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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 23 May 2019

B e f o r e:
LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

SIR DAVID FOSKETT

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

v

JAMIE LEE PICKERING

Mr W Emlyn Jones appeared on behalf of the **Attorney General**
Mr A Sugare (Solicitor Advocate) appeared on behalf of the **Offender**

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(Official Shorthand Writers to the Court)

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J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: Jamie Pickering (to whom we will refer as "the offender") pleaded guilty in the Crown Court at Leeds to two offences of sexual assault, contrary to section 3 of the Sexual Offences Act 2003, and one offence of blackmail, contrary to section 21(1) of the Theft Act 1968. On 15 February 2019 he was sentenced by a recorder to a total term of 18 months' imprisonment suspended for 2 years, with a 60 day rehabilitation activity requirement and a requirement to perform 120 hours of unpaid work.
2. Her Majesty's Attorney General believes that that total sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
3. The victim of the offences (to whom we will refer as "AM") is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during his lifetime no matter relating to him shall be included in any publication if it is likely to lead members of the public to identify him as the victim of any of these offences.
4. In October 2016 AM, who was then 18 years old, went to a party with his girlfriend, SFH. There they met the offender, then aged 24, and his boyfriend. They all had an amicable conversation. AM subsequently received a message from what appeared to be a fake account on Facebook asking if he had ever "been with a guy". AM replied that he had not. In subsequent messages, which AM realised were coming from the offender, it was apparent that the offender wanted to engage in sexual activity. AM indicated that he would tell the offender's boyfriend that the offender had propositioned him. In response the offender said he would tell AM's girlfriend that he and AM had engaged in sexual activity. At the time that was untrue.

5. Eventually, however, AM was persuaded to go to the offender's flat. There the offender briefly performed oral sex upon him before AM announced that he was leaving and did so. The offender was initially charged with an offence of sexual assault in relation to this incident, but he maintained that the encounter had been consensual and his not guilty plea was ultimately accepted.
6. When AM returned home after that encounter he received a message from the offender saying that he could now tell SFH that AM had "sucked me off". He said that he wanted AM to come to his flat again to repeat the activity. AM initially ignored this message, but in subsequent messages the offender repeatedly asked him to visit and threatened to tell SFH what they had done if AM did not comply. He said that if AM would let the offender perform oral sex on him he would then be left alone.
7. Frightened that disclosure of the earlier incident would lead SFH to end their relationship, AM eventually gave in to these threats and on 18 December 2016 he went to the offender's home where the offender performed oral sex on him until AM ejaculated, after which AM quickly left. The offender pleaded guilty to an offence of sexual assault in relation to this incident.
8. Subsequently the offender told AM, in a message, that he had made a video recording of what they had done and that the film would be distributed if AM did not do whatever the offender wanted. The offender was later to claim that the recording had been made on the first occasion and there was no clear evidence to contradict that assertion. AM asked the offender to delete the recording but the offender refused to do so. At first he said he would not do anything with the recording, but a few days later he sent a message telling AM that he wanted him to visit and threatening to show the recording to SFH. This

message was accompanied by a short clip from the film, which of course confirmed to AM that their sexual activity had indeed been filmed.

9. AM tried to make excuses to avoid going to the offender's flat. After a time the offender demanded that AM send nude photographs of himself, insisting that these must show both AM's face and his penis. On one occasion he demanded that AM send a nude photograph with a caption saying: "I wish [SFH] sucked me off as good as you do". AM complied with these requirements because of his fear that the offender would indeed show the film to SFH. In all, over a period of weeks, he sent to the offender some nine or ten naked pictures of himself.
10. In early February 2017 the offender indicated that he would keep the photographs and the video but would leave AM alone. That, of course, came as a relief to AM. Two or three months later, however, the offender made contact again, saying that he wanted further sexual activity and again threatening to tell SFH what had happened if AM did not accede to his demands. AM therefore returned to the offender's flat and saw that the offender was again filming their encounter. The offender began to perform oral sex on AM, this being the subject of the second charge of sexual assault. AM began to cry. The offender asked what was wrong, to which AM replied: "What do you think?" AM was allowed to leave without further incident but subsequently the offender sent messages to the effect that AM would have to return and allow the offender to have full sexual intercourse with him.
11. AM thought this was a bluff and refused. As a result, SFH received a message later that day with a nude photograph of AM accompanied by a message that AM had been sending such photographs to other girls. This message had been sent to SFH by the

offender but for the purpose he had set up a fake Facebook account using a girl's name.

12. There was, inevitably, a difficult conversation between AM and SFH in which he explained what had happened. They both blocked Facebook accounts used by the offender. AM began to receive messages from people he did not know, which he ignored in the belief that they came from the offender. However, AM then received a message which appeared to come from one of his friends, who said that he had seen the film of oral sex between AM and the offender. This message in fact came from the offender, who had created for the purpose another fake account, this time using the name of one of AM's friends.

13. In about August 2017 AM received a message from the offender using yet another Facebook account which threatened to send the video to everyone AM knew in 14 days' time. AM delayed for 12 days and then sent a message asking the offender what it would take to get him to stop. The offender's reply was: "Your cock whenever I want it haha". AM pleaded with the offender to leave him alone, saying this conduct was genuinely "killing me" and that he was scared every day. To this the offender replied: "Not my problem. I own you as long as I want ... As long as you're a good boy and do what you're told, you've got nothing to be scared of. Piss me off and the video gets seen by a lot of people."

14. After further unsuccessful pleas by AM to be left alone the offender sent a message to the effect that he had "thought of a way you can make this all go away", and asked AM how much he was willing to pay. This was the subject of the charge of blackmail. AM made a series of offers of increasing amounts of money and eventually the offender said that a payment of £1,000 would bring the entire matter to an end. AM and SFH then

involved the police and the offender was arrested in September 2017.

15. In interview under caution, the offender admitted the three offences to which he later pleaded guilty and accepted that AM had been "reluctant" to allow the offender to perform oral sex on him. He claimed that the naked pictures of AM had been sent willingly. He admitted that he had sent one of them to SFH, although he said that he had felt awful afterwards. He said that he had demanded money because both he and his boyfriend were in low paid jobs and money was scarce. He agreed that AM had not wanted sexual activity with him after the first time and said that it felt disgusting now and that AM was probably devastated.
16. AM did not wish to make a victim personal statement. The effect of these offences upon him was however apparent from the video recorded interview in which he described the events. He was frequently in tears whilst doing so, said how scared he had been and said that he had been left feeling the worst he had ever been. Further evidence as to the harm caused to AM was given in a statement made by SFH, who described AM's distress when he told her what had happened and when he went to report the matter to the police. She said that since these events AM has completely changed. She described him as being emotionally up and down and said that "the slightest thing can set him back".
17. The offender had no previous convictions but had previously received formal police cautions for assault occasioning actual bodily harm, theft and fraud by misrepresentation.
18. The offender gave an early indication of his intention to plead guilty and did so when the case came before the Crown Court.
19. At the sentencing hearing the recorder was assisted by a commendably thorough

pre-sentence report. This referred, amongst other things, to the fact that the offender had been diagnosed as suffering Asperger's Syndrome. In describing the offences to the author of the report, the offender had acknowledged that he knew at the time that AM had been reluctant to engage in sexual activity after the first occasion. He accepted that he had ignored those signals from AM because he was sexually attracted to him and enjoyed the attention. He accepted that he had put AM under undue pressure by threatening to tell his girlfriend about their first encounter, although he claimed that he would not really have done so. He accepted that he had made the recording but said he had done so for his own enjoyment and no other reason. He acknowledged that he had been aware of AM's reluctance to engage in the later sexual activity but said that he had put that to the back of his mind until afterwards when he was "disgusted by what I have done to him". He nonetheless went on to repeat the activity at a later date. He claimed that the idea of asking for money had only occurred to him on the day when he first raised the topic, and suggested that the seriousness of what he was doing only dawned on him later. He told the probation officer that he was disgusted by what he had done, that he was "not that sort of person" and that he had "probably ruined" AM's life. He sought to rationalise his behaviour by saying that the messages he received from AM caused him to think that there was mutual sexual attraction but he acknowledged that "deep down I knew he hadn't enjoyed it".

20. The opinion of the author of the pre-sentence report was that the offender's behaviour showed significant cognitive deficits and it was possible that his self-reported difficulty in interpreting social situations and in reading other people's emotions could have contributed to his disregard of AM's reluctance. The author recorded that the offender was currently in employment in a coffee shop, sometimes working with customers but

sometimes working in the kitchens when he was "struggling with his Aspergers". He recorded that the offender had reported depression dating back to his teenage days, which had been a particularly difficult problem for him to manage between 2010 and 2016, a period during which the offender had felt socially isolated and unable to work and had made a number of attempts to end his life. Matters had subsequently improved to some extent. However, the criminal proceedings had led to a deterioration in the offender's mental health. He was very worried about what would happen at court and expressed suicidal ideations.

21. The author of the report made this assessment:

"In my assessment, relationship issues and Mr Pickering's attitude towards intimacy is clearly a relevant issue intrinsically linked to his offending. His difficult upbringing, the absence of a pro-social and consistent paternal figure in his life coupled with his difficult educational experiences will likely have had an impact on his ability to perform and sustain mutually supported relationships. Additionally, his previous negative experiences within intimate relationships will also likely have contributed to his own attitude to and behaviour within relationships. He struggles to fully understand his motivation for pursuing the victim in the manner in which he did and thus, there are many issues linked to relationships which he needs to address in more detail in order to develop a more appropriate and less risky relationship skills."

22. At an early stage of the sentencing hearing the recorder asked if it was the prosecution's case that AM had been physically compelled to engage in sexual activity against his consent. Prosecuting counsel made it clear that there was no allegation of the use of physical force, but that AM had not consented to the sexual activity and had only

complied because of the threats made by the offender to disclose matters to SFH. The Recorder indicated that he would approach the matter on the basis that the first encounter was consensual, adding "which really colours everything else, does it not?"

23. It was common ground between the parties, and the recorder accepted, that in the Sentencing Council's Definitive Guideline relating to offences of sexual assault the two offences which the offender had admitted came within category 2A. The harm fell into category 2 because of the touching of AM's naked genitalia. The case was in category A culpability because of the significant degree of planning. In relation to each offence of sexual assault accordingly, the guideline starting point was 2 years' custody, with a range from 1 to 4 years. There is no definitive guideline as yet in relation to offences of blackmail.

24. Defence counsel made submissions in mitigation, indicating that the offenders Asperger's Syndrome had been diagnosed when he was aged 11 and had caused the offender problems with social interaction. At an early stage of those submissions made by Mr Sugare, who appeared then as he does today, the recorder indicated that although the custody threshold had been crossed, he intended to impose a suspended sentence.

25. In his sentencing remarks the recorder said that the offender had taken advantage of AM and had effectively blackmailed him into a position where he could sexually assault him on the two occasions to which he had pleaded guilty. Not satisfied with that, the offender had asked for money which "really took it up to a different level" and "was rather serious". The recorder accepted what was contained in the pre-sentence report and said that there were a number of highly mitigating features. At page 4A of the transcript he said:

"You do have Asperger's Syndrome, which I have no doubt will have impacted on your social interactions and may be partly at the root of the way things developed. But that does not excuse your criminal behaviour. I also accept what is said in the report about the fact that you are very remorseful for what you did and have insight into the effect that you have had on the complainant, which is important."

26. The recorder said that the offender could not complain if he was sent to prison for some time. It was however necessary to consider the particular circumstances of the case which had developed in an unusual manner. He added:

"... given the fact that the prosecution accept that the first encounter that you had with this man was consensual and that it developed from there, that changes the landscape of the case."

27. Giving full credit for the guilty pleas, the recorder imposed a sentence of 18 months' imprisonment suspended for 2 years for the offence of blackmail. He imposed concurrent suspended terms of 9 months' imprisonment in respect of each of two sexual assaults. He imposed the requirements to which we have referred and made a sexual harm prevention order lasting for 10 years, which had the effect of prohibiting the offender from any contact with AM or SFH and from possessing any image of AM.

28. For the Solicitor General, Mr Emlyn Jones submits that the sentencing was unduly lenient. He identifies a number of aggravating features. The blackmail was sustained

over a period of 9 to 10 months, with the seriousness of the threats increasing over time. What had begun as a threat to send the recording to SFH later became a threat to send it to everyone whom AM knew. The first threat was in fact carried out because an indecent image of AM had been sent to his girlfriend. In addition, AM was led to believe that the images had been circulated more widely. Although the sum of money demanded was relatively small, the offender knew that it was an entire month's income for AM. The use of a range of fake social media accounts showed a degree of sophistication and planning. The blackmail relied upon a video recording which had been made without AM's knowledge or consent. The sexual assault offences were aggravated by the victim's free will having been overborne by the blackmail.

29. We pause there to note that in the relevant sentencing guideline the list of potential aggravating factors for an offence of sexual assault includes "blackmail or other threats made (where not taken into account in step 1)"
30. As to the matters of mitigation, Mr Emlyn Jones identifies the comparatively small sum of money demanded, the making of prompt admissions and guilty pleas, the absence of previous convictions, remorse and the fact that the offender has Asperger's Syndrome and a history of depression.
31. In relation to the offence of blackmail Mr Emlyn Jones has referred us to a number of previous decisions of this court. He recognises that all are fact-specific and therefore does not seek to draw any parallels with the present case. All the cases however make clear that blackmail is a serious type of offence, met with severe punishment and with deterrence being an important consideration.

32. Mr Emlyn Jones points out that in the case of R v Ford [2015] 2 Cr App R(S) 17, at paragraph 17, the court said:

"... a crucial element in assessing this type of offending will often be the relationship between the amount of money demanded and the means available to the victim."

33. Mr Emlyn Jones submits that the recorder erred in giving too much weight to the consensual nature of the first sexual encounter. He submits that that is of little, if any, relevance to the overall seriousness of what followed, namely, relatively sophisticated methods of blackmail continuing over a period of several months which first caused the victim to submit to sexual assault and then became a demand for a significant sum of money. He submits that the tone and content of the social media messages which have been recovered make it clear that this was callous and calculating conduct on the part of the offender and cannot be explained by naivety, infatuation or the misreading of signs. He submits that the offence of blackmail required a term of immediate imprisonment and points out that either of the sexual offences attracted a starting point of 2 years' imprisonment. He suggests that the total sentence failed to reflect public concern in relation to offences of this nature involving the threat of exposure of sexual imagery via social media. Such threats, submits Mr Emlyn Jones, are easily made, pernicious in nature and involve a very damaging form of exploitation of the victim.

34. For the offender, in well-focused submissions, Mr Sugare acknowledges that the total sentence could be regarded as lenient but submits that it was not unduly so. He takes

issue with the suggestion that the behaviour of the offender could fairly be described as "sophisticated". He acknowledges that the Asperger's Syndrome suffered by the offender does not excuse his conduct. He points to a letter written by the offender to this court, to which we will return shortly. He also draws attention to the offender's conduct since the sentence was imposed. In summary, the offender immediately began the unpaid work which he had been required to perform. Helpfully bringing matters up to date for us, Mr Sugare tells us that the offender had completed just over 50 hours of work before today, and is indeed performing unpaid work at the time of this hearing. He has also complied with the other requirements of the suspended sentence order. Mr Sugare draws to our attention the consequences for this offender of an immediate sentence of imprisonment.

35. We are very grateful to both advocates for their helpful submissions. Before turning to our conclusions we should refer to two documents. First, a supplementary report has helpfully been prepared by the Probation Service for the purposes of this hearing. It records the unpaid work completed up to the date when the supplementary report was compiled and indicates that the offender has received positive reports from those supervising the work. He has kept all appointments and has engaged well throughout. Offence-focused work should by now have commenced but that has not yet been possible because of the emotional impact on the offender of the pending hearing of this application. The report indicates that the offender is currently working both in a cafe and in a pub, but would lose those employments if sent to prison. The report also refers to the offender's great anxiety about this hearing. He was reported missing on a date in late April 2019 and there were concerns for his safety, although he was subsequently found by police officers.

36. The author of the report expressed concerns about the offender's current mental health and his ability to cope within a prison setting, given that he has Asperger's Syndrome and a high level of anxiety. This, she says, would have to be carefully monitored if the court concludes that immediate imprisonment is necessary.
37. The second document to which we should refer is the courteous letter from the offender to which we have already referred. In this the offender emphasises his co-operation with the police from the beginning of the investigation and his compliance with all that has been required of him since the suspended sentence was imposed. He expresses his remorse and says that he is frankly appalled at his past behaviour and wishes to work at ensuring that it is never repeated. He sets out in stark terms the very serious consequences for him of immediate imprisonment, which he says would result in the loss of his home as well as his employment. He acknowledges the seriousness of his crimes but says that many things have changed in his life since he committed those crimes and he feels he has changed significantly as an individual. He implores the court not to send him into immediate custody. As Mr Sugare submitted to us, the offender in that letter has made, and has well made, points of mitigation which Mr Sugare would otherwise have advanced on his behalf.
38. We have considered this case anxiously. We acknowledge that the recorder was faced with a difficult sentencing process, but with all respect to him, we are unstable to share the lenient view which he took of the case. Whilst he was correct to recognise that the initial encounter was to be treated for sentencing purposes as consensual, we do not agree that the consensual beginning "changed the landscape" of all that followed. The fact that a person consented or may have consented to sexual activity on one occasion does not

lessen the seriousness of a subsequent sexual assault. Moreover, although the recorder identified the fact that the later sexual encounters were effectively procured by blackmail, it seems to us that he failed to recognise or give proper weight to the seriousness of that fact. Over a period of months the offender made repeated attempts to coerce AM into participating in further sexual activity and caused him great fear and distress. He set up a variety of fake social media accounts in order to progress his demands. Whether or not that be described as "sophisticated", it was certainly persistent. He humiliated AM by requiring him to send naked photographs, the demand that these include his face being a clear indication of their potential for use in blackmail. He further humiliated AM by requiring him to endorse one of these pictures with a caption speaking in unfavourable terms about his girlfriend. In what we are bound to say was an act of pure wickedness, the offender compounded his conduct towards AM by sending one of the naked pictures to SFH.

39. We think it relevant in this regard to note that, under section 33 of the Criminal Justice Act and Courts Act 2015, it is an offence to distribute private sexual photographs or film if the disclosure is made without the consent of the person depicted and with the intention of causing that person distress. That is an offence which carries up to 2 years' imprisonment even when the imagery was recorded consensually and in the absence of any element of blackmail.

40. In our judgment, even if matters had ended after the second sexual assault, a sentence of immediate imprisonment would undoubtedly have been necessary. The commission of the further offence of blackmail increased the overall seriousness of the offending to a significant degree. The sum of money which AM was eventually driven to offer was,

for him, a substantial amount. The demand for money was made against the background of the previous coerced sexual activity and the explicit threat that, unless a satisfactory monetary settlement was put forward, the offender would continue to treat AM as being his to do with as he wished.

41. There were undoubtedly significant matters of mitigation, and we recognise that the offender's compliance with the requirements of the suspended sentence order to date must be taken into account in our decision as to the appropriate sentence. We have particularly considered the significance of the offender's Asperger's Syndrome. It seems to us, however, that on the information available to the court, it does no more than provide, as the recorder rightly said, a partial explanation for how the offender's contact with AM began. We accept that initially, difficulties with social interaction and difficulties in reading social cues may have led the offender to taken an unrealistic view of the extent to which his feelings about AM were reciprocated. As matters progressed, however, the offender admitted that he knew AM was reluctant. He nonetheless continued to act in accordance with his sexual and financial motivation. In those circumstances, it seems to us that the history of Asperger's Syndrome and depression can provide only limited mitigation for the offences of sexual assault and very little mitigation for the offence of blackmail. On the other hand, we recognise that for a young man with the offender's problems, imprisonment will be significantly harder to bear than it would be for most others in the prison population.

42. Balancing, as we must, the aggravating and mitigating features of these offences and having regard to the compliance to date with the requirements of the suspended sentence order, including the performance of nearly half the required number of hours of unpaid

work, we conclude that the least total sentence upon conviction, after a trial, would have been one of four-and-a-half years' imprisonment. Giving full credit for the guilty pleas, we conclude that the least total sentence appropriate in the serious circumstances of this case is one of 3 years' imprisonment.

43. We therefore grant leave to refer. We find the sentences imposed below to have been unduly lenient and we quash them. We substitute for them the following. On each of counts 2 and 3, the sexual assault offences, 2 years' imprisonment and on count 4, the offence of blackmail, 3 years' imprisonment. Those sentences will run concurrently the one with the other, making the total sentence one of 3 years' imprisonment. The sexual harm prevention order will continue in force as before.

44. We direct that the offender must surrender by 4.00 pm today to a police station which will be identified in a moment. We further direct that the relevant police station be provided with copies of the pre-sentence report and the supplementary report, the contents of which must be taken into account in relation to the initial custody of the offender and copies of which must accompany him to prison.

45. Mr Sugare, the appropriate police station please?

46. MR SUGARE: The police station is Normanton in Wakefield.

47. LORD JUSTICE HOLROYDE: We direct surrender to the police station at Normanton, Wakefield by 4.00 pm today.

48. Mr Emlyn Jones, would you be kind enough, through those instructing you, to see that the important documents reach that police station in time?

49. MR EMLYN JONES: I certainly will.

50. LORD JUSTICE HOLROYDE: Thank you both very much indeed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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