IN THE COURT OF APPEAL
CRIMINAL DIVISION
CASE NO 202102270/A3

NCN [2022] EWCA Crim 264

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 15 February 2022

LORD JUSTICE HOLROYDE

MR JUSTICE HOLGATE

RECORDER OF BRISTOL

(HIS HONOUR JUDGE BLAIR QC)

(Sitting as a Judge of the CACD)

REGINA

v

JOEY SAUNDERS

Computer Aided Transcript of Epiq Europe Ltd,

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)

MS O LYCOURGOU appeared on behalf of the Appellant.

J U D G M E N T

1.
LORD JUSTICE HOLROYDE: This is an appeal by leave of the single judge against a sentence of 7 years' imprisonment for an offence of rape. The victim of the offence (to whom we shall refer as "C") is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of this offence.

2.
The appellant and C were both students at the same university. At the time of the offence C, unlike the appellant, was a virgin. Her virginity was important to her because of her religious beliefs. In her evidence at trial she explained that she had moderated her parents' strict principles to an extent which enabled her to join in student life and to drink alcohol with her friends. Her faith nonetheless remained important to her, and retaining her virginity was part of that faith.

3.
On the night of the offence C went to the Student Union with some friends. There she met the appellant, whom she recognised because she had seen him about a week earlier. He appeared to be intoxicated. They danced and kissed. Later, C agreed to accompany the appellant to his room. She made clear however that she did not want to have sex with him. As a result of his intoxication the appellant vomited twice as they walked.

4.
Once in the appellant's room, some initial sexual activity took place to which C consented. She did not however consent to the vaginal sexual intercourse which the appellant then forced upon her. C described herself as "freezing" when that happened. The appellant then tried to insert his penis into her mouth, but she pushed him away and told him to stop. The appellant apologised. C went to the bathroom, where she found she was bleeding heavily from her vagina. She sent text messages to her friends reporting what had happened. By the time she returned to the appellant's room to collect her purse, he had fallen asleep.

5.
Very regrettably there was a delay of around 3 years before the trial could be heard. The appellant denied rape, and indeed denied that he had penetrated C's vagina with his penis, but was convicted.

6.
The appellant was approaching his 21 st birthday at the time of the offence. He had no previous convictions. No pre-sentence report was thought to be necessary, and we are satisfied that none is necessary now.

7.
C had initially feared that she might be pregnant, but that proved not to be the case. In a victim personal statement she described her distress and anxiety. She said that she had never imagined that her first experience of sexual intercourse would be rape. She did not feel able to tell her parents what had happened because of their religious views, and had only confided in one friend. She lost confidence in social situations and her studies were adversely affected. The judge in his sentencing remarks accepted that the offence had had a substantial effect upon her.

8.

The judge was addressed about the appropriate categorisation of the offence under the Sentencing Council's definitive guideline for Rape offences. He concluded that it fell into category 2B, with a starting point of 8 years' custody and a range from 7 to 9 years. He was satisfied that the Autistic Spectrum Disorder which affects the appellant had not reduced his culpability. In relation to harm he explained his decision as follows:

"... I do regard your victim as being somebody who was particularly vulnerable because of her faith, the way she was trying to live that faith in the modern context and her virginity, which she had retained and which she lost through you that night."

9.
The judge identified a number of mitigating factors: the appellant's comparatively young age; the absence of previous convictions and the "many admirable qualities of kindness and support" which the judge accepted he had shown. He took into account the particular difficulties faced by those in prison during the Covid-19 pandemic, but regarded that as a less powerful factor in view of the inevitably lengthy sentence which would have to be imposed. Taking those factors into account he moved downwards from the starting point to the bottom of the category range and so imposed the sentence of 7 years' imprisonment. Appropriate ancillary orders were made, about which we need say no more.

10.
In her written and oral submissions Ms Lycourgou, who represents the appellant in this court as she did at trial, submits that the judge was wrong to find that C was "particularly vulnerable due to personal circumstances" for the purposes of the sentencing guideline. The appropriate category, she submits, was 3B, with a starting point of 5 years' custody and a range from 4 to 7 years. She argues that the evidence showed that C was capable of making choices as to what she would and would not do, had chosen during her time at university to socialise and drink in ways which showed her not to be particularly vulnerable, and had chosen to engage in some sexual activity with the appellant. Ms Lycourgou contrasts the circumstances of this case with those of R v McPartland and Grant [2020] 1 Cr App R(S) 51, in which a finding of particular vulnerability was made in circumstances where the victim had been very drunk, alone with two older men in the home of one of them and had been raped when visibly unwell.

11.
Ms Lycourgou has amplified her submissions orally this morning and we are grateful to her.

12.
The factor "victim is particularly vulnerable due to personal circumstances", which appears in the guidelines relating to several sexual offences, has been considered in a number of previous decisions of this court. It is clear that the relevant personal circumstances need not be enduring characteristics such as a young age or a physical disability (see R v Rak [2016] EWCA Crim 882). Thus, for example, adult victims of sexual offences who were asleep or insensible through intoxication when the offending began may be found to have been particularly vulnerable (see, for example, R v Bunyan [2017] EWCA Crim 872 and R v Behdarvani-Aidi [2021] EWCA Crim 582).

13.
The present case raises a rather different issue as to the ambit of this factor. It is important to remember that the particular vulnerability of the victim is identified as a harm factor in the sexual offences guidelines, not a culpability factor. Specific targeting of a vulnerable victim, which plainly is relevant to culpability, would be taken into account as an aggravating factor at step 2 of the sentencing process. The inclusion of the harm factor allows the sentencer to take account of a range

of features which may increase the harm which the offence caused, was intended to cause or might foreseeably have caused to the victim. Often the relevant circumstances will be those which substantially limit or exclude the victim's ability to avoid, protest against or report the offence. This may be the case where, for example, a victim is very young or is insensible through drink. But personal circumstances may also render a victim particularly vulnerable to even greater harm than is likely to be suffered by other victims of a similar offence. A victim may, for example, have mental health problems which are greatly exacerbated by the effects of the offence. Similarly, a victim's religious and/or societal circumstances may be such that being the victim of a sexual offence strikes at her faith and/or results in condemnation by her peers.

14.
It will be for the sentencer in each case to assess the relevant personal circumstances and consider carefully whether the factor applies. Due weight must, of course, be given to the words " particularly vulnerable", bearing in mind that a finding to that effect will place the case into a more serious category with a higher starting point for sentence. As always, care must be taken to avoid double counting. For example, circumstances which render the victim particularly vulnerable to injury may also bring the case within the factor of "severe psychological or physical harm". It must also be remembered that vulnerability which falls short of "particular vulnerability" may be treated as an aggravating factor at step 2 of the sentencing process.

15.
Applying those principles to the particular circumstances of the present case, the judge was entitled to find that C's desire to preserve her virginity, and the religious importance to her of doing so, were personal circumstances which rendered her particularly vulnerable to suffer increased harm as a result of the offence, going well beyond the harm inevitably suffered by anyone losing their virginity in the greatly distressing circumstances of rape by a drunken man. The evidence and information available to the judge showed that C's religious and social background made the loss of her virginity a particularly heavy blow to her religious principles, and left her unable to seek support and comfort from her parents and friends.

16.
We are therefore unable to accept the submission that the judge fell into error of principle in placing the offence into category 2B. Having done so, he correctly reflected the mitigation available to the appellant by moving downwards from the guideline starting point. The judge, having presided over the trial, was in the best position to assess culpability and harm. We recognise, of course, that the sentence is a heavy one for a young man with many good qualities. But he had committed a very serious offence and, although stiff, the sentence was neither wrong in principle nor manifestly excessive. For those reasons this appeal fails and is dismissed.