IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT SHEFFIELD

HIS HONOUR JUDGE DAVID DIXON T20220860

CASE NO 202401064/A1

[2024] EWCA Crim 1203

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 6 September 2024

Before:

LORD JUSTICE MALES
MRS JUSTICE MAY DBE
MR JUSTICE BRYAN

REX
V
KYLE FRANKLYN BUCKLEY

MR S LITTLEWOOD appeared on behalf of the Appellant

A P P R O V E D J U D G M E N T

MR JUSTICE BRYAN:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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. This judgment has been anonymised accordingly.

2. On 18 March 2024 in the Crown Court at Sheffield (His Honour Judge David Dixon), the appellant pleaded guilty briefly before the commencement of his trial, to a count of sexual assault pursuant to section 3 of the Sexual Offences Act (Count 5), to reflect the entirety of his sexual offending against the complainant, with no evidence being offered against him on the remaining counts (which had been in respect of each individual sexual act), with not guilty verdicts being entered on those counts.

3. On the same day, before the same judge, the Learned Judge sentenced him to 2 years' imprisonment to be served consecutively to a sentence already being served. A restraining order with a 15 year duration was also made.

4. Turning to the facts of the appellant's offending. The complainant was the store manager of a shop. On 4 June 2022, at around 9.30 in the morning, the complainant was working at the shop. She went outside for a break and the appellant arrived. He had been known to the complainant for around five years and he had been in a relationship with someone she also knew. The appellant was clearly under the influence of drink. He was laughing and telling the complainant that he had been on a "mad one" for days. He was carrying a half drunk bottle of rum in his hand and the complainant could smell alcohol on him.

5. The appellant then walked up to the complainant and told her that he had always wanted to "get with her". He tried to put his arms around the complainant and pull her towards him. He licked her face. The complainant did not know what to do as she believed the appellant had the potential to turn from nice to nasty. There were customers in and around the shop and she was anxious not to escalate the situation. The appellant became increasingly sexual and asked the complainant what time she finished work. She was trying to be pleasant but repeatedly told the appellant she was not interested in him in that way. The appellant told the complainant he wanted her to sit on his face and suggested he would keep her "locked up for hours".

6. At that point the complainant retreated back into the shop. She could hear the appellant being loud outside the shop as he continued to drink from the bottle. The appellant then

came into the shop. The complainant continued with her work and was stacking sandwiches into a fridge when the appellant found her. As he approached her the appellant made comments about her breasts, before physically grabbing one of her breasts over her clothes. He also slipped a hand down the back of her trousers, touching the upper part of her bottom. The complainant moved away causing the appellant's hand to come out. The complainant asked: "What are you doing? You're not normally like this. Go home." However, the appellant did not go home.

7. He continued to say he wanted to meet the complainant after work. When the complainant turned to continue with her work she felt the appellant's body pressing into her from behind. She had one of her hands on the fridge and he put one of his hands over her hand inhibiting her ability to turn out around or push him away. She felt the appellant moving from side to side against her, so she was then forced to bend down to push and force him backwards. She was then able to turn away slightly and at this stage she realised that the appellant had pulled his tracksuit trousers down, pulled up his t-shirt and had been rubbing his fully exposed penis against her.

8. The complainant shouted to a co-worker. The appellant was laughing and said: "You're not supposed to look at it" before pulling his trousers up. The complainant told the appellant he was making her feel very uncomfortable and he said he knew he was making her feel uncomfortable. When the complainant's co-worker arrived on the scene, the appellant stepped further away from the complainant and left the shop. The complainant told the co-worker what had happened. They reviewed the CCTV footage from the store and called the police. The appellant was arrested and in interview, he made complete factual denials saying that he had not touched the complainant and he had not exposed his penis, despite the fact of the appellant exposing himself and rubbing his penis against the complainant being captured on the CCTV which we have viewed.

9. The appellant had a poor antecedent record with no less than 22 previous convictions for 44 offences, spanning from 9 July 2008 to 19 June 2023, albeit that he had no previous convictions for sexual offences.

10. There was a victim personal statement before the court. The complainant identified that the appellant's actions had led to her being moved to a different store from the one she had worked at for over 20 years, so as to ensure her safety with the unfamiliar environment causing her to feel uncomfortable and stressed and also having to travel a longer distance to work. Whilst on the estate where she lived she felt unsafe and in fear of bumping into the appellant with her suffering panic attacks and anxiety to a point where she avoided taking her dog out for a walk and she started getting taxis to and from work so she was not walking around the estate alone early in the morning or late at night, although she could ill afford to do so. She was and remained at the time she gave that

statement in daily fear of the appellant.

11. The Learned Judge sentenced the appellant without a pre-sentence report, but we do not consider that one was necessary at the time or before this Court in the circumstances of the present case.

12. The Learned Judge considered, as is not disputed on behalf of the appellant, that this was Category 2B offending under the Sexual Assault Guidelines for which the starting point was 1 year's custody with a category range from a high level community order to 2 years' custody. He identified a number of aggravating factors, namely the appellant's awful record of previous convictions and poor compliance with court orders (albeit no previous sexual offending), the location of the incident in a shop where other customers could have witnessed the assaults, the appellant's intoxication and the fact that the victim as the manager of the shop was undertaking a public service at the time. The Learned Judge rejected the appellant's plea that he was remorseful given the lateness of his plea. The Learned Judge considered that the number of aggravating factors took the appropriate sentence above the top of the range into 2 years 6 months' imprisonment.

13. He then considered totality in circumstances where he had been separately sentenced to 44 months' imprisonment (as a result of breaching various suspended sentence orders by the commission of a death by careless driving offence and other associated offences). He made a reduction of 10% to reflect totality and a further reduction of 10% to reflect the appellant's late guilty plea, arriving at a sentence of two years' imprisonment.

14. The grounds of appeal against sentence on which leave was granted, and which were advanced before us today by Mr Littlewood on the appellant's behalf, are as follows: that the Learned Judge adopted too high a starting point at 2 years 6 months' imprisonment and/or failed to give sufficient weight to the principle of totality, and that in consequence the sentence passed was manifestly excessive.

15. As to the first of these points, Mr Littlewood accepts that it was Category 2B offending giving a starting point of 1 year's custody with a range up to 2 years' custody. He accepts that the fact that the offence took place in a shop was an aggravating feature, as was the fact that the appellant was intoxicated but suggests that the appellant's very poor previous record should not have aggravated the sentence significantly given that it did not relate to sexual offending. He did not accept the victim was performing a public service or, if she was, he submitted this was already accounted for by the aggravating feature of the offending being in a shop. His over-arching submission is that whilst these aggravating features would push the sentence up within the range, possibly to the top of the range, they did not warrant a starting point (by which he meant a sentence after aggravating features were being taken into account) that was 150% greater than the notional starting

point and one which he characterised as "far outside the range".

16. It will be seen that Mr Littlewood takes one year as a starting point, and then makes submissions about the aggravating factors and what uplift there should have been for such factors. There is, however, a prior important stage to that, which is to consider what the appropriate starting point should be for the sexual offending in this case having regard to the offending for which the appellant was being sentenced. Count 5 was to cover the entirety of the non-consensual sexual acts, namely the licking of the complainant's face, the grabbing of her breast, putting his hand down the back of her trousers and touching the upper part of her bottom, exposing his genitals and the rubbing of his naked penis against her buttocks - all a series of non-consensual sexual acts taking place over a 10-minute period, the first of which was outside the shop and the remainder of which was inside the shop. This continuum of sexual assault, made up of a number of parts, justified, in our view, a very significant uplift from the notional starting point towards the top of the range before considering the numerous aggravating factors.

17. This was serious sexual offending with a number of seriously aggravating features. It was brazen conduct, that was humiliating and degrading, and it was committed in broad daylight in a public place, a shop with others around, and the appellant's offending understandably had a significant impact upon his victim. The appellant was heavily intoxicated at the time and the sexual assault was inflicted on a shop worker going about her work. The appellant's appalling previous criminal record did further aggravate the offending (if there had been similar previous offending that would have very significantly have aggravated the offending). We consider that the concatenation of aggravating factors justified the Learned Judge going from the already enhanced starting point to 2 years 6 months' imprisonment before considering totality and credit for guilty plea and as such we see no merit in the first ground of appeal.

18. Equally, we do not consider that there is any merit in the totality point, the subject matter of the second ground of appeal. The other offending to which the appellant had been sentenced was disparate offending and this separate serious sexual offending committed on a different occasion against a different victim justified and required a substantial immediate custodial sentence in its own right. We consider that a reduction of 10% for totality was entirely adequate to ensure that the overall sentence was just and proportionate to the totality of the offending. Equally, there is not, and cannot be, any criticism of the 10% credit for a very late guilty plea.

19. In such circumstances the appeal against sentence is dismissed.