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IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202304392/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 30 January 2024

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE JAY

RECORDER OF REDBRIDGE
(HER HONOUR JUDGE ROSA DEAN)
(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 CRIMINAL JUSTICE ACT 1988

REX
V

DAVID MBOMA

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MS S PRZYBYLSKA appeared on behalf of the Attorney General.
MS K HIRST appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application by His Majesty's Solicitor General for leave to refer a sentence, imposed on the respondent, David Mboma ("Mr Mboma"), to the Court, which the Solicitor General considers to be unduly lenient.

2. On 13 October 2023, Mr Mboma (then aged 26 years old) and a person of previous good character, was convicted, after a trial before HHJ Mark Dennis KC and a jury, of two offences of assault by penetration and six offences of sexual assault, and he was acquitted of two offences of voyeurism.

3. The offences were committed on the evening of 15 September and early morning of 16 September 2017, when the appellant was aged 19 years and the complainant, who has the benefit of life-long anonymity, pursuant to the Sexual Offences (Amendment) Act 1992, was aged 15 years. The judge recorded that both were immature as part evidenced by the fact that they had bought brandy and sweets to sustain them during the night. It was common ground that the complainant and Mr Mboma had agreed to meet at a Premier Inn hotel for consensual sexual intercourse. Mr Mboma and the complainant drank brandy and consensual sexual intercourse took place. It was common ground that the complainant, who at that time had just gone into foster care and who had had a very disruptive and chaotic childhood, had said to Mr Mboma, whom she had known for about a year, that she was aged 18 years. This explains why Mr Mboma was not charged with any offences for having sexual intercourse with a child under 16 years.

4. As already indicated, the offences took place after drinking and consensual sexual intercourse. The complainant fell asleep, and it is apparent from photos and videos recovered from Mr Mboma's phone, which was taken from him on his arrest in the

morning of 16 September and downloaded by police on 18 September, that he had filmed and touched the complainant when she was asleep.

5. Mr Mboma was arrested in the morning of 16 September 2017, because the complainant, who had spoken with Mr Mboma in the morning and then left the hotel, felt very unwell, which was not surprising given the brandy that had been drunk the night before. She called for an ambulance, but her foster parents had reported her missing and so both an ambulance and a police car turned up. The complainant panicked and gave the police a false story about drinking with friends and then being taken to a hotel room by a man that she did not know who had raped her. Mr Mboma was then arrested, and his phone seized. A short period later the complainant confirmed that there had been no rape but by then the photos and videos on Mr Mboma's phone had been found.

Delay

6. It is necessary to say something about the chronology of the proceedings because there was an inordinate and an inexcusable delay in the prosecution of Mr Mboma. The complainant first reported the offence on 16 September 2017. Mr Mboma was arrested, interviewed and released under investigation on the same day. His phone was downloaded, and the images discovered on 17 September 2017. The complainant's phone records had been deleted. An officer spoke to the complainant on 26 September about the images and she confirmed that she did not remember any images being taken because she was unconscious at the time. There was an earlier advice meeting between the police and Crown Prosecution Service in November 2017, and the victim complainant was formally interviewed on 29 November 2017. Mr Mboma was rearrested and interviewed about the images on 12 December 2017 and further inquiries were then made. This was so far so good, and it might have been expected that criminal

proceedings would have started in 2018. In fact, the investigation was reallocated to another officer as the original officer became unwell. There were delays because of investigations into records, the case being sent to the CPS and back from the CPS, other unwell police officers, and the need for a senior officer to intervene.

7. It is apparent that this delay understandably caused distress and anxiety to the complainant, but it was submitted on behalf of the Solicitor General that the delay caused only limited detriment to Mr Mboma, because he had in the period of delay not committed any other offences showing good character before and after the offences which he was therefore able to demonstrate to the court. Mr Mboma was made aware that the proceedings were continuing in October 2022 when he was served with the proceedings by postal requisition.

8. The proposition that delay in proceedings has not harmed Mr Mboma, who has had the proceedings hanging over him, who had delayed applying to a university to switch courses after completing one year of another course, who now has a 3-year-old child and who reported suicidal feelings to his GP, is an unreal submission which we reject. It has been acknowledged for centuries that justice delayed is justice denied, but is not only the winner in any proceedings affected by delay. Delays penalise victims, who do not get justice. Witnesses have to attempt to remember matters long after the event. Offenders have proceedings hanging over them and are not able to move on with their lives. Delay is always unfortunate in cases involving young persons, and in particular in cases where the young person was found by the judge, as in this case, to be immature. It is particularly unfortunate in cases where there has been a contemporaneous complaint and investigation which revealed the offending.

The Grounds

9. The grounds on which this Reference is brought were not set out with any particular clarity in writing. As a general proposition it might assist the Court if the Solicitor General adopted the approach taken by appellants in Advice and Grounds of Appeal and specified the grounds on which it was said that the sentence was unduly lenient. That said, we have had the advantage of helpful oral submissions from Ms Przybylska, on behalf of the Solicitor General, and Ms Hirst, on behalf of Mr Mboma, and we are grateful to both of them for their assistance. It seems that the following matters are in issue. First, whether the judge was wrong to characterise the assault by penetration as a category 3A and not category 2A offence, because of the issue of particular vulnerability. Secondly, whether the judge was wrong to find that the extent of penetration was a relevant matter when considering the sentence. Thirdly, whether the judge should have referred to an image that had been sent by the complainant to Mr Mboma the night before the meeting and to describe it as he did. Fourthly, whether the judge should have found that there was degradation or humiliation from Mr Mboma's filming, despite his acquittal for voyeurism. Fifthly, whether the judge's sentence was affected by irrelevant considerations, in that he expressed a view that it was relevant that the victim had not asked whether she would have consented to the offender touching her sexually if she was awake, or to him recording him touching her while she was asleep.

10. There were, it was common ground, mitigating factors for Mr Mboma, being youth and immaturity, lack of previous convictions and good character, and the impact of any imprisonment on his 3-year-old son, and the delay in the proceedings. There has also been some reliance on Mr Mboma's mental health, which has been described as fragile.

The Offences

11. As already indicated, the offences took place after drinking and consensual sexual intercourse. The complainant fell asleep, and it is apparent from the photos and videos recovered that when the complainant was asleep, there was an 8-second video in which Mr Mboma lifted the bedsheets to show to the camera the victim naked in her sleep, panning down to her bottom. That was charged as voyeurism, and Mr Mboma was acquitted of that count. There was a 1-second video of a close-up of the victim's naked vagina and bottom and there was a 3-second video, a close-up of the victim's vulva, with the offender's two fingers touching the vulva and pulling the outer labia back. That was count 1, the assault by penetration. There was a 9-second video showing Mr Mboma stroking the buttocks of the complainant who was asleep. There was a 4-second video showing the offender touching the victim's waist and buttocks and then the camera focused on the complainant's sleeping face. There was a 10-second video, where the offender had touched the right breast of the sleeping victim, and there was a 3-second video, where the complainant was still asleep, the offender was awake and there was a caption across the video saying: "Talking all that shit and that you sleep". There was then a 6-second video where Mr Mboma held the complainant's right breast and sucked her nipple, and then there was a 7-second video where he rifled through the victim's handbag and there was a caption across the footage saying: "Nothing but coins broke bitch". At 11.48, there was a still image of the complainant with both breasts uncovered. There was then a 10-second video where the offender pretended to punch the sleeping complainant as they were both lying together and then there was a 6-second video, where the complainant was asleep with her hand on the offender's arm and he knocked her away and said something but it is not possible to know what was said. At 12.43 there

was a message from Mr Mboma to an unknown user: "That's what you call a loser" and then at 12.43 there was a message saying: "Anyway back to tryna wake this bitch up", then a message from an unknown user saying: "Dash them coins at her head". There was a message from Mr Mboma to the unknown user: "If the sex is dead in the morning watch how ima violate her". Then there was a 11-second video where Mr Mboma touched the victim's vulva, separating that to show the vagina. Mr Mboma separated the victim's buttocks to show her vagina (which was another sexual assault) and then he rubbed her buttocks (another sexual assault) and then another video which was showing her naked and asleep, and that was another voyeurism count on which he was acquitted. There was a 5-second video showing the complainant naked and asleep and there was a selfie image of that.

12. The court was asked before the hearing if it required to see the videos and film and replied that the court did not require to see any video or film but would watch any material which the parties considered it necessary for the court to see in order to determine this Reference fairly. At the start of the hearing that remained the position. At the end of the hearing, in support of the submission on behalf of the Solicitor General that there had been additional degradation or humiliation which should have been found by the judge as a fact, we were then asked to see, and did see, the videos and photographs. In order for that to be done, whilst maintaining the privacy of the materials, the police officer and counsel on both sides came to a room in the Royal Courts of Justice for us to see that material.

Material Relevant for Sentencing

13. The complainant provided a victim personal statement saying:

> "The offences that were committed on me by [the offender] were

> only told to me by the investigating officers and I had never seen the actual images nor recall what he did to me thankfully. I have been told what he did to me and as I have matured I have been more and more angrier at what he had done. It has not helped having to wait so long and sadly this has had a detrimental effect on my wellbeing, mental health, and personal life; including relationships and my ability to trust anyone. This has affected my current relationship with my partner and my ability to be as intimate as I should or would like to be with him. However I have continued to support the case as I felt that he should not be able to get away with what he did."

14. The court ordered a pre-sentence report and Mr Mboma told the probation officer that he thought that everything that happened between him and the victim was consensual. He said he was led by his sexual urges and is not the same person now. He said he regretted his actions and did not intend to cause harm. He said the victim was the first person he had sex with, and the probation officer considered that the offender's admitted use of photography prior the offences and lack of sexual experience caused him to act in the way that he did. She commented that he does appear to accept the jury's verdict but finds it hard to accept that he behaved in the manner which he did, and he presented as apologetic and remorseful.

15. Since the offence, Mr Mboma had started a degree in Sports Management at university but left after deciding to change course. He had been accepted to read Sports Therapy at another university but had not started because of the court proceedings. He had been in a relationship for 5 years with his partner, which started after these matters, and they have a 3-year-old son and plan to marry. The writer observed that a custodial sentence risked causing a detrimental effect on his mental health.

The Sentencing Hearing

16. Prosecuting counsel had not appeared at the trial. Trial counsel had uploaded a

Sentencing Note in advance of the trial, but prosecution counsel made submissions which the trial judge did not accept. For example, it was submitted that alcohol had been used to facilitate the offence, but the judge said that was not how it had been put or appeared at the trial. The judge produced a written note of his sentencing remarks, but the Reference has picked up and relied on some of the exchanges between judge and prosecuting counsel. That is not helpful, unless it is being suggested that those exchanges demonstrate bias or inappropriate behaviour by the judge.

17. In the written sentencing remarks, the judge did say at paragraph 2.4, that:

> "It should be noted that the Complainant has never been shown any of the images which are the subject of this indictment... Accordingly at trial the Complainant was asked very little about the images beyond confirming that she had not known that the images were being taken and stating that she had not agreed to that happening as she had been asleep."

18. Then the judge went on to refer to the previous consensual sexual activity and the principal issues at trial. The judge considered particular features, counts 1 and 2, the assault by penetration, the touching was recorded and counts 2 to 6 and 8 to 9, the sexual assault and, as far as that, counts 4 and 5 were touching of a naked breast. The judge emphasised the assault by penetration was "penetration of the vagina by reference to its legal definition". The judge found as an aggravating feature that the defendant took advantage of a female who was as a fact aged 15 years 5 months and therefore under the age of consent, and who was asleep when the sexual conduct took place. He identified another aggravating feature as multiple acts of touching before turning to mitigating features. The judge then set out the relevant Sentencing Guidelines, and the Assault by Penetration Guideline was referred to. The judge said:

> "Having invited submissions with respect to the guidelines, I take the view that the appropriate categorisation for the offence in this case is as follows:
>
> Category A [Culpability]
>
> (Recording of the offending)…"

19. The judge identified that this was category 3 harm, saying that the factors in categories 1 and 2 were not present. A factor in category 2, which we will come back to, is a bullet point saying: "victim is particularly vulnerable due to personal circumstances".

20. A category 3A offence has a starting point of 4 years, with a range of 2 to 6 years. A category 2A offence has a starting point of 8 years, with a range of 5 to 13 years' custody.

21. The judge referred to the guidelines on that, and he noted that there was category A for counts 1 and 5 recording of the offending and category 2, touching of the naked breasts. As far as the other matters were concerned, the judge found that it was category A culpability for recording of the offending, and category 3 as factors in categories 1 and 2 not present, and again in relation to category 2 of sexual assault, there is a bullet point for "victim is particularly vulnerable due to personal circumstances".

22. The judge referred to the Sentencing Guidelines on Sentencing Children and Young Persons Overarching Principles, and also the guidance in *R v Hobbs* [2018] EWCA Crim 1003 [2018] 2 Cr App R (S) 36, paragraph 30, which demonstrates that the modern approach of the courts to sentencing those under 18 is consistent with the guidelines, that age and maturity were particularly important, and that there was no cliff edge on an 18th birthday. The judge then referred to the reports before saying that, as far as sentencing, that this had been a most unusual and difficult case to consider, it presented the court

with particular difficulties when endeavouring to determine the seriousness of the offending, and in particular, an assessment of the true extent of the defendant's culpability and of any harm caused. The judge reminded himself that he was the trial judge. He had regard to the need to be alert to relevant principles and that counts 1 and 6, which were the assault by penetration, were the most serious level of the offending. The judge then imposed concurrent sentences on each count of 2 years' imprisonment suspended for 24 months and made a rehabilitation activity requirement of 40 days and accredited programme requirement of 35 days. The judge then explained the effect of the sentencing.

Relevant Principles

23. In *Attorney-General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517, it was held:

> "A sentence is unduly lenient we would hold where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate ... However, it must always be remembered that sentencing is an art rather than a science: the trial judge was particularly well placed to assess the weight to be given to various competing considerations, and leniency is not in itself a vice."

24. A Reference permits this Court to remedy a gross error and to preserve public confidence in the sentencing process.

The Reference

25. We then turn to the issues that were argued before us. The first issue is whether the judge was wrong to categorise the assault by penetration as category 3A and not 2A. We were referred briefly to some of the previous authorities and have looked at and also considered *R v Bunyan* [2017] EWCA Crim 872; *R v Sepulvida-Gomez* [2019] EWCA Crim 872 [2020] 4 WLR 11 and *R v Husband* [2021] EWCA Crim 1240. Those deal

with the issue of whether a victim is *particularly vulnerable* due to personal circumstances if they are asleep or intoxicated. It is right that there was one case where a person who was asleep was found not to be particularly vulnerable, but that was in a very particular circumstance where there had been consensual scripted sexual activity between three persons before one person had fallen asleep.

26. In all of those circumstances, this is a question for this Court to consider, because the judge, although he was addressed on whether the victim was *particularly vulnerable* due to personal circumstances, does not appear to have made any express finding on the matter. There was an implicit finding that the victim was not particularly vulnerable because the judge said factors in categories 1 and 2 were not present. The judge however himself found that there was an aggravating feature that the defendant took advantage of a female who was in fact aged 15 years 5 months (under the age of consent) and who was asleep when the sexual conduct took place.

27. In our judgment, the judge was wrong not to find that the complainant was particularly vulnerable due to personal circumstances in this case. This is because the complainant was a 15½-year-old child. She had drunk alcohol, and she was asleep at the material time. The judge was therefore wrong to categorise the offences of assault by penetration as category 3A rather than 2A. For similar reasons all the sexual assaults should have been category 2A, the judge found that some of those were 2A in any event.

28. We will return later to consider the effect of that finding when we consider the sentence. The second issue was whether the judge was wrong to find that the extent of penetration was a relevant matter when considering the sentence. The circumstances in which the penetration took place will always be material for a court to consider, for example the length of time over which the offending took place. No judge is entitled to downplay the

effect of the penetration simply by referring to the descriptions given already set out above. That said, it is not clear what, if any, effect the judge's emphasis on the legal definition of penetration had on the overall sentence.

29. The third issue was whether the judge was right to find that an image had been sent by the complainant to Mr Mboma the night before and to describe it as he did. The trial judge was entitled to find that an image had been sent by the complainant to Mr Mboma the night before. Whether it is a finding we would have made is irrelevant. There is no basis which has been advanced before us to show that this finding was inconsistent with other findings the judge made, controverted by a fact which could not have been gainsaid, or was in any sense irrational. What the judge said was that the complainant responded to the defendant by sending him what was described in the trial as a provocative image of her underwear, together with a message indicating that she was looking forward to their night together. That was the judge simply setting out the background to the matter. It is not apparent that affected or infected the judge's approach to this matter.

30. The fourth issue is whether the judge should have found that there was degradation or humiliation from Mr Mboma's filming despite his acquittal for voyeurism. The Assault by Penetration Guidelines have, as a culpability A factor, recording of the offence. As a category 2 harm factor, there is additional degradation or humiliation. There was, in fact, no distribution charge bought against Mr Mboma, because the prosecution took the view that they were unable to be sure that there had been distribution of these images. The judge heard the trial, he saw the images on many more occasions than we did, and we are simply not in a position to go behind his finding that there was no degradation or humiliation in addition as a feature to bring this within category 2.

31. The fifth point raised was whether the judge was affected by irrelevant considerations, in

that he expressed the view that it was relevant the victim was not asked whether she would have consented to the offender touching her sexually if she was awake. As we have already indicated, there was a slightly curious passage in the sentencing remarks at paragraph 2.4, but it seems there that the judge was simply setting out the background to matters and what the issues were at trial. We cannot see that that showed that the judge misdirected himself in any sense.

32. We are, for the reasons already given however, sure that the judge was wrong to place this in category 3A and not category 2A of the assault by penetration offence specific guideline. We therefore grant leave for the Reference because there was a miscategorisation by the judge. Taking assault by penetration as urged upon us by both counsel, and as seems to have been the approach by the judge, as the most serious offence, for a category 2A matter there is a starting point of 8 years' custody. Taking into account all the other matters but reflecting the fact that they all appear to relate in time and space very much to the same offending, one can aggregate all the offending on to the starting point and still end up with a sentence of 8 years to reflect all of the criminality. We then consider the other matters in mitigation. The first and most important points are age and immaturity. There is also good character and the details that we have seen in relation to that. Doing the best we can and in part reflecting the approach the judge had taken to age and immaturity of this particular man, we reduce the 8 years down to 4½ years to reflect this mitigation and the other aspects of mitigation that we have been referred to, in particular the fact that there is now a child dependent on Mr Mboma. We then turn to and take account of the delay which, as we have already indicated, we considered to be inordinate and inexcusable (and to be fair it was common ground that the delay was inexcusable). Doing the best we can, we can reduce the

sentence by a further 1 year, to take account of that factor. That would then leave a sentence of 3½ years for the assaults by penetration, which is obviously a sentence of a length which cannot be suspended. Ms Hirst had accepted that, if we found that the assaults by penetration was category 2A, and not 3A, for the purposes of the offence specific guideline, it would be very difficult to reduce the sentence to one that could be suspended.

33. In those circumstances, we allow the Reference. We quash the sentences on the assault by penetration and impose a sentence of 3½ years imprisonment on each of those two counts concurrent with each other. So far as the sexual assaults are concerned, we will leave the sentences as they were, but they are no longer suspended because the length of the sentence on the two counts of assault by penetration means that there cannot be a suspended sentence. They will remain concurrent. The net effect is that Mr Mboma will be sentenced to an overall sentence of imprisonment of 3½ years.

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

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