Neutral Citation Number: [2021] EWCA Crim 1877

Case No: 202102861 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT PRESTON
Her Honour Judge Dodd
T20210024 and T20217007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2021

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE HOLGATE
and
MR JUSTICE MURRAY

- -

Between:

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

REGINA	**Appellant/Applicant**
- and -	
AWA	**Respondent**

- -
- -

Peter Ratliff appeared on behalf of the Attorney General
Jimmy Vakil appeared on behalf of the Respondent

Hearing dates: 27.10.2021

- -

Approved Judgment

"**Covid-19 Protocol:** This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be **Friday, 10 December 2021 at 10:30am**

Lady Justice Thirlwall DBE:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences with which we are concerned. No matter relating to any victim of any of the sexual offences in this case 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 one or more of those offences. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. We shall anonymise the victims in this judgment.

2. AWA is now 45. On 15 March 2021 in the Crown Court at Preston he pleaded guilty to Counts 1 & 2 on Indictment T20210024 (the first indictment).

3. On 10 August 2021 before Her Honour Judge Dodd when the case was listed for trial in the Crown Court at Burnley he changed his plea to guilty on Counts 3 & 4 on the first indictment and pleaded guilty to Count 1 on Indictment T20217007 (the second indictment).

4. There were related summary only offences committed on the same day and part of the same incident as the matters on the first indictment which had been committed to the Crown Court for sentence.

5. The judge sentenced him to a total of 3 years and 10 months imprisonment made up as follows:

   Second Indictment: Count 1, Rape contrary to s.1(1) Sexual Offences Act 2003: 3 years and 4 months' imprisonment.

   First Indictment:

   i) Count 1: Having an Imitation Firearm in a Public Place contrary to s.19 Firearms Act 1968, 4 months' imprisonment, consecutive to the sentence for Rape.

   ii) Count 2: Criminal Damage, no separate penalty.

   iii) Count 3: Common Assault (as a lesser offence to Assault Occasioning Actual Bodily Harm) contrary to s.39 Criminal Justice Act 1988, 1 month's imprisonment, consecutive.

   iv) Count 4: Sexual Assault contrary to s.3 Sexual Offences Act 2003, 1 month's imprisonment, consecutive.

   Summary Offences

   i) Charge 1. Failure to provide a specimen contrary to s.7(6) Road Traffic Act 1988, no separate penalty.

   ii) Charges 2 and 3. Assault by Beating contrary to s.39 Criminal Justice Act 1988, 1 month's imprisonment, concurrent on each.

6. A Victim Surcharge Order was imposed in the sum of £190. The respondent was disqualified from driving for 28 1/2 months (12 months' discretionary period and 16 and a half months' uplift under s.35B Road Traffic Offenders Act). He was made

subject to a Restraining Order until further order. There was an order for forfeiture and destruction of the imitation firearm. In addition, he was required to comply indefinitely with the provisions of part 2 of the Sexual Offences Act 2003 (notification to the police). His name may be included in the relevant list by the Disclosure and Barring Service.

No evidence was offered on Count 2 of the second indictment and a not guilty verdict entered pursuant to s.17 Criminal Justice Act 1967.

7. This is an application by Her Majesty's Solicitor General for leave to refer the sentence to this court on the grounds that it is unduly lenient.

8. Before turning to the substance of the application we deal with a preliminary matter: the Restraining Order was recorded as having been imposed pursuant to s5 of the Protection from Harassment Act 1997. In fact, it was imposed pursuant to s360 of the Sentencing Act which had been in force since December 2020. The recording error occurred because the Crown Court software has still not been updated. It is to be hoped the position will be remedied soon.

9. On behalf of the Solicitor General, Mr Ratliff's main submission was that the sentence for the rape was too short and the overall sentence failed adequately to reflect the whole of the criminality. He did not seek to develop orally his written submissions on the offences on the first indictment. In reality this reference was all about the sentence on the rape.

FACTS
Second Indictment

10. We deal with the facts chronologically. The events forming the basis of the second indictment took place in the early hours of 28th August 2020. The respondent and X (24) had been in a relationship for almost two years. X said that the relationship was a happy one but text messages between them in the early part of 2020 revealed that she did not like the fact that the respondent would tend to "jump on" her rather than wait for her to be ready for sexual intercourse. She wanted him to take his time. He promised to do better but the issue appeared to continue. In a text exchange on 4 June 2020 she said "you have to be turned on to jump me. It dosnt matter if im up for it or not or how you feel I have to be ready for you even when im asleep and I still push you off, you don't taken no". The respondent replied "yeah, that's what I like". X also did not like him to take Viagra because sexual intercourse went on for too long, making her sore.

11. Their relationship was fairly described in the defendant's case statement as sexually adventurous. They watched pornography together and enthusiastically acted out their sexual fantasies. They also frequently filmed themselves during sexual activity and watched it for pleasure. Numerous recordings were found on their phones.

12. On the night of 27th/28th August 2020 they had participated in a three way sexual encounter with another man. This was the second such occasion. The first had been over a year in the planning and had been the suggestion of the respondent. X had set out in detail and in writing what was to occur, who was to do what to whom and in what order. The second occasion took place at X's suggestion. As before it took place at the home of the second man. All three of the participants consumed alcohol and took

prescription drugs (Diazepam or Temazepam) before the sexual activity began. The two men also took cocaine. The sexual activity continued for some hours. The respondent was not able to achieve ejaculation. At some point they all fell asleep. At around 5.30 the respondent woke up. He filmed X sleeping. He then placed the phone next to her and recorded himself having sexual intercourse with her. It is plain from the recording that the respondent penetrated X while she was sleeping. He was seeking to ejaculate. She woke up after about two and a half minutes. She said "stop, stop" he said "I'm coming, I'm coming. Don't stop" and within seconds he ejaculated. She said something like "I'm sleeping. I'm asleep." He said something indistinguishable. He then brought her a baby wipe to clean up. All of this appears on the recording. The incident was calm and the respondent apparently tender. Afterwards they both went back to sleep.

13. At 23.43 that night X sent the following message to the respondent "I love you so much baby xox cant believe that has happened but I am glad it happened xx there is not one bit of regret (i thought i would) haha xox when I was looking though my keys to find my keys and I saw the flat keys I was thinking if you ever move our or if we would ever brake up (NOT SAYING WE WILL BECAUSE I LOVE YOU!!!) i will still keep them as it would be a memory of where i had my first threesome!!! … i love you so much baby xoxx you are mine xx i will never leave you for someone else because you are truly the best of the best because we keep getting better and better and the sex gets better and better xx i love you baby xoxoxoxox". Ten minutes later the respondent replied "I'm home now my love I feel the same I've got no regrets at all and I think it does get better an better lol" Then "Gonna roll a dooby" and five minutes later in the early hours of the 29th August "Ps I love you I love you I love you so fucking much".

14. Their relationship continued for the rest of 2020.

15. On 21 November 2020 at 22.33 X texted as follows "Baba xx can I ask x"
He replied "What"
"I do have Tuesday and Wednesday off, but also I am gunner have to extend my pill so I can feel you one more time xxx
Can I see you after Tuesday morning as candy has her op on Monday but I promised to stay xx
He replied "Yeh!!"
She then texted "I might even see you on Monday xox see how I feel xx".

16. When arrested in respect of the first indictment the respondent was interviewed about the rape, which X had reported to the police at the same time as the incidents in the early hours of 30 December. He said he had only ever had consensual sexual intercourse with X. He confirmed that there had been three person sexual activity before he and X were left alone when they had sex. They both then fell asleep. He did not think he had ever had sex with her when she was asleep. When he was shown the recording, he agreed that X was asleep but later said she wasn't asleep, but high on Temazepam. He accepted he had been told to stop but his judgment was impaired by drink and drugs, he said.

First Indictment

17. At about 10pm on 29 December X went to a friend's home. She and two female friends intended to celebrate the festive period. The respondent was expected to join them and

he arrived about half an hour later with his duvet, his two dogs and other possessions. Everyone had been drinking for some time and continued to drink. By the early hours they were all drunk. As a result, the statements were somewhat confused but the following is clear. The respondent licked the arm of one of the women and touched her breast over her clothing. She was angry and told the other two women. X was upset and angry as was the respondent. He could not be calmed down by the other women. He pushed X hard with both hands and she fell against the washing machine and hit her head. She bit her lip and sustained bruising. She later went to hospital, but no treatment was necessary. The respondent left the flat and pushed and punched two of the women outside. At some stage his dogs and other possessions were returned to him. He then drove off in his car and said he would return with his gun.

18. X told the other women that he had a BB gun, not a real gun. He drove back to the flat and shot at the window. He later expressed surprise that it caused a hole in the window. The police arrived on the scene in numbers, given the report of a gun. It was nearly 5 o clock in the morning. The respondent was arrested and taken into custody. He was obviously drunk. He refused to provide a specimen for analysis.

19. When interviewed later he accepted the broad thrust of the allegations. He denied threatening to get the gun but did admit firing it at the window, in an effort to get the three women to open the door, he said. His pleas of guilty entered in two stages reflected his admissions.

The sentencing hearing

20. The case was listed for the trial of the second indictment. Before the case was called on, prosecuting and defence counsel discussed the case. Prosecuting counsel, as we have, had watched the recording. There is no dispute that he expressed the view to Mr Vakil that this was a category 3B offence with no aggravating factors. Mr Vakil took instructions and at the beginning of the hearing asked the judge for a Goodyear indication on sentence. It is clear from the transcript that the judge was somewhat surprised by the request. She asked for confirmation that the respondent had given written instructions to seek an indication. She said she was prepared to give an indication in respect of the rape but could not give a broader indication in respect of any changes of plea on the second indictment until she had considered the papers.

21. The judge was familiar with all the papers in the rape trial and had watched the recording. The previous day she had given directions as to the scope of cross examination.

22. The judge addressed prosecuting counsel and expressed the view that the rape was probably a 3B offence. Prosecuting counsel said that he could not argue otherwise, bearing in mind the nature and scope of the relationship. The judge said there would be a starting point of 5 years with no particular aggravating factors. Prosecuting counsel said, “the filming would be the only one that fitted, but, bearing in mind the nature of the relationship.”, and the judge agreed. The prosecutor agreed with the judge’s assessment that this was not a case where alcohol and drugs had been used to facilitate the offence. The judge said that in the context of the case she was inclined to the view that more than 10 per cent could be deducted from the sentence by reason of the guilty plea because it would save X having to talk about a “relationship of this nature in public”.

23. Prosecuting counsel then set out the details of the offences on the first indictment to which we have already referred. The respondent pleaded guilty to the rape and to the other offences (the assault on X was reduced to common assault, after discussion with her). On his behalf Mr Vakil said that one of the reasons for the guilty plea was to avoid X having to give evidence.

24. The respondent had 114 convictions, although none for sexual offences and none for driving with excess alcohol or refusing to provide a specimen. There were offences of dishonesty, burglary and two offences of violence in 2002 and 2007. His last prison sentence was in 2003. There was a victim statement from X, the principal focus of which seems to have been the incident in December 2020, but it is clear that she regretted the relationship with the respondent in its entirety and believed the respondent's conduct had affected her subsequent relationship.

25. The case was adjourned until later in the day for sentence. The judge's sentencing remarks reflected her earlier observations. She considered that the recording was not an aggravating factor in a situation where the parties regularly recorded their sexual encounters. She remarked that the respondent's conduct after the rape appeared to be loving and caring and that at the time they were both "incredibly fond of each other". She referred to the texts that day and later and to the fact that the relationship had continued until the incident at the end of the year.

26. She categorised the offence as 3B with a starting point of 5 years' imprisonment. She was satisfied that the drugs were taken to enhance the earlier activity and were not an aggravating feature of the rape. Nor was ejaculation given the context.

27. There were no relevant convictions, there was some personal mitigation and she accepted that the respondent was remorseful.

28. The sentence after trial would have been one of 4 years. When considering the reduction for the plea of guilty she said "you indicated that you were not prepared to put [X] through what would have been an incredibly difficult experience of giving evidence in this case" and said she would give credit of somewhere over fifteen per cent for the guilty plea, reducing the sentence to forty months' imprisonment.

29. In dealing with the other matters the judge identified the appropriate guidelines and sentenced as we have set out with a combination of concurrent and consecutive sentences which led to a total sentence of 3 years and 10 months' imprisonment.

30. Mr Ratliff submits that the rape came within category 2A of the relevant guideline with a starting point of 10 years imprisonment. He argues that X was particularly vulnerable as she was under the influence of drugs and asleep. The harm is therefore in category A. As to culpability he relies on the fact that offence was recorded, taking it into Category 2, and on the following aggravating factors:

    i) the respondent was under the influence of alcohol and Class A and prescription drugs;

    ii) there was arguably some abuse of trust, she had warned him about his behaviour some months before;

iii) he had many previous convictions albeit not of a similar nature;

iv) he had ejaculated.

The sentence should have been one of 8 or 9 years, he submits.

31. Mr Vakil submits that the judge took the right approach in her assessment of culpability and harm and came to the right conclusion in categorising the offence as 3B. Furthermore, the prosecutor at trial took the same view and expressed it in discussions and, later, in court during discussions with the judge. The respondent pleaded guilty in the light of the views expressed. This was not a case where the prosecutor reserved the right to refer the case to the Court of Appeal. The reference borders on an abuse, he submitted.

32. We note that no one in the Crown Court suggested that this was category A harm nor that it came within category 2. All had watched the video, as have we. The guideline refers to particular vulnerability as a result of personal circumstances. There are cases where extreme drunkenness and deep sleep constitutes such vulnerability, often in circumstances when the victim and perpetrator are strangers and the victim is somewhere unfamiliar. In this case the extent to which X was still under the influence of drink or drugs is not known. The offence took place at about 5.30 in the morning, she was sleeping in a flat she knew with people she knew and with whom she had had sexual relations over a prolonged period. It was hours since she had taken drugs. She was awoken by the respondent's actions and she told him to stop.

33. We do not accept the submission that whenever a victim of rape is asleep it automatically follows that he or she is particularly vulnerable within the meaning of the guideline. It depends on the circumstances. We are satisfied that this factor was not applicable in this case. It follows that harm was in category B.

34. As to culpability we agree with the judge's assessments. The recording did not aggravate the offence; it was neither additionally intrusive nor upsetting. There was no abuse of trust. Alcohol and drugs were taken for the purposes of improving the sexual experience earlier and not for the purpose of the offence. In the context of this case the fact of ejaculation did not aggravate the offence nor did the fact that the respondent had been drinking and had taken drugs the previous night.

35. There was some mitigation in the form of a letter from the respondent's former partner and the respondent's obvious remorse about the whole of his conduct. He had no relevant previous convictions. The judge's careful sentencing remarks revealed a thoughtful and correct approach to the offence. We do not consider that the sentence of 4 years before reduction for plea was lenient, still less unduly so. The range for a 3B offence within the guideline is 4 to 7 years, from a starting point of 5 years.

36. Mr Ratliff points out that the reduction for the guilty plea should have been no more than 10% since it came at the beginning of the trial, in accordance with the Sentencing Guideline "Reduction in Sentence for a Guilty Plea". The judge explained that she had made a greater reduction (just over 15%) because of the nature of the cross examination that was thereby avoided.

37. The plea of guilty to rape was unexpected. It came, it would seem, as a result of a combination of discussions between counsel and the Goodyear discussion in court. It is inescapable that cross examination would have been particularly difficult for X, given the context. It is also inescapable that the respondent was guilty of rape and could have pleaded guilty much earlier. This was a generous discount, but it did not lead to an unduly lenient sentence.

38. As to the December incident, the judge rightly made the sentence for the possession of the imitation firearm the lead offence and consecutive to the sentence for the rape. In written submissions the Solicitor General argued that a total sentence of 6 months' imprisonment consecutive was not sufficient to reflect the seriousness of this incident. Mr Ratliff repeated the submission but said that the sentencing on the December matter was secondary. We agree. The judge's sentencing exercise in respect of the December incident was meticulous. It is not necessary to analyse it in detail. There is no proper basis for interfering with it. As to the disqualification from driving, Mr Ratliff rightly points out that the extended period should have been 23 months rather than 16 ½ months which seems to have reflected the 7 months spent on remand. The period of remand ought properly to have been reflected in an adjustment to the discretionary period of disqualification in accordance with the decision in **R v Needham,** but the overall outcome would have been the same and we make no adjustment.

39. We are satisfied that the sentence for rape was not unduly lenient nor was the overall sentence. As to the submission that bringing this reference bordered on abuse, in our view it is sufficient simply to make the following observations. The approach to the sentencing exercise on behalf of the Solicitor General was somewhat mechanical and failed to reflect the reality which was shown in the digital recording and in the account of the whole of the circumstances. Had that been done and appropriate account been taken of the judge's observations during the hearing, (together with the prosecution's approach) a decision could properly have been taken not to seek a referral in this case.

40. Accordingly, leave to refer is refused.