

WARNING: reporting restrictions apply to the contents transcribed in this document. 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.

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.

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2020/03140/A2



Neutral Citation Number: [2021] EWCA Crim 582

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 15th April 2021

LORD JUSTICE HOLROYDE

MRS JUSTICE McGOWAN DBE

THE RECORDER OF NEWCASTLE

(His Honour Judge Sloan 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

R E G I N A

- v -

DARIUSH BEHDARVANI-AIDI

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

Mr J Smith appeared on behalf of the Attorney General

Miss R Cooper appeared on behalf of the Offender

J U D G M E N T
(Approved)

Thursday 15th April 2021

LORD JUSTICE HOLROYDE:

1. Dariush Behdarvandi-Aidi, to whom we shall refer as “the offender”, was convicted of two offences of rape and one of sexual assault. He was sentenced to a total of six years and ten months' imprisonment.
2. Her Majesty's Solicitor General considers that total sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
3. The victims of the offences, "AA" and "CC" are entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify them as victims of these offences.
4. On a night in April 2017, the offender went to a nightclub with friends. Afterwards, they returned to the home of one of the group. There they met another of his friends, AA. She and others were taking GHB (Gamma-Hydroxybutyrate), which, if overused, can cause respiratory arrest and passing out. AA had also been drinking alcohol. In the early hours it became apparent that AA was unconscious. Her friends checked that she was still breathing and left her asleep on the sofa. Most of the group then left. The occupier and his girlfriend, "BB", went to bed. The offender was to sleep on the sofa.
5. BB later woke and went into the living room. She saw that the offender and AA were both on the sofa, fully clothed. The offender had his arms around AA and was touching her inappropriately. BB told him to get off AA, who was unconscious. The offender obeyed. AA did not react. This incident was the subject of count 2 (sexual assault).
6. A short time later, BB returned to the living room. She saw AA on her knees with her stomach and face flat on the sofa. Her eyes were closed. BB described her as "out of it". The offender had pulled AA's trousers and underwear down to her knees and was raping her vaginally from behind. This was the subject of count 1 (rape). BB shouted at the offender to stop. He did, and apologised. BB tried to pull up AA's clothes. AA still did not respond. The offender left the house.
7. The following morning, BB told AA what had happened. AA did not report these offences at the time.
8. In subsequent text messages to BB, the offender said that he would contact AA and apologise. He said that he had been heavily intoxicated at the time: "No excuses, but that stuff sends me crazy". He said that he was angry with himself, and asked BB not to tell anyone what she had seen. He exchanged messages with AA, in which AA expressed feelings of shock, violation and embarrassment.
9. The second offence of rape (count 3) was committed some months later. The victim, CC, was a close friend of the offender and trusted him. They went out together socially one night in December 2017. They drank alcohol and took some cocaine. By the time they returned to CC's house, they were both drunk. There was no sexual contact between them. CC was taking medication, which made her sleepy. They both went to sleep in CC's bed, as they had done previously without incident.
10. CC woke to find that the offender had pulled down her pyjama trousers and was raping her

vaginally from behind. She threw him off. He apologised and left. CC called the police.

11. The offender was sent to the Crown Court at Leeds for trial on the three charges we have mentioned. He pleaded not guilty when arraigned on 3rd June 2019. On 20th October 2020, following a trial before His Honour Judge Phillips and a jury, he was convicted of all three offences.

12. The offender, who is now aged 34, had some comparatively minor previous convictions, mainly for offences involving drunken and disorderly behaviour. None involved any sexual element, and none was very recent.

13. A pre-sentence report had been prepared, which recorded that the offender denied any sexual contact with AA and claimed that his sexual contact with CC had been consensual.

14. The judge was provided with letters from female friends of the offender, who described him as kind, caring and considerate, and said that the offences were out of character.

15. AA had declined to provide a Victim Personal Statement. There was, however, a statement from CC, who said that her life had changed drastically since she was raped. Her life had rapidly spiralled out of control and she had become a recluse. She started to drink every night. In February 2018 she was prosecuted for driving with excess alcohol and disqualified from driving. She became disorganised, lost confidence and was unable to maintain the career which she had worked hard to build up. Eventually, she resigned her employment and fell into debt.

16. Both counsel submitted that the offences of rape fell into category 3B of the Sentencing Council's definitive guideline, with a starting point of five years' custody and a range from four to seven years. The judge agreed. He observed that it was foreseeable that both victims would continue to be affected by the offences for the rest of their lives. He decided that the offender was not dangerous, as that term is defined for sentencing purposes. He treated count 3 as the lead offence and considered it appropriate to impose concurrent sentences. The judge said that it was a principal aggravating factor that both victims were particularly vulnerable because they had been asleep or unconscious as a result of their intoxication. The offender's own intoxication was a further aggravating factor. So, too, was the fact that the offender had been confronted with his earlier offences, but nonetheless went on to commit the further rape in comparable circumstances. The judge took into account the personal mitigation which was available. He also made a small reduction to reflect the particular difficulties for those serving custodial sentences during the Covid-19 pandemic.

17. The judge imposed concurrent terms of imprisonment as follows: on count 1, five years' imprisonment; on count 2, 12 months; and on count 3, six years and ten months.

18. On behalf of Her Majesty's Solicitor General, Mr Smith submits that both rapes fell into category 2B of the guideline, with a starting point for each of eight years' custody, and a range from seven to nine years, because in each case the victim was "particularly vulnerable due to personal circumstances". Both prosecuting counsel and the judge had, therefore been wrong to place them into category 3B. The first rape (count 1) was aggravated by the preceding sexual assault (count 2); all offences were aggravated by the offender's intoxication; concurrent sentences were not wrong in principle, but the judge had to mark the overall seriousness of the rape of two victims, each of whom was particularly vulnerable. The total sentence failed to reflect the totality of the offending and was unduly lenient.

19. Mr Smith referred to a number of previous decisions of this court in which it has been held that a person who had been raped whilst asleep or unconscious through intoxication was a

particularly vulnerable victim. These included *R v Whitmore* [2015] EWCA Crim 1699; *R v Rak* [2016] EWCA Crim 882, in which the court rejected a submission that the vulnerability must arise from a characteristic such as age or disability; *R v Bunyan* [2017] EWCA Crim 872; and *R v Sepulvida-Gomez* [2020] 4 WLR 11. He further submits that the guideline itself is clear and that there is no justification for placing a gloss on its wording. There is nothing illogical or improper about the guideline treating an offence of rape as having a greater impact if the victim was asleep or comatose through intoxication and therefore defenceless.

20. Miss Cooper, who appears for the offender in this court as she did below, submits that the judge correctly categorised the offences. She argues that the other factors in the guideline which determine category 2 harm reflect harm which is greater than would normally be expected in a category 3 offence. But, she says, there is no justification for assuming that a sleeping victim will necessarily suffer greater harm than one who is awake. She therefore submits that case law has developed on an incorrect basis which wrongly conflates culpability and harm. She submits that an unconscious or sleeping victim is not necessarily particularly vulnerable and that it is a matter for the judgment of the sentencer. Such a victim may be particularly vulnerable, but it is not axiomatic.

21. From that foundation, in her careful argument Miss Cooper submits that the judge here made a thorough assessment of all relevant factors, including the vulnerability of the victims, and correctly placed both rapes into category 3B. He had heard all the evidence and was in the best position to make that judgment. If the total sentence was lenient at all (which Miss Cooper disputes), it was not unduly so.

22. We are grateful to both counsel for their written and oral submissions, which were of a high quality.

23. Having reflected on those submissions, we begin by repeating that the starting point for sentence for a single category 3B offence of rape is five years' custody. Here, there were two offences of rape, committed on separate occasions, against different victims. The first was preceded, and significantly aggravated, by a sexual assault. The offender was observed by BB and told to stop. But, nonetheless, a short time later he went on to rape his victim. The second rape was significantly aggravated by the earlier offending, and by the fact that it was committed against a friend who had trusted him to share her bed. All of the offences were gravely aggravated by the fact that AA was, effectively, unconscious, and CC was heavily asleep when the offender took advantage of them. They were further aggravated by the offender's own intoxication. The personal mitigation available to him was substantially outweighed by those aggravating factors.

24. In those circumstances, with all respect to the judge, a total sentence of six years and ten months' imprisonment must be regarded as unduly lenient, even if the offences were correctly categorised.

25. We are, however, satisfied that they were not correctly categorised. The rape guideline came into effect on 1st April 2014 as one of a suite of guidelines covering a range of sexual offences. All the guidelines in that suite follow a similar pattern, but it is important to note that the step 1 factors determining culpability and harm vary according to the offences considered. As a matter of principle, the vulnerability of a victim is capable of being relevant to culpability, to harm, or to both. In developing the rape guideline, it is clear that the Sentencing Council decided to include the vulnerability of the victim as a harm factor. At step 1 the guideline is explicit:

"The court should determine which categories of harm and

culpability the offence falls into by reference **only** to the tables below."

Those tables include (in category 2 harm): "Victim is particularly vulnerable due to personal circumstances". Category 3 harm simply states: "Factor(s) in categories 1 and 2 not present". The table of factors relevant to culpability does not include the vulnerability of the victim, save to the extent that that is an aspect of the category A factor "use of alcohol/drugs on victim to facilitate the offence".

26. It follows that where this factor applies, the case necessarily falls into category 2 harm. If a victim is particularly vulnerable due to personal circumstances, it is not possible to say that it falls into category 3, which only applies to cases where category 1 and 2 factors are not present. We are, therefore, unable to accept Miss Cooper's submissions as to the case law having developed on an incorrect basis. The case law reflects the guideline.

27. As Mr Smith rightly acknowledged in his oral submissions, the specific facts of a particular case may justify an adjustment from the starting point; but the starting point is that appropriate to category 2 harm.

28. In the present case, therefore, the key question is whether AA and CC were particularly vulnerable due to their personal circumstances. To that question, there can only be one answer. AA was so severely affected by drink and drugs that she was unconscious and unaware of the sexual offences committed against her, and unaware of BB's coming to her rescue. She could hardly have been more vulnerable. She knew nothing of what the offender had done to her until BB told her hours later.

29. CC was intoxicated with drink and drugs and had also taken medication to help her sleep. She, too, was unaware of what was happening until after the offender had pulled down her trousers and penetrated her vagina with his penis. She was, therefore, defenceless against that penetration and does not even know how long the offender had been raping her before she awoke, although she was able to throw him off once she did wake. She, too, was, on any view, particularly vulnerable due to her personal circumstances.

30. We, therefore, agree with Mr Smith that the submission of prosecuting counsel below, which was accepted by the judge, was mistaken. Each of the rapes was a category 2B offence.

31. At step 2 of the guideline, one of the potential aggravating factors which is listed is "specific targeting of a particularly vulnerable victim". The judge did not find that factor to be applicable here. No criticism is made of his decision in that regard.

32. We bear in mind that the offender had not previously committed a sexual offence and had not previously served a custodial sentence. We also bear in mind the personal mitigation available to him, the difficult conditions in which prisoners presently find themselves during the continuing pandemic, and the need to observe the principle of totality in ensuring that the total sentence imposes just and proportionate punishment for the offending as a whole.

33. On grounds of totality, the sentence for each offence of rape will be less than it would be if that offence stood alone. In our judgment, however, the least total sentence which properly reflects the seriousness of the offending is one of 14 years' imprisonment.

34. We, therefore, grant leave to refer. We quash the sentences of imprisonment imposed

below as unduly lenient. We substitute for them the following sentences of imprisonment: on count 1, seven years; on count 2, 12 months concurrent; and on count 3, seven years consecutive.

35. The ancillary orders imposed below, namely an indefinite restraining order and indefinite notification requirements remain unchanged, as does the order for payment of the appropriate surcharge.

36. The effect of our decision is that the offender has a total sentence of 14 years' imprisonment, of which he will be required to serve two-thirds before being released on licence for the remainder.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk
