IN THE COURT OF APPEAL
CRIMINAL DIVISION
NCN: [2023] EWCA Crim 1039

CASE NO 202301119/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 31 August 2023

Before:

LORD JUSTICE MALES

MR JUSTICE HOLGATE

MR JUSTICE HILLIARD

REX

V

EMIL ANTON

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MR O MAJID appeared on behalf of the Appellant.

J U D G M E N T

1. MR JUSTICE HOLGATE: The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. We refer to the complainant as "C".
2. On 19 April 2022, in the Crown Court at Warwick, the appellant changed his plea to guilty in respect of the offences of attempted rape, threatening another with an offensive weapon and theft. On 20 March 2023, HHJ de Bertodano passed a sentence for the attempted rape of imprisonment for life, subject to a minimum term of 10 years 8 months less 547 days spent on remand. She passed a concurrent sentence of 30 months for threatening with an offensive weapon and imposed no separate penalty for the theft. He appeals against sentence with the leave of the single judge.
3. At the time of the offences C was a schoolgirl, aged 15, living with her parents in Coventry. The appellant was a Romanian national, aged 35, working in the Coventry area as a delivery driver.
4. On 22 August 2021, at around 8.15 pm, C was walking home on Torrington Avenue in the Tile Hill Industrial Estate. She had been out with friends for the afternoon. The appellant was driving on the same road in the opposite direction to C. On seeing C, who was a complete stranger to him, the appellant did a U-turn and began to follow her in his car. C left the road to take a shortcut to her home, following a footpath alongside an embankment, under a railway line and then through an area of waste ground. The appellant stopped his car, got out and chased after C.
5. He caught up with C as she entered the tunnel. He forced C onto the ground facedown.

When this happened, she dropped her mobile from her bag. The appellant took the phone and placed it in his own pocket (count 5). He threw the phone over the fence onto the railway embankment so that C would not be able to use it. The appellant then put his arms around her neck, put his hand over her mouth and threatened her with a knife he had brought with him (count 3).

6. The appellant then dragged C through the tunnel and into some bushes on the waste ground. He punched C to the face because she had been screaming. He then made her lie on her back. He exposed C's breasts and began kissing them. He took off her trousers and looked into her underwear. The appellant saw that C was wearing a tampon, pulled it out and threw it away. She continued to scream and shout for help. She tried to fight back.

7. The appellant assaulted C again and was about to rape her but something appears to have disturbed him. He stopped to check whether anyone else was around. C saw an opportunity to escape and tried to do so but the appellant caught her again, dragged her back into the bushes, forced her onto her knees and showed her his knife again. The appellant went out of C's sight to check again for other people. At that point, she managed to getaway. The appellant left the scene about 18 minutes after he had first started to pursue C.

8. Although C had dislocated her knee during the offending she did not stop running until she reached home. She told her father what had happened, and the police were called. The police went to her home and saw how distressed and visibly upset she was. She had blood on her face and her neck, and her clothing had been ripped. C had injuries to her face, neck, back and bottom which were photographed. They included swelling, inflammation, abrasions and a cut. C spent the night in hospital and was interviewed by

the police the following day.

9. The police investigation focused on the crime scene and CCTV evidence showing the appellant's pursuit of the complainant over a period of some 13 minutes. C's phone and tampon were recovered. Police inquiries indicated that there were only seven cars in the Coventry area that matched the appellant's car and by a process of elimination he was arrested on 16 September 2021. He had tried to change his appearance by shaving off all his hair. In interview, the appellant claimed that he had not been driving his car that day, but cell site analysis showed that that was untrue. Then the appellant accepted he had been driving his car but denied that he had been responsible for the offending. DNA from the appellant was subsequently found on swabs taken from C's chest and from her mobile phone. The appellant's DNA was also found on the inside and outside of the waistband of C's underwear and in blood under the fingernails of C's right hand.

10. When confronted with the DNA evidence, the appellant changed his story again and said that he had stopped his car and walked with C because she had shouted at him: "Hey, come here". He thought she was aged around 20. He claimed that they had held hands and he had kissed her on the cheek not the breasts and C had kissed him back. In the tunnel the appellant had hugged C and touched her breasts but then C had said: "No. Stop it". The appellant claimed that he had picked up C's mobile from the ground and given it back to her, but she then threw it over a fence. The appellant said that he had thought C was a prostitute and that there had been an argument about the provision of her services. He maintained that position until the day of trial.

11. In her victim personal statement, C said that the attack had changed her life. For the first few weeks she slept with her mother. She suffered from nightmares and would wake up screaming. Whereas C had previously been a confident and independent child, she rarely

left the house and stopped socialising. She was scared to go out on her own and became scared of men. She dropped out of school. The family had to move out of the area because their home overlooked the scene of the attack.

12. The appellant was aged 36 at sentence. He had 11 convictions for 13 offences spanning from 2004 to 2021. His relevant convictions included 1 sexual offence and 12 thefts and kindred offences. The most serious offence was committed by the appellant in Romania in 2006, when he was 19. He broke into a house at night with another person, both wearing balaclavas. The appellant was armed with a club and a knife. They stole money and jewellery and seriously injured the occupants. He was sentenced to 12 years' imprisonment.

13. We have read a detailed pre-sentence report. The author noted that, despite his guilty pleas, the appellant remained in denial about his offending. He maintained that he only approached C to offer her money for sex thinking that she was aged 20. He denied being in possession of a knife. The appellant was assessed as posing an on-going high risk of serious harm to child and adult females. The risk relates to rape and sexual assault and the use of violence or weapons to subjugate victims. He poses a medium risk of serious harm to the public, reflecting the conviction in Romania in 2006 for robbery. The author raised a concern that the appellant's very limited English would limit the interventions and opportunities available in custody to address that risk.

14. In her sentencing remarks the judge said that the rape involved a number of category 2 harm factors:

> "Firstly, severe psychological harm. It is clear that the victim has suffered really serious psychological harm. She is likely to continue to suffer that throughout her life as a result of this terrifying experience. Secondly, additional degradation or

> humiliation. I consider it at least, arguable that removing and throwing away her tampon amounts to additional humiliation. Thirdly, abduction. Fourthly, prolonged detention or a sustained incident. This was an incident that lasted almost 13 minutes. It was sustained and, when she tried to get away, you chased her down and pulled her down again. Fifthly, violence or threats of violence beyond that which is inherent in this offence. That is clearly indicated when you use a knife to make threats. Sixthly, the victim is particularly vulnerable due to personal circumstances. A child of 15 walking alone in a deserted area is clearly particularly vulnerable."

15. The judge said that the extreme nature of these factors brought the harm within category 1:

    i. "When a child is chased down on the street, dragged into the bushes, threatened with a knife and almost raped, the harm caused is incalculable. It is bound to be lifelong."

16. With regard to culpability the judge said:

> "In my judgment, there was a significant degree of planning. When you saw [C] walking alone in a deserted area, you turned your car around and altered your journey to follow her. You had a knife in the car with you. You took it and you chased her. The CCTV footage confirms that the offence lasted for a little under 13 minutes. There is no requirement for planning to be provided to have lasted over hours or days in order for an offence to fall into this category. Planning over the course of several minutes can still be significant, particularly when an offender is already armed, as you were, with a knife."

17. The judge considered the decision in R v Dogra [2019] 2 Cr App R(S) 9. She said that judgments on this aspect of culpability are case specific. In the present case the appellant had a knife in the car with him and he took it with him when he decided to chase after C. Unlike Dogra, the appellant chose to harm himself with a knife when he pursued C and in the circumstances the degree of planning was significant.

18. The judge acknowledged that she was sentencing for an attempted rape and not a

completed offence. But she said that the gap here between the acts of preparation and penetration was small. The appellant removed the child's clothes and tampon as a final step before penetration. He did not reach that stage only because of his fear of being disturbed which caused him to pause for long enough to enable C to escape.

19. The judge said that the aggravating features were the previous conviction for a serious violent offence which had justified a lengthy sentence, and the theft and disposal of C's phone to prevent her calling for help. The appellant tried to change his appearance and he made up stories when faced with evidence against him. He had applied to vacate his guilty plea and then withdrew that application. The judge found no evidence of remorse, or any other mitigating factor. She said that the sentence after trial would have been 18 years' imprisonment, towards the top of the range for category 1A. She then allowed slightly more than 10 per cent credit for the guilty plea at trial reducing the term to 16 years.

20. The judge then went on to consider *dangerousness.* She said:

> "I have to consider whether there is a significant risk of serious harm caused by the commission by you of further serious specific offences. I make this determination taking into account the evidence of this offence and your previous offending history. I am assisted in this by the pre-sentence report. This was a case in which you chased down a 15 year old in the street in broad daylight, threatened her with a knife, and tried to rape her. You have a number of previous convictions, the most serious of which involved you breaking into an occupied house at night, with another, armed with a club and a knife and causing serious injury to an occupant. You served a sentence of twelve years' imprisonment in Romania for that offence. You have, therefore, demonstrated on two occasions that you are prepared to use weapons to commit very serious violent offences. In this case, a serious sexual offence against a child. I have no doubt whatsoever that there is a significant risk of serious harm to members of the public, in particular but not limited to women and female children, caused by the commission, by you, of further serious specified

offences."

21. The judge then considered whether a life sentence had to be imposed in this case. Applying the criteria in section 274 of the Sentencing Act 2020 and Attorney General's Reference 27 of 2013 (R v Burinskas) [2014] 1 WLR 4209 at [22], she said:

> "I have already made it clear that I take the most serious possible view of this offence. You have a very serious previous conviction. I have no doubt that the level of danger you pose to the public is high. I cannot foresee a time, at this stage, when that will no longer be the case. You have clearly demonstrated that, despite the very lengthy sentence you have already served, you are prepared to continue to commit offences of the upmost gravity. No available alternative sentence would answer that risk. If I were to pass an extended sentence, the time would inevitably come when you would no longer be subject to licence conditions and I do not believe that this court can have any confidence that you would not be dangerous at that stage. An extended sentence would, in my judgment, be insufficient to protect the public from risk of harm. In those circumstance, I pass a life sentence."

22. The judge then derived the minimum term from the notional determinate sentence she had determined to be appropriate.

23. We are grateful to Mr Omar Majid for his clear and helpful submissions on behalf of the appellant. In summary he submitted that:

    1. The judge wrongly decided that psychological harm, humiliation and degradation, the vulnerability of the victim and abduction amounted to category 2 harm factors. He said that none of the factors present, whether taken individually or in combination, could have been treated as extreme so as to raise the level of harm from category 2 to category 1.

    2. The judge wrongly decided that the offence involved significant planning and therefore involved category A culpability. There was no evidence that the appellant was looking for C before he initially had sight of her or that he had stalked her on any previous occasion. The appellant did not have with him any means of restraint or disguise. The judge wrongly conflated pursuit with planning.

3. Notwithstanding the categorisation of the offence as category 1A, the judge's starting point for sentence was too high.

4. The finding of dangerousness is not criticised, but the offence did not require the imposition of a life sentence. The attempted rape was not sufficiently serious. The judge attached too much weight to the offence in Romania, committed when the appellant was 19, and she failed to give adequate consideration to the impact of a lengthy period of imprisonment, coupled with an extended licence period.

Discussion

24. We see no merit in the first ground of appeal. The judge's assessment quoted above cannot possibly be faulted.

25. With regard to ground 2 and the issue of a significant degree of planning, it is not particularly helpful for the appellant to point out factors which were not present in this case. The real issue is whether the matters upon which the judge relied could not justify her conclusion in the circumstances of this case.

26. The decision in Dogra appears to be commonly relied upon by advocates for appellants. But the observations in that case need to be seen in context. First, the Court recognised that whether significant planning is involved is fact sensitive and involves an exercise of judgment by the sentencing judge on matters of degree (see e.g. [32]). Second, the Court recognised that the matters it indicated in [33] were simply indicators and did not purport to be exhaustive.

27. Third, the Court in Dogra relied upon the effect of a determination that a case does or does not involve a significant degree of planning in the application of the Sentencing Guidelines. They referred to a difference of either 5 years or 4 years in the starting points given for different categories (see [31]).

28. With respect, we do not consider that that comparison was correctly made. This issue goes to whether an offence involves category A or category B culpability. Therefore, for

a given level of harm, the comparison should be between, for example, categories 1A and 1B or between categories 2A and 2B, and not, as was said in Dogra, between categories 1A and 2A. For the offence of rape, the differences are not as stark as the Court in Dogra stated. They are significantly less: 3 years for category 1 (starting point of 15 years compared to 12 years) and 2 years for category 2 (10 years compared to 8 years). For the other offence in Dogra, assault by penetration, the differences are likewise 3 years and 2 years. Furthermore, in the case of category 1 and category 2 rape, and also category 1 assault by penetration, there is a significant degree of overlap between the category ranges. This analysis of the Guidelines simply underscores the point that the Court is dealing with matters of judgment and degree.

29. We note that in R v Jones (Kelsey) [2023] 2 Cr App R(S) 1, Simler LJ said at [40]:

> "As this court has said previously, for example in *R v Dogra* [2019] EWCA Crim 145 and *R v Teklu* [2018] 1 Cr App R(S) 12, each case must be considered on its own particular facts. The determination of when a degree of planning reaches that higher level of culpability by a significant degree of planning is a matter of judgment. In some cases that judgment might be finely balanced. It is also right to observe – and Mr Emanuel accepted – the word 'significant' in the requirement of significant planning is not an absolute concept. In the context of predatory sexual offences like rape and attempted rape that tend more often than not to be committed alone, without implements or tools, hiding in wait in a position designed to trap a lone woman might well be regarded as involving significant planning. Here, while we recognise that the planning did not go on for any length of time, and nor was it sophisticated, the appellant chose the ladies' toilets in a busy pub. He must have known that a single woman would enter in short order. He hid in the cubicle and waited for a woman to use the cubicle next door. He would have been able to see and hear what she was doing and to know when to make his move. That is reflected in what happened here. As she emerged, he attacked her. He had taken off his T-shirt in readiness to cover her face. He also sent a text message to his friend who was waiting for him, to give him more time to commit the offence."

30. We do not consider that the judge's decision in the present case that a significant degree of planning was involved can be faulted. Dogra itself pointed to the possible significance of a decision to take a weapon "to be better able to carry out an attack on finding a victim". Jones recognised that predatory offences like rape and attempt rape tend to be committed by individuals and that significant planning in that context need not continue for any length of time or involve the prior identification of a particular victim.

31. The case of R v Patrick [2021] EWCA Crim 253, illustrates that the pursuit of a victim for a limited period of time may contribute to a judgment that a significant degree of planning was involved. But we re-emphasise that this is always a matter for assessment by the sentencing judge on all the relevant circumstances of the case before the court.

32. The reasons given by the judge in this case justified her conclusion on category 1 culpability. There was a significant degree of planning in the context of this appellant choosing to pursue or target a particularly vulnerable victim, a 15-year-old child, using a knife in order to threaten her, with a view to carrying out his attack at a location he considered suitable

33. We add that the Court said in Patrick at [16], that neither Dogra nor Teklu are Guideline cases. Instead, the cases we have referred to involve this Court reviewing the exercise of judgment by sentencing judges in individual cases. The same is true of the decision we have reached on the judge's conclusions on the circumstances of this case.

34. As to ground 3, we see no reason to criticise the judge's assessment that the attempted rape in this case came very close to the completed offence, both in terms of harm and culpability. The combination of harm factors took this offence well into the category 1 range. The judge correctly weighed the additional aggravating circumstances to which we have referred. There were no significant mitigating factors. We see no basis for

criticising her decision on the appropriate notional determinate sentence.

35. Finally, we conclude that the judge was well justified in deciding that a life sentence had to be imposed, albeit a sentence of last resort. We agree with the single judge. This was a very grave offence. We do not accept the submission that the judge attached too much weight to the serious offence of violence committed in Romania, albeit that the appellant was then aged only 19. Taking into account the well-reasoned pre-sentence report, the judge's explanation as to why a lengthy extended sentence would be insufficient to protect the public against the risk of serious harm posed by the appellant was soundly based.
36. For these reasons, the appeal is dismissed.
37. In conclusion, we would like to compliment the judge on her careful, detailed and well-considered sentencing remarks.