

314.24 *Digital/oral penetration*

R v Sawney 2019 EWCA Crim 756 D was convicted of assault by penetration. D and V were next door neighbours. V, aged 29, had recently split up with her partner C but they were still friends and continued living together whilst their house was being sold. V and C were also good friends with D and his partner and they had gone to D's house for a drink around 9 pm. V went home around 2 am feeling 'tipsy'. D and C continued to drink and take cocaine. C became very drunk. D escorted C home and up to the room where he slept. At about 6 am, D then went into V's bedroom and got into bed with her. V woke up to find D kissing her neck and penetrating her vagina with one or two of his fingers. She complained immediately and pushed D out of the bedroom. D was arrested the same morning and said that, due to his intoxication, he had gotten into bed with V believing he was at home in bed with his partner. At trial, D said that V had beckoned him into the room and had wanted to have sexual contact with him. D was aged 31 and had no previous convictions. The judge noted the agreement between the parties that this was a Category 3B case on the basis that the harm suffered by V and her vulnerability would be reflected as aggravating features in relation to the 2-year starting point. The Judge also noted the aggravating features including the location and timing of the offence. Held. This offence was deeply unpleasant. It was a penetrative offence committed on a woman asleep in what should have been the safety of her own home. Category 3B has a starting point of 2 years and a category range of a high level community order to four year's custody. That is a range covering a wide area. Some offences demand sentencing significantly above the starting point and others a reduction. The difficulty in this case is that we can discern no sustainable basis for a sentence of the order passed by the Judge. A sentence in the region of 3 years was the least that would properly reflect the gravity and unpleasantness of this offence. Therefore, **3 years** not 12 months.

314.40a *Internet rape/Encouraging rape*

R v Falder 2018 EWCA Crim 2514, 2019 1 Cr App R (S) 46 (p 309) D pleaded to 137 offences all of which were either sexual in nature or sexually motivated. The offences included intentionally encouraging rape (and rape of a child) through the internet, causing or inciting sexual exploitation of a child, causing or inciting a child to engage in sexual activity involving penetration and blackmail. The Judge moved to 65 years in total for the offending. He passed four consecutive extended sentences, one for each of the main categories. With full credit for the pleas, he moved to 43 ¹/₃ years and made a further reduction for totality. Held. 33 years' extended sentence (**25 years'** custody, 8 years' extended license) not 38 years' extended sentence (32 years' custody, 6 years' extended license).

314.82 *Victim asleep, drunk etc.*

Att-Gen's Ref 2018 Re Ahmed 2018 EWCA Crim 2941 D was convicted of an offence of rape. V was celebrating her 19th birthday. She visited several pubs and clubs and consumed alcohol and MDMA. In the early hours she went to a house party and called her father to tell him that she would be staying the night at a friend's house. Two men arrived at the party and one, D, was seen to pass V a beer which she accepted. V asked her friend to call her a taxi. When the taxi arrived neither V nor the man she had been talking to could be found so the taxi was sent away. V does not remember leaving the party and believes she lost consciousness. When she woke, she was at a house about a 15-minute walk away from the party. D was with her and took her into a bedroom, telling another man to get out because D "had business to do." V said she wanted to leave but D said she wasn't going anywhere. D forced her to drink something then removed her shirt and touched her breasts. V told him to stop and started to cry. D then laid on top of her and began to kiss her. V struggled but D was much stronger. She told him that she did not consent to which he responded that he did not need her consent. D forcibly penetrated V vaginally.

She was still crying and told D that he was raping her. D said, “Shut up you silly fucking bitch, I’m not raping you, you’re enjoying it.” Subsequently, D gave V another drink and she believed she passed out again. When she came to, she was lying on the bed completely naked next to D who was also naked. D walked V home and suggested another meeting. V humoured him and once she was inside, she told her father and they called the police. D made no comment in interview. At trial, D said that V initiated sexual activity with him and that there was kissing and touching but no intercourse. An expert did not support suggestions that V’s drink might have been laced. In her victim personal statement, V said that the incident had aggravated her body dysmorphia which had caused her sleeplessness and anxiety. She said that she felt “disgusted and gross about herself” and knew that her birthday would be blighted forever as it was also the anniversary of the rape. V said she no longer felt comfortable going out in town as she had sometimes seen D when he had been on bail. As a direct result, V and her family were leaving Cornwall. D was now aged 32 and had no relevant previous convictions. He continued to deny the offence to the author of the pre-sentence report and reported that he had Asperger’s syndrome. A letter from his GP was given to the Judge which indicated that D had ADHD, attachment disorder and symptoms of autism. The author of the report considered that the offender posed a high risk of serious harm to women. The Judge placed the offence within Category 3B with a starting point of 5 years¹ He considered that V had not suffered ‘severe psychological harm’ or ‘violence which is beyond that inherent in the offence’, both factors that would have pushed the offence into Category 2. With regards to culpability, the Judge found no evidence of significant planning and concerns that V had been given a laced drink were not supported by the forensic evidence. He went on to say that D posed “a significant risk to members of the public of serious harm” and that he proposed to pass an extended sentence. Held. D was detained against her will. There is no finding of particular vulnerability, significant physical violence or severe psychological harm. We therefore adopt the categorisation of this offence and put the offence at the top of Category 3B. However, we accept the prosecution’s submission that the sentence did not adequately address the justice of the case. This was a case aggravated by several factors: V was isolated and obviously drunk, she was detained for a short period against her will and there was malice exhibited in D’s verbal aggression. 10 years’ extended sentence (**7 years**’ custody, 3 years’ extended licence) not 8 years’ extended sentence (5 years custody, 3 years’ extended licence).

¹ Prosecuting counsel was initially uncertain as to which guideline category had been used and requested a further hearing. The Judge said that he was unavailable within time for a slip rule hearing but gave written clarification of his decision.