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[2022] EWCA Crim 992  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO 202201509/A3

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday 7 July 2022

Before:  
LADY JUSTICE CARR DBE  
MR JUSTICE FRASER  
THE RECORDER OF WESTMINSTER  
HER HONOUR JUDGE DEBORAH TAYLOR  
(Sitting as a Judge of the CACD)

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

REGINA  
V  
P.D.

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MISS F ROBERTSON appeared on behalf of the Attorney General  
MISS L WYNN MORGAN appeared on behalf of the Offender

J U D G M E N T

LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 section 3 of the Act.

### Introduction

1. We have before us an application by Her Majesty's Attorney General for leave to refer sentences on the ground that they are unduly lenient. We grant leave.
2. The offender, PD, is now 73 years old. He was convicted on 21 March 2022 following trial before Mr Recorder Booth QC ("the judge") and a jury in the Crown Court at Cardiff of the following three offences: sexual assault, contrary to section 3 of the Sexual Offences Act 2003 (count 3); common assault, contrary to section 39 of the Criminal Justice Act 1988 (count 4) and assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (count 6).
3. The victim in each case was PD's wife of 35 years. PD had assaulted her by touching her breasts, straddling her and ejaculating on her. The following day he had violently sexually assaulted her by grabbing her breasts, placing his hands over her mouth and nose, spanking her bottom and inserting two fingers into her vagina.
4. On 21 April 2022 PD was sentenced by the judge to a total of three years' imprisonment made up as follows: on count 3, 12 months' imprisonment; on count 4, three months' imprisonment and on count 6, three years' imprisonment. Those sentences were all to run concurrently. Notification requirements were imposed for an indefinite period, together with a restraining order prohibiting PD from contacting his wife until further order. The statutory surcharge was also imposed.
5. The Attorney General's position is that this case involved serious, violent sexual assaults in a domestic context in breach of trust. The overall sentence of three years' imprisonment did not, by some margin, reflect the seriousness of the offending.

### The facts

6. The wife suffers from a number of medical problems including psoriasis, swollen and tingling feet, a stoma which she had carried for 17 years and chronic lichen sclerosis on her genitalia. PD assisted in her care needs. They had ceased having full sexual intercourse when the wife received her stoma, but they continued to engage sexually. As

the wife's psoriasis became more severe, that contact became limited to masturbation of and oral sex on PD. The marriage had been a happy one until approximately 12 months prior to these offences, when PD became more sexually demanding. He started asking the wife more regularly for oral sex and asking to ejaculate in her mouth. If she refused he would become physically and verbally aggressive.

7. At approximately 4 am on 24 April 2020 the couple were asleep at home. The wife felt PD begin to touch her breasts. She crossed her arms to stop him, to which PD responded: "I only wanna play with your boobs and then I'll get up and I'll leave you alone". She told him to leave her alone but he pulled her top off, straddled her and masturbated over her. PD told her he was going to ejaculate in her face, but he proceeded to ejaculate on her chest and stomach. He used his T-shirt to wipe her chest and face before leaving the bed. This was the subject of count 3.
8. The following afternoon, 25 April 2020, the wife was in the living room at around 3pm, having a cup of tea. PD entered and stated: "I'm bored, I'm going to play with your boobs" - something which, as is apparent, he often said to her. Again, she told him to leave her alone, and again she crossed her arms in front of her chest to prevent him touching her breasts. He grabbed her wrists and managed to pull up her T-shirt and bra, thereby exposing her breasts. He straddled her and began sucking and licking her breasts, pulling on her nipples and trying to kiss her. She asked him to stop and leave her alone, but he persisted. As she tried to stop him, she slid off the sofa onto the floor. PD exposed his penis and stated he wanted her to put it in her mouth. She refused. He bit her cheeks and held her nose and mouth to try and make her open her mouth as he rubbed his penis over her lips. When she refused to open her mouth, PD stated: "I'm gonna wank all over you now". He proceeded to masturbate over her. She struggled against him and grabbed his penis in an effort to cause him pain and get him off her. He responded by laughing. He proceeded to ejaculate. The wife covered her face with her hands. She felt the ejaculate on her hands and chest.
9. PD then removed the wife's jeans and underwear and told her to turn over. He smacked her on each side of her buttocks and told her to open her legs. This was the subject of count 4. The wife refused, to which PD then placed his hands over her nose and mouth again, causing her to have to fight to breathe. He then proceeded to insert two fingers into her vagina and moved them back and forth. The wife was crying and asking PD to stop, telling him that he was hurting her. PD told the wife it would only hurt for a while and said: "Don't cry like a baby, you're a woman, act like a woman." Later he said: "You're my wife, I can do whatever I want to you." This was the subject of count 6.
10. During the course of the assault the wife was screaming for help and swearing at PD. He, as we have indicated, had placed his hands over her mouth telling her to be quiet. At one stage he removed his sock and sought to place it in her mouth, but she was able to resist this.

11. The wife fought PD off and ran to the front door, but he followed her, grabbed her by the arms and pushed her back into the living room onto the sofa. He proceeded to bundle up her clothes which had become bloodied during the assault. She stated that she wanted to put them back on and she did so. She then went into her back garden and shouted to her neighbour to telephone the police.
12. The neighbour called the police who attended the scene and saw the bruising and marks on the wife's body and face. The wife was hysterical. She disclosed that PD had physically and sexually assaulted her. She provided a first account and photographs were taken of the injuries to her face and her arms. The bodycam video footage of her injured, crying and shaking in the back of the police car makes for harrowing viewing. The depth of her trauma is also revealed in what she said: "If I don't report him I'm going to kill myself", and "Life's not worth living anymore." She repeated in the witness box at trial that she would have tried to take her own life by overdose had she not reported the events of 25 April. She also said: "I feel so ashamed of myself" a common, if unjustified, reaction for victims of sexual assault. She had of course done nothing wrong.
13. She was examined at a sexual assault referral centre. She was noted to have petechial haemorrhage marks to the bridge of her nose, her left cheek, the left lateral orbital margin, below her right eye, right cheek, lower lip, below her left clavicle, left breast, right arm, right elbow, right forearm, right wrist, left forearm and lower back sacral area. She was also noted to have a laceration to the left side of her genital vestibule measuring less than one centimetre. The genital laceration was considered to be an acute injury consistent with penetration or attempted penetration.
14. By the time of sentencing three victim personal statements were available. The wife lived alone now and felt vulnerable. She watched the clock continuously and was always checking the doors. She had flashbacks, particularly around 3pm, the time of day when the final attack had occurred. Her psoriasis had flared up as a result of nerves and stress. She had not been out of her home since the incident in April 2020; she was too scared, petrified in case she bumped into PD. Any little noise and she was a nervous wreck. Even with help from GPs, she said it would take her a lot of work and possibly medication even to think about leaving her home, to start living again. She felt embarrassed and ashamed of what had happened and having to discuss it with her children. She had lost a lot of weight since the incident, dropping from a size 14 to a size 8. She hated feeling trapped and frightened and wanted to live her life again. She described how she was now an empty shell.
15. In her later statements she described how almost two years on she had not been able to move on mentally. She had not been out of the house other than to see her son twice and have Covid vaccinations. She was a completely changed person, living like a scared animal and a shell of herself. She was receiving counselling for post-traumatic stress

- disorder (“PTSD”). She kept breaking down and crying. Her flashbacks had continued, also giving her sleeping problems.
16. A letter from a senior independent domestic violence and sexual violence advisor confirmed what the wife had said. She also updated the position, indicating that the wife had now been referred by her GP to a psychiatrist, given the deterioration in her mental health.
  17. For PD, who was of previous good character, there were two character references from his daughters from his first marriage describing him as a good role model throughout their lives, a caring and supportive father, and detailing the deterioration in his health due to transient ischemic attacks (“TIAs”) and diabetes. Further, PD suffered from anxiety and depression and had a pacemaker. He had mobility issues with restless legs, finding stairs difficult and getting out of the chair difficult.
  18. A pre-sentence report recorded that PD acknowledged that, whilst he understood the term "No" in the context of sexual consent, he would often persist with the wife, since they were husband and wife. He stated that he had been experiencing financial stress and health issues. He was noted to suffer, as already indicated, from anxiety and depression, TIAs, high blood pressure, diabetes, back pain and had a pacemaker.
  19. PD was recorded to have expressed surprise at the jury's verdicts. He said: "She [the wife] got what she wanted out of it, with having the house." The author reported that PD was "at best ambivalent about the victim consenting to his sexual behaviour and he appears to have only a limited insight into the causes and triggers to his offending behaviour." PD expressed entrenched attitudes of denial and minimisation which are classically expressed by both perpetrators of sexual offences and domestic violence.
  20. He was assessed as posing a low risk of serious recidivism, re-offending and serious harm towards members of the public, but a high risk of serious harm to the wife.
  21. His attitude there identified seems to us to be reinforced by a prison report from last month which we have read. PD does not wish apparently to undertake any accredited programs to address his offending behaviour. This chimes with his chilling indifference to the consequences of his actions on the wife, as exemplified in his comments as recorded in the PSR.

### The sentence

22. When considering the competing arguments on categorisation for the purpose of the relevant parts of the Sentencing Council Guideline on Sexual Offences ("the Guideline"),

the judge stated that, "[h]aving reflected on the context of the parties' marriage and the sexual activity within it prior to these events", the offending in count 6 was properly to be categorised as towards the higher end of Category 3B. In relation to count 3 he judged the offending to fall within Category 2 harm, as it involved the touching of naked breasts and additional degradation by way of ejaculation, and culpability B. In the context of the relationship, again, the judge took the view that count 4 fell within Category 2 harm and lesser culpability.

23. The offences, he said, were aggravated as they were committed in a domestic context. They involved gratuitous degradation and an abuse of trust. The impact on the wife as set out in her victim impact statements and evidence at trial was noted.
24. In respect of mitigating factors the judge referred to PD's previous good character, his health issues and the delay in the matter coming to trial.
25. PD was not considered to be a dangerous offender but rather a "cowardly bully". The judge said he considered the issue of totality but also the context of the offences within what was a previously happy marriage and the context of the adaptations made to PD's sex life over the years. The judge paid particular regard to PD's age and health but concluded that an immediate custodial sentence was merited and inevitable.

#### The parties' submissions

26. For the Attorney General, Miss Robertson submits that the sentence imposed was unduly lenient for the following central reasons.
27. First, the judge erred in placing count 6 within Category 3B of the relevant part of the Guideline. The offence should properly have been categorised as a Category 2 offence. In particular the harm amounted to severe psychological harm.
28. Secondly, the judge erred in placing count 3 within Category 2B of the relevant part of the Guideline. The offence should properly have been categorised as a Category 2A offence.
29. Thirdly, and separately to errors of categorisation, the judge in any event failed to aggravate the lead sentence on count 6 to reflect the totality of the offending for which sentence was being passed. The sentences could have been consecutive but, given his decision to pass concurrent sentences, it was then incumbent upon the judge to elevate the lead sentence to reflect what were two other significant offences. The judge failed to do so.

30. For PD, Miss Wynn Morgan submits that the sentence overall was not unduly lenient. The judge, it is said, carefully considered and applied the relevant parts of the Guideline. As for count 6, given the lack of medical evidence, the psychological harm could not be said to be severe. As for additional degradation or humiliation, the fact that the sort of act in question was part and parcel of the husband and wife's ordinary consensual sexual activity, this made it less likely that the activity was designed to degrade or humiliate. As for particular vulnerability the submission is that the wife was "technically" vulnerable but not particularly vulnerable for the purpose of the Guideline when account is taken of the personal circumstances of the home and her life with PD, who was himself infirm and vulnerable. As for culpability, the judge was fully aware of the element of breach of trust when passing the sentences that he did and the previous violence in question had only occurred the day before. Miss Wynn Morgan accepts that there was no obvious consideration on the part of the judge in elevating the sentence on count 6 to reflect totality.

### Discussion

31. References under section 36 of the Criminal Justice Act 1988 are made for the purpose of the avoidance of gross error, the allaying of widespread public concern at what may appear to be an unduly lenient sentence and the preservation of public confidence in cases where a judge appears to have departed to a substantial extent from the norms of sentencing generally applied by the courts in cases of a particular type: see Attorney General's Reference No 132 of 2001 (R v Johnson) [2003] 1 Cr.App.R (S) 41 at [25].
32. We start with a consideration of count 6, which the judge sensibly treated as the lead offence. We have no hesitation in concluding that the offending in count 6 fell properly to be categorised at least as Category 2A offending and towards the upper end of that category, and not 3B offending. As for harm, there were no less than five Category 2 factors in play: severe psychological harm, additional degradation and humiliation, violence, the wife's particular vulnerability and a sustained assault. We address each in turn below.
33. Severe psychological harm: as the authorities make clear, a lack of medical evidence to support an assertion of severe psychological harm is in no way fatal to a finding of such harm. What there was before the judge was detailed and consistent evidence, accepted by him, of severe psychological harm. The wife would have tried to commit suicide had she not reported the offences; she had been unable to leave her home; she had experienced flashbacks; she had lost two stone in weight; she was receiving counselling for PTSD and had been referred to a psychiatrist; she had trouble sleeping; she was a shell of her previous self. PD's offences had life-altering, long-term consequences. Alongside all of that, of course the wife also suffered serious physical injuries, including the genital laceration and her exacerbated psoriasis. These are all matters consistent with Category 2 harm.

34. Additional degradation and humiliation: it was suggested, as we have recorded, that because PD had ejaculated on the wife during the course of their consensual activities, this indicated that it was not done on this occasion to humiliate the wife. That submission was made to the judge and has been maintained before us. The judge appears to have accepted it. As indicated above, his categorisation was based on his reflection "on the context of the marriage and the sexual activity within the marriage prior to these events".
35. We find this a troubling approach indeed. It is reflective of outdated stereotype, just as were PD's remarks and apparent belief to the effect that it was in some way the wife's duty to provide him with sexual services. We remind ourselves of what PD said to the wife at the time, namely that she should "act as a woman".
36. The suggestion appears to be that somehow the marital context and nature of past consensual sexual activity lessened the gravity of the offending and the degree of humiliation. Whether or not the wife had previously consented to PD ejaculating on her was in our judgment irrelevant. The question in this instance, where it was a non-consensual act, was whether the ejaculation on the wife was additionally degrading and humiliating. PD straddling the wife, masturbating over her, telling her he was going to "wank all over her" were not the acts of a consensual loving relationship, but acts of dominance and bullying, degradation and humiliation of the wife. Moreover, as we have already indicated, when considering count 3, it was the judge's clear view that there was additional degradation because of ejaculation. That was the correct analysis which he did not apply consistently when considering count 6.
37. Violence: the violence committed alongside the sexual assault beyond the offending in count 4 appears to have been overlooked. It is difficult to understand how this happened. PD repeatedly placed his hands over the wife's nose and mouth; he bit her cheeks; he dragged her back into the living room when she tried to escape; he tried to stifle her with a sock. These acts went far beyond the violence inherent in committing an offence of assault by penetration.
38. Particular vulnerability: the wife was not just "technically" vulnerable. She was particularly vulnerable as a matter of substance, due to her age, ongoing health issues and reliance on PD for help with her care. The fact that PD also had vulnerabilities did not render her any less vulnerable.
39. Sustained assault: the attack commenced when the wife was on the sofa and continued after she had fallen off. She then tried to leave and PD dragged her back. Albeit phased, this was nevertheless a sustained assault.



40. We turn then to culpability. In our judgment there were two Category A factors: abuse of trust and previous violence. As for abuse of trust, the parties were husband and wife. This offence was a clear breach of the marital trust that existed between them, compounded by the fact that PD, as the wife's carer, knew of her vulnerabilities.
41. As for previous violence, PD had sexually assaulted the victim the day before. The judge was invited to treat this previous offending as an aggravating feature placing count 6 within culpability A. In sentencing, the judge suggested that there was no previous violence. We disagree. There clearly was previous violence the day before, coupled with a history of physical aggression.
42. A Category 2A offence has a starting point of eight years' custody with a range of five to 13 years' custody. Given the number of Category 2 features present here, we accept the submission that the offending fell to be judged above the starting point of the range. There would then need to be consideration of aggravating and mitigating features alongside totality, to which we turn in a moment.
43. As for count 3, the judge rightly assessed harm at Category 2, given the touching of naked breasts, the additional degradation and humiliation through ejaculation and the fact that that wife was particularly vulnerable due to personal circumstances. However, he was wrong to place the offending within Category B culpability. This was again Category A offending, due to the abuse of trust. A Category 2A offence has a starting point of two years' custody with a range of one to four years' custody.
44. We turn then to the question of aggravation and mitigation. Taking care always not to double count, the following aggravating factors were present, namely the location of the offending in the wife's own home and the domestic context of the offending. As to mitigating factors, whilst PD's previous good character would carry some, albeit not significant weight, and whilst we do not consider there to be great force in the submission that there was any meaningful delay in bringing the matter to trial given the pandemic, there was significant mitigation available in the form of PD's age and his significant health issues to which we have already referred.
45. Standing back, taking count 6 as the lead offence, in our judgment an appropriate sentence based on Category 2A offending, taking into account all relevant aggravating and mitigating features, and bearing in mind the need to reflect PD's overall criminality, an appropriate sentence is in our judgment a term of nine years' custody.
46. It can thus readily be seen that the sentence of three years' imprisonment imposed by the judge was not only lenient but unduly so.

47. Following a similar analysis, but without treating it as a lead offence, the sentence of 12 months' imprisonment on count 3 was also unduly lenient. A sentence of twice that length, that is to say two years' imprisonment, was justified.
  
48. For these reasons we allow the Reference. We quash the sentences on counts 3 and 6 and substitute them with sentences of two years' imprisonment and nine years' imprisonment respectively. All sentences remain concurrent. PD will now serve two thirds of the overall custodial term before being considered for release by the Parole Board. All notification requirements and all other ancillary orders remain undisturbed.
  
49. This concludes our judgment.

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