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IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 202401033/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 13 June 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE McGOWAN DBE
MRS JUSTICE COCKERILL DBE

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

REX
V
KELECHUKWU ORJI

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MISS S GATES appeared on behalf of the Attorney General
MR J PAGE appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: 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. To maintain anonymity we shall refer to the victim throughout as "AB".

2. Introduction

On 22 November 2023 in the Crown Court at Lewes, Kelechukwu Orji was convicted of two counts of rape, one count of attempted rape, one count of assault by penetration and one count of sexual assault. The trial judge ordered a pre-sentence report to consider whether Orji represented a significant risk of serious harm from the commission of further specified offences. The judge adjourned the case to the following day. He bailed Orji in order to allow him to put his affairs in order. Orji failed to appear the next day. It became apparent that he had left the country on the evening of 22 November on a flight to Nigeria. It must be assumed that that is where he remains.

3. On 21 February 2024, Orji was sentenced in his absence as follows: count 4 (rape) nine years' imprisonment; count 7 (attempted rape) five years' imprisonment; count 8 (sexual assault) three years' imprisonment; count 9 (assault by penetration) five years' imprisonment; count 10 (rape) 10 years' imprisonment. All of the sentences were ordered to run concurrently. The total sentence was 10 years' imprisonment. Ancillary orders were made which are not our principal concern. We shall have to return to one of them at the conclusion of this judgment.

4. His Majesty's Solicitor General now applies for leave to refer the sentence as unduly lenient, pursuant to section 36 of the Criminal Justice Act 1988.
5. On 3 May 2024 there was a hearing before this court leading to a short judgment which *inter alia* considered whether it was appropriate for an application of this kind to be heard when the offender had absconded. The court implicitly considered that it was appropriate. We do not need to consider that issue any further.

6. The factual background

The offender is now aged 48. He has no previous convictions. He came to the United Kingdom in 2017 from Nigeria. He was employed by HMRC. He is married with three children. His wife works as a nurse. As a family they lived in South London.

7. AB is a Nigerian national. Her age at the time of the offences was unclear. Her passport gave her date of birth in 2003. The judge's conclusion, having seen her give evidence, was that she was in her early twenties. Her precise age does not matter for the purposes of this application.
8. AB came to the United Kingdom in September 2020. This was at the invitation of the offender with whom she had stayed on a previous visit to the United Kingdom in 2018. The offender had asked AB to come in order to act as a home help for him and his family. Prior to her arrival he had messaged her in terms which AB thought were sexually suggestive. Notwithstanding that, she agreed to come to the United Kingdom. The offending took place over the course of the six weeks following her arrival.
9. The first occasion on which AB was raped (count 4) occurred when the offender came into her bedroom late at night. He pulled her from her bed and dragged her downstairs. He forced her into the living room where he made her bend over. AB put up a struggle. Eventually the offender was able to pull down her leggings. He held her from behind

while he raped her vaginally. AB told him to stop. The offender ignored her. He ejaculated.

10. The offender attempted to rape AB (count 7) shortly after the first incident. AB had come downstairs for something to eat. The offender took hold of AB and threw her to the floor. She was able to get up and run to the toilet. The offender pulled her out of the toilet. He said: "You're ready for me." For some 15 minutes he tried to remove her clothing, saying things such as "have sex with me" and "I want to eat your pussy". Eventually the offender gave up and AB was able to go to her room.

11. The remaining counts reflected a single continuing incident. It began in the kitchen. The offender's wife had gone to work. The offender asked AB to come and make him some food. When she came into the kitchen the offender pressed her breasts over her clothing (count 8). He then grabbed hold of AB. He said that she had to let him have sex with her. She struggled and begged him not to do it. As he held her down the offender digitally penetrated AB (count 9).

12. Thereafter the offender pulled her into the living room. AB repeatedly said, "Stop, I don't want this". The offender ignored AB who was struggling and trying to bite the offender. He held her down and raped her vaginally (count 10). He ejaculated inside her.

13. AB had downloaded a recording app onto her telephone after the first incident of rape. She audio recorded significant parts of this final incident.

14. The offender had threatened AB that if she were to tell anybody about what had happened she would not be safe in Nigeria when she returned home. AB did disclose something of what was happening to her boyfriend back in Nigeria. In October 2020 she contacted a support group for Nigerians in the United Kingdom. A member of the group

contacted the police to say that they were concerned for the safety of AB. The address of the offender was given as the place where AB was living.

15. On 29 October 2020 the police went to the address. They were able to speak to AB who said that she was in danger because the offender was forcing himself on her. The offender was arrested the next day. In interview he made no comment to all questions. He was not charged with the offences until September 2022. His case at trial was that any sexual activity between him and AB was consensual.

16. Material available to the judge

Because the offender had absconded there was no pre-sentence report. The judge had seven letters which spoke to the offender's good character from friends, work colleagues and a neighbour. He was described as a hard working family man. One friend said he was humble and law-abiding.

17. AB made a victim personal statement on 11 January 2024. She said that the offences and their circumstances meant that she no longer trusted people. She found it difficult to make friendships. She could not concentrate at college and would become upset for no reason. AB said that she could not sleep. She suffered flashbacks. She said she blamed herself for what had happened. She had considered suicide. AB explained that she was still in the United Kingdom because she felt unable to return to Nigeria for fear of reprisals from the offender or his family. She was estranged from her own family in Nigeria. They had not wished the matter to be reported to the police.

18. The sentence

The judge set out the facts of the offending in brief terms. He found that the offender had seen an opportunity for sexual gratification when AB came to stay at his home. He acknowledged that the offences had involved a degree of violence. He noted that AB

had suffered considerable distress due to the offending. The judge said that although rape was an offence of the gravest seriousness, the penetration by the offender was shallow.

19. By reference to the Sentencing Council Definitive Guideline for Sexual Offences, the judge found that the offences of rape fell into Category 2A in the relevant guideline. Harm was in Category 2 because of the violence used by the offender and the vulnerability of AB. Culpability fell into the higher category because the offending was planned, there was abuse of trust and there was previous violence. The judge identified that the starting point for an offence of rape in Category 2A was 10 years with a category range of nine to 13 years. He said that the only mitigation was that penetration was shallow and brief. He referred to the offender's lack of previous convictions. He said that he had regard to totality. He found that: "This was something of a campaign of sexual abuse by a middle-aged largely framed man against a very young woman." The judge then imposed the sentences as already set out.

20. The parties' submissions

On behalf of the Solicitor General it is argued that the judge was correct in placing the offences of rape into Category 2 in the guideline. As well as the use of violence and the vulnerability of the victim, the incidents were prolonged. There were aggravating factors: ejaculation, the location of the offence, steps taken to prevent AB from reporting the abuse, AB being compelled to leave what had been her home in the United Kingdom. The offender's good character was a mitigating factor but subject to the caveat within the guideline: "The more serious the offence, the less the weight which should normally be attributed to this factor."

21. The Solicitor General argues that in relation to count 10 the judge should have adjusted the sentence upwards from the starting point to take account of the multiplicity of harm and culpability factors and of the aggravating factors. Further, whilst the judge was entitled to use count 10 as the lead count and to impose a sentence on that count to reflect the overall offending, that had to involve a significant uplift in the sentence on count 10 above and beyond the upwards adjustment consequent upon the seriousness of the final offence of rape.

22. On behalf of the offender, it is accepted that the sentence was lenient. However, it is put that the sentence was imposed by the trial judge who was an experienced Recorder. His overall view of the appropriate sentence should be respected. The sentence was not unduly lenient, it is said.

23. Discussion

A sentence is unduly lenient "... where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate" (Attorney General's Reference No 1 of 1989, 1990 1 WLR 41). The issue for us is whether the total sentence of 10 years' imprisonment could reasonably be considered appropriate for all of the offending against AB. We have no hesitation in concluding that it could not. We reach that view notwithstanding the fact that sentence was imposed by the judge who had tried the case. That is a factor which requires us to have proper regard to the judge's feel of the case. In our view it cannot be countermanded by the factors which we now outline.

24. If the offence of rape reflected in count 10 had been the only offence committed by the offender, a sentence of 10 years' imprisonment even then would have been lenient.

Given the nature and extent of the harm and culpability factors, the aggravating factors

and the surrounding circumstances, a sentence for that offence alone of 12 years' imprisonment would have been justified. The judge was wrong to find that shallow penetration mitigated the offence, even if factually that had been the position. The offender's good character was of little weight, given the gravity of the offending. Moreover the rape charged in count 10 was preceded by other sexual assaults, including assault by penetration. That assault was separate from the rape. By reference to the relevant guideline, taken on its own, that offence required a starting point of eight years' imprisonment. Because the assault by penetration was part of the overall incident on the day in question, it is appropriate that the uplift to the sentence on count 10 was modest. Nonetheless the starting point for that offence indicates the overall gravity of the conduct.

25. Whether a sentence of 10 years' imprisonment would have been unduly lenient had counts 8, 9 and 10 stood alone is moot. But that was not the position. The overall sentence had to reflect the first rape and the second incident in which the offender tried but failed to rape AB. The judge's description of events as "something of a campaign of sexual abuse" may have been an exaggeration but there was repetition of very grave sexual offending. As the judge himself said, the rape reflected in count 4 was an offence in Category 2A in the guideline. The attempted rape would have fallen into the same category had the offence been completed. The individual sentences imposed on counts 4 and 7 demonstrated the seriousness of the offences.

26. The Sentencing Council Totality Guideline sets out the general principle to be applied when sentencing a case such as this one:

"When sentencing for more than one offence, the overriding principle of totality is that the overall sentence should:

(a) reflect all of the offending behaviour with reference to overall harm

and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender; and

(b) be just and proportionate."

27. The sentence imposed by the judge in this case failed to reflect all of the offending behaviour. It did not adequately deal with the final incident of sexual abuse of AB. It failed entirely to reflect the earlier offending. Had the judge imposed consecutive sentences in relation to the three separate incidents by reference to the relevant guideline, the overall sentence would have been disproportionate. The proper course was the one adopted by the judge, namely, to impose the appropriate overall sentence on a lead offence. What the judge failed to do was to ensure that the sentence on the lead offence was sufficient to reflect the other offences committed by the offender. Those offences were very serious in their own right. A very substantial uplift was required.

28. Conclusion

The offender, so far as is known, is in Nigeria. Whether he will return to the United Kingdom is impossible to say. His absence, as we have already indicated, does not prevent us from adjusting the sentence, if that is what is required to ensure that it is a proper sentence. Public confidence in the sentencing process will be damaged if an unduly lenient sentence were to be left untouched simply because the offender was no longer in the jurisdiction of the Court.

29. We give leave to His Majesty's Solicitor General to refer as unduly lenient the sentences imposed on 21 February 2024. We shall take the same course as the judge and apply the appropriate overall sentence to count 10 as the lead offence. Thus we quash the sentence of 10 years' imprisonment on that count. We substitute in its place a sentence of 15 years' imprisonment which in our view is the least sentence appropriate to reflect all of

the offending behaviour. That period of imprisonment is longer than that advanced by the Solicitor General in the written reference. We however have to take our own view of the case. It is quite clear to us that the gravity of this offending taken as a whole justified a sentence of that length. The other sentences imposed will be unaffected.

30. Finally, we referred at the outset to the ancillary orders made by the judge. He made a Sexual Harm Prevention Order. His Majesty's Solicitor General has argued that this order should be amended so as to require approval to allow the offender to be in contact with his female children. On enquiry, it transpires he has only one child who is female. That child currently is eight years old. The proposition is that that child requires the protection of a Sexual Harm Prevention Order notwithstanding the fact that on the assumption that the offender were to return to this jurisdiction he would be in custody until well after her 18th birthday. It is, in our view, unrealistic to make the suggestion that the terms of the order as made by the judge were other than within the bounds of what was reasonable. In any event, it is not for us on an application of this kind to tinker with an order of that kind which is properly made.

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

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