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Neutral Citation No. [2023] EWCA Crim 1356

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2023 00314 A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 2 November 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE GOSS

HER HONOUR JUDGE DE BERTODANO

REX
v
HLN

____

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MS CHARLOTTE RIMMER appeared on behalf of the Appellant
MR RICHARD SMITH appeared on behalf of the Crown

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J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is an appeal against sentence brought with leave of the single judge. The appellant is a 30-year-old man. He pleaded guilty to two counts of rape. The victim of the offending, who was the appellant's former partner, has the benefit of life-long anonymity and we have therefore anonymised the appellant's name to preserve the victim's anonymity. We will refer to him as 'HLN'.
2. The appellant was sentenced on 5 December 2022 to an extended sentence of 14 years on each count of rape, concurrent with each other, which comprised a custodial term of 11 years' imprisonment and an extended licence period of 3 years.
3. The issues on the appeal are whether the judge identified the correct harm category, whether the determinate sentence of 11 years was manifestly excessive, and whether the judge was right to find that the appellant was a dangerous offender.

Factual Background

4. Following his appearance in the Crown Court, the appellant had originally served a Defence Statement in which he admitted the acts against the victim but suggested that in the past in the course of their relationship he had initiated sexual intercourse when the victim was asleep and she had woken up and participated. On one of those occasions he said he had withdrawn from penetration when he realised she was not waking up. However, on 14 June 2022 the appellant pleaded guilty to counts 2 and 3 upon re-arraignment. This was on the basis reported to the judge that:

"The basis is this, your Honour, that the defendant accepts that the allegation from August 2019 where the complainant says she woke up on the sofa and the defendant was penetrating her, the defendant will plead guilty on the basis that that was vaginal rape and he accepts that it was not reasonable belief in consent knowing that the relationship was over and they were in separate beds. He further accepts that there was a second vaginal rape that occurred between June and August 2019 when the relationship was in a very poor state indeed. He will say at the time he did believe she was consenting but he accepts that with hindsight and considering all the circumstances that belief was not reasonable."

It might be noted that this basis of plea did not accept the earliest occasion on which the

victim had reported waking to find a discharge in her underwear and had confronted the appellant about what he had done. This becomes significant in the light of what happened at the sentencing hearing and the judge's findings from that.

5. During the hearing before the judge at which the basis of plea had been outlined, defence counsel properly asked for time to draft a basis of plea. The judge stated that if the basis reflected the appellant's confession that he had no reasonable belief that the victim had consented then a written basis of plea was not required as the judge had written down what was said. Later events showed that the basis of plea needed to be reduced to writing to ensure that the appellant was sentenced on the proper basis, and also that the pre-sentence report was prepared on the agreed proper basis.
6. As it was, a pre-sentence report was produced in which the author recorded that the risk of reconviction of a serious specified offence was high due to the appellant's failure to acknowledge fully what he had done and to take responsibility. It seems that this was because the appellant challenged parts of the prosecution case. It is apparent that a written basis of plea would have provided the report writer with a proper basis for making findings about what was admitted. The pre-sentence report went on to state that the appellant would pose a high risk to other females with whom he had a relationship. The pre-sentence report noted that prison would be very difficult for the appellant.
7. At the sentencing hearing, with the benefit of the report, the prosecution opened the case on the basis that the appellant and complainant had commenced a relationship in November 2015. Count 2 (the first rape) was said to be committed approximately a year after their relationship commenced, which would have been 2016. The complainant had woken up and discovered a discharge in her underwear. She asked the appellant why her underwear was wet but was unable to recall what he had said in response. Upset, she had then told the appellant that she did not want to continue the relationship, attempted to leave but was blocked. It was said that the appellant pleaded guilty to count 2, which represented the vaginal rape while she was asleep. It is obvious from that short recitation of the sentencing hearing that prosecuting counsel then appearing had not been made aware of the basis on

which the appellant had pleaded guilty. Again, all would have been avoided if a basis of plea had been produced.

8. The prosecution continued saying that the relationship between HLN and the complainant continued and they had a daughter together. By late 2019 the relationship had deteriorated. The couple decided to continue living together and to raise their daughter in the same house but without any continuation of sexual relations. The complainant slept on the sofa, while the appellant had one of the upstairs bedrooms. On one occasion the complainant woke to find her pyjama bottoms had been pulled down and the sensation of something penetrating her vagina. She saw that the appellant was lying next to her (count 3). Shortly after that offence, she asked the appellant to leave.

9. The appellant was interviewed by police on 20 March 2020 and he answered no comment to all questions. He had, however, made partial admissions to other people that he had worked with.

The sentence

10. When it came to sentencing, the judge set out the circumstances. The judge repeated the chronology of the rapes as given by the prosecution, which had not been corrected by the defence, and the appellant shook his head. The judge said:

"You may be shaking your head now but that is what you have admitted."

The judge was right to say that the appellant had admitted two rapes but was wrong to say that the first rape had occurred in about 2016. It may not, as the judge later found at the slip rule hearing, have affected the criminality involved, but the appellant was entitled to be sentenced on the basis of what he had pleaded guilty to.

11. The judge then highlighted the way in which members of the appellant's family had blamed the victim for reporting what had occurred. The judge referred to the case of *R v BN* [2021] EWCA Crim 1250 and said that the fact that the complainant was able to wake up might mean there could be a downward adjustment, but the judge did not make a downward adjustment because the appellant had repeated the behaviour. The judge found that it was arguably category A because of the abuse of trust, but she was content to follow the

prosecution's suggestion that this was category B culpability and treat the abuse of trust as an aggravating factor. The judge found aggravating factors being that the offence was at home, abuse of trust, violent acts within a domestic context, and ejaculation in the first case. The judge found that each offence was category 2B, with a starting point of 8 years and a range of 7-9 years. Aggravating factors increased the sentence to 8-and-a-half years. The judge found that in mitigation there was in reality very little. There were no previous convictions but little or no remorse. The judge found that the appellant's shaking of his head showed that the appellant demonstrated no insight or remorse for what had occurred. The absence of convictions reduced the sentence to 8 years. With a reduction for a guilty plea, that would be a sentence of 7 years 2 months for each count - a total of 14 years 4 months' imprisonment. The judge then gave a reduction for totality and so imposed the concurrent sentences of 11 years on each count.

12. The judge then turned to the issue of dangerousness and referred to the contents of the pre-sentence report and found that, despite the absence of previous convictions, the guilty pleas, the length of time since the offence, the appellant's behaviour included breach of bail and strongly held but distorted views. The judge found that he was dangerous and imposed an extended licence period of 3 years.

13. There was a further hearing on 12 January 2023 on the defence request for a review of the sentence pursuant to s.385 Sentencing Act which is headed "Alteration of Crown Court Sentence". That provides that the court may adjust the sentence within 56 days of the imposition of the sentence. This was on the basis that it was said that the facts had been opened in a way which did not reflect the basis of plea, namely that both offences occurred later in the relationship when the appellant's mental health was low. This was, it was said, also relevant to the issue of dangerousness and the appellant's shaking of the head. The judge found that there was an error in the sentence in identifying the dates of the rapes and saying that the first rape had not occurred before the birth of the child rather than a few years afterwards but found that it did not alter the seriousness of the offending. The judge did not address the fact that the appellant had shaken his head and the judge had specifically

referred to that when sentencing and taking account of the absence of remorse.

The appeal

14. The first ground of appeal raises the issue of whether the judge was right to find that the complainant was 'particularly vulnerable due to personal circumstances' because she was asleep. We were referred to *R v Sepulvida-Gomez* [2019] EWCA Crim 2174; [2020] 4 WLR 11, *R v BN* [2021] EWCA Crim 1250 at 25, and *R v AWA* [2021] EWCA Crim 1877; [2022] 2 Cr App R (S) 15.

15. As a general proposition it is obvious, as was pointed out in *Sepulvida-Gomez* and *BN*, that a person who is asleep will be highly vulnerable, but every sentence must be facts-specific. *AWA* was a case where there was a complainant and defendant who had agreed to a threesome, with scripted sexual activities, consensual drug-taking, and the court there found that there was no particular vulnerability in those circumstances. In this case, in our judgment, the judge was entitled, and indeed right, to find that the complainant was particularly vulnerable due to personal circumstances. She was asleep and she had lost feeling in her genitals following complications when giving birth to her and HLN's child, in that she had suffered a prolapse. All those circumstances meant that the judge was entitled to make the relevant finding.

16. The second point raised in the course of submissions relates to the judge's reference to abuse of trust and the judge's willingness to treat that as a high culpability factor, before being dissuaded by the prosecution approach. In our judgment, although as a matter of colloquial speech what the appellant did might be described as an abuse of trust, that is not the way in which the term is used in the guidelines: see *R v Forbes* [2016] EWCA Crim 1388; [2017] [2017] 1 WLR 53, and *R v WVF* [2023] EWCA Crim 65; [2023] 2 Cr App R (S) 18. Each case will depend on its circumstances, but what is needed is a situation where someone is put in a position of authority or the equivalent of loco parentis, as the common law put it. The judge rightly took into account as an aggravating factor the fact that the victim was sharing a home and that these offences took place in a domestic context but the judge also referred to abuse of trust. This suggested that there was a risk of double counting

aggravating factors. In fact the judge aggravated the sentence from the starting point of 8 years only to 8 and a half years before discount for plea and mitigation, so it seems that there was, in practice, no double counting.

17. We have also considered whether the judge's approach to totality was wrong. But it is apparent that although others may have made a more substantial discount from the notional 14 years and 4 months that the judge arrived at, the judge did address the issue of totality and did make a reduction to reflect it. We do not consider that the judge's approach could be characterised as wrong in principle or led to a sentence which was manifestly excessive, although it was undoubtedly severe.

18. We then turn to the issue of dangerousness. Rape is an offence where an extended sentence of imprisonment is available: see s.280 Sentencing Act 2020. The test for dangerousness is whether there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offences: see s.308(1) Sentencing Act 2020. Section 308(2) provides that in making the assessment the court must take into account all the information available to it about the offender and the circumstances and any pattern of behaviour of which any of the offences mentioned form part.

19. It is clear that an appellate court will be very careful in disturbing findings of a dangerousness made by a court below, particularly if the judge has seen a defendant throughout a trial. In this case there was no trial, but guilty pleas on a basis. That basis then seemed to have been forgotten about by the prosecution, defence and the court. It is now clear from the sentencing remarks that the judge was at least influenced in part by the appellant's reaction to an error made by the prosecution, which was not corrected by the defence and which was adopted by the judge, about when the appellant had carried out the rapes to which the appellant had pleaded guilty. Further, it is apparent in assessing dangerousness that the judge paid no regard to the appellant's admissions to others about his wrongdoing, which demonstrated some insight about his offending, as a relevant factor, or to the fact that he would be in prison for a substantial period of time.

20. We do consider that it is necessary as a matter of fairness to revisit this issue. This is

because the appellant's reaction by shaking his head in relation to the errors made about which rapes he had admitted was used against him and was mischaracterised, understandably given the circumstances, as an absence of remorse. As it is, the appellant was a man of previous good character. The very serious offending took place with his former partner and had not been repeated elsewhere, despite a delay of 3 years before sentencing. The appellant had made some admissions to others he had met. The appellant had not reoffended. The appellant will be imprisoned for a considerable time. In those circumstances we do not find that there is a significant risk to members of the public to be occasioned by the commission of specified offences. The fact that there will always be some risk is not enough to impose an extended sentence.

21. We will therefore allow the appeal to the extent that we quash the finding of dangerousness and substitute a determinate sentence of 11 years' imprisonment on the appellant.
22. We are very grateful to Ms Rimer and Mr Smith for their assistance this morning.

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

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