

No: 2009/6294/A8

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 8 February 2010

B e f o r e:

LORD JUSTICE MOORE-BICK
MR JUSTICE SILBER

MR JUSTICE KENNETH PARKER

R E G I N A

v

SM

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Mr Y Gulraiz appeared on behalf of the **Appellant**

J U D G M E N T
(As Approved by the Court)

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1. **MR JUSTICE KENNETH PARKER:** On 6th October 2009 in the Crown Court at Birmingham, before His Honour Judge Plunkett, the appellant pleaded guilty to counts 1 and 2, sexual assault, contrary to section 3 of the Sexual Offences Act 2003. On 13th November 2009 he was sentenced before His Honour Judge Ross to two years' imprisonment concurrent on each count and made the subject of a Sexual Offences Prevention Order, pursuant to section 104 of the Sexual Offences Act 2003. He appeals

against sentence with the leave of the single judge.

2. The appellant was a taxi driver. In the early hours of 13th April 2009 the complainant, KF, aged 21, and a group of friends, another young woman and two young men, were making their way home from a nightclub in Birmingham. They got into the appellant's taxi at a taxi rank. One of the young men sat in the front. The others sat in the back. The conversation in the taxi between the passengers turned to the subject of the women's breasts. The appellant said: "Can I have a feel?" They disregarded this remark. He dropped off the other young woman and one of the men. The remaining young man asked the appellant to drop the complainant off next and drop him off last. There was a disagreement about this, but ultimately it was agreed that the young man would be dropped off first. The complainant was concerned at this.
3. After the remaining young man had been dropped off she gave the appellant directions from the back seat. He said he could not follow her directions and asked her to get in the front. She did, although she was concerned at this also.
4. As they were driving the appellant started talking about the young woman's breasts. He leant across and grabbed the right side of the complainant's right breast over her clothing (count 1). She pushed his hand away. He made some innocent conversation. Moments later he leant across again and put his hand in her lap, touching her vagina over her clothes (count 2). She pushed his hand away. She thought he was going to rape her. He said: "If I pull over will you shag me?" She said: "No". He said: "What about if I find a quiet spot?" She said: "No". She asked him to turn into her road but he drove past it. She said: "You missed my turn." He locked the doors. They drove past her destination and a number of other possible turning points. He stopped at a distance from her house. The doors were still locked, so she could not get out. He said: "If you take my mobile phone number then you can get out." She recorded his mobile telephone number in her mobile telephone. He unlocked the doors. She got out and ran to her address. He shouted after her that she had left her coat in the car. She came back and took it. As she ran to her door he called after her: "You have great tits." She banged on the door and shouted for her mother. Her mother opened the door. The appellant was standing close by. He demanded money for the fare. The complainant's mother gave him £10. He left. The complainant went to bed. A short time later her mother heard her sobbing. The complainant told her what had happened. The police were called.
5. The appellant was traced via the taxi company and arrested on 23rd June 2009. He tried to hide a mobile telephone under a pillow in the bedroom. One of the officers dialled the number that he had given the complainant to store in her mobile telephone and the mobile telephone that he was trying to hide rang. He gave a prepared statement in interview in which he admitted having been the taxi driver but denied the incident.
6. In a victim personal statement the complainant said she suffered disturbed sleep, she felt anxious when out in public alone and she was frightened to use taxis.

7. The appellant entered an accepted written basis of plea on the basis that the offence was not a pre-planned offence, the reason why the complainant was the last to be dropped off was because it was a cheaper fare that way and that the touching occurred over clothing.
8. There are two grounds of appeal. First, it is submitted that the learned judge did not take due account of the Sentencing Guidelines Council definitive guidance, Sexual Offences Act 2003. Secondly, it is said that the learned judge did not give sufficient credit for personal mitigation.
9. As to the first ground, the learned judge did plainly apply his mind to the relevant guideline. He had regard to the second level of seriousness set out at page 33 of the definitive guideline, particularly under the description: "Contact with genitalia of victim by offender using part of his or her body other than genitalia." The learned judge noted the sentencing ranges, 26 weeks to two years' custody, for a first-time offender found guilty after trial of a single sexual assault of the nature described.
10. In this context it is important to note what the Sentencing Guidelines Council states at paragraph 1.3 in Part 1 under "General Principles":

"For these types of offence more than for many others, the sentencing process must allow for flexibility and variability. The suggested starting points and sentencing ranges contained in the offence guidelines are not rigid, and movement within and between ranges will be dependent upon the circumstances of individual cases and, in particular, the aggravating and mitigating factors that are present."
11. In this case the learned judge made plain that he was departing from the sentencing range to which we have referred and he gave explicit reasons for doing so. The question on the first ground in our view is whether those reasons were substantial and justified the departure, substantial though that was, and whether the judge manifestly erred in so departing from the part of the guidance which he identified.
12. The judge considered that on conviction after trial the offence would have merited a sentence somewhere exceeding three years. The judge justified this conclusion by demonstrating the gravity of the offence. The appellant was in a position of trust and power. The young woman did trust him and was in a poor position to protect herself when he assaulted her in gross violation of that trust. The sexual assault was committed at night and the victim was isolated. There was a degree of manipulation to secure that she move from the back seat of the taxi (where she was in comparative safety) to the front seat (where she was within reach of the appellant). The victim did absolutely nothing to suggest that she would welcome any physical advance by the appellant. She rebuffed him after he grabbed her breast. This did not deter him. Instead he escalated the level of sexual assault by placing his hand on the area of her vagina. It is plain from her statements that she was already in very great distress, as was or should have been obvious to the appellant. But at that point he intensified her

fear by locking his taxi, making her his prisoner and then deliberately driving past her home. It is hardly surprising that she says that at that point she was convinced she was going to be raped. Furthermore, the assault was accompanied by elements of sexual degradation: the language which was used and then continued even when the assaults and confinement in the taxi were over and the compulsion of the victim to take his telephone number, implying that she was the type of woman who would regard his behaviour as some kind of acceptable sexual come-on. At the end, he went to her home, giving the impression no doubt to the victim's mother that nothing untoward had occurred on his part and that, on the contrary, her daughter had failed to pay the taxi fare.

13. These circumstances, in our view, only have to be recited to appreciate the number and gravity of the aggravating features in this case. In our view, these aggravating features did justify the judge's very substantial departure from the provisional starting point in the definitive guidance and his conclusion as to the sentence of something over three years in our view is supportable.
14. As to the second ground, the judge had proper regard to the guilty plea, to the defendant's previous good character, to the references produced on his behalf and of the special fact that his mother was dying. A negative aspect at the time of sentencing was that the appellant minimised his offending behaviour, accepting very limited responsibility and placing a high degree of blame on the victim. The report from the prison now indicates that he is taking responsibility for the offence.
15. Given the starting point that the judge in our view justifiably took, the final sentence of two years' custody reflected all the mitigating factors relied upon by the appellant and that sentence was not in the circumstances of these sexual assaults manifestly excessive. The appeal is dismissed.