

NCN: [2019] EWCA (Crim) 1686
No. 201902896 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 3 October 2019

Before:

LORD JUSTICE SIMON

MRS JUSTICE CHEEMA-GRUBB DBE

and

HER HONOUR JUDGE DHIR 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 -

MATEUSZ CZESLAW OSINSKI

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Miss D Heer appeared on behalf of the Attorney General

Mr R L Taylor appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE SIMON:

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. The prohibition applies until waived or lifted in accordance with section 3 of the Act.

2. 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 sentences which he considers to be unduly lenient. We grant leave.

3. The offender is Mateus Osinski. He is 32 years of age, having been born on 13 October 1986. On 10 July 2019, in the Crown Court at Truro, he was sentenced by Mr Recorder Gibney on eleven counts, to some of which he had pleaded guilty and in respect of some of which he was convicted following a trial.

4. Count 1 charged an offence of controlling or coercive behaviour in an intimate relationship, contrary to section 76(1) of the Serious Crime Act 2015. Count 2 charged false imprisonment. Counts 3, 4 and 5 charged rape, contrary to section 1(1) of the Sexual Offences Act 2003. Counts 6, 8, 9 and 10 charged common assault, contrary to section 39 of the Criminal Justice Act 1988. Count 7 charged assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861. Count 11 charged criminal damage, contrary to section 1(1) of the Criminal Damage Act 1971.

5. On 14 December 2018, the case was listed for a plea and trial preparation hearing. The offender pleaded not guilty to all counts and the case was adjourned for a trial on 20 May 2019.

6. On 16 April 2019, the offender pleaded guilty to counts 6 to 11.

7. On 20 May 2019, the day of trial, the offender pleaded guilty to count 1. The trial proceeded in respect of counts 2 to 5, on which he was convicted.

8. On 10 July, he was sentenced as follows: on count 1, to a term of eighteen months' imprisonment, to run consecutively to the sentences imposed on counts 2 to 11; on count 2, two years' imprisonment concurrent; on counts 3, 4 and 5, ten years' imprisonment concurrent; on counts 6, 8, 9 and 10, three months' imprisonment concurrent; and on count 7, four months' imprisonment concurrent. The overall term was a determinate sentence of eleven and a half years' imprisonment.

9. The offender first met the victim in June 2018. They began a relationship and, soon afterwards, she began to introduce him to her friends. It was apparent to them that he was volatile, emotionally controlling, physically violent; and he had soon isolated her from her previous group of friends. She was later to tell the police that during the course of their relationship, the offender controlled her bank account, and made her pay for everything, including alcohol for him. He would make derogatory comments about the way she looked, including personal comments about how she looked when she was naked. He would not let her wear makeup, saying that it made her look "like a bit of a slag", and he threw away her makeup. He would tie her to the bed with cable ties and wait for her to free herself. He had a tendency to cut things up, including items in the flat such as the sofa, the bedding and her clothes. He said that she was dirty and when she bathed, he would enter the bathroom and pour bleach or salt into the bath. These were the circumstances that gave rise to the charge under count 1.

10. As the relationship progressed, the offender became increasingly violent towards her. On

17 July 2018, the couple were returning to Penzance from St Ives in the offender's car. They stopped in a lay-by and had a drink. When the offender tried to start his car again, it would not do so. He lost his temper and punched the victim twice to the face with a clenched fist. He then grabbed her by the throat and pushed her down into her seat. She thought that he held her throat for about a minute. She could not breathe and she thought that he was going to kill her. As a result, she suffered bruising and swelling to her face. The matter was reported to the police. Although the victim later tried to withdraw her statement, on 30 July 2018 the offender pleaded guilty to common assault. He was made the subject of a Community Order with a condition that he attend Building Better Relationships, a programme designed to help domestic violence offenders avoid re-offending.

11. Within weeks of the order being made, the offender assaulted the victim again. On 16 August 2018, she discovered that she was pregnant. At first, he appeared to be pleased, but, as the day wore on and as the amount that he had to drink increased, he became argumentative and aggressive. He punched her in the stomach, and walked around the flat damaging items. He took her mobile telephone from her so that she was unable to call anyone. He also pulled the landline telephone cable from the wall. He pushed her onto the bed, pinned her down by her arms and took her coat off her to try to stop her leaving. Eventually, she was able to escape. She made a complaint to the police, only to withdraw it a few days later, saying that she did not want the offender to be imprisoned and thought that he would benefit more from the professional help that would be available to him in the community. As a result, the proceedings were discontinued. However, a Domestic Violence Protection Notice (DVPN) was served on the offender on 4 September 2018 preventing him from having any contact with her or residing at her address for 28 days.

12. On 25 September 2018, the offender appeared in court for breaching the terms of his

community order. While at court, he spoke to a probation officer, Richard Swan, and sought to persuade him that he wanted to complete the order and thought that he would learn a lot. However, Mr Swan was struck at the difference between the offender's words and his actions; his demeanour was hostile and he appeared to be trying to intimidate Mr Swan. Ultimately, the offender admitted the breach and was re-sentenced to a suspended sentence with unpaid work and a condition that he complete the Building Better Relationships programme.

13. On 9 October 2018, the offender failed to attend a probation appointment. He telephoned Mr Swan, claiming that he was too ill to do so. As they were talking, Mr Swan heard a female scream in the background and the line went dead. He called the police. Officers attended the victim's flat in St Austell. The door was not opened, despite repeated knocking.

14. In fact, the offender and the victim were inside, but he would not let her answer the door. Later, when she provided an Achieving Best Evidence interview, she was to describe how she had been prevented from leaving the flat between 7 and 10 October (false imprisonment, count 2), during which she had been repeatedly raped and assaulted.

15. On the evening of 8 October 2018, she and the offender were in the flat. While she was asleep in bed, the offender grabbed her from behind and said that he wanted to have sex with her. She did not consent, but he put his penis into her vagina (count 3) and then into her anus (count 4). She told the police how she "blocked out" what was happening to her. When it was over, she went back to sleep.

16. Later in the evening, they were both lying in bed awake. The offender began to masturbate and asked her to "give him a hand". He then grabbed her head and pulled it down towards his penis. She pulled away. He grabbed it again and forced his penis into her mouth (count 5). He

ejaculated into her mouth. She spat his semen out into the lid of a tin of chocolates by the side of the bed.

17. The victim then went back to bed and went to sleep. Later, the offender took some duct tape and tied her wrists together. He then grabbed her ankles and tried to tape them together. As he did so, she managed to free her wrists from the tape.

18. She awoke later in the night to find that all the lights in the bedroom were on. This was not unusual. The offender regularly kept the bedroom lights on to try to stop her from falling asleep, and also in order to film her throughout the night using a webcam, so that he would know what she was doing. On this occasion, she got up and went to use the bathroom. When she returned, she switched off the lights. When the offender awoke and saw that the lights were off, he "went ballistic". He put his hands over her nose and mouth so that she could not breathe. When she tried to get off the bed, he took a pillow and attempted to suffocate her. When he realised that this was not working, he took the pillow away. Again, he put his hands across her nose and mouth to stop her from breathing (count 6). The victim struggled and cried. She tried to pull his hands away from her mouth and nose. Eventually, he stopped.

19. The following morning, she awoke to find the offender standing over her with a pair of scissors in one hand and a clump of her hair in the other, smiling (count 7). He had also cut up the fairy lights that surrounded her bed as a punishment for her having switched them off in the night.

20. The victim said that she felt compelled to comply with what the offender wanted. He had taken her mobile phone from her and she had no way of contacting anyone. She could not leave because he had tied a chain around the front door handle. At one stage, she tried to loosen the

chain, but he heard what she was doing, ran over towards her and grabbed her by the throat, picking her up so that her feet were not touching the floor (count 8).

21. The offender then demanded that she make him a cup of tea. When she did not make it correctly, he poured it away and made her make him another. As she made it, he entered the kitchen and repeatedly slapped her around the face (count 9).

22. It was then that he rang Mr Swan, having failed to persuade the victim to make the call for him. As he was on the telephone, she tried to take the opportunity to leave through the front door. As she did so, the offender ran at her, causing her to scream loudly. This was the sound that Mr Swan heard and that caused him to alert the police.

23. In bare feet, the victim ran down the communal stairs outside her flat, pursued by the offender. As they reached the bottom of the stairs, he jumped in front of her and she froze. He then grabbed her and dragged her back up the stairs. She held on to the rails, trying to resist him, and screamed loudly. But he dragged her back into the flat, locked the door again and pulled her by the hair into the living room (count 10).

24. At this point, she believed that the offender was going to kill her. In an attempt to stop him, she said that her stomach was hurting and that she thought that she may be miscarrying their child. Initially, the offender appeared to be concerned. He told her to lie down on the sofa while he fetched a glass of water. However, after she had had a drink of the water, he took it from her and poured the rest of it over her head. He then ran a cold bath and put her in it, fully clothed. He opened all the windows so that she was freezing. She told him that she was worried about the baby and that he would have to take her to hospital. During the time that they were in the flat, the offender had caused damage to furniture and fittings in the flat, and to her clothing

(count 11).

25. They both got into a car and drove, first, to the offender's parents in Penzance and then to his GP surgery in Marazion. He locked the victim in the car while he went inside in order, he said, to obtain a sick note for his probation appointment. When he returned, she told him that she needed to see her father whom she had arranged to meet that evening. The offender persuaded her that he needed to pick something up from his parents, and so she drove him back there. When he got out of the car, she took the opportunity to drive away. She returned to her own flat, where she found her father looking for her. When he asked her if she was okay, she told him what had been going on. The police were called later that evening.

26. On 10 October 2018, the victim underwent a medical examination which revealed the presence of bruising to both arms and both legs.

27. A search was conducted of her flat. The police found a clump of hair in a bin in the living room, and the lid of a tin of chocolates, which was subsequently found to contain semen. The police also seized a memory card from the pocket of the offender's jacket. It revealed that the offender had been routinely recording what was going on inside the flat.

28. At about 10.30pm, police officers found the offender sitting on the landing outside her front door. He was drinking from a bottle of lager. There was a bunch of red roses attached to the door to the flat. He was arrested on suspicion of rape. After caution, he replied, "It could be worse". He was taken to Newquay police station where he was interviewed the following day. During the interview, he described the allegations as "bullshit". He denied taking money from the victim and denied cutting her hair, although he said that she had asked him to do so. He described the allegation that he had orally raped her as "rubbish". When he was shown

photographs of the victim's injuries, he said that she bruised easily. He denied that he had raped her or physically assaulted her, but otherwise made no comment to questions asked of him.

29. At trial, the offender gave evidence. He stated that the victim had been free to leave the flat at any time. He agreed that they had had sexual intercourse, but alleged that it had been consensual. He repeated his contention that the victim was easily bruised from games they played in which, with her consent, he would tie her up. The jury rejected his evidence.

30. In a Victim Personal Statement, the victim described how her relationship with the offender had turned from a dream to a nightmare. Although she found it heart-breaking, she had since terminated her pregnancy because she could not bear the thought of the offender being her baby's father. As a result of the offences, she lived in constant worry for herself and anyone else who might become close to him. She suffered flashbacks and nightmares about being trapped and suffocated. She had found giving evidence at trial embarrassing and humiliating. Since then, she had tried to rebuild her life, but found it difficult to go outside or contemplate a new relationship with anyone. She felt anxious, depressed and panicky. She had lost her self-confidence. She had felt suicidal and most of the time she felt sad. She considered that the offender had bulldozed her life and that he was not safe to be around anyone.

31. The offender had thirteen previous convictions for nineteen offences, of which the following are relevant:

1. On 22 November 2007, he was convicted of criminal damage. While in drink, he went to the home of his then girlfriend. He hit the front door with a hammer, smashing a window pane.

2. On 17 September 2008, he was convicted of criminal damage. While under the influence of drink and drugs, the offender woke his girlfriend by punching her legs. When he refused to leave, the police were called. He left the house and hid from the police, before throwing a garden ornament at the front door, causing damage. He later ripped a plastic air vent from the property.

3. On 13 January 2014, he was convicted of common assault. While under the influence of drink or drugs, he approached a man in the street and asked if he was gay. When the man said that he was, the offender punched him to the head.

4. On 30 July 2018, he was convicted of common assault, committed against the victim, as we have already described.

32. There was a pre-sentence report before the court. In it, the offender admitted slapping the victim because she refused to call his probation officer, and said that he had cut her hair as a joke. He continued to deny the sexual allegations and false imprisonment. Despite his guilty plea, he denied being controlling towards the victim or that he had financially exploited her. He said that she had lied. The author of the report assessed him as posing a high risk of harm to intimate partners and, notwithstanding his lack of convictions for specified offences, stated that there was a significant risk of him causing serious harm through the commission of further specified offences.

33. On behalf of the Solicitor General, Miss Heer made the following submissions:

1. Each of the three offences of rape fell within category 2A of the definitive guidelines. Category 2A indicates a starting point of ten years' custody, and a

range of nine to thirteen years.

2. There were significant aggravating circumstances: the offences took place in the victim's home; there was ejaculation (count 5); the offences were committed against the background of false imprisonment (count 2), assaults and criminal damage (counts 6 to 11); there were previous convictions (albeit of a less serious nature); and the offender was subject to a suspended sentence at the time that he committed the offences charges in counts 2 to 11.

3. The fact that there were three offences and multiple features of harm made the offences more serious and called for a sentence outside the range for category 2A.

4. In such circumstances, Miss Heer accepts that, in order to avoid double counting, no additional uplift was required to reflect the additional offending reflected in counts 2 and 6 to 11.

5. In any event, the Recorder erred in concluding that the offender was not dangerous, within the meaning of section 226A of the Criminal Justice Act 2003, and in not imposing an extended sentence. Whilst the Solicitor General accepts that the judge was well placed to determine this issue, having heard the trial, nevertheless his finding that the pattern of conduct was relatively short-lived was contrary to the evidence and failed to take account of the offender's previous offending, his failure to comply with the rehabilitative court orders, his attitude to his offending (as set out in the pre-sentence report) and the probation assessment that he posed a high risk of harm to intimate partners.

6. The charge of controlling or coercive behaviour (count 1) fell within category 1A of the definitive guideline for this offence, with a starting point of two and a half years' custody, and a range of one to four years. However, no issue is taken on behalf of the Solicitor General in relation to the sentence of eighteen months' imprisonment on count 1, reducing the sentence from the appropriate starting point to take into account totality.

34. On behalf of the offender, Mr Taylor has submitted that, although it was lenient, this sentence was not unduly so. In placing the offences of rape (counts 3, 4 and 5) within category 2A, the Recorder correctly assessed the sentencing bracket for those offences and the range of nine to thirteen years, with a starting point of ten years' custody. The offences all occurred within a short period of time and were, in effect, one continuing offence. No upward adjustment was required. It was an unpleasant case, but the features of harm were not extreme in the context of such cases.

35. Mr Taylor accepts that the guidelines apply to a single count of rape and that there were, in fact, three counts of rape. However, he submits that it was the same course of conduct perpetrated over a short period of time. The Recorder had imposed a sentencing uplift by ordering the sentence for count 1 to run consecutively to the sentences for the other counts. He submits that the Solicitor General places too much emphasis upon the requirement to impose a sentencing uplift to reflect additional aggravating features. Those features were not so extreme as to require such an uplift. The Recorder did not ignore the fact that the offender had committed multiple offences. He was entitled to reflect the multiple offending by increasing the overall sentence by the imposition of a consecutive sentence for count 1. Mr Taylor submits that the Recorder was in the best position to make an assessment in relation to the dangerousness provisions in section 226A of the Criminal Justice Act 2003. He had presided over the

offender's trial and had heard him give evidence.

36. In conclusion, Mr Taylor submits that the multiple offending might have justified the Recorder in adopting a starting point which was at the top of the range (thirteen years' custody). However, for the reasons he has given, it is submitted that the sentence was not unduly lenient.

37. We have considered these submissions. The Recorder rightly identified counts 3, 4 and 5 (rape) as the lead offences, and he identified the circumstances of the false imprisonment and the assaults as aggravating circumstances. Each of the offences of rape fell within category 2A, with a starting point of ten years' custody, and a range of nine to thirteen years. There was category A culpability, because of the previous violence against the same victim. It was category 2 harm, because of the severe psychological harm caused to the victim, (her decision to terminate her pregnancy) and the additional degradation or humiliation inflicted on her. But there were additional factors that made this course of criminality more serious: the prolonged detention of the victim; she was trapped in her flat for days, during which she was prevented from escaping; and she was violently returned to her flat and assaulted. The Recorder was entitled to treat the rape offences as the lead offences and to pass concurrent sentences on the other counts, apart from count 1. But if he were to do so, it was necessary to reflect the seriousness of these matters in the lead sentences. There was, in addition, the fact that the offender was in breach of a suspended sentence, which had itself been imposed for the breach of the terms of a community order.

38. There was, as is accepted by Mr Taylor, no material mitigation.

39. In these circumstances, we consider that the sentence of ten years' imprisonment on each of the counts of rape was unduly lenient. The sentence should have been a term of not less than

thirteen years.

40. In our view, the Recorder was also in error in not passing an extended sentence in relation to these offences, resulting in a sentence that was unduly lenient in this further respect. The pattern of conduct described by the Recorder was not of short duration. The offences covered by most of the counts had been carried out over approximately three days. The pattern of conduct required the Recorder to take into account this fact and the charge of false imprisonment. But there was also the charge of coercive or controlling behaviour that bore on the material decision. In addition, there were the previous offences; albeit they were not so serious, they indicated an escalation in criminality. The Recorder was also required to have proper regard to court orders which had not been complied with.

41. In our view, there was plainly a significant risk of serious harm to the public occasioned by the commission by the offender of further specified offences. It was not a risk that could be addressed by the determinate that should have been imposed.

42. In these circumstances, we will substitute for the sentences of ten years' imprisonment on counts 3, 4 and 5, an extended sentence of fifteen years, comprising a custodial term of thirteen years and an extended period of licence of two years. This will take effect consecutively to the term of eighteen months' imprisonment on count 1. The other sentences will remain unaffected.