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Neutral Citation No. [2023] EWCA Crim 852

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01357/A5



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 14th July 2023

B e f o r e:

LORD JUSTICE DINGEMANS

HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

SIR ROBIN SPENCER

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

ALAN LUCKHURST

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Mr A Richardson appeared on behalf of the Attorney General

Miss K Aiken appeared on behalf of the Offender

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is an application by His Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which he considers to be unduly lenient. We grant leave.

2. The offender, Alan Luckhurst, is aged 37 years. He was aged between 30 and 35 at the time of the offences with which we are concerned. Prior to the offences he was of effective good character.

3. On 26th January 2023, he was convicted by a jury of eight counts of sexual assault, contrary to section 3 of the Sexual Offences Act 2003 and two counts of causing a person to engage in sexual activity without consent, contrary to section 4 of the 2003 Act. Sentence was adjourned for the preparation of a pre-sentence report. Other reports were also obtained. The victims of the offending have the right to lifelong anonymity, pursuant to the provisions of the Sexual Offences (Amendment) Act.

4. On 27th March 2023, the offender was sentenced to six months' imprisonment, suspended for 18 months, concurrently on all offences, with a requirement that he attend an accredited Horizon programme for 35 days and participate in a rehabilitation activity requirement for up to 30 days. He was also ordered to be included on the child and adults barred lists; and a Sexual Harm Prevention Order was imposed. He will be included on the sex offender register for a period of seven years.

5. It is submitted by Mr Richardson on behalf of the Solicitor General that the sentence imposed was unduly lenient because it failed to reflect two serious and sustained courses of sexual assaults committed against two separate young women, in gross abuse of trust; the

offences were predatory; and he selected young women over whom he had a position of power for his own gratification. Secondly, it is submitted that the overall sentence failed to reflect the serious nature of that conduct; that one offence alone merited a sentence of over two years' imprisonment because it involved the touching of naked breasts, instead of the sentence of six months' imprisonment which was suspended; and that the learned judge had failed to apply the guidelines properly. Thirdly, it is submitted that the approach taken by the judge failed to begin to address the number of offences: there were ten offences and two courses of conduct; there was no uplift for the different victims; and the sentences should have been ordered to run consecutively.

6. It is submitted by Miss Aiken, on behalf of the offender, that the sentence was not unduly lenient; and that although there were two complainants, the offending had taken place against each of them over two days and so it was difficult to describe the offending as sustained. It was recognised that normally for two separate complainants consecutive sentences would be imposed, but it is said that, having seen him give evidence at trial, the judge had been particularly impressed with the offender's mitigation: he had had a lonely upbringing; he had suffered financially and emotionally because of his offending; he had lost a deposit which he had used to buy a business which he could not then complete because of these proceedings; he had been the subject of adverse social media and press commentary; he was married with two young children, whom he had supported financially throughout these proceedings; and he had been the victim of a long delay in so far as the first set of offences were concerned, for which he was not responsible. It is submitted that in all the circumstances this court should not interfere with the sentence that was passed.

7. We are very grateful to Mr Richardson and Miss Aiken for their helpful written and oral submissions.

Factual circumstances

8. It is necessary to set the facts out in some detail because of the course that we propose to take. In 2017, the first complainant, "A", who was aged 17, was studying for a hair and beauty qualification at a local college. The course required her to undertake 36 hours of work placements in different premises. Her first placement of two days was in February 2017 and was with a hair salon in Twickenham. She was instructed to attend at 8.45 am on 10th February. She did so, along with another student.

9. She was met by the offender. He introduced himself as the manager. He showed both students a room at the back of the salon, which appeared to be a utility or staff room. There was also an office used by the offender.

10. Shortly after 11.15 am, the two students and the offender were all in the utility room. The complainant was washing up. The offender stroked her bottom (count 1) and said "Remember not to mix up the towels and the gowns". A was concerned, but took no action.

11. At 2.30 pm, the offender asked both students to go into his office, separately, to complete paperwork. After the second girl went in, he gestured for A to sit on a plastic chair. They started to complete the paperwork. The offender said that A was pretty. He placed his right hand on both of her thighs, causing her to be concerned. After they had finished completing the paperwork, the offender asked where she lived, and whether she had a boyfriend. A answered his questions and left the office.

12. During the course of that afternoon, the offender repeatedly touched A's bottom (count 2). He did so in a way to ensure that no one else would see. He called her "babe" and "darling". She finished work at about 6 pm that day and was not due to return until the following week.

13. On Monday 13th February 2017, A returned to the salon. It was very busy. The offender asked her if she would be interested in working at the salon. He suggested that he could help her qualify more quickly than college, and that she could leave her studies. As the conversation finished and she walked away, the offender grabbed her bottom (count 3).

14. At about 4.30 pm, A went with the offender into his office. They sat in two chairs. He pulled his chair close to hers. He positioned himself so that her legs were in between his legs. He took hold of A's left hand with his right hand and placed it at the top of his thigh, close to his genitals. She moved her hand away. He then moved her hand on to his genitals, over his trousers (count 4). She could feel that his penis was erect. He asked her if she liked it. A asked him to stop and pulled her hand away.

15. There was a conversation about head massages. The offender asked A to stand up. Her back was towards him. He moved himself so that his genitals were touching her bottom, over their respective clothing (count 7). He was quite forceful. Every time that A tried to move away, he pulled her back, using his hands on either side of her hips. The offender roughly massaged A's head. He started to breathe heavily. He began to massage her neck and moved towards her shoulders and breasts. As he came close to her breasts, A pulled away. She could feel the offender's erect penis pushing through their respective clothing in the area of her lower back. She was very scared. She was concerned that no one else was allowed in the office without knocking, so that no one would come to her aid.

16. The offender then pulled A by her hips and forced her to sit on his lap. She could feel his erect penis. She quickly stood up and asked him to stop. He said "You can sit on my lap if you want, I'm not going to stop you". She replied that she did not want to. She was upset and uncomfortable. The offender said "I could have kissed you", and A replied "It wouldn't

have happened". They then discussed arrangements for further work at the salon and the prospect of her starting as a hair stylist. The offender told her that she could not have a boyfriend if she worked at the salon because he was always "flirty" and had been in trouble before for taking it too far. He told A not to tell anyone about what had taken place between them. She stood up to leave and the offender once again squeezed her bottom (count 5). As she walked out, he placed his hand through her legs and touched her vagina, over her clothing (count 6). She walked out of the office and into the utility room. She believed that she was in the office for about 45 minutes. The offender appeared and said that she could leave for the day, and that she had been very helpful. A left straightaway. She reported what had happened to her parents and boyfriend that evening. They told her not to return to the salon.

17. A subsequently reported what had taken place to staff at the college. They informed the owners of the hair salon. The offender was suspended and a police investigation began. CCTV footage was obtained from the salon which effectively supported all that A had said.

18. On 3rd March 2017, the offender attended at Hounslow Police Station by prior arrangement, in order to be arrested and interviewed. At the beginning of the interview he provided a prepared statement in which he confirmed that he had watched the CCTV footage but denied that he had behaved inappropriately. He said that he was a tactile person and had no sexual motive when he touched A. He answered "No comment" to all the questions asked of him.

19. There was a Victim Personal Statement from A, dated 21st January 2023. She explained that working at the offender's salon were the worst two days of her life. She felt overpowered and taken advantage of. She said:

"I was an innocent 17 year old. I felt dirty, felt it was all my

fault, felt I deserved it ... the only one suffering is me."

She explained her experience had been made difficult by the substantial delay before the trial. As a result of the offender's behaviour, she no longer wanted anything to do with the hairdressing industry.

20. The matter was investigated by the police. It seems that there were other complainants who subsequently withdrew support for the prosecution. They therefore form no part of any sentencing exercise.

21. There was a very regrettable delay from the report in March 2017 until the prosecution commenced in October 2019. The offender appeared at the Magistrates' Court in November 2019, and his case was sent to the Crown Court at Kingston Upon Thames. He was remanded on conditional bail.

22. On 19th December 2019, at a plea and trial preparation hearing, he pleaded not guilty. A trial was fixed for 5th October 2020. Attempts were made to bring forward that date, but they were unsuccessful, in part because the Covid 19 pandemic struck. There were then further difficulties in arranging the trial, which it is not necessary to set out, the net effect of which was that the matter did not come to trial until January 2023. During that time the offender remained on bail. He had also managed to obtain his own hair salon at The Avenue in Worcester Park.

23. On 19th June 2021 at a time when the offender was on bail in relation to the proceedings concerning A, a second complainant, "B", started to work at his salon on Saturdays. She had trained that summer and had become an apprentice. She started to work on other days in addition to Saturday. She found the offender's behaviour unprofessional. After about a

week, the offender moved her away from a sink by placing his hand on her lower back, towards the top of her bottom. She put the action out of her mind.

24. A week or so later, a pattern of behaviour developed. There was a kitchen at the back of the salon, which would be used for washing towels. When B worked there, the offender would tell her that her posture was bad. He told her to stand up straighter and to stick her "boobs" out. He would put his arm along her back. He would ask her to go to the beautician's room and ask her to lie down so that he could "crack" her back. B felt uncomfortable, but thought that the offender was helping her. He would tell her to lie on her front and in unusual positions. He would tell her to be quiet so that clients could not hear. He also told her to do the same to him, despite her making it clear that she did not want to.

25. On one occasion, whilst in the kitchen, the offender pulled the front of B's dress away from her body and looked at her breasts. He said that she was wearing the wrong sized bra. He reached out, touched, and massaged B's breasts over her clothing (count 8). He said that she should have her breasts measured.

26. On other occasions, whilst saying that he was trying to help her back, the offender would press B's hand into his groin area and would use his own hand to touch her bottom. She tried to pull her hands away but was not always able to. B never said anything about what he was doing because she felt uncomfortable.

27. About two months into her employment, B and the offender were alone together in the early evening, waiting for customers to arrive. The offender asked her to go into the beautician's room to "crack" her back. She lay facedown on the bed. The offender "cracked" her back, but this time, he felt her legs too and said that she was "tight". He then pulled her dress up and pulled down her tights just below her bottom, revealing her underwear. He told

her that she had nice knickers before pulling her tights up again. He smoothed her dress and stroked her bottom. He then told her to turn over and lie on her back. He reached across B and touched her breasts inside her bra (count 10). His hands were on her naked breasts for five to ten seconds. B froze and complied. He performed what appeared to be some further stretches on B and then asked her to reach her arms out with her palms face up. As she did so, he pulled her hands towards him and placed his clothed testicles in her hands (count 11). She immediately pulled her hands away. The offender turned and left the room. B could see that he had an erect penis underneath his clothing. He went to the bathroom and was there for approximately five minutes. B went to the reception desk to wait for the final clients to arrive. When he came out of the bathroom, the offender acted as if nothing had happened.

28. The next day, B did not go to work and was subsequently dismissed.

29. B told her mother what had taken place. Her mother and grandmother encouraged her to speak to the police, which she did with some reluctance.

30. On 24th September 2021, the offender was arrested and taken to Croydon Police Station where he was interviewed. He again provided a prepared statement in which he said that he and B had not worked together very much, and that she was unreliable. He denied any sexual touching.

31. On 4th January 2022, the case in respect of the offences against A was listed for trial. It was adjourned and re-fixed in July 2022.

32. On 26th January 2022, the offender was charged with offences in relation to B. After the two indictments were joined, the trial went ahead on 16th January 2023. It lasted nine days. The offender was convicted, as we have already indicated, by the jury of count 1 to 8 and

counts 10 and 11. He was acquitted of count 9 (sexual assault, in which B had said that the offender had touched her breasts "probably every day").

33. Sentence was adjourned for the preparation of a pre-sentence report.

34. In the meantime a psychiatric report was prepared on the offender by Dr Mala Singh. It seems that Dr Singh was not aware of the earlier set of offences against A and did not have access to the past medical records, but concluded that the offender was suffering from a generalised anxiety disorder and moderate depression. Dr Singh concluded that "he will not be able to cope with a custodial sentence due to his current mental state" – a conclusion which appeared to be based on the finding of moderate depression and the generalised anxiety disorder.

35. B provided a Victim Personal Statement. She said that the offender's behaviour had affected her confidence. She would start crying and found it difficult to stop. She suffered from panic attacks. She was self-conscious about her body. She kept asking why this had happened to her and what she could have done differently. She stopped going to college, and as a result had had to repeat a year.

36. The pre-sentence report which was prepared showed that the offender accepted with hindsight that his behaviour was sexually predatory. He was only thinking of himself, not his victims. He acknowledged that it was an abuse of his position of trust, but he continued to dispute what B had alleged against him. He denied being attracted to 17 year olds, or that he had received sexual gratification from his actions. The author concluded that he may have a sense of sexual entitlement.

The sentence

37. In passing sentence the Recorder noted that the offender had employed two young women and had sexually assaulted both of them. He had gone significantly further than "making passes". He had taken the women to private rooms in the rear of the salons under the pretext of discussing progress. He felt that he had some sort of licence to behave the way he did.

38. The Recorder noted the financial and business impact the offending had had on the offender and his family. He took account of the delay. As regards the offences of causing a person to engage in sexual activity without consent, the Recorder considered it arguable that the offending included features of category 2 harm, as the victims were particularly vulnerable due to circumstances, but concluded that category 3 was more appropriate.

39. As regard culpability, the Recorder concluded that there was an abuse of trust but that there were no other features of higher culpability.

40. It is not entirely clear from the sentencing remarks how the Recorder approached the sexual assault guidelines, but it appears that he found the offences to fall within category A culpability, because they had an element of abuse of trust; and he found elements of category 2, but broadly category 3 harm. He said that the bulk of the offences would notionally fall in the middle of these combined categories, with a custodial sentence of 26 weeks. He noted that there were multiple and repeated offences and he noted that the second set of offences had occurred while the offender was on bail for the first set. He concluded that the offences passed the custody threshold, but not by the greatest of margins. He had regard to totality and, as already indicated, he imposed sentences of six months' imprisonment, suspended for 18 months.

Relevant provisions

41. The Sentencing Council's guideline for offences of sexual assault provides that an offence falls within category 2 harm where there is the touching of naked breasts, or a sustained incident. Category 3 applies where no features of either category 1 or category 2 are present. Culpability A applies where there is an abuse of trust. It is common ground that count 10 (the touching of B's naked breasts) was a category 2A offence. One offence provides for a starting point of two years' custody, with a range of one to four years. A single category 3A offence provides for a starting point of 26 weeks' custody, with a range of a high level community order to one year's custody.

42. In assessing these sentences, we start with the proposition that the Recorder had to apply the Sentencing Council guidelines, unless he found that it was in the interests of justice not to do so. The Recorder made no such finding, and we confirm that on the material before us there is no such material that would justify such a finding.

43. We consider that count 10 (the offence against the complainant B) should be taken as the lead offence. That was a category 2A matter, with a starting point of two years' custody, with a range of one to four years. Having regard to principles of totality, all of the other offending against B should be aggregated on to that one offence. The aggravating features of the deliberate targeting, the deliberate isolation of a young trainee and the fact that the offences against B took place when the offender was on bail should be taken into account.

44. In our judgment the least sentence on count 10, following a trial and taking all those matters into account, would be a sentence of three years' custody, before taking into consideration mitigating features. There was no delay in relation to the counts involving the complainant B, but there was substantial mitigation available to the offender in his personal life – not only the effects of the offending and the financial punishment, which he had brought on himself, but also the effect that any sentence of imprisonment will have on his

young family and the fact that he had carried out considerable charitable works in the past, the details of which are before us. Having regard to all of those factors, in our judgment a sentence of two years' imprisonment for count 10, to reflect all of the offending against B and all of the aggravating and mitigating factors, is the least sentence that could have been imposed.

45. The counts involving the first complainant were offences which fell within category 3A, with a starting point of six months' custody. There were numerous offences. The sentence on each will run concurrently. Having regard to all of those matters and the aggravating factors, which mirror those that were set out in relation to the second complainant (apart from the fact that the offending against B took place on bail), in our judgment the least sentence that could be properly imposed for each of those offences would be a sentence of one year's imprisonment, to run concurrently with each other, before having regard to the considerable mitigation. There was the mitigation already indicated, but in this respect there was also the issue of delay, which was substantial. It is right that that affected the complainant A very significantly, but it also affected the offender who had to live with the consequences of the outstanding trial and investigation over a prolonged period. Doing the best we can, and having regard to all those factors, we will reduce that sentence of 12 months down to a sentence of six months' imprisonment. That sentence has to be consecutive to the sentence in relation to the offending against B because it involved separate criminality and separate harm to A.

46. In those circumstances, we find that the original sentence was unduly lenient and we allow the Reference. We will impose the shortest possible sentence on the offender that we can, which is an overall aggregate sentence of two years and six months' imprisonment, made up of two years' imprisonment on count 10. The other sentences for the offences in relation to B of six months' imprisonment will run concurrently with each other and with the sentence

on count 10. In relation to the offending against A, the sentences on each count will be six months' imprisonment, to run concurrently with each other, but consecutively to the sentence on count 10. The effect of an aggregate sentence of two years and six months' imprisonment means that the sentence can no longer be suspended, and therefore the order for suspension will be revoked.

47. That leaves the issue mentioned in Dr Mala Singh's report, that of suicidal ideation expressed by the offender. We are told by Miss Aiken this morning that the offender, who has not attended before us and who is at home, had also expressed suicidal ideas overnight. Miss Aikens solicitors have been in contact with him.

48. In those circumstances we direct that the offender report to the Kingston Upon Thames Police Station by 4 pm today. We will also direct that the prosecution should ensure that the police officers to whom the offender is to report are made aware of Dr Mala Singh's report.

49. The sex offender notification requirements will accordingly be extended for life.

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

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