Neutral Citation Number: [2019] EWCA Crim 1782

Case No: 201801360 B1 / 201801361 B1, 201801462 B1 / 201801463 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PLYMOUTH
HHJ DARLOW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 29th October 2019

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE FRASER
and
SIR DAVID FOSKETT
(sitting as a judge of the Court of Appeal Criminal Division)

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Between:

KIERAN MCPARTLAND	**Appellants**
RICHARD GRANT	
- and -	
REGINA	**Respondent**

- -
- -

Mr Nicholas Lewin (instructed by **Alan Harris Solicitors**) for the **Appellant McPartland**
Mr Ali Rafati (instructed by **Walker Lahive**) for the **Appellant Grant**
Mr Piers Norsworthy (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 14th May 2019

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Approved Judgment

LADY JUSTICE THIRLWALL DBE:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences in this case. No matter relating to the victim in this case shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences. This prohibition applies in this case unless waived or lifted in accordance with s.3 of the Act. We shall refer to the victim as 'X' in this judgment.

2. Kieran McPartland is 33. Richard Grant is 31. On 14th March 2018 in the Crown Court at Plymouth after a trial lasting 8 days they were convicted and on 23rd March they were sentenced as follows:

   McPartland: Rape (count 4), 11 years imprisonment. Assault by penetration (count 3), 3 years imprisonment to run consecutively to the term on count 4 making a total sentence of 14 years imprisonment.

   Grant: Rape (Count 2), 11 years imprisonment.

3. Victim surcharge orders were imposed. Both appellants are subject to the provisions of Part 2 of the Sexual Offences Act 2003 (Notification to the Police) and to the schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009 no 37).

4. The jury were unable to agree about Count 1, a further count of rape alleged against Grant. They were discharged from giving a verdict. Subsequently no evidence was offered on that count and a Not Guilty verdict was entered.

5. They each appeal against conviction and sentence by leave of the single judge.

FACTS

6. On the evening of 26th June 2016, X was out with friends in Plymouth to celebrate her birthday. She met the appellants outside Revolution club in the early hours of 27th June and went with them to another pub. She subsequently went with them to Grant's home. Later that day she reported to the police that whilst at the house, she had been raped by them both.

7. At trial it was the prosecution case that Grant had vaginally raped X (counts 1 and 2) and that McPartland had penetrated her vagina with his fingers (count 3) and orally raped her (count 4). An alternative count of attempted oral rape (count 5) was not left to the jury since the evidence was that penetration had taken place, the issue being consent.

8. The issue for the jury on counts 1, 2 and 4 was consent. On count 3 the act of digital penetration was denied by McPartland. The jury's conclusions depended on their assessment of the relative credibility of X and the appellants.

Prosecution Case

9. In her ABE interview X described going out with friends and work colleagues. Over the course of the evening she had drunk eighteen Jägerbomb shots, three quarters of a bottle of Malibu with lemonade, four double vodka mixers and two shots.

10. She was standing with her flatmate outside Revolution at around 2.30am and started speaking to the appellants. She got on with Grant and was attracted to him in a friendly rather than a sexual way. They decided to go to the Two Trees pub and en route her flatmate decided to go home. She went into the pub with the appellants and after that got into a taxi with them. She did not initially know where they were going but it soon became apparent that they had gone to Grant's home.

11. Inside the house the two men started smoking cannabis and the fumes made her feel nauseous. She recalled being in the bedroom but could not remember how they ended up there. Her underwear had been pulled down and Grant proceeded to have vaginal intercourse with her. This was the allegation on count 1 upon which the jury could not agree. McPartland was simultaneously penetrating her mouth with his penis. She was trying to get them to stop and was pushing them away. She felt very drunk and told them that she was going to be sick. She ran to the bathroom and could remember McPartland saying to Grant, "mate, how come you get to fuck her?"

12. Whilst she was in the bathroom, she could recall one of the men trying to penetrate her vagina from behind with his penis. She tried to reach behind her and push him away. She returned to the bedroom to lie down as she felt ill, dizzy and tired. Grant came into the room and had sexual intercourse with her again (count 2). She kept telling him to stop and saying that she felt sick. McPartland then came into the room and penetrated her vagina with his fingers (count 3). He tried to put his penis into her mouth, but she told him to fuck off and leave her alone otherwise she would call the police. She went downstairs, grabbed her things and left in a taxi which she assumed that they had called for her. She asked the taxi driver for their address so that she could note it down. She went home where she woke up her roommate, Laura, and disclosed what had happened. She later spoke to her other flatmate, Sully, before reporting the incident to the police.

13. In cross examination she accepted that she could not recall the precise sequence of events but maintained that she was telling the truth about what had happened. She accepted that she may have been leaning into Grant and hugging him during the earlier part of the evening, but he had not been touching her in a sexual way and she did not say that she would be having sex with him that night.

14. She was asked whether she had sent messages to her friends on her mobile phone about the incident. She said she had and that she had deleted them. She denied having done so between being asked to provide the phone (a request made for the first time two years after the event, and which she initially refused) and providing it.

15. Adrian Walton, a taxi driver, gave evidence that he had picked up X and the appellants outside the Two Trees pub. He did not think that any of them were drunk. He had assumed that X and Grant were in a relationship.

16. Marius Vatrici, also a taxi driver, gave evidence that he had collected X from Grant's address in the early hours of the 27th June. He said that she looked confused and her voice was shaking. When he asked where she was going, she told him to just drive. She started to cry and was talking to herself saying "maybe it was my fault".

17. Laura Merchant-Martin, X's roommate, gave evidence that she had been out drinking with X on 26th June but had left at around 2am. She was woken up in the morning by X who was crying. She said that she had been raped. She calmed her down and left her sleeping when she went to work.

18. Sulzeer "Sully" Burke gave evidence that he had been out with X and others on 26th June. He remembered meeting the appellants. He noticed that Grant was flirting with X and that she seemed to be joining in. He did not recall seeing Grant holding X from behind or her leaning into him. When Revolution club closed, X decided to leave with the appellants as she was not ready to end the night. He subsequently left X and went home.

19. The next morning X came into his room and disclosed that she had been raped. She said that she had another drink in the Two Trees pub which had made her feel extremely drunk.

20. He also gave evidence that he had seen McPartland in February 2017 at another club and they had spoken about the incident with X. McPartland had said that he had stayed downstairs whilst X and Grant went upstairs. He had not seen her again after that as he had passed out.

21. When cross examined, he said that when he saw him in February 2017, McPartland appeared to be quite drunk as he was unsteady on his feet and slurring his words. McPartland had maintained that he had not raped X as he had been downstairs the entire time. The witness had not thought that X had been drunk on the evening in question; she was someone who could handle her drink.

Defence Case

22. **Grant** gave evidence that he had met McPartland at Revolution club. Although they had known each other for around 10 years, they were not close friends. At around 2.45am he had been outside with McPartland and they met X and Sully Burke. They ended up chatting and decided to move on to the Two Trees pub. Sully Burke decided to go home at that point. They had no more than two drinks in the pub; none of them was drunk at that stage. Both he and McPartland were chatting to X. At one stage he was touching her bottom. He recalled that a gay man had been hitting on him and X had said "look I'm sleeping with him tonight." He had, however, not taken her seriously.

23. They decided to leave the club and go back to his house. They took a taxi and stopped off at a petrol station on the way to buy more alcohol. At his house, he smoked some cannabis with McPartland. X then said that they should go upstairs. They went to his bedroom where he took off his trousers and X took off her underwear. He kissed and touched her and they had vaginal sexual intercourse. He then saw McPartland

penetrating her mouth with his penis. She initially made no complaints about what was happening but then told McPartland to stop otherwise it would be rape. This upset McPartland who stopped and said that they should get X to leave.

24. He went downstairs and smoked more cannabis with McPartland. He went back upstairs to check on X. At some point she was sick and he was in the bathroom with her rubbing her back. A little while later he had vaginal sexual intercourse with her again.

25. A taxi arrived shortly after that. At this point X seemed fine. He went downstairs leaving her with McPartland for a couple of minutes. They came downstairs and X left in the taxi. He then went on to another party with McPartland.

26. In cross examination, he denied that he had intended to have sex with X earlier that evening; he had only realised that they would have sex as they went upstairs. She had consented to the sexual activity with him and McPartland and was participating. She had fabricated the allegations. She did not object to anything that he had done. When she objected to what McPartland was doing, he had stopped straightaway.

27. **McPartland** gave evidence which was consistent with Grant's about their friendship and the events of the evening, meeting X and going to the Two Trees Pub. It was clear that X fancied Grant, they were cuddling up to each other and Grant was touching her. They all knew that they were going back to Grant's place for a drink before going on to another party.

28. At the house he smoked with Grant. X was tipsy but not drunk. She then said that they should go upstairs. He asked Grant if that included him as well. Grant asked X if she wanted them both to come up and she said yes.

29. In the bedroom Grant and X started kissing and touching each other. They undressed and started having vaginal sexual intercourse. He initially thought that he would also have sexual intercourse with X but then changed his mind. He accepted that he had penetrated her mouth with his penis but she then said to stop and that if he did it again it would be rape. He had been in no doubt that she was consenting initially but he felt vulnerable at that stage as she could make false allegations against them. He asked Grant to get her to leave and went downstairs.

30. He went back upstairs and saw that X was being sick. He could see that Grant was behind her rubbing her back. X later left in a taxi and was fine. She was not upset and spoke to him normally before she left. He then went with Grant to try and find another party, but they were unsuccessful in doing so.

31. He denied digital penetration and said that he had been put off by the fact that it was obvious that Grant had ejaculated.

32. He accepted in cross examination that he had amended his defence statement to remove the assertion that it had looked like Grant was having sex with X when she was in the bathroom. He had realised that this was not correct. He denied that he had told Sully Burke that he had remained downstairs and had passed out.

Grounds of Appeal

33. Counsel submit on behalf of both appellants that the judge should have adjourned the trial to allow analysis of X's mobile phone to see whether and when she deleted messages about these events.

34. The background to the application was this: the case was listed for trial in late February 2018, nearly two years after the events complained of. We do not know the reason for the delay. In early February 2018 there was a great deal of press coverage in respect of failures to disclose relevant material from social media in trials of allegations of sexual offences. Prosecuting Counsel advised the CPS that X should be asked about her social media accounts. On the 14th February the officer in the case spoke to X and asked if she had a Facebook account. She confirmed that she did and that she used Facebook messenger to send messages to friends. She also told the officer that she had Instagram and twitter accounts. On 17th February the police officer texted X and said the CPS wanted to download her Facebook account. She refused her consent, as she was entitled to. On 18th February she made a statement explaining that she had used only Facebook messenger to send messages to her friends about the incident. She said that she had deleted the messages about four or five months earlier. She explained that she had changed phones but had retained the same number and account. She had given her old phone to her sister who was unaware of the incident (as was the rest of her family). She refused to give her new phone to the police.

35. The police took further advice from the CPS and Counsel which they then passed on to X. She agreed to hand over her new phone. In a further statement on 25th February she said that she had used Facebook Messenger, Snapchat and WhatsApp to send messages to friends, all of whom she named. She said she deleted her messages regularly.

36. Over the weekend before Monday 26th February on which the trial was due to start the police downloaded her Facebook account and reviewed it along with her Instagram and Twitter Accounts. They were unable to access her Snapchat account. They looked for any material that might assist the defence or undermine the prosecution in accordance with their duties. They found nothing. They interviewed four of the people X had named as people she may have contacted and reviewed some messages. They were not disclosable. One of the people to whom X had sent a message shortly after the evening in question was her friend, who gave evidence for the crown. Although X had deleted the message from her phone the police were able to retrieve it from the witness's phone. It was about a skirt that the witness had lent to X that evening. It was irrelevant and so not disclosable but it was in due course provided to the defence.

37. The prosecution informed the defence of the existence and review of the mobile phone as it was happening and all relevant statements were provided to them and to the judge. The case had been listed (for other reasons) without witnesses on 26th February. The Crown were ready to proceed. The defence were concerned that it was not possible to see messages that had been deleted. They wanted to explore when messages had been deleted and why. They pointed to the fact that it was at 5pm on

23rd February that she had been asked about her various accounts and it was the same day that threads had been deleted from Facebook Messenger. She had met the police officer on the 24th. The Crown had made enquiries as to how long it would take to obtain messages deleted from Facebook Messenger. The process was said to involve applications to the courts in the USA and would take at least 5 months. Matters were ventilated at some length. The judge said he had a deep sense of unease and at the end of the hearing it was agreed that the position would be looked at again in the morning.

38. This issue was considered again in detail a week later, on 1st March 2018. On that date the defence applied for the trial to be adjourned so that there could be further exploration of the deleted messages on X's phone and an order that X should hand over her (old) iPhone with a password so that it could be examined. The defence approach was, in short, that the prosecution had started this investigation into the telephone evidence, it was incumbent upon them to finish it off. The judge refused the applications and gave a detailed ruling while the jury were in retirement.

39. During the trial X was cross examined at length about when and why she had deleted the messages. It was put to her repeatedly that she had done so after she had been asked to provide her phone to the police. She said, repeatedly, that she deleted messages from time to time as a matter of routine. She accepted that she had deleted messages on 23rd February. It was put to her that she had deliberately deleted photographs. She said she wouldn't have deleted photographs if the police had asked to look at them. She did not remember being asked to keep anything.

40. On behalf of both appellants it is first submitted that the judge's decision was wrong. Second it is submitted that the judge should have reminded the jury of all the cross examination in relation to the mobile phone and directed them that if they found that X had deleted messages about the incident after being asked to hand over her phone they should take that into account in considering whether she was telling the truth about the events of that evening.

41. By the time of the hearing of the application the following was clear: -

    i) the allegations in this case were not made in the context of people who knew each other, still less who were in a relationship with each other. It is in cases in the latter category where mobile phone evidence is most likely to be relevant;

    ii) there was no suggestion of any contact between X and either of the appellants before or after these events;

    iii) X was open about the fact that she had messaged her friends about the incident. She named them all;

    iv) there was no basis for any assertion that X had said to any of her friends at any stage that she had agreed to sexual contact with the appellants or that they may have thought she had – whether by message or in person. Each of the people with whom she communicated had been spoken to by the police. Two of them gave evidence and were cross examined.

42. The submission that a further exploration of the phone might have revealed that she had deleted relevant messages after being asked to produce her phone went nowhere in the absence of any basis for the suggestion that the messages contained something which may have been of assistance to the defence. The mere fact of deleting messages (if she did) does not support that suggestion.

43. There is no inference adverse to X to be drawn from the fact that she did not initially want to hand over her phone to the police. She was perfectly entitled to refuse to do so. As the judge observed in the course of argument the first time this was raised, it would be a normal human reaction not to want the contents of her phone to be put into the public domain during the trial.

44. It was suggested on behalf of the defence in the course of argument that it is now entirely usual practice in cases involving allegations of sexual assault, that the mobile phone of a complainant should be examined. This is not and should not be thought to be correct. What is a reasonable line of enquiry depends on the facts of each case. On the facts here it is questionable whether it was reasonable to ask X to hand over her phone at all. But even if it were reasonable there was no basis for analysis beyond that which was done, in the light of the evidence from the friends.

45. We are quite satisfied that the judge was right to refuse to adjourn the trial. The application was based on speculation built on speculation. X was cross examined at some length on this subject. The judge was not required to repeat all the evidence on the topic again, both counsel having addressed the jury about it comprehensively.

46. As we have noted earlier in this judgment, there was before the jury the evidence of the taxi driver who had taken her home. He recalled her saying "perhaps it was my fault" or words to that effect. X was cross examined about that too. The defence were entitled and no doubt did refer to that in their speeches and the judge referred to it in terms in the summing up.

47. We reject this ground of appeal.

McPartland's Defence Case Statement

48. Both defence counsel submit that the judge should not have permitted counsel for the Crown to cross examine McPartland on his Defence Case Statement. The judge had refused a subsequent application by Mr Rafati to discharge the jury.

49. In his first defence case statement, filed in January 2018 after a conference with counsel, but unsigned, Mr McPartland wrote "As he climbed the stairs he saw Mr Grant and her in the toilet. She's being sick at this stage and Mr Grant was positioned behind her and it looked to Mr McPartland like he was having sex with her." After a further conference with counsel the statement was amended on 8th March 2018 (once the trial was underway and just before Mr McPartland gave evidence). The words "and it looked to Mr McPartland like he was having sex with her" were deleted.

50. In examination in chief McPartland said that when he had gone upstairs he had looked through the bathroom door and saw X being sick and "Richard Grant was behind her rubbing her back." On behalf of Grant, in cross examination, he was asked to

confirm that when in the bathroom Grant appeared to be rubbing X's back. The judge noted the evidence thus "He said she had been sick and he did not really see them having sex in the bathroom."

51. Mr Norsworthy sought to cross examine on this point. Both defence counsel objected. The judge considered there was no basis for the objection and the cross examination took place. McPartland's evidence was not easy to follow. In short he said both that he had not said what appeared in the original statement back in January 2018 and also that what appeared in the statement was what he thought in January 2018 but was not what he now remembered.

52. As the judge said in his ruling it would have been unfair to the Crown to shut out cross examination by the Crown in the light of the evidence in chief and under cross examination by Mr Rafati. The situation would have been that Grant would have relied on the version of events given from the witness box without the previous inconsistent statement being put to McPartland.

53. There was no unfairness to Grant. The judge directed the jury to ignore what the appellant had said about Grant in the bathroom in an out of court statement which was not repeated in evidence.

54. As to McPartland, the original version of the case statement constituted, it is to be assumed, particulars of facts upon which McPartland intended to rely as part of his defence as required by the Criminal Procedure and Investigations Act 1996. X did not know who was behind her. It was McPartland's case that it was Grant. The judge considered, correctly, that the change of evidence about what he thought Grant was doing went to McPartland's reliability in his account of the events of the evening and he directed the jury to that effect. During the course of argument on the appeal Mr Lewin raised, for the first time, an error in the judge's written direction. Mr Lewin candidly accepted that until the night before the hearing of the appeal he had not noticed it either when reading it or when the judge referred to it in summing up. Neither had anyone else. We have considered it.

55. The direction to which our attention was drawn reads, "If you are sure that the explanation that he now considers that his impression [about what he saw in the bathroom] was simply a mistake, is a valid one, you may accept what he said in his evidence given in the witness box. But if you reject his explanation or you are not sure it is true you should treat both what he said in his statement and what he said in the witness box with caution. It goes to his credibility; whether you find him generally to be a witness of truth or not."

56. The judge should have said something to the following effect, "if you believe his explanation that his impression of what he saw in the bathroom was simply a mistake or you think his explanation may be true then do not hold the change of account against him. If you are satisfied that his explanation is untrue then treat both what he said in the witness box and what he said in the statement with caution. You may consider it adversely affects your view of his credibility."

57. We have considered whether the effect of the judge's direction undermines the safety of the conviction.

58. That Mr McPartland had changed his account about what he had seen in the bathroom was incontrovertible. The two issues were: first, was the change important? If no, the jury should ignore it. If yes, then the second issue was: might the reason he had given for changing his account be truthful? If yes, the jury should ignore it. If no, it went to his credibility generally.

59. The difficulty for Mr McPartland was that his account of why he had changed his account was self-contradictory and difficult to follow (see paragraph 51 above) so that before the jury got to the stage of considering whether his account may be true they first had to identify what his account was. We remind ourselves that he began by denying he had said what appeared in the statement at all – a direct attack on his legal team, which he then abandoned.

60. The judge was generous to him in this regard. In his written direction on two occasions and again when summing up, the judge favourably summed up McPartland's explanation thus "he said that the reason for his deleting those words from his Defence Statement was that he now realised that his impression may have been a mistaken one." The same phrase appears in the paragraph that immediately precedes the passage relied on by Mr Lewin: "So far as Kieran McPartland's case is concerned it is for you to decide how different they are and if this is important. If you decide that the differences are not important, then you should ignore them. But if you think that the differences are important you should consider the reason Mr McPartland gave for his inconsistency, namely that his impression as of January 2018 was a mistaken one."

61. The fact that the case statement was consistent with X's evidence would not have been lost on the jury, nor would the fact that McPartland changed his account only on the day he was due to give evidence, and that his first explanation for the change was to deny the original account. On any view he had undermined his own credibility and we are satisfied that the safety of the conviction was not undermined by the error in the direction.

62. Finally on this topic we add that it was the Crown's case that the evidence of what he had said he had seen in the bathroom went to McPartland's credibility, given that it was their case that he had told Sully (which he disputed) that he had stayed downstairs throughout. The judge very fairly gave a *Lucas* direction to protect the appellant should the jury find that he had lied to Sully about where he had been in the house that night.

63. We reject this ground of appeal.

64. On behalf of Mr McPartland Mr Lewin had submitted in writing a number of further grounds which were not dealt with in oral argument.

65. The judge had provided written directions to the jury at the beginning of the trial. Amendments were needed in the light of the way the case had developed. The judge directed the jury to make corrections. Mr Lewin submits that the judge should have retrieved the original directions from the jury, retyped them and then given them back to the jury.

66. This is not arguable. The corrections were needed because count 5 (attempted oral rape) which was an alternative to count 4 (oral rape) was no longer to be considered in the light of the evidence. It followed that some of the directions of law were irrelevant. The judge told the jury to cross out the irrelevant sections. He explained what he was doing clearly and there is no reason to think that anyone could have had any difficulty with it. We reject this ground

67. In the absence of any cross examination from the Crown Mr Lewin submits that the judge was wrong to direct the jury that they could draw an adverse inference from the fact that McPartland had made no comment in interview but had given a detailed account in evidence. The appellant said nothing in his interview. In evidence he gave a detailed account of what had happened. He said in evidence that he had maintained his silence on the advice of his solicitor. He was not challenged about that. The fact that he followed the solicitor's advice was a matter for him. The judge gave a text book direction as to the approach the jury should take when considering whether or not to draw an adverse inference. There is no need to repeat it. There is nothing in this ground of appeal.

68. The judge had provided in writing a detailed summing up on the facts as well as on the law. Mr Lewin complains that when dealing with X's evidence the judge had not referred to two inconsistencies, which counsel pointed out. The judge was not obliged to repeat every point that could be made on behalf of the prosecution or the defence. The summing up was obviously fair and balanced. These points were before the jury. There is no merit in this ground.

69. Finally, Mr Lewin complains that there were inconsistent verdicts in respect of Grant. He submitted in writing that it was not clear how a jury could rail to reach a verdict on count 1 against Grant and yet did so on count 2. We have no difficulty in distinguishing between the two counts. In the first the jury may not have been sure that Grant knew that X was not consenting. By the time of the second she had been to the bathroom and had vomited, as Grant knew. The circumstances were different. There was no inconsistency. This ground is not arguable nor could it have led to a finding that the convictions of McPartland were unsafe either.

70. We are satisfied that the trial was fair and, despite the error to which we have referred, the convictions are safe.

Appeals against sentence

71. A compelling victim personal statement sets out the effect upon X's life of these offences. Her university studies suffered because she could not concentrate. She had been predicted a first-class degree but could not maintain the high quality of her work as a result of her involvement in the investigation and prosecution. She had not been able to confide in her family. She felt her friends treated her differently and that the whole episode had been emotionally and mentally intrusive "and I am not sure I will ever recover from it". She now struggles to attend social events of any kind.

72. Both appellants had previous convictions, but neither for offences of this seriousness. Grant had committed 41 offences over a 15-year period. He had one conviction for a

sexual offence: indecent assault on a female in 2002. He had been made the subject of a young offender's supervision order for 12 months. McPartland had convictions for public order offences, offences of violence, including domestic violence. His most recent conviction was in 2016. He had been convicted of 25 offences but had no convictions for sexual violence.

73. It is submitted on behalf of both appellants that the judge erred in his assessment of both category and culpability on both counts of rape which should, they say, have been category 3B of the Rape guideline. The judge had concluded that each offence of rape came into category 2A.

74. Each submits that X was not "particularly vulnerable" as envisaged by the guideline. We disagree. She was alone with two older men in the home of one of them. She was very drunk. We accept that the appellants may not have known that initially but by the time she had vomited and was lying on the bed afterwards they knew that she was unwell. That is why the judge was correct to find her particularly vulnerable. It followed that the category was 2.

75. As to culpability, both appellants submit that these were not offences committed by two or more people. This is not arguable. The facts as we have described them earlier in this judgment make it clear that these assaults were committed by two men on the same woman, the assaults were extremely close in time. It does not avail the appellants to say that they assaulted her one at a time.

76. It follows that the judge's categorisation was correct as was his assessment of culpability. It was 2A. The judge was bound to start at 10 years. The range is 9 to 13 years.

Grant

77. The judge added only 1 year for the aggravating factor of ejaculation. We do not accept that a sentence of 11 years imprisonment was manifestly excessive. Accordingly the appeal against sentence is dismissed.

McPartland

78. There was no further aggravation and no mitigation. There were two offences. There is no complaint about the length of the sentence for the digital penetration, nor could there be. Mr Lewin submits that consecutive sentences were not justified. We agree. This was a single terrible incident for this young woman. The digital penetration by McPartland and the oral rape took place almost at the same time. The digital penetration aggravated the oral rape and justified a total sentence of 11 years.

79. We quash the sentence of 14 years and we impose in its place a total sentence of 11 years made up as follows: for the rape, 11 years imprisonment, for the digital penetration 3 years imprisonment to run concurrently. To that extent the appeal against sentence by McPartland succeeds.