

Friday 22 March 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

and

THE RECORDER OF NEWCASTLE

(His Honour Judge Sloan QC)

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

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E G I N A**

**- v -**

**M J L**

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

**Mr M Stanbury** appeared on behalf of the Offender

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

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**LORD JUSTICE SIMON:**

1. This is an application by Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1998, for leave to refer to this court a sentence which he considers to be unduly lenient. We grant leave.

2. The offender is aged 55. On 17 January, following a trial in the Crown Court at Leeds, he was sentenced on eight counts charged on an indictment. These charges represented a course of offending during which he committed crimes of kidnap, assault, making threats to kill and rape. The judge imposed a total sentence of twenty two and a half years, comprising a custodial term of fourteen and a half years and an extended licence period of eight years. Count 1 charged an offence of assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861; count 2, an offence of making a threat to kill, contrary to section 16 of the 1861 Act; count 3, an offence of kidnap, contrary to common law; count 4, a further offence of section 47 assault; count 5, assault by penetration, contrary to section 2 of the Sexual Offences Act 2003; and counts 6, 7 and 8, offences of rape, contrary to section 1 of the 2003 Act.

3. On the first day of the trial, the offender pleaded guilty to count 1. After a trial on the remaining counts, the offender was acquitted on count 5 and convicted on the remaining counts, 2, 3, 4, 6, 7 and 8. The custodial term of fourteen and a half years and the eight year period of extended licence was made up as follows: count 1, nine months' imprisonment concurrent; count 2, two years' imprisonment concurrent; count 4, four years' imprisonment concurrent; and counts 6, 7 and 8, concurrent terms of fourteen and a half years' imprisonment, with extended periods of licence of eight years. In addition, various ancillary orders were made which are not relevant to the present application.

4. The offences were committed against the offender's former wife, J, on 2 May 2018, against a

background of domestic violence and controlling behaviour. They had been in a relationship for around seven years and had married in September 2017. By March 2018, the relationship had ended.

5. J gave evidence that during the course of the relationship and after it the offender was violent and controlling towards her. The violence started around two years into the relationship. The violence included: the offender throwing a cup of hot coffee at her; kicking her to the face (although the kick did not connect) and pushing her downstairs. He had monitored her online activity and sent her messages indicating that he had done so; and he had also pushed her down the stairs on another occasion. Between February and March 2018, after the breakdown of their relationship, he had repeatedly put letters through her door telling her how much he loved her and on one occasion providing a long list of reasons for a divorce and a short list of reasons to fight for their relationship. He purchased a car, which he said was a gift to her.

6. On 20 February 2018, he attended at J's place of work, accosted her, pushed her twice, grabbed her handbag and tried to take it from her in an attempt to find her mobile phone. He also tried to grab a mobile phone which was being used by one of her colleagues to phone the police. He told J, "I'll be waiting for you every morning and night".

7. Between March and April 2018 he caused damage to J's car on four occasions, including scratches and the slashing of tyres. While he denied responsibility for this damage, the judge made a finding that he was "at the base of" this behaviour, whether or not he had actually damaged the cars by his own hand.

8. On 2 March 2018, the offender waited outside J's home, approached her as she opened her front door and pushed her through it. Once inside, he prevented her from leaving and demanded

reasons as to why she wanted a divorce.

9. Despite his behaviour, they continued to be in contact, on and off, after the relationship ended. On one occasion in April 2018 they were intimate. However, she made it clear that she did not wish any form of relationship to continue. From December 2017, she had started a new relationship with a colleague, of which she had not made the offender aware, but which he suspected.

10. On 2 May 2018, at about 4.30pm, he followed her from her home into a lane which she used to attend a parent-teacher meeting. There, in a wooded area, he confronted her, asking her why she had "broken his heart". He then punched her in the face and threatened to kill her by saying "You do realise you're going to die today", and that he would "kill [her] and put [her] in a canal". He verbally abused her, pushed her to the ground and dragged her, injuring her shoulder, to a ledge with a substantial drop. He repeatedly told her that she would die and that they would die together. He took her phone and car keys. He punched her and demanded her telephone password. He looked through her contact history on the phone. He then forced her back to his car. He told her that if she screamed, he would throw her under a bus. The incident in the woods lasted for at least an hour and a half. The punch to the face, the dragging of J along the ground, and making the threats to kill were reflected in counts 1 and 2 of the indictment.

11. The offender then drove J to the moors, while continuing his threats to kill her. He used the telephone which he had taken from her to post sexually explicit and unpleasant messages to her contacts and on Facebook. These included a picture of an erect penis and a post suggesting explicitly that she had been having an affair with a colleague. The offender also tried to contact others with whom he suspected J of having a relationship. One of those calls did not connect. When a second call was answered by a friend, "S", J shouted "He's kidnapped me". The

offender then punched her and told her that she was now "definitely going to die". S contacted the police which led to a search for J.

12. The journey in the car lasted a number of hours, during which the offender repeatedly told J that she would die. He threatened to throw her off a bridge. In an attempt to prevent investigation into her whereabouts, he sent messages to S, among others, indicating that nothing was wrong. This conduct was reflected in count 3 of the indictment, the charge of kidnap.

13. At around midnight, the offender drove his victim to an isolated farm lane. By this point she had been detained in his car for about six hours. She was sick outside the car and was pulled back by the offender. He then told her that he would kill her and cut her so that "no one would want to go anywhere near" her, and that he would go to prison anyway, so he might as well kill her and go down for something worthwhile. He pulled off her clothes and told her that he was going to rape her. He raped her vaginally and whilst doing so told her that she would be poisoned as he was taking cancer treatment drugs. This was in fact a lie. This crime was reflected in count 6 of the indictment. He then raped her anally. This was reflected in count 7 of the indictment. While raping her anally, he forced her to put her fingers into her vagina. He recorded the rape by taking photographs on his mobile phone which were shown, in pixelated form, to the jury. After raping her, the appellant hit her to the face, causing her nose to bleed. The punch was reflected in count 4 of the indictment. He then allowed her out of the car to urinate, but made her remove all her clothing to prevent escape.

14. A police helicopter was heard by the offender and J, and, in an attempt to keep the offender calm, she performed oral sex on him. This was reflected in count 8 of the indictment, alleging oral rape. The judge observed that the jury must have been satisfied that, although pretending to satisfy him, J was not in a position to give true consent and that the offender knew this.

15. Police officers who had been searching for J approached the car, smashed the windows and arrested the offender.

16. In interview he provided three prepared statements in which he said that he and J had met and argued. They had driven to a layby and had had oral and vaginal sex, which J had initiated. He said that he had accidentally penetrated her anus briefly. He denied making threats. Thereafter, he made no comment to all questions asked.

17. The offender had a large number of relevant convictions and sentences: on 30 January 1981, he was sentenced to a term of borstal training for offences of theft, assault occasioning actual bodily harm and obtaining by deception; on 11 September 1981, a community order for an offence of assault occasioning actual bodily harm; on 16 July 1985, a term of sixteen months' imprisonment for offences of unlawful wounding and assault occasioning actual bodily harm; on 7 September 1988, two years' imprisonment for an offence of inflicting grievous bodily harm and a further assault occasioning actual bodily harm; on 25 November 1991, 21 months' imprisonment for an offence of theft, two offences of criminal damage and two offences of assault occasioning actual bodily harm. These crimes were committed against a previous partner of the offender. On 26 August 1994, he was sentenced to two years' imprisonment for assault occasioning actual bodily harm. This offending was also against a former partner. On 7 March 2002, he was sentenced to a Community Rehabilitation Order for an offence of assault occasioning actual bodily harm was imposed. This, too, was an offence committed against an ex-partner. On 14 July 2004, he received a community order for an offence of common assault; on 27 January 2005, a community order for an offence of battery; and on 30 November 2005, four months' imprisonment (later reduced to 28 days) for an offence of harassment. This offending was against a former partner. The offender printed and distributed intimate images of

this former partner, and told her that he would haunt her for the rest of her life. On 26 March 2007, he was sentenced to fifteen months' imprisonment (later reduced to four months on appeal) for a further offence of harassment. This related to offending against a former partner in respect of whom the offender had already been convicted of harassment in November 2005.

18. It appears that former partners had made numerous additional complaints about the offender's violence. These complaints had either not resulted in police action or had not led to convictions.

19. There was a pre-sentence report before the sentencing judge, dated 3 December 2018. It recorded that the offender continued to deny his crimes, other than count 1 to which he had pleaded guilty. He had committed offences against four ex-partners, including J, and he blamed them for his actions. He was a man who came across as needing complete control and someone who shows "a continued pattern of abusive behaviour, posed a very high risk of harm to partners, both future and past, the nature of the risk being emotional abuse, control and fear, harassment, physical and sexual violence". In the view of the author of the report, he demonstrated a pattern of controlling and abusive behaviour.

20. There was also a psychological report before the court from Dr Harry Wood, dated 16 December 2018. There was no evidence of intellectual impairment. Factors indicating that he posed a high risk of harm were identified and at paragraph 22.5 he was assessed as "a high risk of further spousal assault". That is a view which coincided with the pre-sentence report and is perhaps self-evident.

21. As we have noted, the judge had a victim personal statement from J, dated 13th January. In it she said this:

I can honestly say at the time of the offence I thought I was going to die. I still believe to this day that if the police hadn't found me when they did, [the offender] would have gone on to kill me. I think in his mind I was his wife and therefore his property and he could do with me what he wanted to. When I was in his car on the dirt track on the dreadful day, I thought that this was the end of my life. I was in pain from him punching me in my face and I thought I had concussion because I just wanted to sleep. I daren't close my eyes though in case that annoyed him and he hurt me further. I was absolutely petrified and I can remember thinking about my two young children. I couldn't help thinking how they didn't deserve to grow up without a mother and how it wasn't their fault that I got involved with such a monster who would end up killing me.

Later in the statement there is this:

The incident has completely changed my personality. I used to be an outgoing, social and friendly person, but now I never leave the house unless I'm with someone that I can trust. I don't walk anywhere on my own. I've had to buy a new car so that [the offender] doesn't know what car I drive. If I need to visit the local shop for household goods, I will send my new partner or children, as I'll not be outside on foot at any time. I've had to move house so that he doesn't know where I am. All this has been a massive upheaval on my life.

22. In passing sentence the judge set out the circumstances of the offences and his sentencing approach, which was to consider the features of the other offences as aggravating features of the three rape offences and to pass concurrent sentences in respect of those other offences. The judge then considered the definitive guidelines for offences of rape. So far as culpability was concerned, the judge identified three factors that placed the offending in category A: a significant degree of planning; the previous violence against the victim; and the fact that some of the offences had been recorded. So far as harm was concerned, the judge identified six factors:

- (1) The severe psychological harm suffered by the victim as a result of her ordeal;
- (2) The additional degradation from the posting of material on the victim's



phone;

(3) The abduction of the victim;

(4) The prolonged detention;

(5) The violence and threats of violence beyond that inherent in the offences of rape; and

(6) The fact that the victim was particularly vulnerable. She had been taken to an isolated place and her clothes taken from her. As the judge put it, "she was essentially naked, in the middle of nowhere, and entirely at your mercy.

23. The judge considered whether the extreme nature of the harm factors was such as to elevate the offending into the highest category of harm (category 1). The starting point in the guidelines for a category 1A offence is a term of fifteen years' custody, and a range of thirteen to nineteen years. The starting point for a category 2A offence is a term of eight years' custody, with a range of five to thirteen years. The judge concluded that the offending fell "on the border between the very top of category 2 and the bottom of category 1". He took a starting point of thirteen years. He then increased the custodial term to fourteen and a half years to take into account the offender's previous convictions.

24. Mr Smith, who appears for the Solicitor General, makes the core submission that the judge was wrong to have placed the offending on the borderline of category 1A and 2A. He had himself identified a number of harm factors whose extreme impact placed the offending squarely in category 1 harm. Furthermore, there were a number of additional aggravating factors which increased the seriousness of the offending:

(1) The statutory aggravating circumstance of the offender's previous convictions for violence against his domestic partners;

(2) The specified aggravating circumstance that his victim had been forced to leave her home; and

(3) The fact that the offender had not only recorded the offences – a higher culpability factor – he had also sent the recordings out on the victim's phone.

There was, Mr Smith submitted, no mitigation.

25. For the offender, Mr Stanbury pointed out that the trial judge had carefully considered the sentences he imposed and how the rape offences should be categorised by reference to the guidelines. Although he had described the offending as being on the cusp of category 1A and 2A, the custodial sentence imposed of fourteen and a half years was well within category 1A and close to the starting point of fifteen years. In summary, he submitted that the sentence, although 'cautious', was not lenient; but if it were, it was not unduly so. A very significant sentence of imprisonment had been imposed.

26. We have considered these submissions. In our view, the custodial terms of fourteen and a half years on counts 6, 7 and 8 failed to reflect the overall seriousness of this offending and resulted in an unduly lenient sentence. This was an extreme instance of domestic abuse by a violent and controlling bully. As the Sentencing Council Guideline on Overarching Principles: Domestic Abuse makes clear at paragraphs 7 and 8, this makes the offending particularly serious. The extreme nature and impact of the harm factors elevated the offending into category 1: the kidnapping of the victim – itself an act of violence; the detention of her over a significant period of time; the additional assaults and threats of violence, including threats to kill, which went beyond the violence necessary to commit the rapes; J's general vulnerability from the abusive nature of the offender's prior treatment of her and her particular vulnerability when she was isolated and had her clothes taken from her; and the severe psychological harm which,

unsurprisingly, she suffered as a result of these crimes and which led to her being forced to leave her home. In addition to these factors, there was an extensive history of domestic violence against J and the offender's other partners. He had been sentenced to terms of imprisonment for these earlier offences, but neither these, nor the community sentences which were imposed had any effect on his violence against those with whom he had a relationship or felt he had a relationship.

27. In our judgment, these factors, coupled with the additional offending for which he was to be sentenced, called for a custodial term of not less than eighteen years' imprisonment for the three lead offences of rape.

28. Accordingly, we quash the custodial terms of fourteen and a half years on counts 6, 7 and 8 and substitute terms of eighteen years. The other sentences will be unaffected, as will the extended period of licence. The sentence will be an extended sentence of 26 years, concurrent on each of counts 6, 7 and 8, comprising a custodial term of eighteen years and an extended licence period of eight years.