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Neutral Citation No. [2025] EWCA Crim 207

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT SNARESBROOK  
(MR RECORDER PEART KC [01GD1269623])

Case No 2024/04548/A4

Friday 21 February 2025

**B e f o r e:**

**LORD JUSTICE DINGEMANS**

**MRS JUSTICE CHEEMA-GRUBB DBE**

**THE RECORDER OF HULL AND THE EAST RIDING**  
**(His Honour Judge Thackray KC)**  
**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v -**

**SOBIJORN BOLTAEV**

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**Mr W Martin** appeared on behalf of the Attorney General

**Miss Y Kramo** appeared on behalf of the Respondent

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**J U D G M E N T**

Approved

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## **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 is considered to be unduly lenient. The issue raised in the Reference is whether the Recorder below had correctly categorised the offences charged, the sexual assault, contrary to section 3 of the Sexual Offences Act 2003 (count 1), and the assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (count 2). The difference in categorisation arose for both offences because the Recorder found the victim of the offending to be "vulnerable", but not "particularly vulnerable" for the purposes of the offence specific guidelines.

2. On 21 June 2024, following an eight day trial in the Crown Court at Snaresbrook before Mr Recorder Peart KC and a jury, the offender was found guilty on both counts. The issue in the case was identification. The victim, who was unable to identify the offender, had given evidence by way of video interview with the police. There was no cross-examination of her. The victim has the benefit of lifelong anonymity, pursuant to the provisions of the Sexual Offences (Amendment) Act 2002.

3. On 29 November 2024, the offender was sentenced by the Recorder to three years' imprisonment for the assault by penetration and to a concurrent term of three months' imprisonment for the sexual assault.

4. It is submitted on behalf of the Solicitor General that the victim was "particularly vulnerable". She could not remember leaving the bar; she went the wrong way; she was alone at night; and it was raining. Further, if the sentence is increased, the Solicitor General submits that the court should find that the offender is dangerous for the purposes of sections 279 and 280 of the Sentencing Act 2020, and impose an extended sentence.

5. It is submitted on behalf of the offender that the contention that the victim was "particularly vulnerable" was wrong. She was not profoundly intoxicated. The amount she had drunk was not said to be abnormal for her, and her intoxication was not at such a level that she was incapable of looking after herself. The Recorder had had proper regard to the authorities; he had regard to the difference between being "vulnerable" and "particularly vulnerable"; and he was best placed to assess the weight to be given to the relevant factors in the sentencing exercise.

6. We are grateful to Mr Martin and Miss Kremo for their helpful written and oral submissions.

### **Factual Circumstances**

7. On the afternoon of 22 July 2023, the victim had been on a date in Dalston. It began at 3 pm. She and her date were drinking alcohol. She had three pints of cider at a café, and another two pints of cider at a nearby public house. The two of them went back to the date's house, where they drank tequila. She thought that she had had about five shots, as well as a can of vodka and soda.

8. The victim later went to meet her friends for a birthday party at a bar called "All My Friends" in Hackney Wick. She arrived after 11 pm. She had a drink – a rum and coke, she thought – upon arrival.

9. She remembered chatting to her friends and dancing. Two of her friends described her as "uncharacteristically drunk". She was seen by one of them to fall over. Another friend said that she was "drunker than usual"; although another friend did not notice anything "out of the ordinary" about her.

10. After having a drink of rum and coke, the victim remembers feeling very sick and going outside for some fresh air. However, she does not remember going outside, nor indeed any timescale. From that point she reported a significant gap in her memory of events. She told the police that she had never "blacked out like that before".

11. The CCTV evidence shows that the victim left the bar at about 38 minutes past midnight. She did not say goodbye to any of her friends, nor did she collect any of her possessions – including her phone, her purse and umbrella – and it was raining. The CCTV footage shows her sitting alone in a seating area. She can be seen to be slightly unbalanced on her feet as she left the bar. There was a dispute between the prosecution and the defence as to whether she was unsteady, but nothing really turns on that, because she carried on walking. It is apparent that the victim had no idea of where she was going. She was not walking in the direction of her home or to any address which was apparently known to her.

12. The CCTV footage shows that she walked around in the rain for about half an hour. She ended up on a deserted service road on the edge of the Olympic Park bordering the A12. The offender cycled past her as she was walking. At that stage the offender was working as a delivery driver. He turned his bike around and approached her. She was sitting by a metal

barrier at the side of the road, but she had no memory of how she got there. It was around 1.11 am and she was on North Wall Road. She was crying. It was raining. She leaned on his shoulder. She reported that he seemed friendly and initially comforted her, telling her "It's okay".

13. He then grabbed her face and kissed her on the mouth (count 1, sexual assault, for which he was sentenced to a concurrent term of three months' imprisonment). The victim pulled away and said that she had to meet her friends. The fact that she was able to pull away is relied on to show that, although vulnerable, she was not particularly vulnerable at the time.

14. The offender persisted. He walked her along the road to some nearby bushes. The fact that she was easily led to the bushes is relied on by the Solicitor General to show that she was particularly vulnerable. There, the offender pulled her to the ground. It was wet and muddy. He got on top of her and pinned her down by the arms. He was stronger than her. She told him repeatedly to let her go, that she was not interested and wanted to leave. He ignored her. She was wearing a short one-piece jump-suit that fastened up at the back of her neck. The offender tried to get into it but struggled to do so. He then pushed his hands up her shorts and touched her vagina. She was shouting and screaming, trying to make as much noise as she could, but there was no one around. The offender then penetrated her vagina using his fingers. She recalled the act being forceful, deep, and uncomfortable (count 2, the assault by penetration, for which he received three years' imprisonment).

15. The victim managed to break free from the offender by kicking him a number of times. She got to her feet and ran out of the bushes and along the road. The CCTV footage shows that the offender and the victim had been in the bushes for about six minutes. She flagged down a passing vehicle. The driver phoned the police on her behalf and waited with her until they arrived.

16. The victim was medically examined on 23 July 2023 and was found to have abrasions to her back and the back of her elbow. An intimate examination showed that she had minor abrasions in the perineal and perianal areas.

17. The offender was identified following a police investigation which was carried out with considerable care and skill. It began with an analysis of the CCTV footage from cameras surrounding the area. The offender could be seen running from the bushes where the assault had taken place. He got on the bike, which had an identifiable Deliveroo box on the back of it.

18. On 22 August 2023 police attended Westfield Shopping Centre, where they identified the offender's bike. Police saw the offender collecting an order. Subsequent CCTV footage analysis showed him on the evening of 22 July 2023 collecting two other food orders from Westfield.

19. Enquiries with Deliveroo revealed that the deliveries were made using the same rider account number. That was registered to a third party who had made an arrangement to allow others to use the account to earn money. This included the offender, who at that stage had no legal right to work in this jurisdiction.

20. Enquiries revealed that the offender's mobile phone was linked to the account at the relevant times. Cell-site analysis placed the offender in the location of the assault at the relevant time, and tracked his journey back to his home address in Forest Gate.

21. On 1 September 2023, the offender was arrested at Westfield Shopping Centre. He was taken to Bethnal Green Police Station where he was interviewed under caution. He answered "No comment" to all questions.

### **The Proceedings**

22. The offender was charged on 2 September 2023. On 5 September 2023 he appeared at Thames Magistrates' Court and was committed to Snaresbrook Crown Court. He was arraigned on 12 June 2024, when he entered not guilty pleas.

23. After the trial and conviction, the Recorder had the benefit of a pre-sentence report. The author of the report noted that the offender continued to deny the offences and assessed him as being at a high risk of committing offences causing significant harm to women. That assessment was based mainly on his denials and the OASys offence analysis.

24. The Recorder took count 2 as the lead offence. He said that it was culpability B, which was agreed between the parties. He said that harm was less straightforward, because the prosecution submitted that it was category 2 harm, whereas the defence submitted that it was category 3 harm. The Recorder said:

"While on the evidence it is clear that you took advantage of a lone woman who was rendered vulnerable by the amount of alcohol she had consumed, and the location in which she found

herself, the issue I have had to consider is whether she could be considered to be particularly vulnerable, which is the phraseology adopted by the Sentencing Guidelines and indeed by the courts. On that hinges my decision as to whether this was a Category 2 or a Category 3 harm case. ...

... it is conceded that [the victim] was in a vulnerable position due to the location and timing of the offence and due to her intoxication, but it is submitted that she was not a particularly vulnerable victim as contemplated by the Guidelines. This was not a situation in which the victim appeared to have been rendered insensible through drink or drugs or close thereto. [She] remained alert and conscious throughout the incident, notwithstanding that her subsequent recollection of events was impaired."

25. The Recorder referred to the cases of *R v Mosin* [2022] EWCA Crim 1863, which suggests that inebriation needed to be marked for the victim to be considered to be "particularly vulnerable"; and *R v Sabato* [2021] EWCA Crim 940. He said that, having seen the victim give evidence on the Achieving Best Evidence interview, there was insufficient evidence to suggest that she could be properly described as "particularly vulnerable", rather than as simply "vulnerable". The Recorder referred to the fact that the victim was walking, unaided, at a good pace and seems to have been able to extricate herself from the offender and to flag down a passing vehicle.

26. The Recorder noted the offender's mitigation: that he was then aged 26, and had not long turned 25 at the time that the offence took place; that he had no previous convictions; that he had never before been arrested or implicated in an offence in the United Kingdom or in Uzbekistan; that he was in regular employment; and that he sent money to his wife and 4 year old child in Uzbekistan who relied on his financial support.

### **The Offence Specific Guidelines**

27. There are three categories of harm for assault by penetration. The offending was categorised as category 3 harm by the Recorder, because factors in categories 1 and 2 were not present. The short point of dispute between the parties is the Solicitor General's submission that the victim was particularly vulnerable due to her personal circumstances. There are two

culpability levels – A and B – and it was common ground that this was culpability B offending.

28. The offence specific guideline for sexual assault also has three levels of harm and two culpability levels, A and B. It was again common ground that this was culpability B offending. The dispute about whether it was category 2 or category 3 harm mirrored the dispute in relation to the offence specific guideline for assault by penetration.

29. Category 2B for assault by penetration has a starting point of six years' custody and a range of four to nine years. Category 2B for sexual assault has a starting point of one year's custody and a range of high level community order to two years' custody. Category 3B for assault by penetration has a starting point of two years' custody, with a range of a high level community order to four years' custody; and category 3B for sexual assault has a starting point of a high level community order and a range of a medium level community order to six months' custody.

30. Aggravating factors for both offences include the location of the offence; the timing of the offence; and if "particularly vulnerable", the specific targeting of a particularly vulnerable victim.

### **The Reference**

31. The Sentencing Council guidelines are to be interpreted in accordance with the ordinary meaning of the words used. It is clear that a female who is alone at night and is intoxicated can be "particularly vulnerable": see *R v Sepulvida-Gomez* [2019] EWCA Crim 2174, [2020] 4 WLR 11; *Attorney General's Reference No 51 of 2015* [2015] EWCA Crim 1699 at [18]; *R v Gheibi* [2022] EWCA Crim 1863 at [28]; and *R v Moreno* [2023] EWCA Crim 131 at [19]. That will not be so in every case: see *Sabato* (above). Everything will depend on the particular circumstances. Further, the Court of Appeal Criminal Division will not interfere with findings of fact, including evaluative findings of fact, made for the purposes of sentencing by judges who have conducted trials, except in limited circumstances. One such circumstance where the court will interfere is where the judge has failed to reflect uncontroverted facts in findings and evaluative findings.

32. In the case with which we are concerned the Recorder seems to have been particularly influenced by the fact that the victim was walking, unaided, at a good pace, was able to extricate herself after being dragged to the bushes, and was able to flag down a passing vehicle. However, in making that assessment, the Recorder failed to take account of the fact that the victim's friends described her as "uncharacteristically drunk", the fact that she had fallen over while at the bar, she had left the bar without her phone, her purse and her other personal effects,

and had walked to a remote location unknown to her. She was outside in the rain at night (albeit it was summer). The victim was effectively acting on autopilot, and had no sense of the threat posed by the offender as he turned his bike around to come and sit beside her. Any fair evaluation of whether the victim was particularly vulnerable needed to take account of those factors, and so we revisit the finding.

33. In our judgment, in the circumstances of this case the Recorder was wrong to find that the victim was only "vulnerable" and not "particularly vulnerable". This case, in our judgment, reaches the high threshold of particular vulnerability. The victim was uncharacteristically drunk; she had fallen over; she had left the bar in inexplicable circumstances without her possessions; she had walked off in the rain in a random direction; she was alone on a deserted road; and she had a complete memory blank. We do not consider the fact that after the assault she was able to run away and flag down a vehicle, given the circumstances and her reaction to the assault, undermines the finding of "particular vulnerability".

34. We turn to the sentencing guidelines. Assault by penetration has a starting point of six years' custody. There will always be degrees of "vulnerability" and "particular vulnerability"; and within "particular vulnerability" there will be those who are at one end of the scale and those who are at the other. Although we consider that the Recorder was wrong not to find "particular vulnerability" in the circumstances of this case, we consider that the starting point should be adjusted from six years to a starting point of five years' custody to reflect some of the features which the Recorder identified.

35. We, like the Recorder, consider count 2 to be the main count. The criminality of the offending on count 1 will be taken into account on count 2, and for reasons of totality, count 1 will remain concurrent with the sentence on count 2. There are other aggravating factors of location, timing and the fact that the offender targeted the victim, but it is important, as Miss Kremo fairly pointed out, to avoid double counting because those are factors which have been taken into account in the assessment of particular vulnerability.

36. There is the mitigation of the offender's age, the fact that he was working and sending money home to his wife, his positive good character and absence of previous convictions.

37. In our judgment, having regard to the aggravating factors which outweigh the mitigating factors, from the starting point of five years, the lowest sentence that we can impose for the assault by penetration is one of five years and six months' imprisonment. For the sexual assault, there will be a concurrent term of nine months' imprisonment.



38. That brings us to the second part of the Solicitor General's submission, that is the issue of dangerousness. Sections 279 and 280 of the Sentencing Code provide for an extended sentence of imprisonment for specified offences, and these are specified offences, committed by offenders aged 21 or over, and the offender was over 21, where "the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences".

39. A pre-condition of a court imposing an extended sentence is that the sentence of imprisonment is at least one of four years: see section 280(1)(e) and (4). That condition is now satisfied.

40. Dangerousness was not considered by the Recorder. It is right that the author of the pre-sentence report considered that the offender was dangerous, but that appears to be because there was a denial of the offences and because of the OASys risk assessment.

41. We must take account of matters pointing the other way which include the fact that the offender was 26 years old, he had no previous convictions and had never before been arrested or implicated in an offence in the United Kingdom or Uzbekistan. He was in regular employment and he had a wife and child in Uzbekistan who relied upon him for financial support.

42. In all of those circumstances, although we consider that there is a risk of further offending, it is not a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. We therefore make no finding of dangerousness in this case.

43. Accordingly, for the detailed reasons set out above, we grant the Solicitor General leave to bring the Reference and we allow the Reference. We set aside the sentence of three years' imprisonment on count 2 and substitute for it a sentence of five years and six months' imprisonment. We set aside the concurrent term of three months' imprisonment on count 1 and substitute a concurrent term of nine months' imprisonment. We make no finding of dangerousness.

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

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