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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2023/02419/A5

[2023] EWCA Crim 1645

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 13th December 2023

B e f o r e :

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE TURNER

SIR ROBIN SPENCER

R E X

- v -

CHRIS WARREN

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Mr D Harris appeared on behalf of the Appellant

J U D G M E N T

Wednesday 13th December 2023

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Turner to give the judgment of the court.

MR JUSTICE TURNER:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 26th June 2023, in the Crown Court at Sheffield, the appellant was sentenced for two offences of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003, having earlier pleaded on 2nd December 2022. He was sentenced by the judge to four years' imprisonment on each count, to run concurrently with each other.

3. The appellant appeals against that sentence with the leave of the single judge.

4. The facts are these. The appellant was 27 years old at the time of the offences. He and his victim first met on a night out on 22nd February 2019. Both had drunk a lot of alcohol. In the early hours they took a taxi back to the appellant's shared accommodation. They engaged in consensual sexual intercourse, during the course of which the appellant digitally penetrated his victim's anus, without her consent. He continued, despite her asking him to stop, and started to hit her bottom with considerable force. They again had consensual sexual intercourse, but the appellant had some difficulty in maintaining an erection and told his victim that if she did not help him, he would put his fingers in her bottom again. He digitally

penetrated her anus for a second time, again without consent. The appellant then stood up and vomited as a result of his intoxication. The victim dressed, but the appellant asked her not to leave, and they again had consensual sexual intercourse.

5. At some time the victim became aware that the appellant was not wearing a condom and became angry. She left shortly after.

6. In the early hours of the morning the victim contacted a friend, told her what had happened and described being in pain. Her friend, in turn, contacted a sexual assault referral clinic and they went there together later that morning.

7. The victim was examined and found to have petechial bruising, an abrasion on her bottom, a bruise to the perianal area, and a half centimetre linear abrasion at the entrance to the anus.

8. Later that same day, the appellant texted his victim and apologised, saying that he had been in a drunken mess and that she had every right to be annoyed with him. He told her that he would buy her some drinks if he saw her again.

9. The victim eventually found the strength to report the incident to the police about two years later.

10. The appellant was interviewed in May 2021. He admitted being intoxicated and said that he should have taken more care when putting on a condom. The appellant denied penetrating his victim's anus and said that he could not remember parts of the evening owing to the amount of alcohol he had consumed. When he was told about her account, he was shocked and said that he would have stopped if asked. He now accepts that his level of intoxication was such that he had rendered himself incapable of appreciating that his victim was clearly

not consenting to either act of anal penetration.

11. In her Victim Personal Statement the victim described the dramatic and deleterious consequences of the appellant's offending over the years, which included: insomnia, intrusive frequent nightmares, anxiety and repeated re-living of the ordeal. The impact upon her was so severe as to lead to her taking significant time off from university.

12. A central ground of this appeal is based upon the contention that the judge ought not to have categorised the injuries sustained by the victim as severe. The point is made that the tone of the Victim Personal Statement is emotive and that there could be some doubt about which features of the events were directly causative of the significant impact which she described.

13. Nevertheless, despite these features, we are satisfied that the essential picture presented is one which justifies the conclusion that the psychological harm in particular was severe. Accordingly, the judge was entitled to take a reference starting point of six years' imprisonment by the application of category 2B in the sexual offences guideline.

14. An early indication from the prosecution that the offending may have fallen within category 3B was premature and proved to be unsustainable. The judge further indicated, however, that in the circumstances of the offending, an operative starting point of six years would have been too high, although he did not indicate by what margin.

15. We do not consider that there is any merit in the suggestion that the judge departed from the basis of plea in his identification of the factual matrix upon which his sentence was founded. There were some differences between the defence basis and the prosecution stance, but the judge decided that a *Newton* hearing would not be necessary and made express

reference to this in his sentencing remarks. There is no indication that he went on to deviate from this course.

16. What the judge ought to have gone on to do is to weigh in the balance all of the relevant aggravating and mitigating features in order to determine whether to move from the starting point and, if so, in what direction and how far.

17. The exercise carried out by the judge, however, departed from this approach, to the extent that he took account of only some, but not all, of the mitigating factors at this stage. He properly identified the appellant's intoxication as a relevant aggravating feature, particularly since this was the factor which, on his own admission, had blinded him from realising that his victim was expressly and repeatedly withholding her consent. We are not, however, satisfied that he was right to proceed as he did, to conclude that the fact the assault took place at the appellant's flat was in the circumstances of this case an additional and significantly aggravating feature. The victim went there voluntarily, with the intention of having consensual sex.

18. The judge then put in the balance the mitigating factors of the appellant's good character and remorse, before concluding that the aggravating and mitigating factors balanced each other out, so as to justify no movement from the six year starting point.

19. The judge went on to postpone consideration of the further mitigating features, comprising the appellant's long history of mental health problems and the passage of time between the offending and the matter coming to court. Instead, he proceeded at that stage to apply a discount of 25 per cent to the six year assessment, to reflect the appellant's guilty pleas. The level of discount is uncontroversial, but the timing of its application was wrong, because the judge then went on to reduce the sentence further by six months, to reflect the

mental health and delay aspects of mitigation. The same end point would have been achieved had a correct sequence of analysis been applied, by taking a gross sentence length of five years and four months, before deduction for the guilty plea.

20. We consider that a greater departure from the starting point was called for in the particular circumstances of this appeal on a fair balance of the mitigating features, which we have identified, and the aggravating feature of intoxication and the fact that two, rather than one, offences had been carried out. We take the view that a reduced point of four years and six months would have been appropriate. When discounted by 25 per cent, and modestly rounded down, this affords a sentence of three years and four months' imprisonment. To this extent the appeal is allowed.

21. The judge also imposed an open-ended restriction order forbidding the appellant to make contact with his victim until further order. Bearing in mind that the offending in question was carried out on one occasion and that there was no evidence of any deliberately intrusive contact on the part of the appellant thereafter, we consider that a fixed term order of five years would have met the justice of the case. The order will therefore be amended so as to expire on 28th June 2028.