IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 20220989/A3

Neutral Citation No: [2022] EWCA Crim 1560

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 15 November 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MURRAY
HIS HONOUR JUDGE KATZ KC
(Sitting as a Judge of the CACD)

REX
V
BEN LISTER

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR D EMANUEL KC appeared on behalf of the Applicant

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person 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 the offence. To protect the identity of the victim in this case we shall refer to her throughout as "CB".
2. On 4 March 2022 in the Crown Court at Bradford, Ben Lister, then aged 36, was convicted of rape and assault by penetration. In relation to the rape he was sentenced to 10 years' imprisonment; in relation to assault by penetration a concurrent sentence of four years' imprisonment was imposed. He now renews his application for leave to appeal against sentence after refusal by the single judge. He has been represented for the purposes of today's hearing by Mr David Emanuel KC. He did not appear at trial. We are grateful to him for his written and oral submissions.
3. The offences occurred in 2016. On 28 August of that year the applicant, who then was aged 30, met with a group of friends in a bar in Halifax Town Centre. CB, who was then aged 20, was included in the group. Whilst the two knew of each other they were not friends in any real sense of the word. The group moved from the bar to a nightclub and ended up at the home of two of those in the group, a woman called Walker and a man called Rowley. Everyone had been drinking alcohol.
4. CB undoubtedly was drunk. She eventually fell asleep on a sofa in the living room. After everyone else went to bed the applicant came into the living room. He dragged CB onto the floor where first he digitally penetrated her vagina and then raped her. During this assault CB was drifting in and out of consciousness.
5. The next morning CB telephoned Walker, namely the girl at whose house she had spent

the night. She was upset. CB said that she was unsure whether she had had sex with the applicant. Later that day the applicant contacted CB via Facebook to ask if she was all right. She responded by asking if they had had sex. The applicant said "no" but they had engaged in oral sex.

6. A month later CB discovered she was pregnant. There was only one occasion on which pregnancy could have occurred. She then realised that she had in fact been raped by the applicant.

7. For a variety of complex and understandable reasons, CB did not report the matter until January of 2020. The applicant was arrested. He admitted that he had had sexual intercourse with CB but said that he had withdrawn before ejaculation. He said he was not the father of the child, although a later paternity test showed that he was.

8. The judge had a handwritten victim personal statement from CB. We rehearse some brief extracts from it. She said this:

> "I felt like she [the unborn child] missed out, like I was never going to be good enough for her because I sort of resented her. I was severely depressed at the time and still feel the same now. I can't explain how it feels to look at your child with nothing but guilt sometimes."

9. She went on to say:

> "When I sit and play with her now I do look at her and feel like she's a constant reminder of what he has done so me."

10. She explained that the child was "quite confused now and does ask questions such as 'why don't I have a daddy and my friends do' and it breaks my heart." She said that she knew by going to the police she was going to get pushed away by her friends, in

particular her best friend. She said the feeling that she suffered with was more like grief. She felt like she grieved for the loss of the friendship. She also described the psychological effect on her, the feeling of anxiety which had got so much worse over time. She said:

> "I suffered really bad and still do with my mental health side and did try and get in touch with a few places in the end but couldn't talk to them. I do struggle now with depression and anxiety really bad."

11. Those extracts are but a sample of the seven-page handwritten statement that CB prepared.

12. The applicant was of good character. He was a serving police officer at the time of the offence and thereafter. The judge had letters from colleagues in the West Yorkshire Police and others who knew the applicant well describing his exemplary character and his good service to the police.

13. In sentencing, the judge began by expressing the view that CB was somebody who was particularly vulnerable because of her personal circumstances. That was a reference to a harm factor in the Sentencing Council Definitive Guideline in relation to rape. He then referred to the applicant's position as a police officer. The judge acknowledged that the offence was not committed by the applicant using his position as a police officer. The judge said that the applicant's position brought a degree of trust whether he was on or off duty for those who knew him and who had an expectation as to how he would conduct himself. He said that on the night in question CB had returned to a house where she had stayed before and was entitled to feel safe. There came a point when she was reduced to a state of unconsciousness. In that state the applicant had taken advantage of her. He

had not worn any protection and the consequence of what he had done was devastating for CB. He referred to the fact that there had been contact between the applicant and CB in the immediate aftermath of the event. She asked whether the applicant and CB had had sex together and he referred to the applicant having "told the first of many lies". The judge expressed it this way:

> "You said that you hadn't [had sex] and you thought you had got away with it ... "

14. He referred to the fact that there had not for one moment been any remorse expressed by the applicant, in particular for the severe psychological consequences of what he had done. The judge referred, at least in brief passages, to the victim personal statement to which we have referred. Having set out what he regarded as the important parts of the victim personal statement he said: "This is in my view one of the gravest cases of harm as a consequence of rape that it is possible to imagine."
15. The judge referred to the applicant's good character. He said that he could give "little or no credit" for it. He went on to conclude that the combination of the harm factors were not of themselves sufficient to take the case from Category 2 into Category 1 in the guideline, but (perhaps confusingly) he said that the factors in Category 2 alone were sufficient to justify a sentence beyond the category range. He referred to the severe psychological harm, the victim's pregnancy and her vulnerability.
16. The judge identified that the range set out in the guideline was seven to nine years' custody. He concluded, although he did not use this expression, that the interests of justice would not be served by a sentence within that range, given the damage caused to CB. Thus it was he imposed a sentence of 10 years' imprisonment.

17. There are three grounds of appeal. First, there was no justification to increase the sentence beyond the range for a 2B offence. Second, no recognition that the harm factors were interrelated, which was relevant to the consideration of overall harm. Third, an error in concluding that the applicant's good character afforded no mitigation.

18. Grounds 1 and 2 were grounds considered by the single judge. Ground 3 is a ground raised for the first time on renewal. It requires the leave of the court if it is to be advanced. The hurdle for the applicant is a high one. We have to apply the principles a set out in James [2018] EWCA Crim 285. The critical question is whether it is in the interests of justice that we consider the new ground and so we shall look at it and consider it on its merits.

19. In our view grounds 1 and 2 go together. It seems to us the essence of the argument is as follows. Only three of the Category 2 harm factors of the eight set out in the guideline were present. There will be cases where even more harm factors are present, yet the case still would remain within Category 2. Thus it was wrong to go outside the guideline. Further, the judge did not identify any aggravating factors in addition to the matters set out under harm in the guidelines. In refusing leave the single judge did refer to aggravating factors but there was in reality no reason on that alternative basis to go beyond the category range.

20. We agree that there are eight harm factors in the guideline. We do not agree that considering the gravity of the factors in any particular case can be an arithmetical exercise, so that for instance if you have six factors that will always be worse than a case that only has three. That much is clear from the guideline itself. A case may be elevated to Category 1 from Category 2 by "the extreme nature of one or more Category 2 factors." This emphasises that the extreme nature of a single factor may lead to a

move up to the higher category of harm. Any sentencing exercise is qualitative not quantitative. We are wholly unpersuaded that this sentence can be impugned because there will be worse cases. This argument fails to recognise that worse cases in all likelihood would be elevated to Category 1 by reference to the very words of the guideline to which we have already referred. In addition, the sentencing range for Category 2B cases, namely seven to nine years, is narrow, particularly given the gravity of the offence with which the sentencing range is concerned. Wherever headroom is limited, as it is here, the argument that "it could be worse" is in our judgment of very limited value.

21. The single judge found that there were aggravating factors: the location and timing of the offence, namely at night in a friend's home where CB assumed she would be safe; the fact that the applicant was a police officer; the lies told by the applicant to CB which amounted to steps taken by him to prevent her reporting the incident. We consider that the single judge's assessment has merit. It has been argued that any victim of rape will consider that it has occurred in a place where she has to feel safe and that location in reality will not aggravate the offence of rape wherever it happens. On its face this proposition renders nugatory the factor referred to in the guideline. In our judgment it is well-established that it will aggravate the offence of rape to commit it somewhere where the victim has no expectation of any sexual activity. In this case it might have been the position that the applicant and CB had gone to whichever house it was and had engaged in some form of consensual activity short of intercourse. Had the activity then moved on against CB's consent to rape, it may well be that location would be of little moment. But that is not this case. In our judgment the single judge was right to draw our attention to location.

22. In relation to the applicant's status as a police officer, Mr Emanuel has cited to us cases amounting to instances of police officers committing offences in which it was said that their good record in the police was a mitigating factor. The cases cited did not establish guidance, rather they were cases on their own facts showing that good service as a police officer can be a mitigating factor. The principles such as they are expressed in those cases do not detract from the fact in this case that as the judge found CB was entitled to have a proper expectation of how the applicant as a police officer would behave.

23. It is also argued by Mr Emanuel that the lies in this case should not have been an aggravating factor. We acknowledge that the mere fact that a man lies about whether he has committed the offence of course will not be an aggravating factor. But here, as the judge found, these were lies told in the immediate aftermath of the event in the hope of putting CB off the scent. They were told deliberately for that reason by the applicant. As the judge put it, "so the applicant would get away with it". Lies in that circumstance do amount to an aggravating factor within the meaning of the guideline.

24. Taking all those matters into account, we consider that there can be no criticism of the sentence that eventually was arrived at by the judge.

25. In ground 3 criticism is laid at the judge for saying that he could give little or no credit for the good character of the applicant. Mr Emanuel cited to us the passage in the guideline which reads as follows:

> "In the context of this offence [namely rape], previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence."

26. Authorities have been cited to us, again not in any way authorities involving guidance, in

which reference was made to good character in the context of an offence of rape as being a matter that could and should be taken into account as mitigation. That may be so, but what we have to ask is whether this was a case in which what normally should be the case was something from which there should have been a departure. Given all of the circumstances, including the applicant's status as a police officer, we consider that the judge did not err when he gave little credit for good character. In our judgment, the overall approach of the judge was correct. The interests of justice do not require us to consider this ground because in our judgment it has no purchase on the facts of this case.

27. The consequence is that we come to the clear conclusion that the judge was entitled to impose the sentence he did. More particularly we come to the very clear conclusion that the proposition that this sentence was manifestly excessive is not arguable. It follows that the renewed application for leave to appeal will be refused.