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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 986



No. 202201754 A1

Royal Courts of Justice

Friday, 24 June 2022

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE FRASER

MRS JUSTICE MAY

REGINA

V

BRYAN BOWATER

**REPORTING RESTRICTIONS AND ANONYMISATION APPLY:**

Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case.

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MR G. PARKIN appeared on behalf of the Appellant.

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

MR JUSTICE FRASER:

- 1 The parties are reminded that 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. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. These reporting restrictions remain in force in this case and the name of the victim in the judgment is therefore anonymised.
- 2 This is an application for permission to appeal that has been referred directly to the Full Court by the Registrar in view of the imminent early release date, which is very soon given the length of the sentence imposed upon the applicant. The Registrar also made a representation order for junior counsel and we are very grateful to Mr Parkin for appearing via CVP before us this morning.
- 3 On 30 May 2022 the applicant, having pleaded guilty, was sentenced in the Crown Court at York by HHJ Morris to three months' immediate imprisonment on one count of sexual assault contrary to s.3 of the Sexual Offences Act 2003.
- 4 The facts of the offending are as follows. On the evening of 15 December 2021 at 8.00 pm the complainant, to whom we shall refer simply as "A", attended the Metropolitan Hotel in Whitby in North Yorkshire with some friends. The applicant, who was a stranger to A, was one of seven men at the bar and the applicant is described as being very drunk and causing a nuisance. The applicant attempted to speak to A and her friends on more than one occasion, but was politely rebuffed on each occasion. A and her friends were enjoying their evening out shortly before Christmas, dancing and socialising with one another. At one stage, the applicant became aggressive towards A and her group of friends and the applicant called the group "slags" and made an obscene gesture toward them.
- 5 At about 10.30pm A was standing at the bar talking to someone else. The applicant once again tried to talk to her. She ignored the applicant and, almost immediately afterwards, the applicant pressed against her from behind. At that point A felt the applicant's hand go between her legs, touching her vagina over her tights. A immediately remonstrated with the applicant, but he grinned and laughed at her. A short time later, A left the venue and then, in a somewhat shaken state, which is entirely understandable given what had just happened to her, recounted the incident to the police.
- 6 What happened was captured by CCTV, which we have viewed. The offending appeared to have lasted for between one and two seconds. It was an entirely gratuitous sexual assault upon a young woman. Immediately after A reported to the police what had happened, the applicant was arrested and found to be heavily intoxicated. This can be clearly seen in the CCTV, and he is considerably unsteady on his feet almost throughout the episode in the bar.
- 7 In interview, the applicant stated he had no recollection of the incident due to the amount of alcohol he had consumed, but was thereafter apologetic and stated, "If I've done something, I do apologise. I feel disgusted in myself if I've done that. It's just not me. Tell her I'm sorry." He pleaded guilty.
- 8 The sentencing remarks are extremely sparse. They do not explain whether the categorisation of the offending by the prosecution was accepted or not. The prosecution put the offending as Category 3B in a helpful sentencing note that was provided to the court. This has a starting point of a high level Community Order with a range from medium

Community Order to 26 weeks' custody. The judge gave no explanation of why, if this categorisation was accepted, this offending merited moving from the starting point to the very top of the range prior to discount for mitigation or for the plea of guilty. Indeed, no reference was made to any sentencing guidelines when sentencing.

- 9 The applicant has some limited and old convictions for non-relevant matters and was in regular employment: his last previous conviction being in 2012.
- 10 Viewing the CCTV has enabled us to consider the act that the applicant committed that evening, and what we have to say in this judgment in terms of sentence should not be taken as minimising the impact of this sexual assault on A, a young woman who was simply enjoying an evening out with her friends, which came to an end in criminal circumstances when she was sexually assaulted by the applicant. Undoubtedly, this gratuitous and unpleasant sexual assault would have affected her and people are entitled to enjoy themselves socially without being assaulted in this way.
- 11 However, in view of the categorisation of the offence by the prosecution, with which we agree, and the very short duration of the offence itself, we are of the view that it is not justifiable to place this offending at the top of the category range prior to the relevant reductions being made. Very little, if any, explanation was given by the sentencing judge of how or why he was moving within the category range to the very top. This court is entirely aware of the pressure on busy Crown Court judges and the fact that sentencing hearings will often be placed in busy lists, and the considerable pressure on judicial and court time. However, there is a basic minimum that is required in order to explain to the defendant, and also to the public, the mechanism of sentencing, which in this case was lacking.
- 12 The sentencing judge did at least explain the following:
- "I would have given you six months for this because you had your warnings and you wouldn't listen. I am reducing that for your plea and for the conditions inside and the mitigation to three months' immediate. That will give you time to dry out as well, because I suspect that is the problem. But I have considered suspending the sentence, but I am afraid people out in the pubs and clubs of North Yorkshire need to know you grope women like this and you go away for it."
- 13 In view of the very short term imposed, consideration had to be given by the sentencing judge to the Definitive Guideline on the Imposition of Community and Custodial Sentences. This Definitive Guideline is issued by the Sentencing Council and applies to all offenders aged 18 and older sentenced on or after February 2017.
- 14 Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:
- "(1) Every court—
- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case ..."
- 15 The use of the word "must" in the statute makes it clear this is a mandatory requirement. The Guideline on the imposition of community and custodial sentence makes it clear that a custodial sentence must not be imposed unless the offence or the combination of the offence and one or more of the offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence. There is no general definition of where the custody threshold lies. The same guideline also makes it clear that for custodial

sentences that can potentially be suspended there is a four step process, which is clearly set out at p.7 and 8 of the Guideline. This enables the sentencing judge properly to consider in principle whether the custody threshold has been passed and if it has, whether a suspended sentence should be passed. Simply stating, as was done here, "that I am afraid people out in the pubs and clubs of North Yorkshire need to know you grope women like this and you go away for it" is not sufficient. It is also important to keep all relevant guidelines in mind during sentencing as this will help any sentencing judge retain the necessary sense of proportion when passing sentence for any offence, including a gratuitous sexual assault of fleeting duration, such as in this case.

- 16 We are of the view that given the nature of the assault and its extremely short duration, placing it at the very top of the category range prior to discount for plea and mitigation resulted in a sentence which in our judgment is manifestly excessive. In our judgment the correct sentence would, at the most, have been in the middle of the range or near the starting point, which as set out in the Guideline would merit a high level Community Order. We must, however, realistically accept that this applicant has, as of today, spent 25 days or three weeks and four days in immediate custody, which is the equivalent of a seven week' immediate custodial sentence. In those circumstances, we have concluded that the just sentence for this offence is one of time already served in prison.
- 17 We therefore grant permission to appeal. We allow the appeal. We quash the sentence of three months' imprisonment and we replace it with one of imprisonment for the length of time served to date, which is 25 days. The effect of this is therefore that the appellant is entitled to immediate release.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.