Neutral Citation Number [2019] EWCA Crim 1459

No: 201902293/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Tuesday, 30 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

SIR JOHN ROYCE

REFERENCE BY THE ATTORNEY GENERAL UNDER

S.36 OF the CRIMINAL JUSTICE ACT 1988

R E G I N A

v

LEE FOX

Mr T Schofield appeared on behalf of the **Attorney General**

Mr A Rafati appeared on behalf of the **Offender**

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J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: Lee Fox (to whom we shall refer as “the offender”) pleaded guilty before a magistrates’ court to an offence of sexual assault contrary to section 3 of the Sexual Offences Act 2003. He was committed for sentence to the Crown Court at Plymouth. On 22 May 2019 he was sentenced to a community order for 12 months with a requirement to perform 120 hours of unpaid work.

2. Her Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, to refer the case to this court so that the sentence may be reviewed.

3. We shall refer to the victim of the offence as "W". She 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.

4. On a Saturday night in June 2018 W went with a female friend to a nightclub at a leisure park in Plymouth. She drank heavily and consumed MDMA. She became so intoxicated that she was asked to leave the premises. Thus, she became separated from her friend. The offender, who did not know W, was also at the leisure park. He too had been drinking heavily. He had taken cocaine.

5. A security officer witnessed activity around 2 o'clock in the morning. The court has seen CCTV footage showing some of what happened. As the security officer saw, W, clearly incapacitated by drink and/or drugs, was lying face down on the pavement. Her dress was pulled up exposing her bottom and the thong which she was wearing. The offender was crouching beside her. He moved her thong to one side, thus exposing her vagina, which he then touched for several seconds in what appeared to be a fingering movement. It is not alleged that his finger penetrated her vagina. W kicked out in what seems clearly to have been an attempt to stop what was happening. A taxi passed, its headlights illuminating the scene. The offender stopped until the taxi had gone and then resumed touching between W's legs despite her trying to roll away. The security guard could see that the offender's trousers were undone and heard him saying that W "tasted so good". The security guard intervened, asking W if she was all right. The offender pretended that W was with him and that he knew her name. Neither claim was true. He indicated that W was heavily intoxicated, as she obviously was. Indeed, when she was helped up from the ground she could not stand or walk without assistance, and the CCTV footage shows her falling over several times. She appeared to have vomited. She was plainly quite incapable of giving any valid consent to any sexual activity. The offender walked away with her. He was heard to say: "Do you want to suck this dick".

6. The security guard then established that the offender and W were in fact strangers to one another. He told the offender to leave, which the offender did. W was then helped to the security office and thence to hospital.

7. The offender was detained by other security staff a short distance from the scene of the offence. The police were called. He was belligerent towards them. En route to the custody suite he threatened to find and rape the children of one of the officers.

8. When interviewed under caution, the offender said that he had no recollection of the incident. He was shown the CCTV footage and said that he could not tell that W was drunk. We pause to note that no one viewing the footage could be in a moment's doubt that she was heavily intoxicated. He appeared shocked and distressed by what he could be seen to have done. He did not expressly deny the offence, but nor did he make any express admission.

9. The offender was then released under investigation. Six months later a forensic scientist matched W's DNA profile with cellular material which had been recovered from the offender's hands at the time of his arrest. Two months after that, in February 2019, the offender was interviewed for a second time. He made no comment. Eventually he was charged in mid-April 2019, 10 months after the incident. He pleaded guilty at his first appearance before a magistrates' court in May and was committed for sentence on unconditional bail to the Crown Court.

10. In a victim personal statement W said that, as a result of the offence, she had lost her trust in men. She felt unable to go back to the leisure park. She had become anxious to take part in activities which had previously been normal and she was anxious that what had happened to her at the hands of a stranger might happen again.

11. The offender has no previous convictions. He received a formal police caution in May 2016 for an offence under the Public Order Act 1986 but otherwise had not come to the attention of the police. A pre-sentence report assessed him as presenting a low risk of further offending, although a medium risk of sexual offences, and a low risk of harm. The author of the report recorded that the offender was very remorseful, that the offence appeared to be wholly out of character and that it had been committed at a time when the offender had suffered a number of very unhappy events in his personal life which had led to his consuming more alcohol and drugs than previously. The report also recorded that since committing this offence the offender had voluntarily sought counselling and had stopped drinking and refrained from taking drugs.

12. A number of testimonial letters were before the court. The authors spoke highly of the offender and made it clear that he is a hard-working man and a reliable employee at his place of work. Without exception the authors of the letters expressed astonishment that the man known to them could have committed such an offence which was, in their view, wholly out of character for him. It should be noted that one of the testimonials came from his former partner, with whom he had been in a committed relationship since they were teenagers and who was in a position to speak favourably about his attitude towards women in general. It was the breakup with that partner which had been one of the unhappy events in the offender's life mentioned in the pre-sentence report.

13. The judge, in his sentencing remarks, rightly described the incident as “quite disgraceful”. He said that W was plainly vulnerable and that she had been significantly affected by the offence. Under the Sentencing Council’s Definitive Guideline for sentencing in cases of this nature the judge concluded that it was a category 2B offence, with a starting point of 12 months’ custody and a range from a high level community order to 2 years’ custody. The offence was aggravated by the offender’s intoxication with drink and drugs. However, said the judge, there were four factors which made it possible to avoid a sentence of immediate imprisonment. First, the offender was a man with no previous convictions, whose only formal caution related to a very different type of offence and who was a hard-working man, with very good references. Secondly, the offender had at the time been going through a bad patch in his life and had turned to the drink and drugs which had led him to behave out of character. Thirdly, there had been a long delay before the prosecution which the judge said was in no way the fault of the offender. During that period the offender had voluntarily taken successful steps to address his underlying problems. Fourthly, the judge was satisfied that there was genuine remorse and shame. The judge indicated that he would not impose immediate custody in any event but concluded that a community order was appropriate. He sentenced the offender as we have indicated.

14. For the Solicitor General, Mr Schofield submits that the sentence was unduly lenient. Under the Sentencing Guideline he suggests that there were three factors pointing to category 2 harm: first, touching of naked genitalia; secondly, a sustained incident; and thirdly, the victim was particularly vulnerable due to personal circumstances. That combination of factors, submits Mr Schofield, merits an upward movement from the guideline starting point even before addressing the aggravating features of the case. Those aggravating features, he submits, were that the offender targeted a vulnerable victim; that he committed the offence in an area where the victim could be seen by others, thus increasing her embarrassment when she sobered up and realised what had happened; and the offender’s own intoxication. Mr Schofield accepts that there was significant personal mitigation to set against the aggravating features.

15. With regard to the judge’s decision that a community order was appropriate in this case, Mr Schofield acknowledges that a note in the Definitive Guideline is in these terms:

”Where there is a sufficient prospect of rehabilitation, a community order with a sex offender treatment programme requirement under section 202 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.”

16. Mr Rafati, appearing today as he did below for the offender, submits that the judge properly considered and weighed in the balance all relevant matters and was entitled to reach the conclusion he did as to the appropriate form of sentence. Mr Rafati argues that there was no evidential basis for any inference that the offender’s trousers were unfastened with sexual intent as opposed to relieving himself. He submits that the offender was not responsible for the lengthy delay in prosecution.

17. For the purposes of the hearing in this court, an updated pre-sentence report has helpfully been prepared. It shows that the offender has already made good progress in performing his hours of unpaid work and has done so to a high standard. Mr Rafati tells us, and of course we accept from him, that the offender has already completed nearly half of the hours which he was ordered to perform.

18. The offender, the report indicates, continues to do well at work, and it is a measure of his employers' high regard for him that they have funded training which should shortly lead to his qualifying as a large goods vehicle driver. He continues to abstain from drink and drugs and indeed from social activity. The report notes that the offender has described himself as being so disgusted by what he did that he wants to avoid any similar situation in the future. He is unsurprisingly fearful of custody, which would end his employment and thus add to certain debts which he is currently slowly repaying. The report assesses him as being suitable for a particular type of offence-focused work during supervision sessions.

19. The offender is right to be ashamed about this serious offence. We see no evidence that he deliberately targeted a vulnerable victim, in the sense of going out looking for one, but when he encountered a young woman who plainly was very vulnerable he shamelessly took advantage of her. His own intoxication was an aggravating feature. We accept that the offence was wholly out of character, but it must be noted that the offender persisted in committing it even when interrupted by the passing taxi, and that even after the intervention of the security officer he was still walking away with W, inviting her to give him oral sex. We do not agree with Mr Schofield that the duration of the offence comes into the category of a "sustained incident" for the purposes of the Guideline, but we do agree with him that it is a relevant consideration that the offender was stopped in his commission of the offence rather than choosing to stop of his own accord. Plainly there was substantial personal mitigation to be set against the aggravating features.

20. We think it very regrettable that at no point in the hearing below does anyone seem to have referred to the Sentencing Council's Definitive Guideline on the Imposition of Community and Custodial Sentences. That guideline provides the court with a structured approach to decisions as to the imposition and suspension of custodial sentences. At page 7 it sets four questions to be considered in appropriate sequence by the court. Addressing those four questions, our views are as follows.

21. First, the custody threshold has clearly been passed.

22. Secondly, it was, in our judgment, unavoidable that a sentence of imprisonment be imposed to mark the seriousness of the offence. This is not a case to which the note in the Sexual Offences Guideline which we have quoted applied. It is not the case of a sentencer being confronted with a difficult choice between a short or moderate length custodial sentence, and a prospect of rehabilitation which could be achieved through a non-custodial sentence but not through a custodial sentence. Here, the offender had already, to his credit, taken steps which had put him well on the road to achieving rehabilitation.

23. Thirdly, strong though the personal mitigation was, it was outweighed by the factors justifying an uplift from the guideline starting point and then a further uplift to reflect the aggravating features of the case. In our judgment, the shortest sentence commensurate with the seriousness of the offence would, after trial, be one of 18 months' imprisonment. Having regard to the prompt guilty plea, that should be reduced to 12 months' imprisonment.

24. We come to the last of the four questions. Can the sentence be suspended? We have found this by far the most difficult question. The Guideline requires the court to weigh certain specified factors in answering it. The strong personal mitigation, and the realistic prospect of rehabilitation which, as we say, the offender is already well on the way to achieving, are present in this case as factors indicating that it may be appropriate to suspend the sentence. Of the three factors identified as indicating that it would not be appropriate to suspend the custodial sentence, two are plainly not present, namely that the offender presents a risk or danger to the public and that the offender has a history of poor compliance with court orders. As to the first of those, we note Mr Schofield's point that the instant offence was an opportunistic offence and in that sense very worrying. But we are satisfied from the material before the court below and before this court that there is no significant continuing risk to the public.

25. The question therefore becomes whether the third of the factors militating in favour of immediate imprisonment, namely that appropriate punishment can only be achieved by immediate custody, applies in this case so as to outweigh the factors in the offender's favour. The judge, as we have said, did not specifically refer to the Imposition Guideline and his indication of the factors which enabled him to sentence as he did was given with express reference to the non-custodial sentence rather than to reasons for suspending a sentence of imprisonment. He did however also indicate that in any event he would not have found it necessary to impose an immediate sentence of imprisonment. We are satisfied that he did consider all the relevant factors. He concluded that this was not a case in which appropriate punishment could only be achieved by immediate custody. That was a lenient, and indeed a very lenient, decision. However, after careful consideration, we have concluded that, by a narrow margin, it was within the range of sentences properly open to him in the particular circumstances of this case.

26. We conclude that in all the circumstances it was not properly open to the judge to pass anything other than a custodial sentence. The imposition of a community order was therefore unduly lenient. We accept nonetheless that the judge properly considered and weighed the factors relevant to a decision as to whether a prison sentence of appropriate length could be suspended. We further accept that for the reasons which he gave the decision to suspend was one which was, just, properly open to him.

27. In the result, we conclude that the appropriate sentence here is a suspended sentence of imprisonment, with a requirement of unpaid work. The sentence which we will pronounce will take effect from the date of the sentencing below and we expect that those hours of unpaid work which the offender has already performed will be counted towards the requirement which this court imposes upon him.

28. For those reasons, we grant leave to refer. We quash the sentence imposed below as being unduly lenient. We substitute a sentence of 12 months' imprisonment suspended for 2 years, with the requirement that the offender performs unpaid work for 120 hours.

29. The effect of that sentence will be to alter some of the consequential orders made below. The surcharge will now be £140 and the notification requirements will apply for 10 years.

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

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