APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 3
HCA/2022/000291/XC

Lord Justice Clerk
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

MG

Respondent

Appellant: Lord Advocate KC, AD, Gill; the Crown Agent
Respondent: Gravelle, Sol Adv; Beltrami & Co, Glasgow

7 February 2023

[1] This is an appeal by the Crown alleging that a sentence of 4 years imprisonment for rape was unduly lenient.

Background

[2] MG is now 39. He is a foreign national who had been granted indefinite leave to remain in the UK. He is married with 3 children. He was convicted of raping the

complainer in the following terms

> "did assault [the complainer] pretend to her that the public toilets in the hotel were out of order and induce her to go with you to your room and there an intoxicating substance caused her to lapse in and out of consciousness and rendered her unable to control her movements and incapable of giving or withholding her consent, manoeuvre her into various positions on a bed, remove her trousers and underwear, remove your own clothing, forcibly penetrate her mouth with your penis, insert your fingers into her anus, remove her top, lie on top of her, kiss and bite her breasts, rub your penis against her body, remove her tampon, penetrate her vagina with your penis, turn her onto her stomach, lick and bite her buttocks, place her hand on your penis, induce her to masturbate your penis and you did thus rape her, to her injury: CONTRARY to Section 1 of the Sexual Offences (Scotland) Act 2009."

Circumstances of offence

[3] At the time of the offence, MG was a 35 year old General Practitioner. The complainer was 19 years old. They met through the Tinder dating platform. MG, who was calling himself by a name other than his given one, said he was 23 years old and a junior doctor. After a few weeks of messaging of a non-sexual variety, they agreed to meet up at a hotel in Stirling, where the complainer lived.

[4] On 8 December 2018, they met as arranged in the bar of the hotel, where MG had in fact booked a room. After drinking and chatting over the evening, during which time the complainer had about 4 gins, she was about to arrange a taxi to go home. She indicated that she needed to go to the bathroom. MG told her that the toilets in the bar were closed and suggested she use the toilet in his room. She agreed. Up to this point there had been no physical contact between them. The complainer was not particularly attracted to MG. When she entered the room they kissed and she went to the toilet. When she came out of the toilet MG gave her a mug and told her it contained pink gin. She found it very strong. MG had purchased the alcohol before arriving at the hotel, having previously ascertained

what she liked to drink. Whilst she was in the toilet he took a Viagra. They talked for a while, but the complainer began to feel very tired and heavy, as if she wanted to sleep.

[5] Over a period of around 3 hours, the complainer lapsed in and out of consciousness whilst MG raped her in the manner described in the charge. Eventually she was able to stand up, (albeit with some difficulty) and went into the toilet, taking her phone with her. She messaged two friends but neither replied. She came out of the toilet, managed to get dressed and leave the room.

[6] CCTV footage seemed to show her leaving the hotel quickly and without her shoes on. She sat on the steps to put her shoes on. The hotel night porters found her sitting outside the front door crying, upset, distraught, not willing to come back into the hotel and asking for directions to a cash machine. At least one of the porters told police that she seemed drunk, thus supporting her account of incapacity. When she eventually returned home, she contacted the police. On examination she was found to have recent injuries, being a scratch to her lower eyelid, a 6cm abrasion to her left buttock and on the front right thigh a fingertip bruise.

Submissions for the Crown

[7] The Lord Advocate submitted that the test in *HM Advocate* v *Bell* 1995 SCCR 244 was met: the sentence falls outwith the range of sentences which a judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. The sentence failed to meet the objectives of protection of the public, punishment and expressing disapproval of the offending behaviour. It did not reflect the gravity of the offence, the degree of premeditation, the complainer's vulnerability from being under the influence of an intoxicating substance, and the prolonged nature of the incident.

[8] Having regard in particular to the Sentencing Council for England and Wales Definitive Guideline for cases of rape, a fair and appropriate sentence in this case would have been imprisonment in the range of 7 to 8 years bearing in mind:

a. that this was a conviction after trial,

b. the significant element of duplicity involved,

c. the significant element of pre-planning involved,

d. the age and professional position of the respondent and

e. the age and vulnerability of the complainer.

[9] According to the Definitive Guideline the case would fall into Harm Category 2 by virtue of (a) the offence being a "sustained incident"; and (b) the complainer being "particularly vulnerable due to personal circumstances". A "sustained incident" can refer "to a single offence set in its surrounding circumstances or context; but it can also refer to a single episode of some duration within which more than one assault might take place"(*R* v *KC* [2019] 4 WLR 127 para 32). As a result of an intoxicating substance, for the duration of the offence, the Complainer lapsed in and out of consciousness. The Complainer's circumstances were therefore such as to render her "particularly vulnerable to even greater harm than is likely to be suffered by other victims of a similar offence" (*R* v *Saunders (Joey)* [2022] 2 Cr App R (S) 36 para 13; see also *Attorney General's Reference (R* v *BN)* [2022] 1 Cr App R (S) 37 para 25).

Submissions for MG

[10] There was no evidence that MG had brought pink gin and Viagra with the prior intention of committing a sexual offence. His evidence was that he had brought those items in the hope of facilitating a consensual sexual encounter. There was a significant difference

between acts and behaviour designed to facilitate a consensual sexual encounter, and a course of conduct with the primary objective of committing a rape. The public are protected by the deprivation of the appellant's liberty for a period of four years. The impact of sentence is punitive in terms of the length of sentence and the consequences of imprisonment. The severity of the punishment is not to be measured exclusively in terms of the length of sentence. MG will be the subject of notification requirements for an indefinite period upon his release, with no right of review thereof within fifteen years. He will be unable to resume practice as a General Practitioner.

Analysis and decision

[11] The trial judge explains in his report the process by which he arrived at the sentence of 4 years. It appears that he considered what would be the appropriate sentence for the offence of rape of which the accused was convicted, by which he reached what he described as a "headline sentence" of 5 years. He then reduced that by one year to reflect what he considered to be the personal mitigation available to the accused, in the form of his hitherto good character, and the loss of his profession.

[12] The Scottish Sentencing Council Guideline on the Sentencing Process makes it clear that the headline sentence is that arrived after consideration of all the circumstances of the case, including both aggravating and mitigating factors. If, as he maintained, the figure of 5 years was selected by reference to sentences in other, unspecified, cases, the headline sentence in those cases would already have reflected any mitigation which existed. There is therefore a risk of double counting in the trial judge's approach. However, the appeal is not based on error of law, and the trial judge has not been given an opportunity to comment on

this matter. We would thus merely observe that it appears that he has not followed the approach set out in the Sentencing Process Guideline.

[13] We consider that a sentence of 4 years for the offence in question is undoubtedly a lenient one: the question is whether it meets the test in *Bell* and may be considered to be unduly lenient. Examining the factors relied upon by the Crown as indicating the gravity of the offence and which it is said should be taken into account in selecting the appropriate sentence, we find that some of these are of no, or minimal, relevance. For example, the fact that this was a conviction after trial means that no discount should be applied, but it does not conversely mean that the sentence is increased: there is no punishment for going to trial. The professional position of the respondent has no bearing on the offence, which was committed in a private capacity, and through contact made on Tinder not through work. The appellant is somewhat older than the complainer but there is nothing in the circumstances which makes age a particularly relevant factor. That leaves the element of duplicity, the alleged significant element of pre-planning, and the complainer's vulnerability through intoxication. We accept that there was an element of duplicity, in that the respondent lied about his identity, his age, and apparently about the closure of the bar toilets, which may be seen as a manoeuvre to entice the complainer to his room. We are not satisfied that it is correct to say that there was a significant element of pre-planning for the commission of an offence as opposed to taking steps to facilitate the possibility of a sexual encounter: as the trial judge observed in his report,

> "There was no evidence that the respondent had brought pink gin and Viagra with the prior intention of committing a sexual offence. His evidence was that he had brought those items in the hope of facilitating a consensual sexual encounter, and there was no evidence to indicate the opposite, albeit that that is not how matters turned out. The respondent gave evidence that this had not been his first Tinder date and that some of his previous dates had ended with consensual sexual intercourse."

[14] We see no reason not to accept the trial judge's assessment of matters. As to the vulnerability of the complainer, we accept that as a result of her condition the complainer would be more vulnerable to being taken advantage of, and less able to assert herself than she might otherwise have been. We question, however, whether it is exactly correct to say, as the Crown submitted, that her circumstances were therefore such as to render her "particularly vulnerable to even greater harm than is likely to be suffered by other victims of a similar offence". There is nothing in the circumstances to suggest that she was vulnerable to greater harm from the offence than a non-intoxicated person would be, and it is notable that the full passage in *Saunders* from which the extract in this submission was taken, makes it clear that it is not referring to the vulnerability to exploitation that arises from intoxication, but from the increased effect that an offence might have because of particular vulnerability from, for example, pre-existing mental health issues. We note that in the Definitive Guideline a factor which may place a case in Category 2 rather than Category 3 is that the "Victim is particularly vulnerable due to personal circumstances". It seems that there may be a degree of debate in England as to precisely what this means: *Saunders* appears to take one approach, whereas a different approach may be identified in *Attorney General's Reference (R* v *BN).* Another factor which is listed as taking a case into Category 2 as opposed to 3 is "Prolonged detention/sustained incident". We note that the quotation from *R* v *KC* contained within the Crown's written submissions is incorrect: it does not say that a "sustained incident" can refer "to a single offence set in its surrounding circumstances or context; but it can also refer to a single episode of some duration within which more than one assault might take place": it says that an "incident" may refer to a single episode of some duration within which more than one assault might take place. Whether an offence

may be classified as a "sustained incident" seems to us, on the authorities, to be a more nuanced question than one determined merely on the duration of the event. There are cases where an event of relatively short duration has been considered a "sustained incident" but in those cases there appears generally to have been another factor, involving elements of abduction or restraint. So for example, in *R* v *Dogra* [2019] 2 Cr App R (S), a rape which lasted about 20-22 minutes was considered sustained and meriting a Category 2 classification when it was preceded by a protracted pursuit of the victim, who was "perhaps even hunted down", and also dragged from the street into some bushes. In *R* v *Mamliga* [2018] EWCA Crim 515 an attack lasting about 25 minutes was viewed as sustained where the complainer had her hands tied behind her back, a towel forced into her mouth and her face pushed into a pillow to stop her calling out. Her ankles were then tied together, and both her hands and legs bound with shoelaces brought for this purpose to the scene. All of this is consistent with the approach in *R* v *KC*, where it was noted (para 38) that:

> "we draw support for our conclusion from the fact that the expression "sustained incident" is a part of "prolonged detention/sustained incident" and the two phrases are intended to bear some common characteristics. In the case of prolonged detention a child might be prevented from leaving for a period of time during which one or more assaults occur. In such a case the increased harm factor is because there was a wider incident of "detention" bordered by a start point (restraint) and an end point (release). During the period of detention various assaults might occur. The facts of *Mamaliga* (ibid) reflect such a situation. The concept of a 'sustained incident' is clearly intended to be similar or analogous to a 'prolonged detention'".

[15] In having regard to the Definitive Guideline on rape applicable in England and Wales, it is necessary to recognise that, as has often been noted, this should be used as a cross check and should not be the subject of direct and unthinking application. In *HM Advocate* v *Ian Milligan* [2015] HCJAC 84 the court stated (para 5):

> "We caution against too rigid an application of the English sentencing guidelines. They are not to be applied even in England in mechanistic fashion and it must be borne in mind that those guidelines in England are to be understood in a different sentencing regime from the Scottish sentencing regime…….. the Scottish approach to sentencing is rather less formulaic than the English sentencing guidelines."

[16] Using the Guideline as a cross-check, we consider that it would not be appropriate to classify it as other than in category 3B, which has a range of 4-7 years, and a starting point of 5 years. On that basis the sentence selected by the trial judge can be seen to be lenient, but not excessively so, and the appeal must fail.