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**Neutral Citation No. [2023] EWCA Crim 49**

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

CASE NO 202202946/A1



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Wednesday 18 January 2023

Before:

LORD JUSTICE DINGEMANS

MRS JUSTICE MAY DBE

HIS HONOUR JUDGE CONRAD KC

(Sitting as a Judge of the CACD)

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

REX

V

SAMUEL ANTHONY MOULDER

Computer Aided Transcript of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS K BROOME appeared on behalf of the Attorney General.

MR E HICKEY appeared on behalf of the Offender.

**J U D G M E N T**

LORD JUSTICE DINGEMANS:

**Introduction**

1. This is the hearing of an application by His Majesty's Solicitor General for leave to refer a sentence which he regards as unduly lenient, imposed on the respondent, Samuel Moulder, who was convicted of two offences of rape against the same victim, following a trial in the Crown Court at Gloucester. The victim has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act.
2. Mr Moulder is now 34 years old, having been born on 13 August 1988. He was 28 years old at the time of the first rape and 29 years old at the time of the second rape. Delay is an issue that has been raised.
3. There was some delay before the victim reported the offences. There was then a delay in the investigation, in particular there was a long delay before the respondent Mr Moulder was interviewed. Mr Moulder was then charged and his first appearance at court was on 12 January 2022, when not guilty pleas were indicated to the two charges of rape. There were concerns regarding Mr Moulder's fitness to stand trial and he was not arraigned at the pre-trial preliminary hearing on 10 February 2022. Mr Moulder then recovered sufficiently to have a trial and the trial took place between 15 and 23 August 2022. After conviction, sentence was adjourned and the sentencing hearing took place on 8 September 2022, when Mr Moulder was sentenced to a total of 8 years' imprisonment. Consequential orders were made.

**Grounds for the Reference**

4. The grounds on which the Reference are brought are that: first the judge erred in he incorrectly categorised count 1 as a section 3B offence for the purposes of the Sentencing Council Guidelines when the correct categorisation was 3A and thereafter failed to

properly account for the aggravating factors present; secondly, the judge incorrectly categorised count 2 as a 3A offence when the correct categorisation was category 2A or took a starting point for count 2 which was well below the appropriate range for a category 2A offence and thereafter failed to properly reflect aggravating features; thirdly the judge failed to increase the sentence imposed on count 2 to reflect the count 1 offending, given that the judge was taking count 2 as the lead offence; and fourthly the judge incorrectly reduced the sentence to take account of totality because of an earlier unrelated sentence of imprisonment.

5. The application is resisted on behalf of Mr Moulder. It is noted that the prosecution accepted that the first offence might be category 3A or 3B at trial. The categorisation of the first rape was correct because there was inadequate evidence of previous violence which was relied on to make the first count a category 3A. The second offence was a category 2A matter but the judge had had proper regard to all the relevant issues which included Mr Moulder's mental health issues, the delay and issues of totality. The effect of the delay was that Mr Moulder had served a sentence of 27 months' imprisonment for separate offending after the commission of these offences which might be considered.
6. We grant leave for the Reference. Before setting out the relevant circumstances we recall that Mr Moulder did not formally enter pleas to the counts because of the earlier concerns about fitness to plead. In circumstances however where he was treated as pleading not guilty and he was convicted by a jury, properly directed after a trial of the evidence, this irregularity in procedure does not make the conviction unsafe, see R v Williams [1978] QB 373.

**The factual circumstances**

7. Mr Moulder and the victim had been in a relationship for about 8 months but they did not

live together. The victim was taking medication for depression and anxiety during this period. Mr Moulder had been made homeless and was given temporary accommodation at the Travel Lodge in Cheltenham. One night, between 16 July and 25 July 2017, the victim visited Mr Moulder at the Travel Lodge to spend some time with him. During the evening she received a text from a taxi-driver asking if she needed to be driven back home. An argument followed and Mr Moulder accused the victim of having an affair. Mr Moulder told her to leave his room, which she did and waited outside. While outside she realised that she was cold and had no money to get back home. Mr Moulder contacted the victim by telephone and stated that she would only be allowed back in if she had sex with him. At about 3.00 am she went back into the hotel room. She did not want to have sex with Mr Moulder but Mr Moulder pulled her towards him, pulled down her clothing and penetrated her vagina with his penis. The victim was crying throughout. The sexual activity was non-consensual and Mr Moulder would have known this given her reaction. After ejaculation Mr Moulder fell asleep. The victim left the Travel Lodge a few hours later, did not make any contact with Mr Moulder after this and did not talk to him about what had happened.

8. The victim thought that as a result of the rape she had fallen pregnant but the evidence before the trial seemed to be unclear as to whether this was only her belief or was the fact and the judge made no clear finding in relation to that matter. The victim visited her GP on 10 August 2017 and she was 5 weeks' pregnant. The victim was happy she was pregnant. The pregnancy was however ectopic and she had to attend the Gloucester Royal Hospital on 11 August 2017 and she had surgery to remove the ectopic pregnancy on 13 August and was later discharged.
9. The victim contacted Mr Moulder again when she had found out that she was pregnant.

They had arranged to meet and she invited him back to her address. Mr Moulder had taken crack cocaine and was intoxicated. In the early hours of the morning they both entered the bedroom and drank alcohol. Initially everything was normal and fine but then Mr Moulder became aggressive towards the victim and began to talk about a mutual friend to whom the victim had disclosed the first rape. Mr Moulder said: "I'll show you what fucking rape is" and jumped on top of her as she lay on the bed. She fell from the bed screaming and Mr Moulder grabbed a duvet and pulled it over her face. She screamed for help and banged on the bedroom wall to get the attention of the neighbour. At this point Mr Moulder threatened the victim and was kneeling on her chest. She managed to free herself but he grabbed her, pulled off her clothing and penetrated her vagina with his penis while covering her mouth with his hand to prevent her screaming. He later ejaculated onto her back and after the rape Mr Moulder took the victim's mobile phone and put it down the toilet. The victim left but Mr Moulder followed her and repeatedly asked her what had happened as he said he could not remember. The victim reached her friend's house and disclosed that she had been raped.

10. The victim told a number of friends about the rape. Some of them remembered bruising and injuries on her body. Mr Moulder had also admitted to a further person that he had raped the victim. The victim's family and friends gave examples of previous incidents of violence said to have been committed by Mr Moulder. They described his behaviour as "controlling".
11. The victim reported the rapes to the police in November 2018 and, as already indicated, he was later interviewed in January 2020 and again in February 2020. In interview Mr Moulder denied the offences, stating that all sexual activity was consensual and provided alternative explanations for the incidents and said that the victim had consented

throughout. He purported to explain some bruising on a photograph by saying that he had been violent in the past, but whether that was the truth or just a false explanation for the bruising which the victim had suffered during the rape was a matter for assessment of the trial judge.

### **The sentencing**

12. The victim provided two personal statements which outlined the impact of the offending on her. Mr Moulder had completely changed her. She had been an outgoing person who enjoyed life but her pre-existing mental problems had been exacerbated by his actions. Her medication required to be increased. She is now suffering with higher anxiety, lower mood, lack of motivation, struggle sleeping and weight gain. She had lost the ability to trust people and she said that Mr Moulder had ruined her life.
13. Mr Moulder has nine previous convictions for 27 offences between 2011 and 2018. Early offences included theft and robbery. In 2015 he was convicted of battery, affray and possession of a knife. In 2017 he was convicted of battery, criminal damage, possession of cannabis and theft offences.
14. On 22 November 2018 Mr Moulder had been sentenced to a total of 36 months' imprisonment, for various offences committed on different dates including possession of extreme pornographic images and indecent photographs of children. The sentences were also for offences for assault occasioning harm, theft and taking a vehicle without consent. The assault, theft and driving offences took place in November 2017 when Mr Moulder had attacked the man to whom the victim had previously reported the rapes. Mr Moulder was sentenced to 27 months' imprisonment for those offences and a restraining order was made.
15. There were also available at the sentencing exercise two psychiatric reports from Dr

Laidlaw, which had been prepared in April 2022 and which addressed Mr Moulder's fitness to stand trial. The reports provided some details about Mr Moulder's previous psychiatric history and episodes of drug-induced psychosis.

16. At the sentencing hearing the prosecution had submitted that the first offence was a harm category 3 offence and that the culpability might be 3A or 3B. The starting point for category 3B is 5 years' custody with a range of 4 to 7 years. Regarding count 2, the prosecution submitted that this was a category 2A offence because this offence was violent, involved threats of violence and there had been previous violence against the victim. The court was also reminded that the offence took place in the victim's home and Mr Moulder had ejaculated on both occasions.
17. The judge indicated that, in his opinion, the first offence was a category 3B offence. The judge also said that there would need to be consideration of totality, so far as the sentence of 27 months' imprisonment which related to associated matters, namely the report to the third party and the violence against the third party as the instant offences had occurred before those offences.
18. On behalf of Mr Moulder the categorisation of count 1 as a 3B offence was accepted and a count 2A offence was agreed. The defence also accepted the presence of various aggravating features.

### **The sentencing remarks**

19. When sentencing, the judge noted in respect of count 1 the previous violence and that the victim had become pregnant. In his view the second rape was more serious, it was violent because Mr Moulder had been violent previously and he had raped her before. He determined count 1 to be 3B as he had already indicated. For count 2, he did not specifically identify what harm category it was but said it was culpability A and that he

had taken a starting point of 7 years. A starting point of 7 years is appropriate for culpability A harm category 3 rather than harm category 2. The judge determined that count 2 was the lead offence and reached an overall sentence of 9 years' imprisonment for both offences before reducing the sentence by 1 year to reflect totality including the previous sentence. It is not clear what aspects of totality were reflected in the reduction. The judge considered dangerousness and concluded that Mr Moulder should not be found dangerous for the purpose of the statute.

20. A prison report produced since sentence shows that Mr Moulder is now at an enhanced incentive level and has had no contrary adjudications. There were no facilities for carrying out sex offending work at the prison where he has been located. Mr Moulder had not contacted the Drugs Team or the Mental Health Team.

#### **Decision on the Reference**

21. In our judgment, the judge was entitled to find that the first offence of rape was a category 3B offence. He had heard the trial and was best placed to judge whether there had proved to be previous violence to the victim before the first rape notwithstanding the statement that Mr Moulder had made in interview. That may be because the judge took the view that those admissions were false admissions in an attempt to explain the bruising on the victim photographed by her after the second rape.
22. The judge's first sentence of 5 years reflects the starting point for this offence and does reflect matters of aggravation, including previous convictions and matters of mitigation including delay and Mr Moulder's mental health issues.
23. The real issue on this Reference relates to the judge's categorisation of the second rape. The judge did not share his categorisation of this offence and simply announced that the starting point would be 7 years before increasing it to reflect the first offence to 9 years



and then taking account of totality to take the sentence to 8 years.

24. It was common ground in the submissions below and before us that the second rape was a category 2A offence. This was category 2 because of violence or threats of violence beyond that which is inherent in the offence, and category A because there had been previous violence, namely the rape against the victim. That does raise an issue about totality which we will need to consider when avoiding double counting and some of the criminality involved in the first matter. This gave a starting point for the second rape of 10 years and a range of 9 to 13 years for the second rape alone. There were aggravating factors of the previous convictions of Mr Moulder, the offence being committed in breach of community order, the location of the offence in the victim's home, the steps taken to prevent the victim reporting the offence by putting her phone in the lavatory and the commission of the offence while under the influence of alcohol or drugs. There were mitigating factors of mental disorder, delay. There was also a need to take account of totality in respect of the first rape, a potential issue of double counting because the first rape was part of the reason that the second rape was category 2 and the earlier prison sentence.
25. In our judgment, it was appropriate to reflect all of the criminality of the first and the second rapes on the second count, which was the most serious rape and that was the approach taken by the judge. In our judgment however, the sentence which the judge took for the starting point for the second rape was simply too low and not in accordance with the Guidelines. No reason was given by the judge for departing from the Guidelines and we have not been able to see any such reasons. The starting point for a category 2A rape was, as already indicated, 10 years.
26. We consider that in order to find a sentence which is proportionate to all of the offending

but which also reflects the aggravating features, the mitigating features, the delay and totality, the sentence on the second rape should be one of 12 years, increased from 8 years. The sentence on the first rape should remain at 5 years and remain concurrent with the second rape. We will therefore allow the Reference to the extent of increasing the sentence on the second rape from one of 8 years to 12 years.

27. We are very grateful to Ms Broome and Mr Hickey for their helpfully written and oral submissions.

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

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