APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 23
HCA/2023/000206/XC

Lord Justice Clerk
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

TJ

Respondent

Appellant: Charteris KC, Solicitor General; D McLean; the Crown Agent
Respondent: D Findlay KC; C Miller; John Pryde & Co, Edinburgh

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22 June 2023

Introduction

[1] The respondent pled guilty to a charge of rape that

> "on 27 June 2021 at …. you …. did assault LS, … and did enter said property uninvited, repeatedly touch her on the body, place your hand inside her lower clothing, repeatedly penetrate her vagina with your fingers, seize her mobile telephone from her, pin her down onto the bed, seize her by the body, pull down her

> lower clothing, and repeatedly penetrate her vagina with your penis and you did thus rape her, all to her injury: Contrary to Section 1 of the Sexual Offences (Scotland) Act 2009."

[2] The court was told that the respondent had no prior convictions. The trial judge imposed a sentence of 4 years and 6 months, reduced from a headline sentence of 5 years to reflect the plea. The Crown appeals the sentence as being unduly lenient. It is asserted that the trial judge erred in her assessment of the seriousness of the offence and her approach to the aggravating and mitigating factors. An examination of sentences in other Scottish cases, together with a cross-check with the guidelines in England and Wales, suggests that the headline sentence ought to have been materially higher.

Background

[3] The complainer worked at a bed and breakfast establishment where the respondent was staying for work purposes. The complainer arrived for work on the afternoon in question, along with her 7 year old son, and found the respondent, whom she had not met previously, in the kitchen. She was waiting for her employer to arrive. The respondent was drinking vodka and offered her some. She accepted, but being of slight build became extremely intoxicated. She started to vomit. She asked her surprised employer to take her home. The employer put the complainer into the car with the assistance of the respondent, who then got in the car uninvited. On arrival at her home the complainer said she was fine and that they could leave. The respondent disputed this, owing to the presence of the complainer's 7 year old son. He suggested that the employer should leave, whilst he remained. The employer was not comfortable with this and repeatedly suggested they should leave but the respondent refused. Eventually, the employer persuaded the

respondent to leave. The complainer went to bed wearing pyjamas and her son was in his single bed in the same room.

[4] After returning to the B & B the respondent immediately returned to the complainer's house and let himself in. He entered her bedroom, lay behind her in the bed, and digitally penetrated her, roughly, for about 5 minutes. She was shocked and frightened, and concerned about her son, so pretended to be asleep. Her son came over to the bed, took her hand and said "Don't worry, Mummy, [X, her partner] will be home soon". The young boy then left the room followed by the respondent. The complainer called 999 but did not speak to the operator as the respondent returned. He got into the bed and continued to penetrate her, digitally. She said no and tried to move away. Her son returned, and again said that [X] was coming home. The respondent again left and the complainer again called 999, but before she could speak the respondent returned. He declined the call and pushed the phone away. He then pulled down her pyjama trousers and pants and penetrated her vagina with his penis. He asked if she liked it and when she said no he ignored her and persisted in having sex with her.

[5] The complainer's son returned again and said that [X] was here. The respondent got out of bed and the complainer again dialled 999. Hearing the respondent returning, she hid the phone under her pillow. He flipped her onto her stomach and penetrated her vagina once more. She heard her son shout, which caused the respondent to jump out of bed and leave the room. The complainer pushed him towards the bathroom while she ran down the stairs to the back door. At this point the respondent left her house. He later told police "I had sex, but it wasn't rape". The complainer was found to have several injuries: three "fingerprint" bruises to the crease of the wrist; non-specific bruising to the upper right forearm; and tenderness and redness of the vagina.

[6] In respect of sentence the sentencing judge's report states:

> "He could offer no real explanation for his actions, although he accepted responsibility for them. I considered that the crime the appellant had committed, already very serious, was aggravated by being carried out in the presence of the complainer's young son, who must have found these events extremely disturbing. Against that, this was the appellant's first conviction of any kind, he had accepted responsibility (albeit against a background where he said he had no recollection of events due to inebriation), and had exhibited remorse. He was assessed as being at low risk of general offending, and medium risk of sexual offending. He had a good record of employment, and his family in Poland remained supportive of him."

[7] The trial judge would have imposed a sentence of 5 years imprisonment, but considered that the plea, tendered on the second day of the trial had some modest utilitarian benefit, in particular that it spared the complainer having to give evidence. She accordingly reduced the sentence to one of 4 years and 6 months.

The trial judge's report

[8] In her report the trial judge states that she had regard to the "Principles and Purposes of Sentencing" and "The Sentencing Process" guidelines published by the Scottish Sentencing Council. She had regard to the core principle that sentences must be fair and proportionate, having regard to the seriousness of this offence and the circumstances of the offender. She explicitly identified the offence as a serious one, with aggravating factors. She considered the sentences imposed in a number of cases, and concluded that the appropriate headline sentence for a serious offence of rape, perpetrated by a first offender, of previous good character, who had accepted responsibility and shown remorse, was 5 years.

[9] As to the Crown's assertion that the offence was pre-planned, the judge states that the CJSWR noted that the level of planning was difficult to discern due to the respondent having no real recollection of events, but that no other reason for returning was proffered. The trial judge considered that whether it was correct to describe the offence as

"premeditated and planned", rather than opportunistic, might be a moot point, but that in any event she considered the circumstances which provided evidence of the appellant acting deliberately, were eloquent of a serious offence having been committed.

[10] The trial judge claims that the author of the CJSWR asserted that he was confident, notwithstanding the absence of an interpreter, that he was able to obtain sufficient information to prepare the report, and to apply four specified risk assessment tools. Having regard to the terms of the report, she did not consider that the statutory criteria for an extended sentence were met.

[11] Were she to sentence according to the Guidelines in force in England and Wales, she suggested that the case was akin to a category B3 offence, which would suggest a range of 4-7 years, with a starting point of 5 years. In any event, she considered it more appropriate to assess the sentence by reference to sentencing decisions within this jurisdiction.

The CJSWR

[12] This records that the respondent's limited command of English made it difficult to gauge his level of insight and the consequences of this. His poor recollection made it difficult to assess the level of planning. He seemed remorseful and emotional but could not offer an explanation for his behaviour. He appeared to accept limited responsibility for the offence. A risk assessment was undertaken suggesting that he presented a medium risk of further violent or sexual re-offending. No protective factors were identified. This seemed to have been a first offence, and on that basis the risk of further offending does seem low. However, if [he] were to re-offend the likelihood of significant harm would be high.

Crown submissions

[13] The sentence met the test for being unduly lenient, *per HMA* v *Bell* 1995 SCCR 344. There were several aspects to the Crown's argument.

[14] First, the trial judge erred in her assessment of the gravity of the offence and failed to have regard to its particularly serious factors, specifically:

(i) the degree of planning and premeditation, which reflected a high degree of culpability. The respondent displayed interest in the complainer at the B&B, took a role in transporting her home, encouraging her employer to leave the house, and on having returned to the B&B, immediately went back to the complainer's house where he knew the door was unlocked;

(ii) his own voluntary intoxication;

(iii) that he entered her home uninvited and attacked her in her own bedroom;

(iv) the deliberate targeting of a victim who the respondent knew to be vulnerable, being aware that she was intoxicated, alone save for her young son, and in bed in an unlocked house;

(v) that he raped her in front of the son who tried to comfort her and put an end to it;

(vi) that he prevented her from seeking help;

(vii) that the assault was sustained, in the sense that, the respondent left the room three times, having been interrupted by the complainer's young child, but on each occasion returned and resumed his attack;

[15] Second, that the trial judge erred in considering that public protection was not a primary factor relevant to sentence. The nature of the attack itself demonstrated the risk presented by the respondent to the public, as did the conclusion in the CJSWR that he is at

medium risk of further sexual offending and medium risk of violent offending. The trial judge did not attach sufficient weight to this factor.

[16] Third, the sentence imposed was out of line with many reported Scottish cases involving an intruder (*HM Advocate* v *Kevin Turner*, 8 June 2021 and *HM Advocate* v *Kyle McKenzie* 13 May 2022), rape in the presence of a child (*HM Advocate* v *John McCallister* 3 April 2020) and rape of an intoxicated and vulnerable complainer *(HM Advocate* v *Lars Thor Pedersen* 25 July 2022).

[17] Fourth, that a cross-check with the E&W Guidelines suggested that the offence fell into category A2, 9-13 years with a starting point of 10 years, or Category B2, 7-9 years, with a starting point of 8 years.

Submissions for the respondent

[18] For the appellant, senior counsel submitted that whether the sentence might be viewed as lenient was irrelevant, the question was whether the sentence was unduly lenient, a high test. Consideration of the trial judge's report suggested that she had given careful consideration to all the relevant factors, and had properly recognised the degree of risk referred to in the CJSWR. Reported cases on sentence may assist in providing a range of appropriate sentences but this should not be reduced to a box ticking exercise. On the issue of planning, it was submitted that here any element of planning would not be regarded as significant. It should be noted that when an opportunistic chance had been taken and a course embarked upon to commit an offence, it does not mean that the offence has been planned.

Analysis and decision

[19] In our view there are several factors which the trial judge either did not take into

account, or to which she did not give sufficient weight. One of these is the degree of planning and premeditation. The trial judge appears to have considered the case one where the actings of the respondent were wholly opportunistic rather than having involved a degree of planning or premeditation. In our view the trial judge has underestimated the evidence which points to a degree of planning. This can be seen from the time at which, uninvited, the respondent entered the employer's car. Thereafter, in the complainer's house, the respondent declined to leave, and tried to engineer that he remain with her in the house whilst her employer departed. It is clear that from at least that point the respondent was engaged in planning to commit the offence. The fact that he tried to persuade the employer to leave him alone with the complainer is not mentioned in the trial judge's report. As the Solicitor General pointed out, after being returned to the B&B the respondent had to make his way back to a house which he had visited only once, and to do so before the complainer's partner returned, it having been stated that he was expected to return soon. It seems clear that rather than returning for some "inexplicable reason" as suggested by the trial judge, the respondent returned specifically with the intention of committing the attack. There was therefore a degree of planning involved in the offence, although not "significant".

[20] A further factor to which the trial judge does not seem to have given adequate weight is the degree of violence involved. The libel, which states that he seized the complainer by the body, and pinned her down, included the allegation of injury. The narrative explained what the injuries were - again not referred to in the report or the sentencing statement- and these were consistent with the use of a certain degree of force.

[21] This was a sustained attack, in which the respondent returned three times repeatedly to sexually assault and rape the complainer. The presence of her young son, who tried to comfort her, and who repeatedly tried to bring matters to an end by suggesting that her

partner would be home soon, was an added degradation. The respondent prevented the complainer from seeking help, and each time after the intervention of the complainer's young son – three times- , after seeming to check that the coast was clear, he returned to the attack. This is a significant factor to which the judge has clearly not attached sufficient weight.

[22] The report of the trial judge suggests that the sentence was selected as one which reflected "the appropriate headline sentence for a serious offence of rape, perpetrated by a first offender, of previous good character, who had accepted responsibility and shown remorse", but this in turn fails to recognise that the sentence should be individual to the circumstances of the case, and that there is no such thing as a generic "serious" rape by a generic first offender.

[23] In the course of argument, reference was made to a number of sentencing decisions in other rape cases. We do not dispute that this may be a valuable exercise in assisting the court to identify a sentencing range for the circumstances of an individual case. However, it must be borne in mind always that each case is unique, and it is always necessary to consider the individual factors which are present and which reflect either the culpability of the offender or the harm to the complainer or both. The cases referred to by the Solicitor General certainly offer more assistance in this regard than those referred to by the trial judge. The case of *MG* in particular, referred to by the trial judge in her report, is of no assistance here. First, it was a case which lacked the elements of planning, presence of a child, offence committed in the complainer's own home, by an uninvited intruder, and where the court was not satisfied that the incident involved the sort of sustained attack which would take it from category B3 to B2 of the E&W Guidelines. Secondly, it was a case where the court clearly indicated that the sentence imposed was one which it considered

lenient. Cases where a Crown appeal fails because the sentence is lenient, but which does not meet the high test for undue leniency do not provide any sort of benchmark and must be treated by sentencing judges with caution.

[24] We are satisfied that the combined effect of the numerous serious factors present in this case, including a degree of planning, the location of the offence, the uninvited entry to the house, the presence of the complainer's young son, the actions of the respondent preventing the complainer from raising the alarm, the persistent and relatively sustained nature of the attack, the use of a degree of force, and the apparent targeting of a vulnerable complainer, all suggest that the sentence selected by the trial judge was significantly outwith the range of sentences which might reasonably be selected for the offending in question. The only mitigating factors were a lack of significant convictions and the tendering of the plea.

[25] Finally, we agree with the Solicitor General, using the material as a cross-check, that it seems that the circumstances of the offence would bring the case within category B2 of the relevant guideline in England and Wales, and at the higher end of the relevant range. The factors particularly relevant in this regard are (i) the location of the offence; (ii) uninvited entry to the house; (iii) the presence of the complainer's child; (iii) the steps taken by the respondent to prevent the complainer reporting the incident; (iv) a degree of planning; (v) the vulnerability of the complainer; and (iv) the commission of the offence while under the influence of alcohol.

[26] Having regard to all relevant factors and the devastating impact on the complainer as now shown by the Victim Impact Statement, we are of the view that an appropriate headline sentence would be one of 9 years. We accept that there was to an extent a utilitarian value in the plea, although the trial judge had overstated that at 6 months, having regard to the sentence she imposed. However, 6 months as a proportion of 9 years does

reflect the utilitarian value of the plea. We will therefore quash the sentence and impose a sentence of 8 years and 6 months.