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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1299



No. 202201146 A2

Royal Courts of Justice

Thursday, 15 September 2022

Before:

LORD JUSTICE SINGH
MR JUSTICE HENSHAW

REX
V
MARK MAKERI

**REPORTING RESTRICTIONS APPLY:
Sexual Offences (Amendment) Act 1992**

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Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

MS C HAWLEY appeared on behalf of the Appellant.

J U D G M E N T

LORD JUSTICE SINGH:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. Under those provisions where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.
- 2 This is an appeal against sentence brought with the permission of the single judge.
- 3 On 11 March 2022 in the Crown Court at Southwark the appellant was convicted of an offence of rape. He was acquitted of a further count of rape. On 8 April 2022 the appellant was sentenced by HHJ Milne QC to a sentence of seven years and six months' imprisonment. The appellant was then aged 29. Further appropriate orders were made in view of the nature of this offence.
- 4 The facts can be summarised as follows. The appellant met the complainant, who was 24, at a gym where the appellant had worked as a trainer and subsequently a sexual relationship developed between them.
- 5 On 23 July 2021 the appellant and the complainant attended a nightclub together and they both consumed alcohol. An argument ensued and, eventually, the complainant went home alone and the appellant followed separately. The complainant was tired and under the influence of alcohol. The complainant awoke at home some time later and was naked, although she did not know how she came to be naked. The appellant was in the complainant's bed and was asking for sexual intercourse. The complainant was not interested and told the appellant so and also told him that she was not taking contraception. The appellant continued to ask the complainant for sexual intercourse and the complainant repeatedly said no. The appellant eventually restrained the complainant's arms and penetrated her vagina with his penis. The complainant had told the appellant that she did not want to engage in sexual intercourse. She was unsure if he ejaculated.
- 6 One of the complainant's housemates woke at 3.00 a.m. to the sound of the complainant screaming and when she had gone to investigate, she found the complainant in distress and naked in the corridor outside her bedroom. The complainant was in tears and was hyperventilating. Another housemate was also awoken. The appellant was also in the corridor partially dressed. When the appellant was out of earshot, the complainant told one of her housemates that she was a bit drunk, had been sleep, but the appellant had kept trying to have sex with her. The complainant added that she kept telling the appellant to stop but he would not. The complainant had told the appellant to leave and had told him that she would not be contacting the police. The appellant remained at the address, telling the complainant to come back to bed. The appellant left the address some time later.
- 7 The complainant subsequently contacted the police and the appellant was arrested on 30 August 2021. In interview, the appellant stated that he and the complainant had had consensual intercourse when the complainant began to hyperventilate and cry. The appellant stated that he had not ejaculated and had comforted the complainant. The appellant thought that the complainant's behaviour may have been attributed to him earlier telling the complainant that he did not want a relationship. The complainant had appeared jealous when they had been out and that had been exacerbated by the complainant seeing a picture of the appellant's ex-partner on Instagram.
- 8 The appellant had three convictions for four unrelated offences spanning the period from 2009 to 2016.

- 9 We note that the Crown Court sentenced the appellant without a pre-sentence report. We confirm that we do not consider that one is now necessary. The sentencing court also had the advantage of a victim personal statement, which we have also had the advantage of reading.
- 10 In his sentencing remarks, the judge said that he did not regard this as being a case of extreme psychological harm. However, he did consider that the victim was a vulnerable woman and was "particularly vulnerable at the time". For that reason, he placed this harm into Category 2 by reference to the definitive guideline issued by the Sentencing Council with effect from 1 April 2014. He had in mind the fact that at the time the victim was asleep, somewhat the worse for wear in drink, that the appellant had undressed her and that the rape took place when she was only just returning to consciousness. The judge also considered that the location and timing of the offence in the victim's bed and in the small hours of the morning were aggravating features.
- 11 Turning to culpability, the judge accepted that aggravating features were largely absent and so he placed the offence into Category B rather than A. He did not regard this offence as involving significant planning. He did not find that the appellant had used alcohol to facilitate the offence, although he would have known that the victim had been drinking, and he did not regard this as a case of targeting a victim in the sense envisaged by the guideline.
- 12 The judge observed that for a Category 2B case the starting point recommended in the guideline is eight years' custody, with a suggested range of seven to nine years. He felt that the only sentence he could impose was one of seven and a half years' imprisonment. In the circumstances of this case, he decided to take no action in relation to the issue of dangerousness.
- 13 Leave was granted by the single judge to pursue the following grounds of appeal:
- (1) The judge was wrong to conclude the offending fell into Category 2B and the offending should have been dealt with as a Category 3B case, which would have given a starting point of five years' custody with a suggested range of four to seven years.
 - (2) It is argued that the judge was wrong to conclude the victim had been "particularly vulnerable due to personal circumstances" and failed to fully justify that finding.
- 14 In her helpful oral submissions, Ms Hawley has acknowledged that the two grounds are in substance one ground. Her fundamental complaint is that the victim could have been described as "vulnerable" but that the guideline requires more. It requires that she must be "particularly vulnerable due to personal circumstances". Ms Hawley emphasises that there is no evidential basis for that by way of, for example, a report before the court or a history of any particular circumstance going to the complainant's vulnerability. She reminds this court that the victim was an adult at that time of the offence, that there was no material age disparity between her and the appellant, that there had been a consensual relationship in the past and she has also reminded this court of the victim's demeanour in giving evidence and text messages which she had exchanged with the appellant which showed that she was well able to remonstrate with him.
- 15 By reference to the sentencing guideline, the only factor listed in relation to Category 2 (harm) which was potentially relevant was that the victim was "particularly vulnerable due to personal circumstances." No issue has been raised before this court that this was a culpability A case. Accordingly, the question for this court is whether the judge was entitled to place this case into Category 2B rather than Category 3B.

- 16 Every offence of rape is serious because it involves the violation of a person's bodily integrity, autonomy and dignity, but we must also bear in mind the need for consistency in sentencing. This is why Parliament has directed in s.59(1) of the Sentencing Act 2020 or the Sentencing Code that every court must in sentencing an offender follow any sentencing guidelines which are relevant to the offender's case, unless the court is satisfied that it would be contrary to the interests of justice to do so.
- 17 Although each case turns on its own facts, as was fairly acknowledged at the hearing, we note that in *R v Begley* [2018] EWCA Crim 336 at para.19 this court, in a judgment given by Nicol J, emphasised that the relevant guideline refers not simply to vulnerability, but that the victim is "particularly vulnerable due to personal circumstances". Furthermore, Nicol J said that must be a reference to vulnerability at the time of the offence and not later, for example when the witness is giving evidence at a trial. We also noted that in *R v KH* [2018] EWCA Crim 1819 at para.13 this court, in a judgment given by Sweeney J, said that although the victim in that case was undoubtedly vulnerable because she was asleep when the offence began, in the terms of the guideline she was not particularly vulnerable due to personal circumstances.
- 18 Turning to the circumstances of the present case, we accept the main submission which has been made on behalf of the appellant by Ms Hawley that this should have been regarded as a Category 3B case and not a Category 2B case. In all the circumstances of this case, having regard both to aggravating and mitigating features, we consider that the just and proportionate sentence would have been one of five years' imprisonment.
- 19 For the reasons we have given, we allow this appeal against sentence. The sentence passed by the court below is quashed and there is substituted for it a sentence of five years' imprisonment.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

This transcript has been approved by the Judge