SC/CRIM/02/21

SENTENCING REMARKS

REGINA

v

CHRISTIAN EVGENIO CATALDO FIGUEROA

before
HHJ Malcolm Simmons

Given on
18th April 2022

Representation:

Mr Stuart Walker Crown Counsel, Prosecution

Mr Damian Sabino Christian Evgenio Cataldo Figueroa

These sentencing remarks will be published indefinitely for this reason:

- *As per section 629 of the Criminal Procedure and Evidence Ordinance 2014, this sentence is excluded from rehabilitation as the sentence of imprisonment imposed exceeds 48 months.*

Any concerns about the publication or content of this document will be placed before the Judicial Officer(s) for consideration.

IN THE SUPREME COURT OF THE FALKLAND ISLANDS

Case Number: SC/CRIM/02/21

REGINA

v

CHRISTIAN EVGENIO CATALDO FIGUERO

SENTENCING REMARKS

Redacted pursuant to s. 465 of the Criminal Procedure and Evidence Ordinance 2014 to protect the identity of the victim

1. When sentencing an offender, I have regard to the purposes of sentencing which are set out in the law of the Falkland Islands (s.477, Criminal Procedure and Evidence Ordinance 2014). Those purposes are:

(a) the punishment of the offender;

(b) the reduction of crime (including its reduction by deterrence);

(c) the reform and rehabilitation of the offender;

(d) the protection of the public; and

(e) the making of reparation by the offender to persons affected by his/her offence(s).

2. I also have a duty to consider making a compensation order when imposing a sentence (s.608, Criminal Procedure and Evidence Ordinance 2014).

3. There is a route I follow to decide a sentence.

4. In determining the appropriate sentence, I apply sentencing guidelines, in accordance with s 482 of the Criminal Procedure and Evidence Ordinance 2014 and I take into account the Overarching Sentencing Guidelines of the Falkland Islands. The specific sentencing guidelines applied in this case are those of England and Wales and set out in the Sexual Assault and Assault by penetration Guidelines.

5. In this case I am dealing with three offences.

6. In respect of each offence, I am required to determine the seriousness of the offence, looking at the harm caused by the offender and their culpability. That provides a Category. That Category guides me to a sentence range and indicates a starting point for a sentence. I move from the starting point with aggravating and mitigating factors. I decide on the sentence. I can reduce the sentence after a guilty plea dependant on circumstances. I then consider whether that sentence is a proportionate one for the offence and I apply the totality principle.

7. I must take account of the ruling in *R v Butler* [2018] SC/CRIM/04/17 and in determining sentence I do not give additional discount because the licence point for a custodial period differs in the Falkland Islands from that in England and Wales.

8. Mr. Cataldo, you were found guilty on 24th March 2022 on three charges: Counts 1 and 2 were charges of Sexual Assault under section 205 of the Crimes Ordinance 2014. Count 3 was one charge of Assault by Penetration under section 204 of the Crimes Ordinance 2014.

9. The offences of which you have been convicted were committed on 29th/30th October 2021 in your accommodation on the Mount Pleasant military complex, Falkland Islands. Your victim was a 19-year-old man.

10. The facts of this case are that you and the complainant had agreed to watch a film. The complainant arrived at your accommodation at around 8pm on 29th October 2021. The two of you watched a film. The complainant became heavily intoxicated. When the filmed ended, you and the complainant talked and then danced. You kissed the complainant on the lips. You continued dancing until the complainant vomited and fell on the floor. You helped him get up and onto the bed. He was clearly incapable of helping himself. The complainant was so intoxicated by drink that he was slipping in and out of consciousness. You knew the complainant was very drunk. Indeed, you told police "We drank and we drank and we drank a lot." You said the complainant was a '9' on a drunkenness scale of '1 to 10'. You described yourself as being '7'. It was while the complainant was in this vulnerable state that you sexually assaulted him by touching his penis with your mouth (Count 1), touching his anus with your tongue (Count 2) and then penetrating his anus with

your finger (Count 3). The offences were, by their nature, sexual. The complainant did not consent nor did you reasonably believe he had consented.

11. You have consistently denied the offences.

12. You are 52 years of age and a citizen of Chile. You arrived in the Falkland Islands in 2014. At the time of these offences, you were employed by SODEXO as a tailor at the Mount Pleasant Complex. You have your own room in the civilian block on the base. You are married with four children. The youngest child is six years old and the oldest child has just started University. Your family live in Chile. As I understand it, due to the pandemic, you have not seen them for two years. You used to return every year to see them but with no flights to South America in the last two years this has not been possible.

13. I have read the Pre-Sentence Report of the Probation Service dated 13th April 2022. It is a thorough report. In that report, the Probation Officer says you maintain your innocence and refuse to take responsibility for your actions. It was therefore difficult for the Probation Officer to assess your motivation for your offending.

14. In terms of risk, the Probation Service measures this on two dimensions: risk of further offending and risk of serious harm.

(a) You have been assessed at a **low risk** of further offending;
(b) You have been assessed as being at **high risk** of harm to the public, namely adult males.
(c) There is a further **medium risk** of serious harm to the victim. However, the victim is no longer in the Falkland Islands.
(d) At this stage there is no indication of a risk to other groups.

15. The Probation Service report also refers to 'Active Risk Management'. This is a dynamic risk management framework used to assess men who have committed a sexual offence. It is designed to assess and manage dynamic risk by highlighting the most important areas for intervention and risk management. The Active Risk Management assessment in your case is assessed at **'high'**. You have been assessed as a high priority for intervention because there are serious concerns about further offending, despite the low risk of further offending. This means that, if a further offence should occur, the impact would be serious and potentially life-altering, and, therefore, regular intervention is required to address these concerns.

16. I have a Victim Impact Statement of the complainant. He says that following the assault he felt discomfort in his anus that has lessened over time. However, the psychological impact has endured. He described a changed personality. He said that, although he is fine around friends, he has become very untrusting and on guard around persons he does not know. He said he felt unable to discuss with family what had happened to him. He is relieved to be returning to the UK and hopes that, in time, he will begin to overcome the trauma of these events.

17. The offences in respect of which you were convicted are serious and the length of the maximum sentences reflects that. I am obliged to consider all the purposes set out in the law for sentencing, and I do consider all I have referred to including punishment.

18. I have considered the relevant facts of this case against the definitive guidelines. I have considered the Pre -Sentence Report for which I thank the Probation Officer. I have also been assisted by Mr. Walker and Mr. Sabino.

19. I have read the character references provided by Rachel Handford, Flight Lieutenant Thomas Compton and Major Orr. These have assisted me.

20. I recognise that because of your conviction for these offences you will lose your job, your accommodation, your work permit will not be extended and you will likely be deported. I also recognise that you are working in the Falkland Islands to support your wife and young family in Chile. Whatever sentence I impose will have a direct impact on them.

21. I have considered the general guidelines as to the imposition of a custodial sentence. As to that, I have to ask myself whether it is unavoidable that a sentence of imprisonment be imposed. Even if the custody threshold is passed it does not mean that a custodial sentence must be inevitable. I note that custody should not be imposed where a community order could prove sufficient restriction on an offender's liberty, by way of punishment.

22. I will deal with **Count 3** first because that is the more serious offence.

23. Section 204 of the Crimes Ordinance 2014 gives the maximum sentence for an offence under this section being imprisonment for life. I will refer to the Sentencing Council guidelines.

24. I have to consider whether the psychological or physical harm which you caused was severe.

25. An offence of this nature almost inevitably causes considerable psychological harm and, in my judgment, the harm suffered by the complainant was significant. In terms of physical harm, the complainant described "discomfort" in his anus. It does not appear that he requires any medical

intervention as a result of the trauma he suffered. On balance, and without in any way minimising the terrible effect which your conduct has had on him, I do not consider that, in the context of these offences, the harm which you caused was severe.

26. The second question which arises in relation to the harm which you caused is whether the complainant was particularly vulnerable. The complainant was heavily intoxicated and, by reason thereof, was passing in and out of consciousness. It was obvious to you that the complainant was vulnerable and it was that vulnerability that provided you with the opportunity to commit the offences. The decision to take advantage of the victim shows a predatory disposition and a degree of calculation that you might get away with the offences because the victim was vulnerable. Having regard to the case of *R v Jose Sepulvida-Gomez [2019] EWCA Crim 2174*, by reason of the complainant's vulnerability through drink, this places the harm in Category 2.

27. As to Culpability, while intoxication was a feature of the offence, it was not used by you to facilitate the commission of the offence. There was an element of abuse of trust. However, in my view, in order to elevate to Culpability A, the abuse of trust needs to have an element of an imbalance of power where there is an assumption of a trusting relationship, such as a teacher and pupil or doctor and patient. As that does not exist here, for the purpose of culpability, it does not put you into Culpability A.

28. Mr. Cataldo, you will be sentenced under 2B which has a starting point of 6 years in custody and a range from 4 to 9 years in custody.

29. In terms of aggravating factors, at the time of the commission of the offences, you were under the influence of drink.

30. In terms of mitigation, you are a man of good character with no previous convictions. You work in the Falkland Islands to support your family. I recognise that a custodial sentence will have an impact on them. You will lose your job, your accommodation and will likely be deported. I recognise that you have never previously been in custody and that the impact of a custodial sentence will be serious. You are a foreign national without an established network to support you during any prison term. You have a good command of English. I have carefully considered your three Character References. These are people who attest, amongst other things, to your professionalism, friendship, kindness and generosity. I have taken those into account.

31. Turning now to the other two counts.

32. The Defendant was convicted on two Counts of Sexual Assault under Section 205 of the Crimes Ordinance 2014. Section 205 gives the range of sentence for an offence under this section being

10 years imprisonment or a fine or both. The Sentencing Guidelines refer to an offence range between Community Order and 7 years custody.

33. I will deal with **Count 1** next.

34. In terms of psychological and physical harm and vulnerability, I make the same findings here as under Count 3. In addition, reference is made in Category 2 to 'touching of naked genitalia' which is clearly applicable here. Therefore, although this case does not fall into Category 1, it does fall into Category 2.

35. In terms of culpability, I do not find any of the factors under 'Culpability A' present. Therefore, I find this case falls more appropriately into Culpability B.

36. In the circumstances, you will be sentenced under 2B which has a range from High Level Community Order to 2 years custody. The starting point is 1 year in custody.

37. I have considered the same aggravating and mitigating factors when sentencing under Count 1.

38. In respect of **Count 2**,

39. In terms of psychological and physical harm and vulnerability, I make the same findings here as under Counts 3 and 1. Therefore, Defendants conduct falls more appropriately in Category 2.

40. In terms of culpability, again, I do not find any of the factors under 'Culpability A' present. Therefore, I find this case falls into Culpability B.

41. In the circumstances, you will be sentenced under 2B which has a range from High Level Community Order to 2 years custody. The starting point is 1 year in custody.

42. I have considered the same aggravating and mitigating factors when sentencing under Count 2.

43. In respect of all of the offences, I have taken into account the submissions made on your behalf by Mr. Sabino.

44. These offences clearly cross 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 acknowledge that your family will suffer. 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. On the night in question, the complainant was heavily intoxicated and passing in and out of consciousness. While he was in that vulnerable state you sexually assaulted him by touching his penis with your mouth, touching his anus with your tongue and then penetrating his anus with your finger. The complainant was violated in the basest way by your deliberate actions and the sentence must reflect that. This is not an offence in this context that is appropriate for a suspended sentence.

46. There is no reduction for a guilty plea. You have continued to deny the offences. You have shown no remorse.

47. When sentencing, I am required to bear in mind what is known as the totality principle. I am obliged to impose a total sentence which reflects all of your offending, but it must be no more than is just and proportionate. I have taken that into account in my determination of the sentence.

48. These offences are so serious that only a custodial sentence is justified. Having regard to the aggravating and mitigating factors, the least possible sentences that I can impose are as follows:

(a) In respect of Count 3, I sentence you to 4 years and 8 months in prison.

(b) In respect of Count 1, I sentence you to 18 months in prison, <u>concurrent</u>

(c) In respect of Count 2, I sentence you to 18 months in prison, <u>concurrent</u>.

49. You will serve a total of <u>4 years and 8 months</u> in prison.

50. You will serve two thirds of your sentence and will then be eligible to be released on licence.

51. I am not making a compensation order nor costs order because of the immediate prison sentence.

52. A Sexual Harm Prevention Order is not sought in this case.

53. Mr. Cataldo, having been convicted of an offence under Schedule 3 of the Crimes Ordinance 2014, in accordance with section 296 of the said Ordinance, you will be subject to a notification requirement for an indefinite period. This obliges you to provide the police with information about your life.

HHJ Malcolm Simmons

Acting Supreme Court Judge

18th April 2022