IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES

HER HONOUR JUDGE PLASCHKES CP No: 01TW1063123

CASE NO 202400689/A1 [2024] EWCA Crim 1464

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 19 November 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE FARBEY DBE
HIS HONOUR JUDGE LEONARD KC
(Sitting as a Judge of the CACD)

REX
V
NATHAN HUNTER

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MS F LEVETT appeared on behalf of the Appellant
MS E SMITH appeared on behalf of the Crown

J U D G M E N T

REPORTING RESTRICTIONS APPLY

MRS JUSTICE FARBEY:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, no matter relating to the victim of the offences that form the subject of this appeal 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 a sexual offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 7 July 2023 in the Crown Court at Kingston upon Thames before Her Honour Judge Plaschkes KC, the appellant (then aged 30) pleaded guilty to seven offences. On 24 January 2024 the judge imposed the following sentences: on count 1, committing an offence with intent to commit a sexual offence (contrary to section 62(1) of the Sexual Offences Act 2003) ("the section 62 offence"): life imprisonment with a minimum term of 4 years and 130 days; on count 2, kidnapping: life imprisonment with a minimum term of 4 years and 130 days to be served concurrently with the sentence on count 1; on count 3, strangulation: 2 years' imprisonment concurrent; on counts 4, 5, 6 and 7 which were each assaults on emergency workers, namely police officers: 1 month's imprisonment on each count.

3. The total sentence was therefore a life sentence with a minimum term of 4 years and 130 days. Appropriate ancillary orders were made, including a Sexual Harm Prevention Order.

4. The appellant appeals against sentence by limited leave of the single judge.

The Facts

5. In the early hours of 11 June 2023 the victim, a 21-year-old woman, had been in the centre of Kingston upon Thames. CCTV footage showed the appellant following the victim to a bus stop at around 4.50 am. The victim first noticed the appellant sitting on a bench near the bus stop. As she waited for the bus the appellant approached her on more than one occasion to ask for directions to a fast food restaurant and to ask which bus went to Feltham. The victim's bus arrived shortly afterwards. She boarded the bus and went upstairs to the upper deck not knowing that the appellant had boarded and was sitting in the lower deck.

6. The victim got off the bus in Teddington and saw the appellant. The appellant began to follow her. She crossed the road on a number of occasions and altered her route, only to find that the appellant was still behind her.

7. After a while the victim heard the appellant approaching and began to film what was happening on her mobile phone. The footage from her phone demonstrates that she repeatedly and clearly told the appellant to stop following her. She told the appellant that she was a vulnerable female.

8. The appellant ignored what she said. He removed a black glove from his jeans and placed it on his right hand. He continued to follow the victim. She stopped recording on her phone and telephoned the police at 5.17 am. She was put on hold. The appellant approached her and pushed her, causing her to fall to the ground. He took her phone and ended the call.

9. The victim, who was crying, got up and made her way to a block of flats in the hope of attracting someone's attention but the appellant caught up with her. He put both his hands around her neck so that she could not breathe. She fell again to the ground and began kicking at the appellant, while screaming at him and telling him to get off her.

10. Two of the residents in the block of flats shouted at the appellant who walked away from the scene, throwing away the victim's phone as he did so. One of those witnesses thought that the appellant was attempting to rape the victim. The appellant boarded a bus going towards Heathrow. Police officers arrived on the scene and spoke to the victim, who was seen to have some redness to her neck, a bruise and scratch to her thumb, and some grazing to her legs.

11. Police officers located the bus on which the appellant was travelling. The bus driver told the police that he had seen the appellant discard a glove at the bus stop and the glove was subsequently recovered. Police officers spoke to the appellant who appeared agitated and a decision was taken to handcuff him for the safety of the police. The appellant thereafter swung out and hit a police officer to the cheek. He was then pepper sprayed, handcuffed and arrested. He began crying, stating that he had taken an overdose outside a nightclub. On placing the appellant in the van one police officer was bitten twice by him. Another police officer was headbutted. A third police officer sustained an injury to his thumb as he tried to hold the appellant's head.

12. The appellant was taken to hospital and then into custody where he was interviewed on 12 June 2023 in the presence of a solicitor and an appropriate adult. He initially remained silent but then gave an account in which he said that the victim had hit him on the head with a vodka bottle and they began to fight. He stated that he had not intended to rape the victim. He accepted assaulting the police officers and stated that he had voices in his head.

13. The appellant was aged 31 at the date of sentence. He had 26 previous convictions. Notably, on 9 June 2016 in the Crown Court at Lewes he had been sentenced for five offences, including a section 62 offence committed in March 2016. He had received an extended sentence of 7 years' imprisonment comprising a custodial element of 4 years and an extended licence period of 3 years. He was released on licence in relation to that extended sentence on 28 January 2020 but was recalled to prison 3 days later. He was thereafter released on 28 April 2023 (his sentence expiry date). The present offences were committed only 6 weeks or so after he had completed the earlier sentence.

Sentencing Remarks

14. In her sentencing remarks the judge set out the facts. She noted that the appellant had given an untrue account in interview, seeking to excuse and minimise his conduct by blaming the victim. She noted that the appellant had told the author of the pre-sentence report that he had taken an overdose the night before and that he had been drinking and taking drugs. The judge did not believe the appellant's account of taking drugs on the ground that toxicology testing was negative.

15. The judge observed that the appellant had at no stage given an account of what he intended to

do to the victim, save that he had in his interview denied that he intended to rape her. She concluded: "The fact that you got the victim on the ground, tried to force her legs apart, and appeared to an independent witness to be trying to rape her leads to the inescapable conclusion that the sexual offence you were trying to commit was rape." She added: “That is the prosecution case, and the basis upon which you are to be sentenced."

16. In relation to the kidnap, the judge correctly stated that there was no offence guideline. She considered the various factors in *R v Needham* [2022] EWCA Crim 545, [2022] 2 Cr. App. R. (S.) 44. As regards the length of the detention, she observed that the period of detention was short but that the appellant had demonstrated persistence. As regards the circumstances of the detention, the appellant had followed the victim onto the bus, stayed on the bus, and followed her off the bus and through the streets in the early hours of the morning for a period of over 30 minutes. In respect of violence the appellant had strangled the victim which could have led to loss of consciousness or worse. No weapon had been used. As demonstrated by the use of a glove, the kidnap was planned. The offence was associated with other criminal behaviour, namely an intention to rape and strangulation.

17. In relation to the section 62 offence, the judge stated that the sentencing guideline for the offence of rape assisted in determining the appropriate sentence. She said that the ordeal must have been terrifying. There had been a significant degree of planning because the appellant had targeted a young woman alone at a bus stop having gone out equipped with a glove. He had followed her on and off public transport, kidnapped and strangled her, with the intention of raping her. She concluded that those factors made it a Category 2A offence which had a starting point of 10 years' custody and a category range of 9 to 13 years' custody. She added that there needed to be a downward adjustment because the appellant had intended but did not commit the rape.

18. The judge briefly noted the seriousness of each of the counts of assault of police officers concluding that they passed the custody threshold. She then turned to the aggravating factors of the appellant's offending as a whole. She gave details of his lengthy criminal record. In particular she set out the facts of the appellant's first section 62 offence for which he had been sentenced in June 2016. In the early hours of the morning he had followed a young woman, pulled her into an alley, put his hand around her throat and forced her legs apart. The woman had screamed but managed to get away and to call the police. The judge properly emphasised the similarities between the facts of that offence and the facts of the offences for which she was sentencing the appellant.

19. By way of mitigation the judge took into consideration that the appellant had mental health difficulties and a care package. She took into account a letter from the appellant's parents and accepted that the situation was very difficult for them.

20. The judge dealt with the Overarching Guideline on Sentencing Offenders with Mental Disorders. She set out in detail the appellant's history of serious mental health problems including ASD, ADHD, anti-social personality disorder and factitious disorder. On the basis of a psychiatric report by Dr Abu Shafi and the pre-sentence report, she concluded that the appellant's mental health problems did not significantly reduce his culpability and did not provide significant mitigation.

21. Turning to the appellant's guilty pleas, the judge determined that he was entitled to a full one-third discount for counts 4 to 7. In relation to counts 1 and 2 the judge noted that the charges had not initially been framed in the same terms as in the final indictment. Nevertheless, she determined that the appellant was entitled to only a 25% reduction as he had not indicated his guilt to the underlying conduct at the first opportunity. There is no longer any challenge to the judge's approach.

22. On the basis of the reports, the judge gave detailed reasons for concluding that the appellant was dangerous pursuant to sections 285 and 308 of the Sentencing Act 2020. She went on to consider whether, in light of her finding that the appellant was dangerous, she was required to impose a life sentence. She stated that the seriousness of the section 62 offence and the kidnap justified such a sentence. The appellant had committed a previous section 62 offence for which he had received an extended sentence of imprisonment. The present offence had been committed in a matter of weeks after his release from the custodial part of that extended sentence. The appellant had consistently refused to engage with therapeutic interventions which may have reduced the risk that he posed to the public. The risk of his committing further serious violent offences remained high. Neither a determinate sentence of imprisonment nor an extended sentence could adequately address the risk that he posed. The judge held that the only appropriate sentence was a life sentence under section 285(3) of the Act.

23. In setting the minimum term the judge stated that if she had been sentencing the appellant to a determinate sentence, taking account of all the aggravating and mitigating factors, she would have sentenced him after a trial to 10 years' imprisonment; his guilty plea would have reduced that sentence to seven years and six months' imprisonment. He would have served up to two-thirds of that sentence in custody. It followed that the minimum term was five years before deducting the number of days that he had spent on remand in custody. Having made the appropriate deduction, the minimum term was, as we have indicated, four years and 130 days. She then proceeded to impose the sentences for each offence in the terms we have already stated.

Ground of Appeal

24. In her written and oral submissions Ms Francesca Levett submits that the judge was wrong to conclude that the appellant's intention was to commit the offence of rape which was not an inescapable inference in light of the evidence. The evidence on which the judge had relied was too speculative. She emphasises that the relevant sexual offence was not identified in count 1 of the indictment. She says that the prosecution only made it clear that count 1 covered kidnap with intent to rape after a plea had been entered. She submits that the prosecution ought to have made it clear from the outset that the intention they sought to prove was an intention to rape.

25. Ms Levett criticises the judge for concluding that in the absence of a written basis of plea the appellant had to be sentenced on the basis of the prosecution case rather than on the basis that an intention to rape was the only fair conclusion to be drawn from the evidence. The appellant's guilty plea was treated as an admission to the most severe form of the offence. Requiring him to supply a basis of plea would have led to him having to give evidence,

placing him in a worse position than if he had pursued the case to trial when he would have been entitled to test the evidence but remain silent.

26. Ms Levett submits that the factual basis upon which the judge imposed the sentence on count 1 was contradicted by the prosecution evidence. The evidence adduced by the prosecution was consistent with some lesser sexual offence such that the judge was required to sentence the appellant on the least adverse basis.

27. Ms Levett submits that the judge's error in sentencing the appellant on the basis of an intention to rape renders the life sentence manifestly excessive. A determinate or extended sentence of imprisonment should have been passed in relation to counts 1 and 2. In the alternative, if a life sentence was justified, the notional starting point of 10 years was too high for the offending and ought to be reduced.

28. In the written Respondent's Notice which she has adopted today, Ms Emma Smith resists the appeal on the basis that the judge was entitled to sentence the appellant on the basis of an intention to rape. The judge had not made any error in her factual findings. The appellant was aware that the case was put against him as involving an intention to rape, as set out in the prosecution sentencing note before the judge. He had nevertheless declined to submit a basis of plea and had declined a *Newton* Hearing. Ms Smith submits that the grounds of appeal failed to identify an error in the judge's findings or approach. The decision to impose a life sentence was justified and a minimum term was not manifestly excessive.

Legal Framework

29. In *R v Pacurar* [2016] EWCA Crim 569, the court considered the effect of the prosecution's failure to specify any particular sexual offence in a charge of trespass with intent to commit a sexual offence under section 63 of the Sexual Offences Act 2003. The court noted the absence of authority on the point but did not hold that the indictment was invalid or that the failure to give further particulars of the offence rendered the conviction unsafe in itself. Rather, in dismissing the appeal against conviction the court focused on the fairness of the proceedings. On the facts, the trial was “undoubtedly fair” (paragraph 33) as there had been ample safeguards for the appellant. Both he and the jury knew the case that he had to meet (paragraphs 33 to 34). The court went no further than to observe that prosecutors in future cases may wish to put more details into the body of the particulars of a section 63 offence.

30. We should also refer to *R v Tolera (Nathan)* [1999] 1 Cr App R 29 in which the court considered the procedure to be adopted where there may be a discrepancy between the basis upon which a defendant pleads guilty and the case presented by the prosecution. In a judgment given by the Lord Bingham LCJ, the court held at 31F to 32G:

> "The procedure raises no problem in a case where a defendant pleads not guilty and is convicted. That leads to the facts being fully contested before the judge and he is then in a position, known to counsel, to make his own judgment on the facts of the case. The position may however be different where the defendant pleads guilty. In the ordinary way sentence will then be passed on the basis of the facts disclosed in the witness statements of the

> prosecution and the facts opened on behalf of the prosecution, which together we shall call the 'Crown case', unless the plea is the subject of a written statement of the basis of the plea which the Crown accept. The Crown should however consider such a written basis carefully, taking account of the position of any other relevant defendant and with a reasonable measure of scepticism. If the defendant wishes to ask the court to pass sentence on any other basis than that disclosed in the Crown case, it is necessary for the defendant to make that quite clear. If the Crown does not accept the defence account, and if the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of a *Newton* hearing to resolve the issue. The initiative rests with the defence which is asking the court to sentence on a basis other than that disclosed by the Crown case.
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> …
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> A different problem sometimes arises where the defendant, having pleaded guilty, advances an account of the offence which the prosecution does not, or feels it cannot, challenge, but which the court feels unable to accept, whether because it conflicts with the facts disclosed in the Crown case or because it is inherently incredible and defies common sense. In this situation it is desirable that the court should make it clear that it does not accept the defence account and why. There is an obvious risk of injustice if the defendant does not learn until sentence is passed that his version of the facts is rejected, because he cannot then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing can be held and evidence called to resolve the matter. That will ordinarily involve calling the defendant and the prosecutor should ask appropriate questions to test the defendant's evidence, adopting for this purpose the role of an *amicus*, exploring matters which the court wishes to be explored…".

Discussion

31. The offence guideline for section 62 offences states that:

> "The starting point and range should be commensurate with that for the preliminary offence actually committed, but with an enhancement to reflect the intention to commit a sexual offence.
>
> The enhancement will vary depending on the nature and seriousness of the intended sexual offence but 2 years' custody is suggested as a suitable enhancement where the intent was to commit rape or assault by penetration."

32. Although directed to the guideline by Ms Smith at the sentencing hearing, the judge did not deal with it. However no point is taken that this omission made the sentence either wrong in principle or manifestly excessive. Nor is any point taken that the overlap between counts 1

and 2 should affect the overall sentence.

33. The appellant advanced no credible account of what he intended to do. In his police interview he was asked: "Did you intend to rape her?" To which he replied "Stop please" before returning to making no comment to questions about his intention. At a later point in the interview he provided police with an account of a fight which he blamed on the victim. He was asked: "You are telling me you had no intention to rape her?" To which he replied: "No, the intention wasn't to rape her." He did not however put forward any positive account of any intention to commit any sexual offence, simply saying that he intended to hurt the victim when she tried to attack him with a vodka bottle. Given his guilty plea to the section 62 offence, that account must be discounted. It was plainly untrue.

34. As the appellant is bound to accept, he pleaded guilty to all offences on a "full facts" basis rather than on any basis of plea. He declined the opportunity of a *Newton* hearing. Other than his untrue account in interview, he failed to advance any alternative to the prosecution case.

35. The relevant sexual offence was not specified in the indictment. We have been directed to no authority for the proposition that the indictment was thereby defective. As we have indicated, in *Pacurar* the court considered whether the proceedings had been unfair. The case concerned a section 63 offence and was an appeal against conviction. We see no reason not to adopt a similar approach in relation to a section 62 offence and in relation to a guilty plea. We shall therefore consider whether the proceedings were fair.

36. The prosecution's sentencing note stated that the appellant's intention was to rape the victim. It was uploaded to the digital case system some months before the sentencing hearing. The appellant had ample opportunity to advance an alternative case and to seek a *Newton* hearing before he was sentenced. It is right to note that Ms Levett directed the judge's attention to aspects of the evidence which, she submitted, were consistent with an intention to commit a lesser sexual offence than rape. By failing to advance any account of his own, the appellant took the risk that the judge would reject those submissions. He had already incriminated himself by pleading guilty. It is inapt to refer to the right to silence. If he had wanted to challenge the prosecution case the appellant could and should have done so. There was no unfairness.

37. The judge was not required to sentence the appellant on the version of events most favourable to the appellant. On the contrary and in accordance with the principles stated in *Tolera*, the judge was bound to sentence the appellant, in the ordinary way, on the basis of the prosecution case as supported by the unchallenged prosecution evidence.

38. There was ample evidence on which the judge could be sure that the appellant intended to rape the victim. He targeted her by getting onto the same bus and then following her. He put on a single glove which (as the judge properly and unsurprisingly found) was part of the plan to attack a lone woman by covering her mouth to prevent her from biting him. When the victim reached the block of flats he pushed her to the ground. When she got up he persisted in trying to overcome her resistance by grabbing her by the neck, choking her, pushing against her and standing over her. In his police interview the appellant admitted that he went

downwards towards the victim who had her legs spread apart, albeit that he said that he had fallen on top of her. One of the residents within the block of flats said that the appellant was on top of the victim and that he was trying to open her legs. The appellant had recently been released from the June 2016 sentence for very similar conduct. The victim of that earlier offence had reported that the appellant had tried to rape her. On the basis of these multiple strands of the evidence, the judge was entitled to conclude to the criminal standard that the appellant intended nothing less than rape.

39. Having found that the appellant intended rape, the judge's finding that the appellant was dangerous and her conclusion that the seriousness of his offending was such as to justify the imposition of a sentence of imprisonment for life are not open to criticism. Her approach to the application of the statutory provisions and the way in which she reached the appropriate minimum term were proper and adequate. We have neither read nor heard anything to persuade us that the judge made any error of law or of approach. It was open to her to set the minimum term at 4 years and 130 days. The overall sentence was neither wrong in principle nor manifestly excessive.

40. For these reasons, while we are grateful for Ms Levett's helpful submissions, this appeal is dismissed.