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No: 201901052/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 2 May 2019

B e f o r e:
PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE JAY
MR JUSTICE FREEDMAN

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A
v
DARREN RILEY

Mr J Polnay appeared on behalf of the **Attorney General**
Ms J Benson appeared on behalf of the **Offender**

Computer Aided Transcript of the Stenograph Notes 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)

J U D G M E N T
(Approved)

1. PRESIDENT OF THE QUEEN'S BENCH DIVISION: On 12 February 2019, following a trial lasting some six days in the Crown Court at Woolwich before Her Honour Judge Downing and a jury, Darren Riley, who is 44 years of age, was convicted of four counts of sexual assault, contrary to section 3 of the Sexual Offences Act 2003. On 21 February 2019 he was conditionally discharged for 18 months on each count to run concurrently, ordered to pay compensation of £750 to the victim and required to comply with the notification obligations for a period of 18 months. The relevant statutory surcharge was also imposed.

2. Her Majesty's Solicitor General now seeks to refer this sentence to the court, pursuant to the provisions of section 36 of the Criminal Justice Act 1988, on the grounds that it is unduly lenient. We grant leave.

3. The circumstances are as follows. The offender and the victim (to whom we shall refer as "A") were both volunteers at St John Ambulance in [redacted]. The offender was the unit manager. A had joined St John Ambulance in part due to emotional difficulties that she had previously suffered in her personal life. The offender was well aware of her background.

4. On 20 March 2017 A was completing her First Aid training. The offender was one of those delivering the course. She was lying on the floor while the offender was holding her neck to demonstrate how treatment should be given. She was wearing a jumper with a low cut and the offender said: "You should see the view I can see down your jumper now". A became anxious and left the room, followed by the offender who approached her from behind and squeezed her bottom.

5. That evening the offender messaged A saying: "Sorry again for touching your bum xx". The following day he further messaged: "If I was younger I would love to ask you. But I'm not younger, single I'm your line manager and it's my job to ensure all is ok x. Plus I would never try to ouwt. Lisa would kill me LOL". That is a reference to the offender's partner who was also a volunteer.

6. The offender sent other messages to A including the following: "Won't slap your arse that hard [I] promise LOL". In response to a message sent by the victim stating that she had failed her course work and was dumb: "No you're not, and if you put yourself down again I'll put you across my lap LOL. Only joking. Safeguarding!!! LOL." He went on: "Might have to give rescue breaths!! Promise I won't use my tongue LOL. As long as no chest compressions are required. Wouldn't know where to put my hands LOL". Finally: "In a different life and world I would be honoured to have you at my side. But we don't live in a perfect world X".

7. On 4 November 2017 A was volunteering at an event. Whilst cleaning one of the ambulances the offender approached her from behind and squeezed her bottom again.

8. On 5 November she was volunteering at a football club, when walking to a treatment area the offender said "walk in front I get a better view" and then again grabbed her bottom.

9. On 6th November, whilst volunteering at a fireworks event, she was making tea in a St John ambulance vehicle and as A lent over the counter the offender again grabbed her bottom.

10. When interviewed under caution however, he denied that he ever had sexually assaulted A. During the course of the trial the offender continued to deny all allegations of assault and described the text messages he had sent as "banter", denying a sexual attraction to A. He recognised that what he had said was inappropriate.

11. Turning to the position of the offender. He was a man of good character, save for a single caution going back to 2007 for common assault. He had been in paid employment as a social worker for Kent Adult Social Care, although he had been dismissed as a result of a sexual complaint that had been made against him. He was then employed as a vehicle recovery officer though concerned he could lose his job as a result of the conviction.

12. In a pre-sentence report he continued to deny committing the offence. He stated that he believed the victim and the witnesses had conspired against him as "they wanted to usurp his position". He displayed no empathy or remorse towards the victim. A probation officer recommended a community order with a rehabilitation activity requirement and an unpaid work requirement.

13. The defence had obtained a psychological report which noted that the offender had suffered post traumatic stress disorder and depression some 20 years previously following an unstable relationship and his experiences in the Army. At the time, however, his mental health had improved and he was not then suffering any major mental illness.

14. Character references spoke of him as "a great friend and role model", "a great friend and mentor". Two women referred to him being "a true friend who had always acted in a respectable manner" and "a caring and reliable friend to her, someone upon whom she could count".

15. A victim personal statement was available at sentence. A provided considerable detail. It is necessary only to quote part of it. She said:

> "I started off my employment with St John's, I was at my lowest point of life and wasn't in a very good mindset. I really needed this job as it opened doors for me to make new friends and this came at the right time. My mum was incredibly ill and in hospital. My mum had renal failure. I ended up becoming a full time carer as well as working at [redacted]. I was struggling both emotionally and physically. I wouldn't go out with my friends as I feared leaving my mum alone. I wanted to volunteer as I wanted to have something that felt my own....

> At first I thought me and Darren were friends. He had supported me through some difficult months. There were times I would talk to him about everything that was going on ...
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> The messages that Darren sent they started to go from friendly to have a slight sexual nature. I would brush these messages off or answer in a careful way. It was a difficult situation as Darren was in a position of power, he was my manager. The reason I didn't report this at the time because I had told everything that we could complain about would go back to Darren. I couldn't speak to the second in command because it was Darren's fiancée. Darren had sexually assaulted me and I am now brave enough to come forward. It's made it difficult for me to approach men. I've gone through every scenario in my head about why he did the things he did and I have often blamed myself. It made me feel small and I felt completely controlled. I feel stupid and I feel like an idiot. I've had safeguard training drummed into me and I didn't see this happening to myself. I didn't see the warning signs I should have done.
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> I am not providing this statement to be vindictive. I don't want to ruin Darren's life. I'm not even wanting him to go prison; I want him to understand that this behaviour is not acceptable. He is in a position of trust and power. This has taken all my courage to come forward although this may seem minor to some, this has halted my life. It's impacted my home life, my St John's life and my actual career. It is like Darren has somehow become part of it all."

16. The prosecution submitted that this offending fell within category 3A of the Sentencing Council's Definitive Guideline in relation to Sexual Assault, on the grounds that there was an abuse of trust. The defence submitted that the category fell within category 3B. The judge agreed with that submission having analysed R v Ashton [2016] 1 Cr App R(S) 32, where this court considered whether there was an abuse of trust when an employer sexually assaulted a member of staff in the workplace.

17. Having concluded that this was not a form of breach of trust, by reason of abuse of a position, the court went on:

> "24. Having said that, however, there was not totally equality between the two parties concerned in relation to what took place, and the age and the circumstances of the victim of these offences is something that should very properly be reflected in the sentence in relation to culpability of the appellant."

18. In this court Mr Jonathan Polnay, on behalf of the Solicitor General, does not submit that the judge was wrong to place this offence within category 3B, but argues that the relationship between the victim and the offender did constitute an aggravating feature which was relevant for the judge to consider.

19. When passing sentence, the learned judge observed that the offender did not cross the custody threshold and concluded that she was sentencing on practically the lowest level of seriousness and identified that she would be passing a community order. However, having read the victim impact statement, based on the fact that the offender had been punished by having to come to court, the loss of his good name, the distress caused to the offender's partner by the offender requiring her to give evidence, his traumatic background in the Army and the downward spiral in his life as a result of matters beyond his control, the judge decided to take a different view. She also observed:

> "Were I to pass a community order, you would be on the Sexual Offender's Register for five years and I am bold enough to say and I hope it will not ... that that is not with respect, what Sexual Offenders' Register is about."

In those circumstances she imposed the conditional discharge to which we have already referred.

20. In this court Mr Polnay argued that although the offending fell within category 3B of the guideline, the offender was a manager and had a relationship with the victim as a volunteer which was therefore not one of equality. In the circumstances, the age and circumstances ought properly to be reflected as an aggravating feature of culpability. In that regard it is important to underline that the offender himself had recognised that he was the victim's manager and therefore exercised a degree of responsibility, if not power, over her.

21. Mr Polnay secondly argued that the totality of the offending, that is to say four offences rather than one, needed to be reflected in the sentence and that the learned judge had failed properly to have regard to section 125 of the Coroners and Justice Act 2009, which required the judge to follow any sentencing guideline unless the court was satisfied it would be contrary to the interests of justice to do so. He noted that the guideline reflected a category range of a community order at the bottom end. He also submitted that that was different from a conditional discharge, which by reference to section 12 of the Powers of Criminal Courts (Sentencing) Act 2000 can be imposed where the court is of the opinion, having regard to the circumstances, including the nature of the offence and the character of the offence, that it is inexpedient to inflict punishment.

22. Mr Polnay submitted that the consequence of progressing through court proceedings and the upset caused to the offender's fiancée were all as a consequence of his decision, rejected by the jury, to challenge his guilt and therefore did not constitute mitigation. Similarly, the issues of his mental health 20 years previously ought not to have been reflected in the sentence.

23. Mr Polnay's final submission was that the learned judge's approach to the notification provisions under the sexual offender's legislation was wrong and that this requirement should have been ignored. He referred to Attorney-General's Reference No 50 of 1997 [1998] 2 Cr App R(S) 155, in which a judge said he was imposing a lesser sentence

than otherwise would have been appropriate because of the need to register under notification provisions. Giving the judgment of the court Rose LJ made it clear:

> "As to the effect of the 1997 Act in relation to a judge's sentencing powers, Mr Wing, on behalf of the offender, submits that the provisions of that Act can, and should, be viewed as a penalty, within section 28 of the Criminal Justice Act 1991 and, that the learned judge was therefore correct in doing that which he did, and reducing the sentence which he otherwise thought appropriate. The difficulty with that submission, as it seems to this Court, is, first, that the purpose of the 1997 Act was to establish a register. Second, there is nowhere in the 1997 Act any suggestion that what is being established should be regarded as a penalty within the provisions of section 28 of 1991 Act. Thirdly, if Mr Wing's submissions were correct, the process would have been an entirely circular one, for the judge would first select what was the appropriate penalty; then he would have regard to the registration provisions applicable to penalty of such a length; and then he would reduce the sentence which he would pass.
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> In our judgment, such an approach cannot conceivably have been intended by Parliament, because it would lead inevitably to a partial circumventing of the provisions of the Act itself. Accordingly, in our judgment, the judge was wrong to reduce the sentence for the reason which he gave. We add this. A judge's personal view about the wisdom of a Parliamentary enactment have no proper place in the sentencing process. It is the duty of all judges to implement the sentencing powers which have been given to them by Parliament, whether or not an individual judge happens to believe in the wisdom of those sentencing powers."

That conclusion was reinforced in R v Fox [2012] EWCA Crim 944, at paragraph 6. In the circumstances, although Mr Polnay does not submit that the custody threshold was passed, he argues that a high level community order, at the least, should have been imposed.

24. On behalf of the offender, Ms Judith Benson has forcefully argued the case that the judge was entitled to conclude that there was no abuse of power, notwithstanding the admissions made by the offender; further, the trial had been delayed some 18 months because the magistrates had declined jurisdiction consequent upon a second charge having been brought, in respect of which the judge ruled there was no case to answer. She was equally entitled to have regard to the effect in his life and the stress of the proceedings both for him and his partner, on the basis that they reflected a degree of punishment. She recognised that the learned judge's observations in relation to the notification provisions were wrong as a matter of law, but argued that that was only one of the reasons that the learned judge gave.

25. In our judgment, none of the reasons given by the judge are proper considerations for going outside the guidelines as identified in section 125 of 2009 Act. The features

upon which she relies, namely the fact of going through the court proceedings, his earlier mental health difficulties, the notification provisions, do not, in our judgment, constitute reasons which should have satisfied the court that it would be contrary to the interests of justice to have regard to the guidelines. Furthermore, the learned judge played no sufficient attention to the fact that she was not sentencing the offender for one offence but for four offences, in circumstances where the impact on the victim had undoubtedly been real and was continuing, however modest in the range of potential offending that these offences actually fell.

26. In our judgment, there was no basis whatsoever for going outside the guidelines, particularly bearing in mind the number of offences and we are concerned that the learned judge should have failed to reflect Attorney-General's Reference No 50 of 1997 and relied upon the notification provisions as a reason for passing a lesser sentence than otherwise she might have done.

27. In our judgment, having regard to the errors of law in the approach to sentencing, this sentence can be and is, and should be categorised as unduly lenient. At the lowest end of the bracket we believe that the learned judge ought to have passed a community sentence and bearing in mind that we are resentencing the offender in having been entitled to accept that the proceedings had come to an end, we reduce the number of hours of unpaid work that we order him to serve. In the circumstances, we sentence him to a community order for a term of 18 months with a requirement that he undertake unpaid work for a period of 80 hours. That entirely coincides with the recommendation made in the pre-sentence report. As a consequence, the notification period will be 5 years and the statutory surcharge £85. To that extent, this Reference succeeds.

28. Before leaving the case, we must add one further detail which has absolutely nothing to do with the offender but which it is important to address. The Attorney General has a statutory responsibility, pursuant to section 36(1) of the Criminal Justice Act 1988, to consider whether certain cases ought to be referred to the Court of Appeal where he considers the sentence to be unduly lenient. In Attorney-General's Reference No 14 of 2003 (The Times, 18 April 2003) this court emphasised the two safeguards built into the legislation, namely that the Attorney General or the Solicitor General must consider the matter personally and decide for himself or herself whether to seek leave. The discretion is theirs.

29. In that regard it is open to the Attorney General to depart from the submissions as to categorisation for sentencing purposes or the presence of aggravating or mitigating features made by prosecution counsel: see Attorney-General's Reference (R v Stewart) [2017] 1 Cr App R(S) 48.

30. The time limits within which the Attorney General must refer a case are themselves very tight, that is to say they must be lodged with this court within 28 days of sentence, without a power to extend the time. In those circumstances, where consideration is to be given to an Attorney-General's Reference, it is usually essential that the Attorney General obtain and see a transcript of the entire sentencing hearing. That transcript is obtained to ensure that the Attorney General has the fullest understanding of the facts

advanced or the concessions made by the prosecution, the mitigation advanced and the reasons given by the judge for the sentence imposed when considering the exercise of discretion.

31. On 21 February Her Honour Judge Downing sentenced this offender. On 26 February the Crown Prosecution Service submitted a request for a transcript of the sentencing hearing. It was made on standard form and requested an urgent transcript overnight, for which the Crown Prosecution Service were prepared to pay, the purpose being for consideration of an unduly lenient sentence. The matter was placed before Judge Downing who refused the request. When the matter was pressed, she gave reasons which it is unnecessary for this court to recite. Suffice it to say that we are entirely satisfied that there was absolutely no good reason to refuse to grant the order for this transcript. The provision that the judge must consider a request for transcript applies in many circumstances and could be made by a journalist or any other person interested in the proceedings and therefore it is appropriate that in those circumstances a degree of discretion should be exercised. But where the Attorney General, pursuant to his statutory responsibilities, seeks a transcript in order fully to be aware of the context of the sentencing hearing, bearing in mind his public interest, it is inimical to that interest for a judge to purport to limit the information that he should be provided with for that purpose or for him or herself to seek to reflect the interests of the public purse by making any order restricting that which the Attorney General seeks.

32. We trust that this problem will not arise in the future.

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

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