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IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL
CRIMINAL DIVISION

No. 2019 02049 A2

Neutral Citation Number: **[2019] EWCA Crim 2181**

Royal Courts of Justice

Friday, 04 October 2019

Before:

LORD JUSTICE HADDON-CAVE
MRS JUSTICE COCKERILL DBE
HIS HONOUR JUDGE BATE

REGINA

v

BRIAN EDMUND HEYWOOD

REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992

Transcript prepared from digital audio by
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MR K. BLOUNT appeared on behalf of the Appellant.
THE CROWN did not appear and was not represented.

J U D G M E N T

MRS JUSTICE COCKERILL DBE:

1 On 16 April 2019, having pleaded guilty before the Magistrates to counts of outraging public decency and a count of sexual assault, the Appellant was committed for sentence to the Crown Court. On 7 May 2019, in the Crown Court at Nottingham, he was sentenced to a total of three years' imprisonment.

2 In addition:

a. having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003, the Appellant was required to comply with the provisions of Part 2 of the Act, (that is notification to the police) for ten years.

b. having been convicted of an offence specified in the Schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, the Appellant will, or may be, included in the relevant list by the Disclosure and Barring Service.

3 The Appellant’s victims are entitled to the protection of the Sexual Offences (Amendment) Act 1992. Under the provisions of that Act, 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 them as the victim of that offence. This prohibition will continue to apply unless and until it is either waived or lifted in accordance with the Act. We shall not, therefore, name the victims but shall instead refer to them by initials.

4 In relation to the sentence of imprisonment which the Recorder imposed, the Appellant appeals to this Court by the leave of a single Judge. He contends that the sentence imposed was manifestly excessive.

5 The facts of this case, though unusual and perhaps indeed unique, may be simply stated. They concern five offences committed on four dates over a period of just under two years.

6 The first occurred on 18 September 2016. NB was travelling alone by train from London St. Pancras to Sheffield. During the journey, the Appellant appeared and sat opposite her. He was wearing a T-shirt and tight, Lycra boxer shorts and stretched his legs out blocking NB's exit to the aisle. She noticed that the Appellant had an erect penis and that he was rubbing himself against the edge of the table, looking directly at her as he did so and making noises denoting pleasure. The episode went on for some time. When anyone walked past, the Appellant would cover his erection with a newspaper.

7 The second date was 29 September 2016. CF was travelling alone on a train from Manchester to Ealing. Again, halfway through the journey, the Appellant sat opposite her. This time, he was wearing a running top and small, tight briefs. He went through a similar performance, which lasted for 20 minutes and included manual masturbation. CF was so upset that she decided to depart the train early.

8 The very same day, DB was travelling alone on a train from London St. Pancras to Nottingham. The Appellant boarded the train about halfway through the journey and sat next to her. He was wearing a T-shirt and very short, thin boxer shorts. Again, the victim noted his erect penis and his direct stare. Again, he covered himself to avoid detection when anyone walked past. DB left the train feeling intimidated and scared. When she left the train, she was concerned that the Appellant might be following her.

9 The fourth incident came on the afternoon of 20 June 2017, when CW was travelling alone from Leicester to Nottingham. The Appellant sat opposite her wearing gym gear and tight running shorts. He constantly adjusted himself with his hand while reading a newspaper.

CW could see that he had an erect penis and he was intentionally exposing it to her. She tried to ignore him, but he was constantly fidgeting, and his legs were stretched under the table very close to her. She felt vulnerable and distressed.

10 The final incident, and the most serious, was on the evening of 23 May 2018. EK was travelling alone from Sheffield to London St. Pancras. The Appellant boarded the train about halfway through the journey and sat next to EK. Again, he was wearing a T-shirt and very short running shorts. Again, he stared intensely at EK. When she evaded his glance, the Appellant shuffled close to her – squashing her towards the window. She noticed that he had an erect penis. As on previous occasions, when people walked past, he would cover it with a newspaper. On this occasion, he touched her briefly. EK felt alarmed and disgusted. CCTV has revealed that, after leaving this train, he hid behind a lift on the platform, reached into his bag and put on a new pair of shorts.

11 It was established that the Appellant had been at various stations throughout the East Midlands that day, and that he had made a significant number of journeys backwards and forwards before going to Derby later in the evening and boarding a train to Leeds. He had travelled almost 300 miles on the railway network in one day and was repeating the pattern of exiting the train and changing his shorts.

12 The Appellant was arrested at a train station on 14 June 2018, dressed in shorts. He made no comment in his first interview on 15 June 2018. In a second interview, in January 2019, he acknowledged that he had a problem. He then, as already noted, pleaded guilty and was referred for sentence. The Judge had the benefit of Victim Personal Statements of all the victims, to which I shall refer later.

13 In terms of antecedents, there was a relevant conviction, albeit 18 years ago, when the Appellant committed precisely the same sort offence in relation, on that occasion, to a young girl.

14 In sentencing the Appellant, the Judge noted that he was satisfied that the Appellant's offending originated in selfish sexual gratification and had nothing to do with stress or any obsessive-compulsive disorder to which he may be subject. He referred to the Appellant's preparations, the clothing, the railway tickets and his dedicated approach of locating a suitable victim. He found that, given the number of offences that fell to be dealt with, this was ingrained, entrenched behaviour over a number of years. He also noted, having read the Victim Personal Statements of the victims, and the profound impact of the Appellant's behaviour, that the effect on each of the women he had targeted was serious. He referred to the seriousness of offending: on mainline trains, making his victim in each case a prisoner, effectively, to the activities he wished to commit; the prolonged course of conduct in each case and the determination to disguise what he was doing when other people came by. He noted the number of offences and the escalation evident in the final offence, which involved touching the victim.

15 The Judge concluded that it was difficult to categorise the offences in terms of the sentencing guidelines, because the conduct was so unique it did not sit easily in any sort of grid. The Judge also considered the position taking into account the fact that other people with the Appellant's proclivity should not be encouraged to behave as he did.

16 The Judge noted the Appellant's efforts to get help via therapy and Cognitive Behavioural Therapy, and the effect on his wife who was unwell, and on her very elderly mother for whom the Appellant also cared.

17 Bearing all these factors in mind and making allowance for the early plea, the sentences which he imposed were: eight months; eight months consecutive; eight months concurrent, (for the second offence on one day); eight months consecutive; and twelve months consecutive.

18 In submissions before us today, Mr Blount has very clearly put forward the case advanced on behalf of Mr Heywood. He submits that either the Judge's starting point was too high in relation to each of the offences, or the totality was too high, or both. The main point which he pursued relates to the guidelines. Relying, in relation to the sexual assault guideline, on the relevant guideline for that offence, and for the outraging public decency offences to the analogy of the guidelines for the offence of exposure, he noted that the sexual assault in this case was a very limited one, and which the Crown had only ever suggested was a Category 3A. He reminded us that this was a case where there was no actual exposure and that, by reference to the guidelines for exposure, this was the kind of offending which would suggest a community order. He submitted that this was a case which was not so unique that it should be seen as outside the guidelines – rather, we should see it as analogous. He said that the Judge's approach, in departing from the guidelines, was compounded by sentencing the offences effectively consecutively, meaning that an overall disproportionate sentence was relied on.

19 Having considered those submissions, we do consider that, as regards the outraging public decency charges, the Appellant cannot complain about the length of term imposed. The analogy with the Exposure Guidelines is not, as the Judge noted, apt in this case. Exposure will normally be fleeting; the victim will have the opportunity to quickly evade the unwanted sight. Here, the situation was markedly different and much more serious. The Appellant had a well-established and sophisticated *modus operandi* involving planning, both as to tickets, supplies and travelling. Each of the victims was effectively trapped by the

Appellant. Each was put in a position of being forced to be present to hear and, to some extent, see as the Appellant gratified himself, as well as deliberately unsettling them by endeavouring to engage their gaze. That this was serious and upsetting to them was apparent to the Judge from the Victim Personal Statements he had, and is apparent to us – both from his sentencing remarks and from the updated Victim Personal Statements which entirely confirm what he said.

20 We were referred by Mr Blount, in the course of submissions and in the grounds of appeal, to the case of *R v Pennant* [2017] EWCA Crim 1180 on the basis that the result there of two years on appeal assisted the Appellant's case because that case was one of repeated masturbation and actual exposure. We consider, however, that this case rather tends to support the Judge's analysis. The difference in terms of what was seen between actual exposure and what the Appellant was doing is minimal; but in *Pennant,* the Defendant simply perched himself on an electricity box at the corner of the road "*seeming to take an interest in females as they walked by*". Here, in the present case, these unfortunate women were effectively trapped and unable evade the display which the Appellant chose to make of himself. The *Pennant* case was therefore a much less serious offence. Further, the three counts there all related to the same day and fell very properly to be sentenced concurrently.

21 In those circumstances, it seems to us that the sentence of eight months for each of the outraging public decency counts was not manifestly excessive. Indeed, the Judge might have taken an even stronger view, as the approach of this Court in *R v Smith* [2018] EWCA Crim 1510 indicates, that being a case where a 12-month sentence was deemed suitable for persistent but transitory behaviour and 15 months for a brief offence in a pew, albeit that case was, as Mr Blount pointed out in the course of submissions, in the context of greater previous convictions and actual exposure, but the point remains.

22 There might be said to be a question over a sexual assault sentence were that the only one in question. That case was indeed opened by the prosecution on the basis that it was a Category 3A offence. On that basis, the sentencing range was a high-level community order to a year's custody with a starting point of 26 weeks custody.

23 Here, it seems to us that the Judge may have sentenced as if for a combined set of charges relating to the EW incident of outraging public decency and sexual assault, where only the single charge was put forward and the sexual element of the incident was fleeting and drove the categorisation initially as a Category 3A offence. In those circumstances, it might be said that the appropriate sentence for this offence would not have been higher than 12 months, reduced to 8 months after taking account of plea. However, that is to ignore the important context of the assault and how this offence fits in to the totality of the offending and the criminal behaviour.

24 We are certainly not attracted by the other arguments and, when it comes to totality, to which it is clear that the Judge did have careful regard, the Judge plainly adopted an appropriate approach in looking carefully at which offences were properly to be regarded as being taken together. We cannot accept the submission that he erred in saying that offences which stretched over two years should be largely sentenced consecutively. Further, it is important to look at the matters being sentenced as a whole, the total length of the sentence arrived at. While there is no specific deduction given for the consecutive sentences, it should also be borne in mind the second offence was not given a longer term as might well have been done to reflect the concurrent sentencing of the second and third offences.

25 Overall, it seems to us that the sentence arrived at may have been arrived at by a somewhat unorthodox route, but it certainly cannot be said that the sentence overall is manifestly excessive. On the contrary, it evidences a careful and considered approach to a sentencing

exercise in relation to very serious offending of this nature, and which was a difficult sentencing exercise for the Judge because of the unique facts. We cannot accept the submission that it was in any way manifestly excessive and the appeal therefore falls to be 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 **