault never happened". He accepted that there may have been a "scuffle", but denied any sexual element. He admitted to feeling unwell and not taking any medication at the time.

18. The author of the pre-sentence report assessed the offender as lacking boundaries and having poor self-regulation. The motive for the offending was assessed as "indicative of a sexual motive and desires". The risk of harm posed by the offender to women, in particular during heightened periods when his mental health was in decline, was assessed as high. The author of the report also concluded, however, that there "is no additional evidence to suggest at this stage that he satisfies the criteria for dangerousness, and while he complies with mental health treatment and medication in the community, the risk of potential harm to others can continue to be contained".

19. The offender's lack of recall was described as "a worrying factor". The author of the report noted his mental health history, which was addressed in a separate psychiatric report. To his community mental health nurse, the offender expressed a belief that "everyone was a clone", including his keyworker and the victim in this case. His delusion that the world was populated by clones was assessed by the community mental health nurse as "ongoing and active at the time of the assault. However, his florid psychotic experiences and thought disorder that he was experiencing, are not ongoing and are well treated". He presented to the nurse as a "gentle man who is in recovery from a serious psychotic episode".

20. An addendum pre-sentence report provided in between the two sentencing hearings was also before the Court. In the addendum, the author of the report set out further information provided by the responsible clinician, Dr Gunasekara, who provided mental health treatment for the offender. Dr Gunasekara agreed with the imposition of a mental health treatment

requirement as part of a non-custodial sentence. In his view, the offender had a severe and enduring mental illness which was chronic and which was relapsing and remitting in nature. The diagnosis was schizophrenia, paranoid type. The offender attended the Clozapine Clinic at the Maudsley Hospital every two weeks for monitoring of blood tests for Clozapine (an antipsychotic medication) and to pick up his medication. Currently, the offender was relatively stable in his mental state and in partial remission of his condition. He continued to be well engaged with the community mental health team and the medication clinic, and was committed to his care plan. He was likely to maintain stability and to continue improvement if he maintained his commitment to the biopsychosocial therapy regime. The offender was not detained pursuant to the Mental Health Act, nor on any compulsory treatment order. He was a voluntary patient in the community.

21. A psychiatric report from Dr Mehrotra, a consultant psychiatrist, was also before the court. The offender told Dr Mehrotra that he could not remember much of the offending and believed that he was mentally unwell at the time. He had accepted having a scuffle with the victim. He could not explain his lip injury. He said that he had never had a sexual relationship and that he thought he bought the condoms "for his own protection". The offender stated that he currently struggled to care for and wash himself, and that he spent most of his time on the internet, watching videos concerning the end of the world.

22. Dr Mehrotra noted the following psychiatric history:

1. In 2015, the offender had been detained under the Mental Health Act while in police detention. He had been arrested for assault and battery which was thought to be psychotically driven. He had complained of hearing voices in his room and appeared to have responded to them. The offender was reported to have been

concerned about intruders, to have brandished a knife, and to have punched a neighbour, believing him to be an intruder. He was admitted to the Maudsley Hospital and noted to have paranoid delusions and auditory hallucinations. He was given oral anti-psychotic medication, to which he responded over several weeks.

2. In March 2015, he was detained under the Mental Health Act as there was thought to be a risk of non-compliance with treatment. He was diagnosed as suffering from an episode of psychosis.

3. Although he appeared to have recovered from these episodes, he was noted in August 2017 to be relapsing. He was suffering from insomnia, hearing noises and having paranoid thoughts.

4. In October 2017, the offender was assessed as having a low mood. He had feelings of being watched, and controlled or hypnotised. He felt that he had deteriorated over the previous two months. He appeared to have side effects from medication in early November, akathisia (trouble staying still) and insomnia. A trial of antipsychotic Amisulpride was then suggested.

5. On 16 November 2017, the offender expressed beliefs about the end of the world, but denied responding to unseen stimuli. He appeared to be affected by psychotic symptoms, although he was not thought to be manic at the time.

6. After the commission of the crimes with which we are concerned, the offender's mother rang his treating team to inform them that he had been



withdrawing large amounts of money, had used her phone to gamble and had been buying condoms, which was out of character.

7. Through early 2018 the offender expressed a fixed believe that "others" or aliens had replaced the people around him, believed the world would end, and had seen his cousin turn into his sister. In the belief that the "aliens" did not feel pain, he had held a flame of a cigarette lighter to the arm of his seven year old nephew.

8. On 13 February 2018, the offender was assessed by a psychiatrist who concluded that he was showing signs consistent with a relapse of psychotic disorder. He was admitted to hospital informally, and later detained under the Mental Health Act after continuing to express religious delusions and a belief that human beings were aliens. The diagnosis was modified to schizophrenia. He was not discharged from hospital until 15 October 2018.

9. In October and November 2018, he continued to express the belief that "everyone has been replaced by angels and demons".

23. Dr Mehrotra concluded that the offender was fit to plead and stand trial. He had suffered a psychotic (distorted reality) mental illness and had displayed symptoms of schizophrenia (including hallucinations, delusions and thought disorder). Chronic paranoid schizophrenia was the most likely diagnosis, along with a probable borderline learning disability. The offender had limited insight into his condition. The onset of the illness occurred in 2015 with psychosis. Since then he had been hospitalised twice, once after a confrontation with a neighbour and once after burning his nephew's arm. It appears that the offender's aggression comes more to the fore

when he is mentally ill. There had been some gains from the use of Clozapine medication, such that he can live in the community, but he was still burdened by ongoing positive and negative symptoms of psychosis. He would clearly need lifelong medication. When acutely unwell, the offender believes that aliens/clones mean him harm. He conducted "reality testing" by holding a lighter flame to his nephew's skin. He becomes aggressive, questioning others, is suspicious, has an increased use of alcohol, and there is a deterioration in his self-care. At the time of the offence, the offender's mental state was disordered and he was acutely psychotic. He knew the nature and quality of the acts that he was doing and knew that he was doing wrong. He was aware that his conduct was unlawful and the comment that he made to the victim suggested a motivation related to sexual gratification. A defence of insanity was not available to the offender. In the event of conviction, a hospital order was not appropriate as a disposal, as it was not proportionate given the offender's response to the treatment plan and his compliance with medication. The offender was in a fragile state of rehabilitation, and imprisonment might undo the therapeutic work in the community.

24. There was an addendum psychiatric report from Dr Mehrotra before the Sentencing Judge in which he addressed the issue of future risk. He was of the view that there were a number of "protective influences" in place which would act as a buffer against recidivism. He also expressed the view that custody would disrupt the offender's "so hard won" stability and put him at serious risk of mental ill health and future offending.

25. There was also an email before the court from Dr Mehrotra dated 11 June 2019, which stated that there was no reason why the offender's medication, Clozapine, could not be administered in a prison setting. However, he has not seen prisoners on Clozapine and would have thought it exceptionally rare to see. The administration of Clozapine in prison would be difficult because, in the event of default for more than 48 hours, the offender would require

hospital admission, and because his blood results would require monitoring.

26. Mr Smith, on behalf of the Solicitor General, submitted that the offending was marked by a number of aggravating factors: the timing of the offence (in darkness); the location (dragging the victim to an isolated place); the impact on the victim; the accompanying violence; the efforts to prevent the reporting of the offending; abduction (an aggravating feature of the sexual assault, relevant to harm); and the fact that there were two offences.

27. He acknowledged that there were two mitigating factors: the offender's previous good character and his mental illness. Mr Smith accepted that the offender was psychotic at the time of the offending, but submitted that he appreciated the nature and quality of his acts, that they were wrong and had a sexual motivation.

28. We have been provided with a post-sentence report, which was ordered by this court previously constituted, prepared by Dr Ian Cumming on behalf of the prosecution. The report does not greatly advance matters, but it contains this:

138. As noted in my report, [the offender] has provided conflicting thoughts about his mental state at the time and whether he thought it was right or wrong. On balance, I would consider that he was unwell at the time of the offence. I noted that in the original report dated 21<sup>st</sup> March 2019.

He added this in terms of culpability:

140. ... I did feel that he was psychotic at the time of the offence. Though his mental state cannot be conclusively linked to the offence, there is no doubt that he was unwell and, notably, he was admitted within a short period to hospital, where he remained for a number of months. I am therefore of the opinion that there was a link and that his culpability was therefore reduced.

29. The submission advanced on behalf of the Solicitor General was that the sentence imposed was unduly lenient and failed to take proper account of the nature of the offences and the aggravating features of the case. More particularly, a community sentence was inappropriate, given the gravity of the offending and the aggravating features of the case. The sentence should have been one of immediate imprisonment. Furthermore, as the appropriate custodial sentence should have been a term of four years or more, and given that the judge had made a finding that he was "dangerous", the offender should have been made the subject of an extended sentence.

30. Mr Smith referred the court to the definitive guidelines on sexual offences. He submitted that the offending in count 2 fell within category 1B of the guidelines for the offence of sexual assault, contrary to section 3 of the 2003 Act, with a starting point of two and a half years' custody, and a sentencing range of two to four years after a contested trial.

31. For the offending under section 62 of the 2003 Act, the definitive guidelines provide:

The starting point and range should be commensurate with that for the preliminary offence actually committed, but with an enhancement to reflect the intention to commit a sexual offence. The enhancement will vary depending on the nature and seriousness of the intended sexual offence, but two years is suggested as a suitable enhancement where the intent was to commit rape or assault by penetration.

(We note that Mr Smith accepts that the intended offence was not an offence under section 1 or 2 of the 2003 Act, but an offence under section 3.)

32. On behalf of the offender, Mr Skinner made a number of preliminary observations. He drew attention to the extremely careful consideration that the judge gave to the sentencing of the offender, and he acknowledged that the judge took an exceptional course. He emphasised the clear evidence of the offender's serious mental disorder at the time of these offences. He drew

our attention to the fact that the offender had spent eight months in hospital after the offence; and to a recent report of the community health nurse in which it is said that the offender is now making significant progress. The reference in that report is to the offender's commitment to his treatment and recovery programme.

33. Mr Skinner submitted, first, that over three separate hearings the judge conducted an exhaustive analysis of the relevant circumstances of what Mr Skinner accepted were serious offences which crossed the custody threshold; and that in doing so, he passed a sentence that was appropriate in the circumstances.

34. Second, Mr Skinner took issue with the Solicitor General's submission that the appropriate sentence was one of four years' custody or more. The two offences formed a single course of conduct. The offence intended was the sexual assault, which fell within category 1B of the guidelines, with a starting point of two and a half years' custody. The judge had recognised that the section 62 offence called for an enhancement. He had started on the basis that the offender did not suffer from a mental disorder; made an appropriate allowance for his mental disorder, which is a specific mitigating factor in the sentencing guidelines for a section 3 offence; and then gave full credit for his guilty plea. These factors properly brought the sentence below a term of four years, which precluded the imposition of an extended sentence. Mr Skinner acknowledged that the judge made a finding of dangerousness, but he submitted that the finding was qualified by the Judge's reference to the medication that the offender was currently taking and will have to take for the rest of his life, and to the very significant difficulties in providing and monitoring his medication while in prison. Mr Skinner submitted that, in passing sentence, the judge had the protection of the public in the forefront of his mind and rightly took into account the medical evidence that imprisonment would pose a significant risk of undermining the offender's treatment, ultimately to the prejudice of public safety.

35. We have considered these submissions. We accept Mr Skinner's first observation. This was a difficult sentencing exercise, because it involved weighing the culpability of an offender who committed serious offences, but who was suffering from a severe mental illness at the time. As this court recognised in *R v Edwards and Others* [2016] EWCA Crim 595, at [14], this may, as here, present the judge with a difficult task. The court needs to consider the psychiatric evidence and four specific questions: the extent to which the offender needs treatment for the mental disorder from which he (or she) suffers; the extent to which the offending was attributable to the mental disorder; the extent to which punishment is required; and the extent to which the protection of the public is required.

36. It is clear from his full and exceptionally well-structured sentencing remarks that the judge took great care to consider each of these questions and that he came to a conclusion which holds in balance the answers to these four questions. He properly considered the sentences that he would have passed in the absence of any underlying mental health issues. On this basis, and giving full credit for the guilty pleas (which was on a full facts basis and did not dispute the victim's account), he concluded that on count 2 the sentence would have been two years and eight months' imprisonment. The judge explained his reasoning as follows:

The aggravating features are stark in the horrific circumstances of this case. One only has to imagine for a moment what the victim must have felt, being dragged in the dark, pulled to the floor, her trousers grabbed at, your hand grabbing between her legs, her phone taken from her, removing the last vestige of hope, given no one had come as a result of her seemingly endless screams. Mentally putting oneself in her position for just a moment and then remembering this incident went on for a number of minutes, if not half an hour or so, gives the clearest indication of why, in my view, the only reason the case stays within category 1B is due to your lack of previous convictions.

In our view, the judge's articulation of the feelings of the victim as a result of this crime are well expressed and fully justified.

37. So far as count 3 was concerned, again bearing in mind that the sexual offence was a charge of sexual assault and not assault by penetration, taking into account lack of previous convictions and full credit for the guilty pleas, the judge concluded that the sentence would have been a term of four years' imprisonment. His starting point must, therefore, have been a term in excess of six years.

39. The cases to which Mr Smith has referred the court, *R v Newton* [2017] 2 Cr App R(S) 41, and *R v Kight* [2017] EWCA Crim 2250, were considered and referred to by the judge during his sentencing remarks. However, they do not advance the Solicitor General's application. The cases illustrate some of the circumstances in which an offence under section 62 can be committed, and the sentences which have been regarded as commensurate, depending on those circumstances. They provide little further assistance in this case.

40. The judge then turned to the effect of the offender's mental disorder. No criticism can or could be made of his summary of the medical evidence. He said:

Anyone who needs to look at this sentence in the future needs to read carefully all the documents prepared on your behalf, but particularly the report of Dr Mehrotra, where he sets out the passage of your condition both before, at the time of and after this offence. What is clear is that, although you are well treated, you still have symptoms. For example, it appears you have paranoid beliefs in respect of your family being replaced by clones or aliens. Further, you are clearly a very vulnerable individual, as is evidenced among other matters in paragraph 162 of Dr Mehrotra's report. That being said, while you still have some symptoms, it is the clear view of both doctors – one treating you and one having prepared a report on you – that at the moment you are, for want of a better word, safe as far as the general public is concerned – or as safe as any person is.

41. The judge then referred to section 166 of the Criminal Justice Act 2003, which contains the

saving powers to mitigate sentences and deal appropriately with mentally disordered offenders; to section 166(2) which provides that a court, after taking into account such matters, may pass a community sentence, notwithstanding that it considers the offences are so serious that a community sentence could not normally be passed; and to section 168(5)(a), which expressly refers to mentally disordered offenders.

42. The judge carefully considered the danger that the offender posed to the public and he formed an entirely cogent and rational view that the danger could best be addressed by continuing support within the community.

43. This court has received a supplementary post-sentence report from the Probation Service, dated 31 July 2019, which contains this passage:

A community order with which [the offender] has engaged fully has provided the opportunity for him to access a community mental health team, the Probation Service, key workers through supported accommodation and to maintain a healthy support network through his family. [The offender] is subject to electronically monitored curfew, restraining order with an exclusion zone, the notification requirement for those having committed sexual offences, and a Sexual Harm Prevention Order for ten years. These criminal justice measures are for a good level of monitoring of [the offender's] risks.

Should he be sentenced to custody, he would lose his current supported accommodation, which crucially provides the required monitoring of his compliance with medication. Custodial establishments have lesser ability to monitor engagement with Clozapine prescription, and a failure to comply with the medication requires a lengthy titration process. In the case of [the offender] not receiving Clozapine would be likely to lead to a serious relapse/psychotic episode and he has demonstrated reasonable awareness of such consequences.

44. These were undoubtedly serious offences. We do not overlook their terrifying nature and the effect on the victim, as well as the need to protect members of the public from random



sexual assaults. However, we are not persuaded that we should interfere with these sentences.

45. In our view, the Reference has not addressed the effect, in sentencing terms, of the offender's mental disorder. Accordingly, we refuse leave to refer.