JUDGMENT

SC/CRIM/01/22

REGINA

Respondent

v

ROLAND O. WEDGWOOD-OREKOYA

Appellant

SC/CRIM/02/22

REGINA

Appellant

v

ROLAND O. WEDGWOOD-OREKOYA

Respondent

before
The Honourable Mr Justice James Lewis, Chief Justice

Given on
20th January 2023

Representation:

Mr Stuart Walker For the Crown

Mr Jonathan Duffy For Roland O. Wedgwood-Orekoya

This judgment will be published indefinitely for this reason:

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CASE NO SC/CRIM/01/22 and
CASE NO SC/CRIM/MC/02/22

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS
ON APPEAL FROM THE MAGISTRATE'S COURT

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 20th January 2023

Before:

THE HONOURABLE JAMES LEWIS KC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

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BETWEEN:

REGINA

Respondent

-and-

ROLAND OLUWASEYI WEDGWOOD OREKOYA

Appellant

REGINA

Appellant

-and-

ROLAND OLUWASEYI WEDGWOOD OREKOYA

Respondent

Mr Jonathan Duffy for the Appellant in the first appeal and the Respondent to the Attorney General's appeal.

Mr Stuart Walker for the Respondent in the first appeal and the Attorney General in the second appeal.

Judgment

THE CHIEF JUSTICE:

FIRST APPEAL

Introduction

1. On 21st July 2022 the Appellant was convicted by the Senior Magistrate after trial of one offence of sexual assault contrary to section 205(1) of the Crimes Ordinance 2014, namely:

> Roland Olumseyi Wedgwood Orekoya, on the 10th day of April 2022, intentionally touched [the complainant], the touching was sexual, [the complainant] did not consent to the touching and Roland Olumseyi Wedgwood Orekoya did not reasonably believe that [the complainant] consented to the touching.
> *Contrary to section 205(1) of the Crimes Ordinance 2014*

2. He was sentenced to 18 months imprisonment against which there is no appeal by the Appellant but there is an appeal by the Attorney General arguing that this sentence of 18 months imprisonment was unduly lenient. That is the subject of the Second Appeal and is dealt with in the second part of this judgment.

Brief Facts

3. On Saturday 9th April 2022, the complainant went to a friend's house to celebrate a birthday. At about 23.00 hours she went with friends to the K&C burger van near to Philomel Street. The complainant had been drinking vodka mixed with cranberry juice and was drunk. The complainant is 17 years old.

4. At the burger van the complainant met the Appellant and they began a conversation. The complainant did not know the Appellant but they had a connection because the Appellant had worked with a member of her family. She told the Appellant that she was a lesbian and that she was not interested in the Appellant in a sexual way.

5. The Appellant invited the complainant back to his accommodation where he said he had cannabis and would give her some to smoke. At the accommodation the Appellant showed an empty jar which he said had contained cannabis but there was none anymore.

6. There then is a dispute as to what happened next with the complainant stating that the Appellant grabbed her around the waist and tried to kiss her. Her evidence was that she pulled away and tried to push the Appellant away. The complainant was drunk,

disorientated and confused. The Appellant pulled the complainant towards a bedroom where they struggled in the doorway. During this struggle the complainant sustained a bruise to her left thigh.

7. The complainant said the Appellant removed his clothing so that he was naked and removed the complainant's top clothing except for her bra. The complainant told the Appellant "no" but the Appellant took no notice. The complainant and the Appellant fell on to the bed. The Appellant undressed, his penis was erect; and he had put on a condom. The Appellant forced the complainant's hand onto his erect penis, he closed her hand around his penis and moved her hand up and down to masturbate him. The complainant continued to resist and managed to free herself and left the house soon after.

8. The Appellant's evidence was different. He stated that at his house, after finding there was no cannabis on offer, the complainant had asked him if he had any condoms and asked him to get them. She stripped down to her underwear and 'ordered' him to take off his clothes, put on the condom and lie on the bed with his hands behind his head.

9. The Appellant said the complainant would not let him touch her and that she had not touched him while he was lying naked on the bed.

10. The Senior Magistrate after hearing all the evidence including that of recent complaint, accepted the evidence of the complainant and rejected that of the Appellant, and accordingly convicted him of the charge.

Grounds of Appeal

11. The Appellant originally advanced a number of grounds of appeal. However, in a Note dated 15th January 2023, Mr Duffy on behalf of the Appellant, very sensibly and realistically clarified that only one ground of appeal was to be maintained and advanced. Mr Duffy said:

> "Therefore, it is confirmed that any previous distinct or separate ground of appeal relating to the conclusions reached by the Senior Magistrate as to the reliability, consistency or the impression that the court formed of any witness during the trial, or any assertion of bias, is not being pursued. 7.
>
> The sole ground of appeal is the failure of the Senior Magistrate to direct himself properly as to the good character of the appellant."

12. However, Mr Duffy prayed in aid of this single ground of appeal the importance of a full good character direction because of the inconsistencies in the complainant's evidence

identified in the original grounds. In short the matter of credibility he said was at the forefront of the importance of a full good character direction.

13. The basis for this ground of appeal is the self-direction made by the Senior Magistrate in his Judgment dated 21st July 2022.

14. Mr Duffy relies on the fact that the Senior Magistrate in his Judgment said at paragraph [26]:

> "It is agreed that the Defendant has two previous convictions in the United Kingdom, one of Careless Driving and one of Driving with Excess Alcohol. The defendant has never been convicted of any offence involving allegations of sexual assault. This is not a defence to the charge but it may make it less likely that the defendant committed the offence of which he now stands accused. I will take this into account in the defendant's favour and decide what importance I give to it."

15. This submits Mr Duffy is an inadequate good character direction. It omits the first limb of the standard good character direction as to good character supporting credibility. In those circumstances the 'mis-direction' was fatal and the conviction should be quashed by this court.

16. Mr Walker for the Crown, accepts that the parties agreed that both limbs of the good character direction (propensity and credibility) should be given on the basis that the previous convictions of the Appellant (two driving convictions in the United Kingdom (careless driving and excess alcohol) from 2021 were not relevant.

17. However, submits Mr Walker, notwithstanding the Senior Magistrate did not expressly refer to the first limb of the standard good character direction in his judgment, during the trial and in discussion of the appropriate self directions the day before on the 20th July 2022, the Senior Magistrate agreed the wording of the direction with the parties and read out both limbs of the direction in open court for the party's approval:

> "The offences are relatively minor because of their nature the defendant is to be regarded as if he were a person of previous good character. The standard direction then goes on to say this does not mean that he could not have committed the offence with which he is charged but it should be taken into account in the defendant's favour in two ways. First the defendant gave evidence. The fact the defendant should be treated as someone with good character is something that I should take into account when deciding whether I believe the defendant's evidence.
>
> Secondly the defendant is 31 years of age and has never committed an offence of the type of which he is now charged which may mean that he is less likely to have committed this offence. Does that (sic) And then you should the fact the defendant is to be regarded as a person of good character into account in his favour in these two ways. And then I will decide what importance is to be attached to it."

18. Mr Walker submits while it is unclear why the wording read out by the Senior Magistrate in court was not reproduced in full in the judgment there was no mis-direction by the

Senior Magistrate, and if there were a defect in relation to the character direction then it is not fatal to the conviction as the conviction is not unsafe in the light of the detailed analysis the Senior Magistrate carried out in determining what evidence to accept and what evidence to reject.

Analysis and conclusions

19. It is clear that this appeal is not a rehearing of the trial before the Summary Court. Section 663 of the Criminal Procedure and Evidence Ordinance 2014 (as amended by S.16 Ord. 9/2022 w.e.f. 16/05/2022) makes that clear:

> 663. Appeals against conviction
>
> (1) Subject to subsection (2), the Supreme Court, upon the hearing of an appeal against conviction
>
> (a) must allow an appeal against conviction if it thinks that the conviction is unsafe; and
>
> (b) must dismiss the appeal in any other case.
>
> (2) The Supreme Court, even if it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it considers that no miscarriage of justice has actually occurred.
>
> (3) Subject to this Part, the Supreme Court must, if it allows an appeal against conviction, quash the conviction and direct a judgment and order of acquittal to be entered.

20. The single ground advanced is that there was a material irregularity in the course of the trial, namely an insufficient good character direction in the judgment, and accordingly the conviction is unsafe.

21. In this case the Appellant was not entitled as of right to a good character direction. Not only did he have previous convictions but he had admitted to reprehensible conduct in the course of the events. He offered, and was going to supply a controlled drug to the 17 year old complainant, and that is clearly reprehensible conduct. It follows the Senior Magistrate would have been entitled not to give a good character direction. However, the Senior Magistrate did exercise his discretion to give both limbs of the good character direction and therefore the Appellant was entitled to be treated as a man of good character. The failing alighted upon by the Appellant is the Senior Magistrate but did not repeat the agreed words in his judgment.

22. The leading authority on good character directions and the approach the Court of Appeal in England should take is *R v Hunter* [2015] EWCA Crim 631. It is useful to extract some relevant principles from that case.

> "72. It may sound like a statement of the obvious but only defendants with a good character or deemed to be of effective good character are entitled to a good character direction. A defendant who

has a record of previous convictions or has a bad character of some other kind is not entitled as of right to a good character direction; it matters not for this purpose who has adduced the evidence and whether the bad character evidence is relied on as probative of guilt. It does not follow from the fact that the bad character is not considered probative of guilt that a defendant is entitled to be treated as if he had a good character. Once evidence of bad character is admitted, a judge cannot ignore it and give directions to a jury which would make no sense. To the extent that decisions such as R v Payton [2006] Crim LR 997 suggest otherwise they were wrongly decided, no doubt in ignorance of the decisions put before us. Where a defendant has a bad character, a judge is not obliged to give a good character direction, s/he has a discretion"

…

"79. Where a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character. It does not follow from the fact that a defendant has previous convictions which are old or irrelevant to the offence charged that a judge is obliged to treat him as a person of good character. In fairness to all, the trial judge should be vigilant to ensure that only those defendants who merit an 'effective good character' are afforded one. It is for the judge to make a judgment, by assessing all the circumstances of the offence(s) and the offender, to the extent known, and then deciding what fairness to all dictates. The judge should not leave it to the jury to decide whether or not the defendant is to be treated as of good character.

80 If the judge decides to treat a defendant as a person of effective good character, the judge does not have a discretion whether to give the direction. S/he must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure the jury is not misled."

…

"89. What if the judge does go wrong? The sole statutory test for the Court of Appeal (Criminal Division) is now one of safety of the conviction. There can be no fixed rule or principle that a failure to give a good character direction or a misdirection is necessarily or usually fatal. It must depend on the facts of individual cases. It follows that all the decisions put before us in which convictions were quashed as a result of a misdirection were entirely fact specific. They provide no guidance at all. As we have endeavored to demonstrate, there are two lines of authorities not just the one put before the court in R v Hoyte [2013] EWCA Crim 1002. For every decision in which it has been held that the failure to give a direction or a misdirection was fatal to the safety of the conviction, there is likely to be another decision which points the other way.

23. In this case the Senior Magistrate was not directing a jury. If he had been it might be different, and there would be a much stronger argument on misdirection, but he had already agreed in open court, and recited, the full (both limbs) good character direction. He was directing himself. Indeed, the current situation is more analogous to a judge correctly directing a jury during the course of a trial as to good character and not repeating exactly the same direction in his final summing up.

24. The failure to repeat the full character direction in his judgment, says Mr Duffy, permits of three possibilities:

    (1) The Senior Magistrate decided not to direct himself on both limbs of the standard character direction;

(2) The Senior Magistrate forgot that he was meant to take into account both limbs of the standard character direction; or

(3) The Senior Magistrate just forgot to add in writing the second limb of the standard character direction.

25. It is important to note that the self-direction the Senior Magistrate gave in his judgment is not contradictory of the standard character direction, it is simply incomplete.

26. Moreover, in this case there is a fully reasoned decision with a recitation of the evidence and an analysis of the evidence resulting in his decision as to what evidence he accepted and rejected and why he had done so. As Mr Walker rightly says the position is very different when a jury is deprived of the benefit of a direction on the first limb as the appellate court has no idea of the "chain of reasoning", that is not the instant case. Here the correct direction was agreed the day before and it was stated in open court that that would be the self-direction.

27. The Senior Magistrate is a very experienced judge and it is not plausible that he did not have in mind the correct approach to good character when assessing the evidence notwithstanding the omission in the final judgment of express reference to the first limb of the standard direction. It is implausible that the Senior Magistrate changed his mind and decided not to direct himself on both limbs without raising the matter with counsel having arrived at the agreed position the day before. It is similarly implausible that the very experienced Senior Magistrate simply forgot that he was meant to take into account both limbs of the standard character direction.

28. Mr Walker points out that at paragraph [106] of the Senior Magistrates judgment he said:

> 'I have discounted them [the previous convictions] from my deliberations and assessment of the evidence and treated the defendant as a man of good character' [Emphasis added]

29. He submits that the Senior Magistrate in assessing the evidence took account of the Appellant's good character, and by inference that would be both limbs as agreed the day before in open court.

30. In my judgment there was no material misdirection. The Senior Magistrate had directed himself correctly in open court the day before and the omission of reference to the first limb of the standard direction does not create a misdirection.

31. In any event, as was held in *Hunter (*at [89] *ante),* even in the case of misdirections as to the first limb of the good character direction, a conviction may still be upheld.

32. So even if there was a misdirection, it is clear that there is nothing unsafe about the conviction which was closely reasoned with care by the Senior Magistrate. He identified inconsistencies and determined the timeline with reference to the call log. His finding as to credibility, having seen the witnesses give evidence was clearly open to him.

33. It follows for these reasons the appeal against conviction is dismissed.

SECOND APPEAL

34. The Attorney-General appeals to the Supreme Court against the sentence of 18 months imprisonment imposed, on the grounds that the sentence of 18 months imprisonment was unduly lenient.

Brief facts

35. The Senior Magistrate set out the factual basis for sentence in the following terms:

> 9. The facts of this case are that on Saturday 9th April 2022, [the complainant] went to a friend's house to celebrate a birthday. At about 23.00 hours she went with friends to the K&C burger van in Philomel Street, Stanley. She had been drinking vodka mixed with cranberry juice. She was drunk. She was 17 years-of-age.
>
> 10.At the burger van [the complainant] met the defendant and they began a conversation. She did not know the defendant but they had a connection because the defendant had worked with a member of her family. She told the defendant that she was a lesbian and that she was not interested in the defendant in a sexual way.
>
> 11.The defendant invited her back to his accommodation to smoke cannabis. The defendant later admitted during a police interview that he believed that there might still have been a chance of having sex with her. The court found that the defendant's behaviour was predatory and that he intended to lure the victim backed to his accommodation and to have sex with her. The defendant's account of [the complainant] instigating a sex game was found to be entirely unbelievable.
>
> 12.At the accommodation the defendant failed to produce any cannabis. Instead the defendant grabbed [the complainant] around the waist and tried to kiss her. She pulled away and tried to push the defendant away. [The complainant] was drunk, disorientated and confused. The defendant pulled her towards a bedroom where they struggled in the doorway. It was as they struggled that [the complainant] sustained a bruise to her left thigh
>
> 13. The defendant removed his clothing so that he was naked. The defendant removed [the complainant] top clothing except for her bra. She told the defendant "no" but the defendant took no notice. [The complainant] and the defendant fell on to the bed. The defendant's penis was erect and he had put on a condom. The defendant forced [the complainant's] hand onto his erect penis, he closed her hand around his penis and moved her hand up and down to masturbate him. [the complainant] continued to resist and managed to free herself.

> 14.The defendant followed her into the living room. She punched him away and the defendant returned to the bedroom and got into the bed allowing her to collect her belongings and leave.

Grounds of Appeal

36. It is common ground that the Senior Magistrate had to consider the sentencing guidelines for sexual assault. Those guidelines required him to determine the harm caused to the complainant and culpability of the offender so as to identify the correct category within the guideline of sentence to apply.

37. The Attorney-General submits that the Senior Magistrate:

    (1) incorrectly categorised harm as being between category 1 and category 2 when the offence was clearly category 1 harm;

    (2) failed to take into account the presence of multiple category 2 harm factors;

    (3) incorrectly categorised culpability as category B when a category A factor was clearly present; and

    (4) gave undue weight to the limited mitigation which lead to an undue reduction in sentence.

38. The Respondent submits that the Senior Magistrate passed a sentence which was just and proportionate, was within the offence range and was within a range that, applying his mind to all relevant factors, he could have passed. It was not unduly lenient.

The Senior Magistrate's approach

39. The Senior Magistrate found that the harm caused by the offence fell somewhere between category 1 and category 2; and the culpability fell in category B. It is useful to set out the material parts of his sentencing remarks in full.

> 28. The current legislation imposes on the court a duty to follow any relevant sentencing guidelines unless it is in the interests of justice not to do so. The legislation does not constrain the proper excise of individual judgement on the specific facts of the case. In all cases, it is incumbent upon the sentencing judge to impose what he or she considers to be a just sentence.
>
> 29. I have to consider whether the psychological or physical harm which you caused was severe.
>
> 30. An offence of this nature almost inevitably causes considerable psychological harm and, in my judgement, the harm suffered by the complainant was significant. There was also physical harm. On balance, and without in any way minimising the terrible effect which your conduct has had on her, I do not consider that, in the context of this offence, the psychological harm that you caused was severe.

31. There was clearly a level of violence in the way you manhandled your victim. You tried to force yourself upon her. She pulled away and tried to push you away. You pulled her towards a bedroom where you struggled in the doorway. It was as you struggled with your victim that she sustained a bruise to her left thigh. This was clearly a frightening event for her.

32. There was touching of naked genitalia when you closed her hand around your erect penis and forced her to masturbate you.

33. What occurred in this case was not a momentary touching but a sustained assault.

34. The next question that arises in relation to the harm which you caused is whether the victim was particularly vulnerable. [The complainant] was 17. She was living at home with her parents, having recently left school. You are a man in your thirties. You support yourself. You have travelled the world working. [the complainant] was intoxicated. You told police you thought she was "quite drunk." It was obvious to you that she was vulnerable and it was that vulnerability that provided you with the opportunity to commit the offence. The decision to take advantage of the victim shows a predatory disposition and a degree of calculation that you might get away with the offence because she was vulnerable. Having regard to the case of R v Jose Sepulvida-Gomez [2019] EWCA Crim 2174, by reason of her vulnerability through drink, this would place the harm in Category 2.

35. The presence of violence would suggest sentencing should be in accordance with category 1.

36. In my view, this case falls between categories 1 and 2 of the Sentencing Guidelines. I say that because, although violence is present, it is at the lower end of the scale

37. As to Culpability, while intoxication was a feature of the offence, it was not used by you to facilitate the commission of the offence. You simply took advantage of an already intoxicated victim. While you clearly intended luring her back to your accommodation in order to have sex with her, I do not consider this to involve 'significant' planning. As that does not exist here, for the purpose of culpability, it does not put you into Culpability A.

38. In terms of aggravating factors, at the time of the commission of the offences, you were under the influence of drink. In addition, you specifically targeted a particularly vulnerable victim, a young girl who you knew had been drinking.

39. I have read the Victim Impact Statement in which she describes the impact on herself and a much wider circle that includes her family, friends and her friend's family. Clearly your actions have had a longer-term and very negative impact on your victim.

40. You have two recent convictions in the UK for relatively minor driving offences. One of those offences was committed while under the influence of alcohol. You have no previous relevant convictions.

41. There is very little mitigation. You continue to deny the offence. You have shown no remorse.

42. There is no reduction for a guilty plea.

43. I recognise that you have never previously been in custody and that the impact of a custodial sentence will be serious. You are a UK national without an established network to support you during any prison term. This conviction will have a significant impact on your ability to obtain work permits in other countries.

44. This offence clearly crosses the custody threshold. I am not going to suspend the sentence that I impose. The reasons to suspend a sentence include a realistic prospect of rehabilitation, strong personal mitigation, or that immediate custody will result in a significant harmful impact upon others. I cannot see how rehabilitation is possible on my assessment in the light of the Pre-Sentence Report. In any event, appropriate punishment weighs against any harmful impact on other matters that might lead me to suspend the sentence.

45. You do not have leave to work or remain in the Falkland Islands. Therefore, a community sentence would not be suitable.

> 46. On the night in question, you took the victim back to your accommodation to smoke cannabis. It was obvious to you that she was drunk and vulnerable and it was that vulnerability that provided you with the opportunity to commit the offence. The decision to take advantage of the victim shows a predatory disposition and a degree of calculation that you might get away with the offence because she was vulnerable.
>
> 47. This offence is so serious that only a custodial sentence is justified. The sentence that I impose is one of 18 months in prison.

Analysis and conclusions

40. The correct approach for this court when dealing with an application that the sentence was unduly lenient is clear. It is only when a sentence falls outside of the range that could reasonably be considered appropriate. It is not a rehearing and not a substitution of what this court might think is the appropriate sentence.

41. Davis LJ in *AG Reference SK* [2022] EWCA 1421 said:

> 24. We remind ourselves of what was said by Lord Lane CJ in Attorney General's Reference No 4 of 1989 [1990] 1 WLR 41 when section 36 of the 1988 act was in its infancy:
>
> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice."
>
> 25. The principles set out by the then Lord Chief Justice in 1989 hold good today. We have to ask whether the minimum term imposed by this judge fell outside the reasonable range open to him. In doing so we must pay proper regard to the advantage held by the judge who has sentenced after hearing the trial. We also must acknowledge the great experience of the judge in this case.

42. Lord Woolf CJ in *Attorney-Generals References* No 31,45,43,42, 50 and 51 of 2004 said:

> "In those cases it was indicated that this Court should not intervene unless it was shown that there was some error of principle in the judge's sentence, so that public confidence would be damaged if the sentence were not altered. 4. The power of the Attorney General to refer cases to this Court is not intended to interfere with the proper exercise of discretion of the trial judge as to what sentence is the appropriate sentence to apply. The trial judge is required to have regard to the guidelines issued by this Court. In the future the trial judge will also have to take into account the guidelines issued by the new Sentencing GuidelinesCouncil established under s.167 of theCriminal Justice Act2003 (''the 2003 Act'') as required by s.172. However, guidelines remain guidelines and it is perfectly appropriate for a judge not to follow the guidelines or not to follow an earlier authority of this Court on similar facts if in the circumstances he concludes that doing so will not result in the appropriate sentence"

43. I have no doubt that is the correct approach in this jurisdiction.

44. I cannot fault the Senior Magistrate for taking the view the offending conduct fell between category 1 and 2 in respect of harm because the violence was at the lower end of the scale.

The Attorney General's submission that the Senior Magistrate could not reasonably find as such, and it was unreasonable not to find category 1 harm, is unsustainable.

45. Nor can I fault the Senior Magistrate for finding there was not 'significant planning' when considering culpability. Again, the Attorney General's submission that the Senior Magistrate could not reasonably find as such is unsustainable. It was well within the reasonable margin that must be afforded to the sentencer who had conducted the trial.

46. Whilst it would have been helpful for the Senior Magistrate to expressly state the notional starting point he arrived at and then to apply an uplift or down lift to that starting point by reference to aggravating or mitigating features, it is relatively clear the Senior Magistrate took a starting point somewhere between 1 and 2 years custody, which are within the brackets of overlap between category 1B and category 2B in the guidelines. His appreciation of the aggravating and mitigating factors led him to 18 months immediate custody (there being no other factors or guilty plea meriting a further reduction of sentence).

47. In my judgment I can see no reason for holding that such a sentence was not within the reasonable range open to him having proper regard to the advantage held by the Senior Magistrate who has sentenced after hearing the trial.

48. It follows the appeal by the Attorney General is dismissed.