

NCN: [2018] EWCA (Crim) 3119  
No. 2018/02046 A1  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 21 June 2018

Before:

LORD JUSTICE SIMON

SIR JOHN SAUNDERS

and

HIS HONOUR JUDGE MAYO QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

---

**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

---

**REGINA**

**- v -**

**FILMON KBROM**

---

Computer Aided Transcript of Epiq Europe Ltd, 165 Fleet Street, London EC4A 2DY  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

*This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

*WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

---

**Miss J Faure Walker** appeared on behalf of the Attorney General

**Miss L Sweetland** appeared on behalf of the Offender

---

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

---

**LORD JUSTICE SIMON:**

1. This is an application by Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which he considers to be unduly lenient.
  
2. On 27 October 2017, in the Crown Court at Maidstone, the offender, Filmon Kbrom (then aged 18) pleaded guilty to an offence of sexual assault, contrary to section 3(1) of the Sexual Offences Act 2003. On 20 April 2018 he was sentenced by His Honour Judge Statman QC to a term of 19 months' detention in a young offender institution, suspended for two years with an unpaid work requirement of 180 hours to be completed within twelve months, a requirement to attend 30 days of rehabilitative activity sessions and a requirement to abide by a curfew for ten months of electronic monitoring.
  
3. At about 5am on 18 July 2017, "AH" (aged 25) was using her mobile phone outside a fast food restaurant. She was alone, had consumed alcohol but was not drunk. She was approached by the offender who earlier the same night had tried to dance with her and her friends in a nightclub. When AH ended her phone call the offender asked her to walk with him. She declined. He said that he wanted to show her something while holding his penis through his clothing. He then started to strangle her. She felt light-headed and thought that she would faint. She pushed him away, whereupon he grabbed her left wrist and tried to pull her towards him. She told him to "get off". As she again tried to push him away, he grabbed the right side of her chest and slid his hand down her breast, touching it over her clothing. He then inserted his fingers into her mouth and held her cheek. She screamed and he walked away.
  
4. As a result of the offender's assault, AH's neck was bruised, her breast was swollen and her wrist was sore.

5. CCTV images, which this court has seen, captured part of the incident. The offender was recorded walking along a pavement towards the camera, looking in the direction of the victim to his left as she was using her mobile telephone. He is then out of view and returns into view about 20 seconds later. He approaches the victim. He appears to try to engage her in conversation while she is still using her mobile phone. He then steps close to her, places his hand near to his waistband and raises his top slightly while smiling. She moves away to her left, but he continues to linger close by. It appears as if he is trying to speak to her. He then approaches her again and touches her. She reacts by raising her arms. He backs away for a few seconds and then goes towards her again and touches her with both hands. She struggles with him and steps backwards. He tries to kiss her and she moves away, off camera. The next time they are captured on camera together again is further along the road when he is still trying to make physical contact with her. He then walks away. The total duration of the period from when he first makes physical contact to when he walks away is agreed to have been about 26 seconds.

6. The offender was arrested on 11 August 2017. During interview under caution, he identified himself on the CCTV footage shown to him. He had no recollection of events but accepted that the footage showed him commencing the assault, and that AH was trying to push him away. He also said that he had seen AH in the nightclub.

7. When describing the offence, the victim stated: "My life flashed before my eyes". As a result of the offence, she was too frightened to go out alone. Her confidence has been affected.

8. The offender has no previous convictions or cautions. According to the author of the pre-sentence report, he was intoxicated at the time of the offence and had no recollection of it. However, he understood the effects of the offence on the victim. He had written a letter of

apology to her in which he expressed his remorse and shame. According to the offender and those who worked closely with him, he had not consumed alcohol since his arrest. He demonstrated that he had a high level of maturity in general, but the commission of the offence showed an element of immaturity in that he had consumed excessive quantities of alcohol. The consequences of his behaviour had now focused his thoughts. The author of the report assessed the offender as posing a medium risk of re-conviction and a medium risk of harm to others. Although the offender had demonstrated that he was capable of causing significant harm, the risk was not imminent and he was unlikely to do so unless his circumstances changed. The author proposed requirements to be attached to any suspended sentence.

9. The offender was charged on 18 August 2017. At the first effective plea and trial preparation hearing, on 27 October 2017, he pleaded guilty on a basis that was not accepted by the Crown. The matter was then adjourned to 6 December for a *Newton* hearing. On that day the victim did not attend court; she had not been warned. The matter was, therefore, adjourned until 15 January 2018. Prior to that hearing, the offender withdrew his basis of plea and indicated that he no longer wished to dispute any aspect of the prosecution case. Sentencing was then adjourned for the preparation of the pre-sentence report.

10. At the sentencing hearing on 20 April 2018 it was agreed between the prosecution and defence – and accepted by the judge – that the offence fell within category 1B of the Sentencing Council guideline for section 3(1) offences. The judge found that the timing of the offence (the early morning), but not its location, was an aggravating factor. He also noted that the offender was under the influence of alcohol at the time of the offence, which further aggravated the seriousness of the offence.

11. The judge referred to mitigating factors: the offender's lack of previous convictions, his

good character, genuine remorse, his youth and immaturity, the steps taken to address offending behaviour and the lack of further offences committed while on bail for a period of eight months. The judge took into account the offender's unusual personal circumstances. He had been mistreated in prison in Eritrea when he was aged 14. He arrived in this country aged 16 and successfully claimed asylum whilst his family remained in Eritrea.

12. The judge heard oral evidence from IM, a volunteer from a local charity that assisted young refugees, including the offender. She had also co-authored a letter which was placed before the court. She referred to the offender's attendance at college four days a week where he studied English for speakers of other languages (level 2). His level of understanding of English was basic. She referred to the offender's caring nature. She had never seen him under the influence of alcohol. The judge also took into account written character references provided by staff at the same charity and by a refugee support worker of the British Red Cross.

13. The judge found that the appropriate sentence would have been a term of two years' detention in a young offender institution, before reduction for the guilty plea. He indicated that he afforded a 20 per cent discount on account of the guilty plea. When explaining the reasons for suspending the sentence, the judge referred to the offender's youth. He also referred to the "horrible events" witnessed by him during his childhood. The judge remarked that in appropriate cases "justice must be tempered with mercy". The judge added that it had been a "very, very difficult sentencing exercise" in which he tried to impose appropriate punishment against "a highly unusual" background. He then passed the sentence to which we have referred.

14. The offender was also made subject to a restraining order for seven years, under section 5 of the Protection from Harassment Act 1997, preventing him from contacting the victim directly or indirectly and from attending any address at which he believed she resided.

15. As an automatic consequence of the conviction, the offender will be subject to the notification requirements in accordance with section 80 of the Sexual Offences Act 2003. The duration of his being subject to such provisions is determined by the length of sentence imposed. In the present case, the requirement to comply is a term of ten years.

16. No application was made for a Sexual Harm Prevention Order.

17. Ms Faure Walker, who appears for the Solicitor General today, invites attention to the following aggravating features of the offence: the use of violence (which was a harm factor); the timing of the offence (as agreed by the judge); the fact that the offender committed the offence while under the influence of alcohol (as agreed by the judge); and the targeting of a vulnerable victim.

18. She acknowledges that the following mitigating features are also present: the lack of previous convictions; his positive good character; his expressions of remorse; his age and lack of maturity; the demonstration of steps taken to address his offending behaviour since the offence; his unstable upbringing; and, importantly, the guilty plea. She submits that, because of the violence used by him, the offender's offending fell into category 1 harm under the sentencing guideline for sexual assault, contrary to section 3. She accepted that, in term of culpability, the offence fell within category B, as none of the culpability factors laid down by the guidelines was present. The starting point for a category 1B sexual assault is a term of two years and six months' imprisonment, with a range of two to four years.

19. In the written Reference (although it was not pursued in oral submissions), reliance was placed on *Attorney General's Reference No 51 of 2015 (R v Whitmore)* [2015] EWCA Crim 1699, in which the 19 year old victim of rape was alone in a public place, having been to a

nightclub, and was heavily intoxicated. The offender approached her when she ended a mobile phone call. The court found that the harm factor "victim is particularly vulnerable due to personal circumstances", indicative of a category 2 offence, would plainly cover someone in the victim's position. In addition, the aggravating factor "specific targeting of a victim who is particularly vulnerable" was to be borne in mind, providing that there was no double counting.

20. In the instant case, although AH was not extremely drunk, she had consumed alcohol and was alone at night in a public place using her mobile phone. It was, therefore, submitted in the written Reference that the case of *Whitmore* was authority for the proposition that a young woman in circumstances such as those in which AH found herself in the present case should for the purposes of sentencing be considered to have been "particularly vulnerable", or at least "vulnerable" and that in this case this should be considered to be an additional aggravating feature.

21. It was submitted that the sentence of 19 months' detention, suspended for two years, was unduly lenient in that it failed to take into account the seriousness of the offending and the gravity of the aggravating features. In addition, it was argued that, in any event, the sentence should not have been suspended. Appropriate punishment could only be achieved by immediate custody.

22. For the offender, Ms Sweetland submitted that the judge identified the correct starting point for the offence, having weighed the aggravating against the mitigating features, so as to adjust the sentence within the category range, and that his decision to suspend the sentence was a wholly reasonable exercise of his discretion, having applied his mind to the relevant considerations.

23. We agree with Ms Sweetland. As the judge recognised, this was not a straightforward sentencing exercise. The crime was serious, albeit short-lived, but the mitigation was strong. In our view, the judge was right to place the offending in category 1B of the guidelines. There was violence: the attempt to strangle the victim, although we are doubtful, had it been charged as a crime of violence, that it would have been characterised as one of causing greater harm. The sexual assault was short-lived, but the judge properly recognised that it involved violence. However, since there were no category A elevated culpability factors, it was a category 1B case. It follows that the starting point was a term of two and a half years' custody, with a range of two to four years.

24. It was argued that an aggravating factor was that there was "specific targeting of a particularly vulnerable victim". We have seen the CCTV recording of much of the incident. It seems to us that this would be to mis-characterise the offence. The offender and the victim had both drunk alcohol and the offender's approach to AH appears to be tiresomely insistent due to his own consumption of alcohol, rather than the specific targeting of a particularly vulnerable victim. We note that it was not suggested before the judge that this was a case of "specific targeting of a particularly vulnerable victim". There is no basis, in our view, for saying that the offender "targeted" AH in this sense. He had not followed her and had walked past her before returning. AH had consumed alcohol and was alone at night in a public place. But she was not drunk. She was waiting for a friend in a well-lit area outside a 24 hour fast food shop on a high street. She was fully able to dial the emergency services and report the crime shortly after it had occurred. The case of *Whitmore* was qualitatively different and more serious. The victim in that case was obviously and seriously intoxicated. Whitmore had admitted in interview that he noticed the victim because she was so obviously drunk. She was insensible due to the alcohol she had consumed while the offence of rape was being committed.



25. Cases of this sort are fact-specific. It is sufficient for this court to observe that the facts in the present case are markedly different to those in *Whitmore*.

26. It is common ground that the offender was drunk. It appears that this was the first time he had drunk spirits. The judge was told that he had not drunk alcohol since.

27. So far as mitigation is concerned, there were, as the Solicitor General accepted, a number of mitigating factors: the offender's youth (the offence was committed five weeks after his 18 birthday); his immaturity; his lack of previous convictions; and the evidence of his positive good character. The offending was described by those who knew him as completely out of character and doubtless committed due to the consumption of alcohol to which he was not used. There was, as the judge accepted, his genuine remorse. As the judge also accepted, he had an unstable and miserable background.

28. This was, as the judge recognised, a difficult sentencing exercise in a "highly unusual" case. The sentencing hearing had taken the best part of two hours during which the judge heard evidence from IM, the volunteer from the charity Kent Kindness, called on behalf of the offender. He also heard submissions from the Crown and from Miss Sweetland who put in a comprehensive written document covering the many factors relevant to the sentence. As the judge put it (at page 29 of the sentencing remarks), it was an exceptional case calling for an exceptional course. Ms Faure Walker does not argue that the judge overlooked any material matter or that he took into any immaterial factors.

29. In the event, he took a term of two years' custody, which was within the category range for a category 1B offence, in order to reflect the matters of aggravation and mitigation. He then gave a discount of 20 per cent for the guilty plea, so as to reach a sentence of 19 months. In our

judgment, that was an appropriate sentence for this offending by this offender.

30. The judge suspended that sentence and, in our view, he was entitled so to do. He took into account, as he was bound to, that an appropriate sentence could be achieved without the imposition of a sentence of immediate custody. Among those reasons was that the offender could not take part in any Sex Offender Treatment Programme in custody due to his poor English. The terms of the suspended sentence were rigorous. They involved unpaid work, an electronically monitored curfew and a Rehabilitation Activity Requirement. In addition, the judge made it clear that there would be monthly reviews of his progress. In this way, as the judge expressed it, the community and the victim would be best protected.

31. In our view, this was an appropriate sentence which was not unduly lenient. Accordingly, we refuse leave.