In the Court of Appeal of the Falkland Islands

R-v-Charles David James Murdo Hewitt

Judgment

1. We are very grateful for the very clear and helpful submissions of Miss Lindop.
2. On 17th April 2017 in the Supreme Court of the Falkland Islands the Appellant pleaded guilty to counts 3 and 5 on an indictment containing five counts. The 17th April was to have been the first day of the trial as the Appellant had pleaded not guilty to all counts on 25th January 2017. In the light of the pleas to the two counts entered on 17th April the prosecution decided not to proceed on the other 3 counts.
3. On 20th April after an adjournment to obtain a pre sentence report the Appellant was sentenced to 12 months imprisonment for an offence of sexual assault which was count 3 on the indictment. That sentence was partially suspended; the Appellant was ordered to serve 8 months immediate imprisonment and the remaining 4 months was suspended. The Appellant was sentenced to 3 months imprisonment for an offence of harassment which was count 5 on the indictment. That sentence was ordered to run concurrently to the sentence on count 3.
4. As count 3 is an offence of sexual assault it is covered by reporting restrictions and nothing must be published in any report of this case which either identifies the complainant or might lead to her identification. The complainant will be referred to as M throughout this judgment.
5. The brief facts of the offences are as follows. The Appellant and M had been in a relationship for some time prior to the commission of the offences. The Appellant was older than M. He was 25 and she was 17 at the time of the commission of the offences. The relationship was not straightforward, principally because M was in a relationship with another man with whom she lived. Nevertheless the Appellant formed a very close attachment to M and was jealous of her other relationship. M was more ambivalent about her relationship with the Appellant and by the time count 3

was committed in November 2016, the relationship had become strained and the Appellant was becoming increasingly jealous of the other man in M's life.

6. The sexual assault took place in the Appellant's house. As a result of M mentioning her boyfriend, the Appellant became angry. He locked M in the house, pushed her to the floor and grabbed her by the throat. The Appellant told M that she had to promise that she was his. He dragged her onto the bed and held her down by sitting on her and holding her arms above her head. When M struggled to get free, the Appellant threatened to tie her up. He told her that he was the boss and that she was not to move or she would regret it. M continued to struggle and was screaming at the Appellant to stop but he appeared to take no notice. The Appellant pushed M's head into the bed and forcibly removed her trousers and underwear. He applied lubricant between her legs and then forced M's legs up. M must have feared that the Appellant was going to have sex with her forcibly. She was very scared.

7. In fact the Appellant did stop otherwise he would have faced a more serious charge. The Appellant later told the police that he stopped as he had come to his senses. The Appellant also said in his interview that what happened was not consensual, that he was sorry for what he had done and wished he had stopped earlier.

8. Although M and the Appellant did see each other after this incident, M broke the relationship off a short time later. The Appellant was not able to accept that the relationship was over and persistently texted M trying to continue seeing her.

9. Although the Appellant admitted the offence in interview, he pleaded not guilty at his first appearance in court. He served a defence case statement in which he asserted that the sexual activity had been consensual and that he had only confessed to the police as M told him to and she dominated him. That remained his public position until the day of the trial.

10. Miss Lindop who represented the Appellant in the Falklands and before us has submitted to us both orally and in writing that the sentence was manifestly excessive. She complains that the Judge gave inadequate credit to reflect the guilty plea; she argues that

the Judge took too high a starting point and asserts that the sentence should have been wholly suspended..

11. In deciding whether the sentence is manifestly excessive, we shall consider each of the grounds of appeal separately.

12. Credit for plea. The Judge gave the Appellant 10% credit for his plea on the day of trial. That is in line with the guidance on credit for pleas given by the Sentencing Council of England and Wales. It is accepted that that guidance has persuasive effect in the courts of the Falkland Islands. While it may be that there are some parts of the Sentencing Council guidance which are not appropriate for the Falkland Islands due to local concerns, the two that we are concerned with namely the guilty plea guideline and the sexual offences guideline, are not within that group. It is accepted that the Judge was correct to take that guidance into account. Miss Lindop argues that the Judge should have given a substantially greater discount to reflect the fact that the Appellant's guilty plea had saved M the trauma of having to give evidence of very embarrassing and intimate matters. She says that the point is made stronger as M did not make an ABE interview so she would have had to give her evidence in public in its entirely rather than partly by video. If Miss Lindop is correct, then it would follow that there would normally be greater credit for pleas of guilty in cases involving sexual offences. That argument has never found favour in the Court of Appeal for England and Wales and there is no established principle that more credit for plea is given in sexual offences than other cases. The reason for that is while the trauma of giving evidence in sexual matters may be greater so is the trauma of waiting to give evidence in the expectation that there will be a trial. There is no reported decision that supports Miss Lindop's argument and nor is to be found in any guidance. In our judgment that submission is not based on any established principle of law or practice.

13. Did the Judge choose the correct starting point? The Judge found that the offence came within category 2 in relation to harm and B for culpability. This gives a range of a high level community sentence to 2 years custody with a starting point of 1 year. The Judge decided that the facts of the case merited a starting point in

excess of 12 months. Having made allowance for the plea and other mitigation, the Judge arrived at a sentence of 12 months imprisonment.

14. Miss Lindop does not suggest that the Judge did not select the correct bracket. It is certainly arguable that by reason of the violence used and the threats of violence made by the Appellant in the course of the assault the appropriate category for harm was 1 not 2. Certainly by reason of that factor the Judge was entitled in our judgment to take a starting point above 12 months.

15. Finally Miss Lindop submits that the Judge having arrived at a figure of 12 months imprisonment should have suspended the entirely of the sentence rather than only 4 months. The reasons for suspension are, it is submitted, the fact that the Appellant has no relevant convictions; the Judge saw a number of favourable character statements and the Judge herself described the Appellant as well as M as being vulnerable and would benefit from help. The Judge had wished when she passed a partially suspended sentence to couple with that a supervision. In the end she was persuaded that she did not have the power as a matter of law to do that. In that event argues Miss Lindop the sentence should be wholly suspended. There is no doubt that a supervision order can be attached to a sentence of imprisonment which is wholly suspended.

16. The decision to wholly or partially suspend a sentence is primarily a matter for the discretion of the trial Judge. Was the Judge entitled to take the view that this sentence should only be partially suspended. While the Judge was persuaded to suspend part of the sentence, this was a serious sexual assault and it cannot be said that it was wrong in principle not to mark that by an immediate sentence of imprisonment at least in part. In our judgment the Judge was entitled to conclude that because of the seriousness of the offence only an immediate sentence of imprisonment would be appropriate.

17. Miss Lindop does also complain that the Judge in the course of the hearing gave the impression that she was taking into account against the Appellant the fact that he had indicated an intention to apply at trial to stay the indictment and to exclude the

interviews. In the case of the application to stay that seems to have related to events on which one of the other counts which was not proceeded with was based. In those circumstances, it cannot have been relevant to any issue at the sentencing hearing. The attempt to exclude the interviews on the basis of oppressive conduct by the police may have had some although limited relevance. In those interviews the Appellant had said that he was sorry and had shown remorse for what he had done. It is more difficult for the Judge to give weight to that remorse when it has been alleged that the confession was obtained by oppression. In the end however we have come to the conclusion that any views the Judge may have held about those potential arguments which were not pursued after the plea was entered did not affect the sentence that she passed.

18. For all those reasons this appeal against sentence is dismissed.