IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1090

CASE NO 202200454/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 8 July 2022

Before:

LORD JUSTICE GREEN
MR JUSTICE SPENCER
SIR NIGEL DAVIS

REGINA
V
AUSTIN GACHERU

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MISS L BATES appeared on behalf of the Appellant

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J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge.
2. The anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead to the identification of the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
3. On 10 December 2021 in the Crown Court at Kingston-upon-Thames, the appellant, who is now 34 years of age, was convicted by the jury of a single count of rape. On 17 January 2022 he was sentenced by Mr Recorder Hunter to seven years' imprisonment.
4. The grounds of appeal in short are that the judge started too high within the range for this offence under the relevant Sentencing Council guideline, and failed sufficiently to take account of various mitigating factors. The appeal raises the question, in part at least, of whether a victim who is raped while she is asleep is a victim "particularly vulnerable due to personal circumstances".
5. The victim of the offence was a young woman then aged 22. The appellant at the time was 28 years old. On the night of Friday 16 September 2016 the victim was out with a female friend at a bar in South London when she met a male friend of longstanding, JX, with whom she had for some time enjoyed a casual sexual relationship.
6. The three of them moved on to another bar where JX introduced the victim to the appellant, who was calling himself 'Michael'. That was not his real name but as Miss Bates explained in the course of the hearing before us this morning, it was a name which he often used and was known by, so nothing sinister should be inferred from that.
7. They all went back to JX's home, the appellant offering to drive as he had not been drinking. By now it was around 2.45 am. They stopped on the way to buy alcohol and snacks.
8. There was drinking and dancing at JX's home. The victim's female friend eventually left so that only the victim and the two men remained in the house. Some time, it would appear, after 5 am the victim and JX went into the bedroom and had sexual intercourse. JX began to feel unwell and went to the bathroom. The victim fell asleep. She awoke to find a man on top of her having vaginal sexual intercourse with her. His penis was inside her. She assumed at first that it was JX but in fact it was the appellant. She became aware of this only when she touched his head and realised that the man having sex with her was bald, unlike JX. As soon as she realised this and protested, the appellant stopped. He jumped out of the bed and went to find JX in the bathroom. The victim was shouting at the appellant, asking what made him think he could do this, to which he replied that she made him think he could. The appellant then left the flat.
9. The victim was very distressed. The matter was reported to the police straightaway. She gave an ABE interview. The appellant had phoned the victim which enabled the police to trace him. He was arrested the following evening. In interview he denied rape, saying that he believed the victim was consenting to have sex with him. That was plainly rejected by the jury.
10. Sentence was adjourned for the preparation of a victim personal statement. No pre-sentence report was sought and none was required. A significant custodial sentence was inevitable.
11. For reasons which remain unclear, nearly three years elapsed between the appellant's interview and the commencement of the prosecution by postal requisition in July 2019.

Thereafter there was further delay, in part because the prosecution had to establish whether the victim wished to give pre-recorded evidence under the section 28 procedure. In fact she did not; she gave live evidence at the trial, with her ABE interview being played as her evidence in chief.

12. The appellant's first appearance in the Crown Court was on 26 September 2019 when he entered a not guilty plea. A trial date was fixed for May 2020. As a result of the pandemic there were successive postponements of the trial and it was not until 6 December 2021 that the trial began, more than five years after the offence.
13. In her impact statement the victim said that she had felt completely violated by the rape. Anxiety kept her awake at night; she felt hopeless and lost. She had undergone counselling; she had become very distrustful of men and hypervigilant when men were around. She had lost confidence and optimism about life generally: she had had to carry this burden for five years before the case finally came on for trial.
14. The appellant had no previous convictions for sexual offences, although we note that he had received a suspended sentence in 2017 for an offence of being concerned in the production by another of cannabis, an offence committed in February 2016 only a few months before the rape in this case. As Miss Bates explained, the circumstances of that offence (which were ventilated during the rape trial) were that he had let a property to others who were growing cannabis there and he was receiving money knowing that this was the position. He was otherwise of positive good character. There were impressive supporting testimonials from the mother of his children, from his then current partner, from a close friend and from a school where he had apparently worked. He was a teacher by profession.
15. In advance of the sentencing hearing both prosecution and defence counsel each helpfully provided a written sentencing note. The prosecution contended that it was a Category 2 offence in that the victim was "particularly vulnerable due to personal circumstances". She must have been asleep when the offence took place. Attention was drawn to the recent decision of this court in R v AWA [2021] EWCA Crim 1877. That was an Attorney-General's Reference. It was a case on very different and unusual facts in which this Court did not accept the submission that whenever a victim of rape is asleep it automatically follows that he or she is particularly vulnerable within the meaning of the guideline; it depends on the circumstances. We shall return to that authority.
16. The defence sentencing note prepared by Miss Bates accepted that it was for the judge to determine whether in the circumstances of this case the victim was particularly vulnerable because she was asleep. It was submitted to the judge that the authorities cited by the prosecution concerned victims who were rendered unconscious through intoxication by drink and drugs or through medication to assist sleep. Attention was drawn by Miss Bates in the sentencing note to another recent decision of this Court in R v Behdarvani-Aidi [2021] EWCA Crim 582; [2022] 1 Cr.App.R (S) 1, where that was broadly the factual position. It was an Attorney-General's Reference in which an unduly lenient sentence had been passed for two offences of rape committed against separate victims several months apart. Each offence had wrongly been placed in Category 3 when they should have been in Category 2 because the victim on each occasion was particularly vulnerable due to personal circumstances. The total sentence passed after trial for the two rapes was only 6 years 10 months. This Court increased the total sentence to 14 years, with consecutive sentences of seven years for each rape. The court

made it clear that on the grounds of totality the sentence for each rape was less than it would have been if it had stood alone. We shall return to that authority also.

17. In the defence sentencing note, Miss Bates also submitted to the judge, in the alternative, that if the offence was properly in Category 2 it fell towards the bottom of the range for Category 2B, so that a starting point of less than eight years would be appropriate. Emphasis was placed on the excessive delay as a mitigating factor. We observe that in her defence sentencing note placed before the judge it was not suggested that the sentence should be below the range for Category 2B, which is 7 to 9 years, although of course she is not bound by what she said in that sentencing note.
18. In his admirably succinct sentencing remarks the judge said that the appellant had taken advantage of a woman who was in a vulnerable position. It was not suggested that she was in any way drunk, but she was asleep. She was asleep having had sex with the man with whom she had a sexual relationship. It must have been a terrible experience, the judge said, in the dark in that situation suddenly to find that it was not that man but someone else who was having sex with her. It was not surprising that this had had a deep and lasting effect upon her.
19. The judge found that in these circumstances the victim was particularly vulnerable due to personal circumstances. It followed that it was a Category 2B offence with a starting point of eight years and a range of seven to nine years. The judge then said:

    i. "This in the circumstances is an offence which would fall generally towards the upper end, eight or nine years, but I cannot ignore the fact that this is a rape allegation… made five years… before it actually came to trial. No one should have to wait so long for a trial, and no victim should have to wait so long to come to court. That must have had a very large impact upon her."

20. The judge said that taking account of the mitigating features, that is to say that the offence was wholly out of character and that the appellant had continued to make a positive contribution to society whilst awaiting trial, the least sentence he could pass was at the lowest end of the bracket, seven years' imprisonment.
21. In the grounds of appeal it is said that the judge was wrong to find that the offence was towards the upper end of the range, in that there were no additional aggravating factors. It is said that the judge should have made it clear whether he was starting at eight years or nine years before taking account of mitigating factors. It is said that he failed to make sufficient allowance for the excessive delay and for the difficult conditions in prison in which the sentence would be served.
22. Miss Bates has developed these points most attractively in her oral submissions. She has not maintained the submission she made to the judge that the offence should properly have been placed in Category 3 rather than Category 2. She does not challenge the judge's finding that the victim in this case was particularly vulnerable due to personal circumstances. Her main submission is that the judge simply made insufficient allowance for the exceptional delay in this case which, coupled with the other mitigating factors the judge identified, should have resulted in a greater reduction than was allowed. She submits that although the range for this offence is narrow, the judge did not make it clear where he was starting, whether it was at the guideline starting point of eight years or a higher figure. If he was starting above eight years there was no justification for that.

The mitigation which impressed the judge sufficiently to result in the reduction to seven years should properly have taken the sentence below the category range, that is below seven years.

23. She explained, at our request, what was known of the reasons for the delay but the highly regrettable fact is that it remains completely unclear as to why there was a delay of three years before charge. There does not seem to have been a necessity for extensive disclosure, for example, in relation to downloading phones and the like.
24. We have considered all these submissions carefully but we are unable to accept that this sentence was manifestly excessive.
25. We think the judge was fully entitled to conclude on the facts of this case that the sleeping victim was particularly vulnerable due to personal circumstances so as to place the offence in Category 2. Although the point is no longer taken that the judge was wrong in his categorisation, we think it necessary to add a little more by way of background as that was a submission made forcefully in the lower court.
26. As was said in the case of AWA (to which we have already referred) at [33], it does not automatically follow that whenever a victim of rape is asleep he or she is particularly vulnerable within the meaning of the guideline. It depends on the circumstances. Giving the judgment of the court in that case, Thirlwall LJ had said at [32]:

    i. "The guideline refers to particular vulnerability as a result of personal circumstances. There are cases where extreme drunkenness and deep sleep constitutes such vulnerability, often in circumstances when the victim and perpetrator are strangers and the victim is somewhere unfamiliar. In this case the extent to which X was still under the influence of drink or drugs is not known. The offence took place at about 5.30 in the morning, she was sleeping in a flat she knew and with people she knew and with whom she had had sexual relations over a prolonged period. It was hours since she had taken drugs. She was awoken by the respondent's actions and she told him to stop."

27. Judgment was handed down in AWA in December 2021. No reference was made to the other case we have already mentioned, Behdarvandi-Aidi which had been decided in April 2021. However, there is no conflict between the two cases. In the latter case, Holroyde LJ giving the judgment of the court pointed out at [26] the importance of determining whether particular vulnerability due to personal circumstances was established; for if it is, that precludes a finding of Category 3 harm which only applies where "factor(s) in categories 1 and 2 are not present."
28. In respect of each of the two rapes considered in Behdarvani-Aidi the clear conclusion of this court was that the sentencing judge had wrongly failed to find that the victim was particularly vulnerable due to personal circumstances. One victim, AA was so severely affected by drink and drugs that she was unconscious and unaware of the sexual offences committed against her. She could hardly have been more vulnerable. She knew nothing of what had been done to her until she was told several hours later. The other victim, 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. She did not even know how long the defendant had been raping her before she awoke, although she was able to throw him off when she did wake. On any view she was particularly vulnerable due to her personal circumstances.

29. Contrary to the submission made by Miss Bates at the sentencing hearing in the present case, we do not accept that there is any distinction of principle to be drawn between the situation where the victim is insensible and/or asleep through drink or drugs, and the situation in a case such as the present where the victim is simply asleep. It is clear that the rationale of the line of authority which establishes that a sleeping victim may, for that reason alone, be "particularly vulnerable due to personal circumstances" is that a victim who is asleep is defenceless.
30. For another statement of that rationale see R v Sepulvida-Gomez [2020] EWCA Crim 2174; [2020] 4 WLR 11 in which the authorities were reviewed. Dingemans LJ giving the judgment of the Court said at [53]:

> i. "... we are sure that the judge was right to find that A was 'particularly vulnerable due to personal circumstances'. The personal circumstances were that A had drunk half a bottle of wine and was asleep in her boyfriend's bed in his bedroom. A person in such circumstances is particularly vulnerable because they are defenceless, compare *R v Bunyan* [2017] EWCA Crim 872 at [25]."

31. It seems to us that a sleeping victim is equally defenceless whether he or she is asleep simply through tiredness or asleep through intoxication with drink or drugs or medication. The reason why the victim is asleep cannot be the determining factor. But we repeat and emphasise that whether on the facts of a particular case a sleeping victim is to be regarded as particularly vulnerable due to personal circumstances will depend on an assessment of all the relevant circumstances.
32. In the present case the judge was particularly well-placed to make that assessment having heard all the evidence in the trial. It was not simply the fact that the victim was asleep; she was asleep having just had sexual intercourse willingly with her partner. She was lying in or on the bed in a state of undress. The appellant took advantage of her partner's temporary absence from the bedroom to go in there himself and rape her, knowing full well she was asleep. She could hardly have been more defenceless. We are therefore satisfied, as Miss Bates realistically concedes, that the judge was fully entitled and correct to place the offence in Category 2B with a starting point of eight years and a range of seven to nine years.
33. Because the sentencing range is so narrow, spanning only three years with a starting point of eight years in the middle, we do not attach particular significance to the judge's reference to such an offence “falling generally in the range eight or nine years”. The sole issue for us in this appeal is whether, from the guideline starting point of eight years, which is conceded to be correct, the judge should have reduced the sentence significantly below seven years to reflect mitigating factors, such that his failure to do so has resulted in a manifestly excessive sentence.
34. The judge did allow a reduction of 12 months from the starting point and passed a sentence at the very bottom of the guideline range. We take fully into account all

Miss Bates' submissions in relation to the exceptional nature of this delay, but we think that the reduction the judge made did make ample allowance for the mitigating factors of the regrettable delay and the impact of the pandemic, on top of the other factors that he took into account.

35. As to those factors, although the appellant had no previous conviction for a sexual offence, he was not a man of completely good character in view of his suspended sentence for the drug offence committed only six months before this rape. In any event, as Miss Bates has rightly conceded, the guideline states in terms that the more serious the offence, the less the weight which should normally be attributed to previous good character. It should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence.
36. There would have been no justification in our view for moving outside and below the identified category range of seven to nine years, as it is suggested the judge should have done. The sentence was already at the very bottom of the range for Category 2.
37. We are satisfied then that this sentence of seven years was not manifestly excessive or in any way wrong in principle, and despite Miss Bates' attractive submissions, the appeal must be dismissed.

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