WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Neutral Citation No. [2022] EWCA Crim 1649

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202200958/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 7 December 2022

Before:

LORD JUSTICE DINGEMANS
MRS JUSTICE McGOWAN DBE
HIS HONOUR JUDGE PICTON
(Sitting as a Judge of the CACD)

REX
V
LUIS MIGUEL CALADO

Computer Aided Transcript 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)

MR S HAMBLETT appeared on behalf of the Appellant

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. The appellant is a 28-year-old man having been born on 30 March 1994. He had, before the offending the subject of this appeal, nine convictions for 11 offences which included threatening behaviour, theft and assault on an emergency worker. The appellant was convicted in the Crown Court at Worcester on 7 December 2021 following a trial before a judge and jury of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 and sexual assault, contrary to section 3 of the Sexual Offences Act 2003. The complainant in that case we will call "A". After another trial before judge and jury he was convicted on 18 February 2022 of rape, contrary to section 1 of the Sexual Offences Act 2003 and an offence of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003. We will refer to the complainant in that case as "B".
2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
3. The appellant was sentenced on 1 March 2022, by the judge who had heard the second trial, to seven years' imprisonment for the assault by penetration and one year concurrent for the sexual assault in respect of complainant A and seven years' imprisonment for rape and two years concurrent for the assault by penetration in respect of complainant B. Some of the offending took place during a 12-month operational period of a suspended sentence of 26 weeks' imprisonment for theft. Twenty weeks of the suspended sentence

was activated and made consecutive to the overall sentence of 14 years at a slip rule hearing a couple of weeks after the main sentencing hearing. This meant that the final sentence was one of 14 years and 20 weeks' imprisonment. The ground of appeal is that the judge failed to have sufficient regard to the principle of totality.

The factual background

4. So far as the first set of offences is concerned, complainant A is described as a very vulnerable individual who had a diagnosis of mild learning difficulties and autistic spectrum disorder. She required support in managing her daily activities. With the support of her parents she had managed to move into a flat on her own in Worcester when she was 21 years old. She had lived there until she was 23 years old when the offences were committed.

5. On 6 July 2018 the complainant had been at home when the appellant had called round to the same block of flats to see a friend. The complainant heard a knocking on the door and came to her door to investigate. The complainant recognised the appellant as they had met previously and the appellant subsequently entered her flat. After an initial conversation the appellant began to stroke the complainant's back and thereafter sucked the complainant's breast (which was count 1) and subsequently placed his fingers under the complainant's nightdress and inserted a finger into her vagina without consent (count 2). The complainant felt shocked and uncomfortable and made an excuse to go to the bathroom. When the complainant returned from the bathroom she told the appellant that she needed to go to sleep and the appellant left the complainant's address.

6. A complaint was made and the appellant was arrested and interviewed by the police. In interview the appellant denied that any sexual activity had taken place.

7. On Facebook some seven months later the appellant published comments tagged to about

78 people - although the complainant said it felt like 200 people - and called the complainant a filthy disgusting human being who had lied to the police to have him arrested. It is apparent from the victim personal statement that the offences had a serious effect on A's mental health and wellbeing.

8. Whilst on bail for those offences the appellant had met complainant B, who was 23 years old, in a chance encounter outside her address after the complainant had attended a boxing session at a gym. The complainant and the appellant subsequently sat outside the complainant's flat drinking alcohol and smoking cannabis. The appellant and the complainant thereafter went to the complainant's flat where consensual kissing had taken place. The complainant then pulled away from the appellant. Later, after the complainant and the appellant had visited a friend of the complainant's, the appellant and the complainant returned to the flat. The complainant bent over her bed to get some tobacco from a basket and the appellant came up behind the complainant and digitally penetrated her vagina (count 2) and thereafter pushed the complainant onto the bed and began to have vaginal sexual intercourse with the complainant. The appellant ejaculated. The appellant had a cigarette with the complainant before leaving her address. The complainant subsequently made a complaint to the police.

The sentence

9. The judge had the benefit of a pre-sentence report. That showed that the appellant had been treated with medication since the age of 11 for ADHD. It identified the appellant as posing a high risk of serious harm to adult females and raised issues about his behaviour to female prison staff after he had been imprisoned. The judge summarised the offending. The judge found that the first sexual assault in the first set of offences concerning complainant A was Category 2B with a starting point of one year and a range

up to two years. The second offence for the first set of offences was the most serious and had a starting point of six years with a range of four to nine years. The judge held that the offending was aggravated by the steps taken by the appellant to discourage the complainant from reporting, including the messages on Facebook. It is fair to note that this was after the offences had been reported to the police but it is right to note that it was plainly intended as a message, as the judge found, to dissuade the complainant from supporting the prosecution. The judge noted that the appellant had left when asked to leave.

10. As far as the second set of offences were concerned, the judge recorded that the appellant was on bail at that time. The judge found that the sexual assault was Category 3B because the victim was vulnerable but not particularly vulnerable for the purposes of the guideline. This had a starting point of two years and a range up to four years. The rape was also Category 3B with a starting point of five years and a range of four to seven years. Aggravating factors were that the offence was committed on bail, ejaculation, location of the offence at home and identification of complainant B as someone who could be exploited.

11. The judge determined that the lengthy sentence meant that he did not need to find that the appellant was dangerous. The judge considered the conditions in which the appellant would be incarcerated because of the Covid-19 pandemic and noted the findings about the appellant's mental health difficulties. The judge recorded that none of those difficulties had any bearing on the commission of the offences and it should be recorded that the judge had heard a trial concerning the appellant in relation to the second set of criminal offending and was best-placed to make that assessment. The judge said he would make the offending for each set of offences consecutive to each other and had to

consider the guideline on totality. He then imposed the sentences set out above.

The appeal

12. Mr Hamblett, to whom we are very grateful for his careful written submissions and succinct oral submissions this morning, submits that the overall sentence is manifestly excessive and that the principle of totality while referred to has not been correctly applied. He submits that the sentences for the first set of offences were manifestly excessive before even considering the sentence for the second set of offences and totality. He emphasises that the Sentencing Council Guideline on Totality emphasises the need for a just and proportionate overall sentence. He makes a further complaint that the 20 weeks that was activated of the suspended sentence should not have been made consecutive to the earlier sentence of 14 years.

13. In our judgment as to the first set of offences the judge was right to find that the sexual assault was a 2B offence because it involved touching of naked breasts and other culpability A factors were not present. As for the assault by penetration, it was Category 2 because the victim was particularly vulnerable due to circumstances and culpability B because Category A factors were not present. There were aggravating factors of the location of the offence in A's home, the Facebook message which the judge found was an attempt to dissuade A from continuing with the prosecution and the judge expressly found that there was no mental disorder linked to the commission of the offence. In those circumstances the sentence of seven years for that offending was permissible.

14. As for the second set of offences, the judge was right to find that these were Category 3B offences and that gave a starting point of five years with a range of four to seven years for the rape and the assault by penetration a starting point of two years and a range from a high level community order to four years for the assault by penetration. There were

particularly aggravating features, namely that the offences were committed on bail for the first offence, again in the complainant B's own home, there was ejaculation and the judge who had heard the trial found that there was targeting of B.

15. In our judgment, it is apparent that the judge must have reduced the total sentences for the first and second set of offences to come to the figures of seven years for each set of offences given the criminality disclosed and the aggravating factors which substantially outweighed the mitigating factors. The judge must have done that to take account of the proportionality. It is right to acknowledge that the judge did not expressly state what discount had been provided for totality but the judge did refer to the relevant guideline and principle. While some judges may have provided a greater discount, in our judgment it is not possible to say that the overall sentence of 14 years was manifestly excessive. It is also right to acknowledge that the judge took that into account in avoiding making a finding of dangerousness.

16. That leaves only the question of the suspended sentence. It is common ground that the judge was right to activate the sentence. It is common ground that the judge was right to reduce the amount activated from 26 weeks to 20 weeks to take account of the time which the further offending had taken place. In our judgment in circumstances where a suspended sentence is activated, it is perfectly appropriate to make that consecutive to the other and separate offending and criminality. The fact that other judges might have taken a different approach does not mean that the sentence was manifestly excessive.

Conclusion

17. Therefore, for all those reasons, we dismiss the appeal.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk