IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1718

No: 202100329 A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 12 October 2021

MR JUSTICE SPENCER
MR JUSTICE HENSHAW

REGINA
V
AAO

Computer Aided Transcript of Epiq Europe Ltd,
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Mr A Davidson appeared on behalf of the Appellant.

Ms S Allen appeared on behalf of the Crown.

J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge.
2. The appellant is now aged 17 years and three months. He was born on 15 July 2004. On 4 December 2020, when he was aged 16 years four months, he pleaded guilty to an offence of rape. The victim was his sister. That offence took place in the early hours of 7 July 2018, when he was still 13 years of age, a few days before his 14th birthday.
3. This is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the victim of this offence shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
4. We also renew the order made in the Youth Court pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999. No matter relating to the appellant shall, whilst he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person concerned in these proceedings, in particular (a) his name; (b) his address; (c) the identity of any school or other educational establishment attended by him; (d) the identity of any place of work; (e) any still or moving picture of him.
5. Following his guilty plea to the offence of rape, the appellant was committed for sentence from the Youth Court to the Crown Court. On 22 January 2021 in the Crown Court at Worcester he was sentenced by His Honour Judge Jackson to a term of two years six months' detention under section 250 of the Sentencing Act 2020. Relevant ancillary orders were also made, as to which there is no complaint.
6. The grounds of appeal are: first, that the judge placed the offence in the wrong category under the relevant Sentencing Council guideline; and second, that the judge failed to have sufficient regard to the welfare of the appellant in passing this custodial sentence rather than acceding to the recommendation in the pre-sentence report (if custody could be avoided) of a community order with requirements attached to it.
7. We are grateful to Mr Davidson, who also represented the appellant in the court below, for his written and oral submissions. The prosecution have also been represented at this appeal, and we are grateful to Ms Allen for her written and oral submissions.
8. This was on any view a particularly serious and difficult case. The offence of rape took place in the appellant's family home. He lived there with his father. His father and mother had separated some years earlier. The victim of the offence was the appellant's older sister, then aged 15 years seven months. She lived with her mother, but had regular contact with her father and the appellant, her brother.
9. At the time of the offence, her mother was on holiday in Mexico. She had come to stay with her father and the appellant for a few days, arriving that evening. She was sleeping on an airbed in a room downstairs. The appellant had a bedroom of his own upstairs, as did their father.
10. On the evening of the offence, the appellant and his sister and their father had been socialising with neighbours. It is not entirely clear exactly what the sequence of events must have been, but during the course of the evening both the sister and the appellant had consumed some vodka. The appellant was unaccustomed to alcohol. It seems that when they got home and after their father had gone to bed, the appellant helped himself

to more vodka, consuming possibly as much as half a litre bottle.

11. Before the sister retired to bed, she went upstairs to say goodnight to the appellant. It seems that he had been confiding in her earlier in the day about some of the problems he had been having, and she had been very supportive. When she went up to say good night to him, he was on his iPad in his room. She went downstairs to bed and fell asleep.
12. Later on, and this by now would probably have been into the early hours of the next morning, she awoke to find the appellant lying behind her in bed. He had pulled her knickers down to her knees and she could feel his penis inside her vagina. He had his iPad in his hand and was taking photographs of her on the iPad.
13. She was shocked. She jumped up and demanded that he delete the photographs. In fact she grabbed the iPad and deleted them herself. She asked why he had taken these photographs. He said because his friend wanted to see them, although he had decided not to send them.
14. She ran to the bathroom. There she saw an empty ripped condom wrapper in the bin, and she realised, no doubt with growing horror, what had happened.
15. She called her mother in a distressed state. Her mother in turn contacted her own mother, the children's grandmother, and the police were also contacted. They arrived in the early hours of the morning. The appellant was arrested.
16. The police found a used condom which the appellant had hidden in the lavatory cistern. Forensic examination revealed his sister's DNA on the outside of the condom and the appellant's DNA and semen inside the condom.
17. The appellant's sister gave a lengthy ABE interview the same day. After she had described the sequence of events, she was asked if she and the appellant had ever talked about sex before, and she said, "Yes, just that he had a girlfriend and he wanted to do things with her, so I told him to be safe. He didn't really say what sort of things he wanted to do with his girlfriend."
18. The appellant was interviewed that day with a solicitor present and an appropriate adult. Initially, he gave a prepared statement through his solicitors, a short statement denying the allegation of rape and asserting that his sister was lying. Thereafter he gave a no comment interview. He was also interviewed again in September and gave a no comment interview.
19. The police investigation was completed in September 2018, within two months or so of the offence. Regrettably, there was then a very lengthy delay before the prosecution commenced. It seems that this was largely because there were extensive discussions as to whether there would be a prosecution at all.
20. A postal requisition was eventually served on 28 June 2020, that being the commencement of the proceedings. The appellant's first appearance in the Youth Court was in July 2020. A report was obtained from an intermediary to make sure that the appellant could follow the proceedings and participate fully. In view of his not guilty plea, a trial date was set initially for September 2020. That had to be vacated because there had been some sort of administrative mix-up, and the trial date was set again for December 2020. The appellant was still denying the offence, and was now asserting that he believed his sister had encouraged the sexual activity and was consenting to it. We emphasise that he subsequently withdrew those assertions, which he accepts were totally false.
21. A psychiatric report was obtained in advance of the trial date. It was provided the day

before he entered his guilty plea on 4 December 2020, which was the day the case was listed for trial. The conclusion of the psychiatrist, Dr Irani, was that the appellant fitted the diagnosis of autistic spectrum disorder, but that a further assessment would be necessary. Dr Irani was satisfied that the appellant understood the concept of consent for rape and sexual offences. We shall return to her report.

22. There was a very full pre-sentence report before the judge from the Youth Offending Team dated 15 January 2021, sentence having been adjourned for the obtaining of reports. The pre-sentence report said that the appellant now accepted full responsibility for his behaviour. He had changed his plea to guilty. He had come to terms with his behaviour. He had, "looked at what he did and how messed up it was." He had said he had, "no defence". He told the author of the report that he had consumed at least half a bottle of vodka and was heavily intoxicated. He and his sister had drunk a small quantity of vodka with their father early in the evening, but then he had taken the bottle from the cupboard later on and consumed more of it when their father had gone to bed. He struggled to recall his behaviour or how he was feeling before, during or after the offence. He said he, "barely remembered anything when he woke up next morning." He found it difficult to talk about his behaviour and felt embarrassed and ashamed. He said:

    i. "Almost everything about it was wrong. I know it was. Rape is rape regardless, but it being my sister makes it even worse."

23. The pre-sentence report described the impact on the victim of the offence, expressing concern that she might never recover from the harm the offence had caused.
24. The recommendation in the report, as we have indicated, was for a three-year youth rehabilitation order with supervision, programme and activity requirements.
25. It is very clear that the offence has had a profound impact upon the appellant's sister. When she gave her ABE interview on the day of the offence, she said at the conclusion of the interview (no doubt when it had been explained to her what the sentencing options might be for someone as young as her brother) that she thought her brother needed help and she did not want him to go to prison. However, her attitude had changed by the time of the sentence hearing, not least because of his prolonged denial of responsibility and his assertion that she was lying and making a false complaint. That itself had caused her extreme distress, as well as considerable family upset, and had led to a breakdown of her relationship with her father.
26. When the appellant entered his guilty plea on 4 December 2020, his sister made a victim personal statement in which she explained how her mental health had suffered greatly as a result of the offence. She was now 18 years of age. She had been diagnosed as suffering from anxiety and depression, for which she took medication daily. She had missed six months of school. She had tried to take her own life on three occasions. She had dropped out of A-Levels because she was unable to concentrate on her studies. She relived the sexual assault in her dreams. The delay in the case coming on for trial, when he was still indicating a not guilty plea, had also weighed heavily on her mind. She believed that the appellant had shown no remorse and no sympathy for her, and had deliberately delayed facing up to what he had done.
27. Those strong feelings on the part of his sister have been repeated in a further victim personal statement submitted for this hearing. She speaks still of constant panic attacks

and reliving the ordeal even three years on.

28. The judge also had a report dated 3 December 2020 from Dr Irani, a child and adolescent forensic psychiatrist, to which we have already referred. Dr Irani had interviewed the appellant at length three weeks earlier and had also spoken to the appellant's father, who provided valuable background history of the family. It was apparent that the appellant had not had any contact with his mother since moving to live with his father at the age of eight. He had been bullied at school. His main interests were computer games and computers generally. In February 2017, about 18 months before the offence, the school had referred him to the Child and Adolescent Mental Health Service (CAMHS) because of his lack of application to his studies, but at an early stage in that referral his general practitioner had felt this was unnecessary.
29. The appellant told the psychiatrist that he understood the concept of consent to sexual intercourse. However, he was still claiming when he saw the psychiatrist that he assumed his sister was consenting because of comments he alleged that she had made earlier in the evening, comments which he now accepts he had invented and were quite untrue. The appellant recognised that the activity giving rise to the offence was wrong. The psychiatrist's opinion was that the appellant was aware that he needed to seek consent at the time of engaging in sexual intercourse with his sister, and because she was asleep she was unable to provide such consent. The psychiatrist was of the opinion that the appellant met the classification requirements for autism, but as we have already indicated, she recommended a detailed assessment.
30. The appellant had no previous findings of guilt recorded against him and had not previously been involved with the police in any way.
31. In his sentencing remarks, having set out the factual background, the judge turned to the Sentencing Council guidelines. He concluded that the offence fell firmly within category 2A of the Sentencing Council guideline for rape. There was category 2 harm because the victim was particularly vulnerable due to her personal circumstances. She was fast asleep. There was level A culpability, the judge found, because there had been planning. The appellant had decided to use a condom, so must have been aware of the risk of pregnancy for his sister. He committed the offence equipped with an iPad, which he used to take photographs. Recording the offence was itself a level A culpability factor under the guideline. For category 2A, the starting point for an adult under the guideline was ten years, with a range of nine to 13 years.
32. The judge found there were other aggravating factors. The offence took place in the family home, where she was entitled to feel safe. The ongoing effect on the victim had been very considerable. She had also effectively lost the relationship she had with her father. Although the judge did not mention it specifically, it is clear that the appellant had ejaculated; his seme was found inside the condom.
33. The judge mentioned in his sentencing remarks a recent decision of this court, an Attorney General's reference in the case of R v JB [2020] EWCA Crim 1699. That too was a case where the victim was particularly vulnerable because she was asleep, and possibly under the influence of sedatives. She had been raped whilst asleep and filmed on the defendant's mobile phone. This court held in that case that the offence fell within category 2A of the guideline.
34. The judge said that, had he been sentencing an adult for this offence of rape, the sentence would have been nine years' imprisonment after trial. The judge referred to the contents

of the reports before him, noting that the psychiatric report identified the appellant as immature and having some learning difficulties. The judge acknowledged that this should be reflected in the appropriate starting point for the appellant.

35. The judge referred to the relevant guideline on sentencing children and young people, and the suggestion that the court may feel it appropriate to make a reduction from the appropriate adult sentence of somewhere between one-third and one-half for children aged 15 to 17, and allow a greater reduction for those under 15. Applying the guideline, the judge said that he would allow an even greater reduction in the appellant's case of two- thirds, resulting in a provisional sentence of three years' custody, before credit for plea.
36. Whilst noting the appellant's vulnerability, his failure of friendships and the impact of bullying at school, the judge also noted that the appellant had sent sexualised Facebook messages to a girl that same night at 10.25, 10.30 and 10.35. Sexual matters were plainly on the appellant's mind, the judge said, and the appellant had deliberately used his own sister for his sexual gratification, having put some degree of thought into it. We note in passing that one of those messages, timed at 10.25 pm, read, "I am more horny than drunk."
37. The judge acknowledged that in cases of this kind there is inevitably a balance between rehabilitation and punishment. He accepted that the starting point of his consideration should always be to favour rehabilitation, but he also had to take account of the gravity of the offence.
38. Mr Davidson had referred the judge to another decision of this court, R v E [2016] EWCA Crim 1028, in which the court quashed a sentence of immediate custody and substituted a Youth Rehabilitation Order. That was, the judge said, a wholly dissimilar case on the facts, because it involved a relationship between two young people who had previously engaged in consensual sexual activity, and the offence had occurred when the defendant wanted to progress to full sexual intercourse.
39. In passing we should say that in his oral submissions, Mr Davidson has explained that his reliance upon that authority was not so much on its factual similarity, which was limited, but on the conclusion of this court in that appeal that although a substantial sentence of immediate custody was otherwise appropriate, the need to have regard to the welfare of the defendant was held in the end to supervene, and a Youth Rehabilitation Order was substituted on appeal.
40. The judge allowed 10 per cent credit for the appellant's guilty plea, as to which there is no complaint.
41. The judge concluded that ultimately the gravity of this offence of rape was too great to justify the alternative proposal of a Youth Rehabilitation Order. Regrettably, he said, it was therefore necessary to pass a sentence of immediate custody to mark what had occurred. That was a sentence of 30 months' detention pursuant to section 250 of the Sentencing Act 2020, custody for grave offences.
42. The appellant has been serving his sentence of detention at a Young Offender Institution. We have been provided very helpfully with three reports from that institution, which give a picture of how the appellant has been responding to the sentence.
43. There is first a custody report dated 29 May 2021 from the appellant's offender supervisor. In short, his conduct has been of a high standard, which is to his credit. He has been accommodated in a purpose-built unit for vulnerable young people who have

been identified as being unlikely to cope in a mainstream custodial setting. He has worked well at his studies and made good progress.

44. There is a report dated 18 May 2021 from the focus team of the forensic Child and Adolescent Mental Health Service for the area, written by a clinical psychologist and a mental health practitioner. It was noted in the report that the appellant has struggled to discuss the details of the offence and has demonstrated some apprehension and anxiety about professional involvement by the mental health service. However, intervention has been successfully begun.
45. There is a report dated 8 April 2021 from a specialist occupational therapist from CAMHS based at the Young Offender Institution. From this it emerged that in the 18 months before he was sentenced, the appellant had left the house on only five occasions, spending up to 11 hours a day at home. His main interest in life, it is clear, was his computer games. Concern was expressed about the risk of his becoming institutionalised in this custodial setting.
46. We also have the benefit of a full psychiatric report dated 20 September 2021 from Dr Chakrabarti, a consultant forensic psychiatrist specialising in children and adolescents. This report was commissioned by the appellant's solicitors on the direction of the single judge at the request of the appellant's counsel, Mr Davidson, in his advice on appeal. As part of the background, on 29 July 2021 a formal diagnosis of autistic spectrum disorder was made by a clinical psychologist.
47. Dr Chakrabarti interviewed the appellant at some length in person on 3 September 2021. The appellant told Dr Chakrabarti that he was struggling in prison as he was, "not good around people". He told Dr Chakrabarti that he was attending education and was excelling in it. He said he knew about consent at the time of the offence but was intoxicated on the night. He was not proud of what he had done and he would not have done it had he not been under the influence of alcohol. He repeated that he had drunk half a litre bottle of vodka. He had never drunk any significant quantity of alcohol before that night.
48. Dr Chakrabarti in his conclusion described the appellant's unsettled schooling, resulting from frequent moves as a young child. He described the appellant having faced bullying at primary school and to a degree at secondary school. He had started to self-harm at an early age. He struggled with social interaction at home and at school.
49. Dr Chakrabarti was specifically asked to address the issue of culpability, having regard to the appellant's autism spectrum disorder. At paragraph 10.1.7 of his report, Dr Chakrabarti said this:

    i. "At the time of the index offence [the appellant] was a 13 year-old child who had an unrecognised neurodevelopmental disorder and he had drunk a significant amount of alcohol. As a result, it is unlikely that he was aware of any criminal intent on his part at the time of the index offence. I am therefore of the opinion that he is not culpable of the index offence of rape."

50. We shall return to that paragraph of the report.
51. Dr Chakrabarti also addressed the appellant's vulnerability in his present custodial setting. His opinion was that although the prison in-reach team had been efficient in identifying and diagnosing the appellant's autism, it was highly unlikely that they could

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meet all his needs and requirements. His current incarceration, the doctor said, was likely to aggravate his anxiety and have an effect on his confidence and self-esteem, which may cause further deterioration of his mood. There is a danger he may become institutionalised in a place with young people with offending behaviour. Consequently, there is a chance he may gravitate towards such people in the future, as he may feel comfortable in their presence. Thus, said Dr Chakrabarti, he may inadvertently get involved in their criminal activities or may be exploited by them. The appellant's current placement in a prison setting is not meeting the appellant's mental health needs and is making him vulnerable for all these reasons, was Dr Chakrabarti's conclusion.

52. We note that the appellant's current release date is 22 April 2022. He therefore has a further six months or so of the custodial term of his sentence still to serve if the appeal does not succeed.
53. In his written and oral submissions, Mr Davidson contends that the judge placed this offence in too high a category under the guideline. As to culpability, Mr Davidson submits there was no "significant" planning as required for level A. He also contends that the judge failed to give sufficient regard to the welfare of the appellant. He takes no issue with the level of discount for the guilty plea. He accepts that the judge referred to the relevant matters of personal mitigation. He submits that particularly in the light of the recent psychiatric report, the court should even at this late stage adopt the recommendation of a Youth Rehabilitation Order with the requirements specified in the pre-sentence report. He submits that rather than category 2A under the guideline, this offence should have been categorised as 2B. He takes issue with whether this was really a case of recording the offence as opposed to taking some photographs.
54. We have given all these submissions very careful consideration. We do not think there can be any legitimate criticism of the judge's approach to categorisation of this offence under the Sentencing Council guideline. The victim was asleep, as the appellant well knew. She was therefore particularly vulnerable by reason of her personal circumstances. In his oral submissions, Mr Davidson has not challenged that proposition.
55. We also observe that it is clear that as a result of the offence the victim has suffered severe psychological harm, which in itself could have been a fact justifying category 2 harm; if not, it would certainly have been an additional aggravating factor justifying some elevation from the starting point.
56. As to culpability, we take Mr Davidson's point that the judge referred in his sentencing remarks only to "some degree of planning" rather than "a significant degree of planning". However, there was undoubtedly the taking of photographs on his iPad, and to that extent recording of the offence, which is a level A culpability factor in itself, as the judge rightly concluded.
57. Looking at the matter realistically, the appellant must, we think, have planned the offence to a significant extent, even if it was only on the night, in that he obtained and used a condom which he subsequently disposed of by hiding it in the toilet cistern. On the material before the judge, we think there was undoubtedly high culpability.
58. It is submitted by Mr Davidson that the appellant had been unused to alcohol, and perhaps inadequately supervised by his father, who had apparently permitted the children to drink vodka at some stage during the course of the evening. The appellant's state of intoxication militated against high culpability, or certainly could not be regarded as

an aggravating factor.

59. We think that in the circumstances of this offence, the consumption of alcohol was in reality a neutral factor. We say that because, despite the amount the applicant says he had consumed, he was still able to do all the things the judge identified in committing the offence.
60. The Sentencing Council guideline entitled "Overarching principles: sentencing offenders with mental disorders" requires the court to focus on the impact of any mental disorder on culpability. Section 2.11 of the guideline provides that culpability will only be reduced if there is a sufficient connection between the offender's impairment or disorder and the offending behaviour. Paragraph 13 provides that relevant expert evidence when available will often be very valuable, but it is the duty of the sentencer to make their own decision, and the court is not bound to follow the expert's assessment if there are compelling reasons to set it aside.
61. It is appropriate for us to consider Dr Chakrabarti's opinion on the issue of culpability. We note, however, that it goes far beyond anything said in the psychiatric report from Dr Irani, which was the report before the sentencing judge. To that extent on one view Dr Chakrabarti's report could be regarded as fresh evidence, for which leave would be required to present it to the court on the basis that it is capable of affording a ground for allowing the appeal. However, although we pay due regard to his report we cannot accept Dr Chakrabarti's assessment that it is unlikely the appellant was aware of any criminal intent on his part at the time of the index offence and that he is not therefore culpable.
62. Mr Davidson, unsurprisingly, was also troubled by that conclusion, or at least the way it was expressed. Mr Davidson told us in the course of oral submissions that he had spoken by telephone with Dr Chakrabarti to seek clarification of that paragraph in the report, and Dr Chakrabarti had explained that he was not suggesting that the appellant could advance a defence of insanity, rather he was simply seeking to indicate that because of the combination of the alcohol and his autistic spectrum disorder, his culpability was much reduced.
63. Mr Davidson accepted in his oral submissions, very properly, that it is for us, as it would have been for the sentencing judge had Dr Chakrabarti's report been before him, to make its own assessment of culpability, paying due regard to Dr Chakrabarti's opinion in the light of all the other evidence in the case.
64. For the reasons already explained, which are articulated very clearly in the judge's sentencing remarks, it seems to us that despite any problem attributable to his autism, and despite the quantity of alcohol he had consumed, the appellant plainly knew perfectly well what he was doing and behaved with some precision and deviousness. He knew he did not have his sister's consent to what he was doing to her. She was asleep. He knew he should not be doing it. He knew he needed to take precautions by wearing a condom. He intended to take photographs of her in the course of the offence and he did so. All those features are, it seems to us, quite inconsistent with an absence of culpability. On the contrary, they are consistent only with the judge's correct assessment of a high level of culpability.
65. We think the judge's conclusion that for an adult the appropriate sentence before credit for plea would have been nine years cannot be faulted. The starting point under the guideline would have been ten years, and for reasons we have explained, there could have

been elevation from that for the aggravating factors. The judge had the guideline on sentencing children and young person's very much in mind. He reduced the adult sentence by a full two thirds on that account, entirely in accordance with the guideline. Again, we think that conclusion cannot be faulted.

66. The real issue in this appeal is whether the sentence should have been a Youth Rehabilitation Order as a direct alternative to immediate custody. As the judge recognised in his sentencing remarks, there is a balance between rehabilitation and punishment. In relation to adults, section 57 of the Sentencing Act 2020 provides that the court must have regard to the following purposes of sentencing: the punishment of the offender; the reduction of crime, including its reduction by deterrence; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences.
67. Section 58 of the 2020 Act, which has not yet been brought into force, provides that nothing in the Sentencing Code, including section 57, affects the duty of the court to have regard to the principles of the youth justice system, which are to prevent offending or reoffending by persons aged under 18 (see section 37 of the Crime and Disorder Act 1998) and, (under section 44 of the Children and Young Persons Act 1933) to have regard to their welfare, and in certain cases to take steps in relation to their surroundings and provision of education, et cetera.
68. As the commentators in Archbold 2021 point out at paragraph 5ASC-1071:
    i. "The result is that courts must simply have regard to the general aims of the youth justice system under section 37 of the Crime and Disorder Act 1998 and their duty under section 44 of the Children and Young Persons Act 1933. It is, however, well established that there exist other factors to which the court must also have regard."

69. We bear in mind what is said by the commentators in Archbold 2021 at paragraph 5ASC-1075.
70. "As this court said in R v Islam [2010] 1 Cr App R (S) 101, in a case where a 15 year-old defendant had committed a very serious offence of violence resulting in permanent disability of the victim:
    i. "The paramount need is to maintain confidence in the criminal justice system by the public at large, and in particular by victims. Sentences which do not reflect the gravity of the offence undermine that confidence."

71. This was a very serious offence which has had quite devastating consequences for the victim. We think that the judge struck the correct balance and that his assessment is not undermined by the latest psychiatric report or by anything in the other reports on the appellant's progress in custody.
72. For all these reasons, we are not persuaded that this sentence was either wrong in principle or manifestly excessive, and despite Mr Davidson's attractive and tenacious submissions, this appeal is therefore dismissed.
73. We would only add this: we hope and trust that when the appellant is released on licence, attempts will be made to ensure that as much as possible of what was proposed in the pre-sentence report by way of support and treatment will still take place, and we are quite

sure that if he returns to live with his father, his father too will do all he can to ensure that the appellant receives the necessary assistance.

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

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