IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
HHJ CHRISTOPHER MORGAN T20227202
Neutral Citation Number: [2024] EWCA Crim 1644

CASE NO 202402024/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 11 December 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE GARNHAM

RECORDER OF MANCHESTER
(HIS HONOUR JUDGE DEAN KC)
(Sitting as a Judge of the CACD)

REX
V
THOMAS BLACK

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR H GODFREY KC appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE MACUR:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, no matter relating to the victim in this case shall, during her lifetime, be included in any publication if is likely to lead members of the public to identify her as the victim of the offence. This prohibition will apply unless waived or lifted in accordance with section 3 of the Act.

2. On 20 November 2023, the appellant changed his plea to guilty for the offence of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003. Two other counts indicting him with rape and further assault by penetration respectively were subsequently ordered to lie on the file on the usual terms. On 12 January 2024, he was sentenced to 8 years' imprisonment. Other ancillary and orthodox orders were made.

3. He appeals against sentence with leave of the Full Court, upon the sole ground that the sentence inadequately reflected his mental ill-health. The Full Court granted an extension of time in order for him to bring the appeal. He is represented by Mr Godfrey KC, who did not appear below.

4. Prosecution counsel lodged a skeleton argument at the direction of the Full Court. We are grateful to Mr Potts (prosecution trial counsel). Upon receipt, we considered that the attendance of counsel on behalf of the prosecution was unnecessary to assist further on the issue in this appeal.

The Facts

5. On 24 November 2019, the appellant and his friend met C and her sister whilst they were all out celebrating the season. They had not previously known each other. The four remained drinking and socialising together throughout the evening before the appellant drove them all to C's sister's home. More alcohol was purchased en route and there was a further stop at a local pub in order to have another drink.

6. The complainant subsequently described herself as "a walking drunk" at that stage. Once at the house the four changed into more comfortable clothing and began drinking again. The appellant's friend however left before the incident took place which formed the basis of the indictment.

7. The complainant began to feel ill and vomited several times, as the appellant would have observed, for he himself indicated in interview that he had assisted her in the bathroom. Once back in more comfortable surroundings the appellant removed the complainant's jogging bottoms that she had been wearing and penetrated her vagina digitally. C described the room as "spinning" at this point. She said she felt paralysed and unable to move or speak. She began to cry and asked for her sister. The appellant put the complainant's jogging bottoms back on and said, "Nothing happened between us" before helping her to her sister's room. The appellant then left the complainant's sister's home and returned to his car in the early hours of the morning.

8. On 26 December 2019, he was arrested and his mobile phone was seized. In interview that followed the appellant insisted that C had been consenting to what had happened between them. He was bailed. His mobile phone was analysed thereafter, and that

revealed photographs of the appellant digitally penetrating C's vagina and of photographs of her exposed breasts. It then became apparent that he had circulated the images on a WhatsApp group to approximately six other participants. In a subsequent interview, the appellant claimed that C had been aware of the images that he had taken and had not objected. However, he said he regretted circulating the images.

9. C, when asked, denied that she was aware that the images had been taken, nor consenting for them to be taken and was understandably mortified to think that such images had been distributed to others.

10. There is no question, as Mr Godfrey makes clear, but that the judge in sentencing this offence was correct in his categorisation of it as falling into level 2A harm and culpability of the Sentencing Guidelines applicable in sentencing sexual offences. Equally, there is no question that, but for the issue of the appellant's mental health, that the sentence would be unappealable and, if anything, tends towards the lenient.

11. There were multiple factors of harm and culpability. This was a serious and sustained sexual assault carried out upon a vulnerable victim. C's vulnerabilities were all too apparent (or should have been) to the appellant. She was conspicuously inebriated and unable to physically resist the appellant (as he would have known) and she had revealed her own mental health difficulties to him in conversation.

12. The impact upon C has been quite devastating, not least caused by the further humiliation and degradation associated by the dissemination of the images. The offender had

recorded the assault and he had encouraged C to continue to drink. These factors would themselves have caused the judge to move up in the category above the starting point. There were also aggravating features, not least, that the location of the offence and the fact that the appellant had sought to quieten and deceive the complainant by indicating that nothing had happened.

13. An immediate term of imprisonment was inevitable, as Mr Godfrey recognises. There was no basis upon which the judge was entitled to consider any sentence other than custody; there was no suggestion that a Hospital or Hybrid Order was applicable in the circumstances. As we indicate above, the issue in this appeal is the weight given to the mitigation put forward regarding the appellant's mental health disorder at the time of sentence.

14. On the appellant's return home after committing the offence he struck a pedestrian. It was a fatal collision. The appellant was subsequently convicted of failing to stop after an accident and has been sentenced for that offence. News of the fatality was apparently the trigger for the appellant's mental health decline. There is a well-evidenced diagnosis of post-traumatic stress disorder. We do not refer to the medical records or other reports beyond commending the Community Sentence Treatment Requirement court report that was prepared for the sentencing hearing. This report was well articulated, balanced and gave considerable information to the sentencing court.

15. We know therefore that the appellant suffered and may well continue to suffer flashbacks of dead people. We accept, although this is less well documented, that whilst awaiting

trial, this appellant made three attempts of suicide - one of which led to his compulsory admission to hospital in 2023. We also note that he was in the fortunate position to be able to access therapy through private funding to manage the symptoms of his condition.

16. The sentencing judge acknowledged the evidence of the appellant's PTSD. He rightly concluded that it did not impact upon the appellant's culpability for the sexual assault. However, neither did he regard it to impact upon the sentence he would otherwise impose. In his sentencing remarks, he stated:

> "As far as mental health is concerned, again I bear that in mind but it doesn't have a significant impact as far as you are concerned in mitigation because it arose out of what happened on the road as you drove home."

17. Mr Godfrey, in his written advice on appeal, has indicated that there were other reports that were not before the sentencing judge which he is able to provide if necessary. We made clear that if there was any point upon which he intended to rely contained within them, then he should do so. He did not do so. Instead he sought to produce as 'fresh evidence', that is evidence that was not before the sentencing judge, a report of Joanne Huntley dated 24 March 2024. We have read the same de benne esse but it does not seem to us to take the matter any further for the purposes of this appeal. Joanne Huntley was the appellant's therapist before his sentence; she cannot provide information as to the up-to-date position or the impact of prison life upon his PTSD.

18. Mr Godfrey, also in his written advice on appeal, indicates that the appellant has been seen at least once, if not more often, by a psychiatrist whilst he has been in prison. He

continues to take prescribed medication which are antidepressants and sleeping tablets; the suicide watch to which he was subjected has been reduced from half hourly to 2 hourly. However, remarkably there is no documentary evidence produced regarding this. Nevertheless, in the circumstances, we are content to proceed on the basis that this appellant's mental state continues to be fragile.

19. PTSD is a mental disorder listed in annex A of the Overarching Sentencing Guideline for Sentencing Offenders with Mental Disorders, Developmental Disorders or Neurological Impairments and therefore the guideline is applicable. The relevant sections of the guideline, insofar as this appeal is concerned, are worth repeating here:

> "Section one: General approach.
>
> 1. This guideline applies when sentencing offenders who at the time of the offence and/or at the time of sentencing have any mental disorder, neurological impairment or developmental disorder, such as those listed within Annex A.
>
> 2. The fact that an offender has an impairment or disorder should always be considered by the court but will not necessarily have an impact on sentencing.
>
> 3. There are a wide range of mental disorders, neurological impairments and developmental disorders and the level of any impairment will vary between individuals. Accordingly, in assessing whether the impairment or disorder has any impact on sentencing, the approach to sentencing should be individualistic and focused on the issues in the case...
>
> Section three: Determining the sentence.
> Sixteen General principles.
>
> - Impairments or disorders experienced by the offender are factors which sentencers are required to consider at Step 1 (where the impairment or disorder is linked to the offence) or at Step 2 (where it is not linked to the offence) when

considering the stepped approach set out in offence-specific guidelines.

- Impairments or disorders may be relevant to the decision about the type of sentence imposed, in particular a disposal under powers contained in the MHA
- Impairments or disorders may be relevant to an assessment of whether the offender is dangerous as that term is defined for sentencing purposes in Chapter 6 of Part 10 of the Sentencing Code...

22. Custodial sentences. Where an offender is on the cusp of custody or detention, the court may consider that the impairment or disorder may make a custodial sentence disproportionate to achieving the aims of sentencing and that the public are better protected and crime reduced by a rehabilitative approach. Where custody or detention is unavoidable, consideration of the impact on the offender of the impairment or disorder may be relevant to the length of sentence and to the issue of whether any sentence may be suspended. This is because an offender's impairment or disorder may mean that a custodial sentence weighs more heavily on them and/or because custody can exacerbate the effects of impairments or disorders. In accordance with the principles applicable in cases of physical ill-health, impairments or disorders can only be taken into account in a limited way so far as the impact of custody is concerned. Nonetheless, the court must have regard both to any additional impact of a custodial sentence on the offender because of an impairment or disorder, and to any personal mitigation to which their impairment or disorder is relevant."

20. The sentencing exercise for the judge in this case was undoubtedly more complicated in the circumstances in which a significant term of custody was inevitable. However, regrettably, the judge's dismissal of the appellant's mitigation relating to his mental health appears to conflate the cause of the post-traumatic stress disorder with effect. That is, regardless of the cause of the post-traumatic stress disorder, the guideline makes clear that it can be taken into account in sentencing. However, we ultimately conclude that, even despite the judge's analysis of the impact of the appellant's mental health upon sentence, in reality this is one of those cases where he could not be said to have been in

error to conclude that it could only be taken into account in so limited a way as to mean that a custodial sentence of 8 years' imprisonment was warranted.

21. Mr Godfrey concedes that the judge correctly categorised the harm and culpability of the extant offence. His submission is that we should proceed on the basis that the obvious inference to draw is that this appellant's post-traumatic stress disorder is such that it will inevitably impact upon him, and therefore a lengthy custodial term will be more severely felt by him than by someone who does not suffer from the same disorder.

22. Whilst there is some merit in that submission, it is not particularly well supported in the materials that we have before us. What is more, Mr Godfrey also conceded that the reduction that was appropriate was of a relatively marginal period. We note that the judge in this case afforded somewhat more, although only little more, than 10 per cent reduction for plea on the day of trial.

23. We bear in mind all the circumstances of the offence and have taken into account that which we know, and which we assume in this appellant's favour, regarding his mental health disorder. Nevertheless, bearing in mind the inevitability of the length of custodial sentence that was warranted, we are not persuaded that this custodial term of 8 years was manifestly excessive. We therefore dismiss the appeal.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk