Neutral Citation Number: [2018] EWCA Crim 2501

Case No: 2017/05151/B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2018

Before :

LORD JUSTICE HICKINBOTTOM

MRS JUSTICE WHIPPLE DBE
and
THE RECORDER OF WESTMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR

Between :

REGINA
- and -
MARK HODGE

(Transcript of the Handed Down Judgment.
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Mr Ali Naseem Bajwa QC appeared on behalf of the **Applicant**
Ms Michelle Heeley QC appeared on behalf of the **Crown**

Hearing dates : 24 October 2018

Judgment
As Approved by the Court

LORD JUSTICE HICKINBOTTOM :

1. This appeal concerns offences to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Consequently, no matter relating to the complainant (to whom we shall refer as "B") shall be included in any publication if it is likely to lead members of the public to identify that person as the victim of any of those offences. This prohibition shall last during her lifetime, unless it is waived or lifted in accordance with s.3 of that Act.

2. On 22 June 2015 in the Crown Court at Birmingham (His Honour Judge Bond and a jury), the Applicant was convicted by a variety of unanimous and majority verdicts of five offences, namely two counts of rape (COUNTS 1 and 2), one count of assault by penetration (COUNT 3) and two counts of sexual assault (COUNTS 4 and 5). On 30 June 2015, he was sentenced by Judge Bond to a total of 11 years' imprisonment. He now seeks leave to appeal against conviction, his application having been in part refused and in part adjourned to the full court by the single judge.

3. At the relevant time, the Applicant was 49 years old and a man of good character. He was senior partner in a firm of solicitors, and married with three young children. The complainant's mother, A, worked at his firm.

4. On 14 October 2013, the Applicant, A, and her daughter B went out to celebrate B's 18th birthday. During the course of the evening, they each consumed a large amount of alcohol. B became "really drunk".

5. In the early hours of the following morning, the three of them returned to the family home of A and B, where it had been pre-arranged that the Applicant would spend the night. A went to bed. The Applicant went to the kitchen to make a cup of tea for B. What happened that evening to that point was uncontentious; but, in respect of what happened next, the accounts of the Applicant and B substantially diverged.

6. It was the prosecution case that the Applicant, in the kitchen while making tea, hugged and kissed B twice (COUNT 4). She pulled away, but he put his hand up her skirt and his finger into her vagina (COUNT 3). They thereafter moved into the living room, where B's clothes were removed. The Applicant was also naked. He kissed her, fondled her breasts and licked her vagina (COUNT 5). He then put his penis into B's face and ordered her to put it in her mouth. She repeatedly told him "no"; but he proceeded to put his penis into her mouth in any event, without her consent (COUNT 2). She pulled away, but he then proceeded to put his penis into her vagina also without her consent (COUNT 1).

7. We pause to note that the jury found the Applicant guilty of all counts, but they gave a special verdict in relation to COUNT 5 to the effect that they were not sure that the Applicant had licked B's vagina. So far as this appeal is concerned, that is of no direct moment; but it does show the care with which the jury considered their verdicts.

8. Returning to the morning of the incident, between 01.24 and 07.00, B exchanged a number of text messages with her friend, C. The first text read: "Please help me". Later, B intimated to her that, despite her makeup and clothes being there, she did not want to enter the room in which the Applicant was sleeping; and she asked C to look after her.

9. At 08.33 that morning, the Applicant sent B a text message: "Very kind of you last night to invite me out. Had a good time. Hope you are feeling okay today. I'm not feeling too bad at the mo. Your mum looks shit". B did not reply. B went to school that day and she told C that the Applicant had raped her.

10. On 20 October 2013, six days after the night of the incident, the Applicant sent B a text message: "Hi, [B]. Fancy baby-sitting for me on Saturday xx".

11. On 22 October 2013, the Applicant and his children visited B's family home. Neither the Applicant nor B made any mention to each other or to anyone else as to what had happened 12 days earlier.

12. On 3 November 2013, three weeks after the incident, B told her sister, D, that the Applicant had raped her. B then told her parents, and they informed the police. The following day the police spoke to B, but she said she would not support a prosecution. However, on 6 November 2013, she gave the police an ABE video interview in which she said she would now support a prosecution. The same day the Applicant was arrested. He gave a "no comment" interview and was released on bail.

13. On 9 November 2013, the police seized cushions from the sofa in B's living room, i.e. the sofa upon which B said the rape had taken place. Upon forensic examination the Applicant's semen was found on one of the cushions.

14. On 8 January 2014, the police again interviewed the Applicant. They had by now disclosed to him the recovery of his semen from the cushion. It seems that he did not expect semen to be found, because he accepted in his oral evidence at trial that the day after the incident he had checked the sofa and found no semen staining where the incident the previous night, whatever form it had taken, had occurred. In any event, the Applicant remained silent during his interview; but read a prepared statement in which he described the allegations as "distressing". That made no reference to any incident occurring that evening.

15. However, later he was charged; and, in his defence statement, he provided an explanation for the presence of semen on the cushion. He said that he had fallen asleep on the sofa in shirt and pants, and woke up to find B masturbating him. He woke upon ejaculating. He never consented to that act. That was the version of events he maintained at trial.

16. The versions of events maintained by B and the Applicant respectively did not allow for mistake. In terms of the substance of their accounts, at least one was lying. It was the jury's task to consider whether the prosecution had satisfied them so that they were sure that B was telling the truth.

17. On the basis of the Applicant's account, B had sexually assaulted him by masturbating him without his consent whilst he was asleep. The two grounds of appeal relied upon by the Applicant, through Mr Bajwa QC, turn on the differences between how the judge dealt with evidence relating to B as complainant and evidence relating to the Applicant, also (he submits) in effect a complainant.

18. First, he submits that, although the judge warned the jury about the danger of stereotypes and assumptions in relation to B as a complainant and the Applicant as

alleged perpetrator of rape (see transcript vol IV, page 43A-D), he erred in failing to warn the jury about the risk of approaching the evidence in relation to the Applicant's allegation that he was sexually assaulted by B with such preconceptions or assumptions. The error was more pointed, he submits, because

i) the warning that was given was overtly targeted at B's complaint and only that complaint;

ii) and the judge questioned the Applicant (at transcript vol III, pages 78A 79E) about why he (the Applicant) did not ask B at some stage why she had sexually assaulted him the way he maintained she had – to which the Applicant responded, in effect, that he felt embarrassed by the incident, he wished to have a return to normalcy and he also did not have an appropriate opportunity.

The Applicant said that he could not speculate as to why B might have done such a thing, although it was suggested that it might be as a result of B falling out with her parents. This questioning, Mr Bajwa submits, whilst not objectionable in itself, compounded the judge's error of not warning the jury about making assumptions in respect of B as an alleged sexual offender and the Applicant as a complainant.

19. The single judge refused leave to appeal on this ground. In our view, he was right to do so. At the trial, the Applicant was charged with rape and other sexual offences against B. B was the complainant. The Applicant made no complaint about B to the police, and maintained a "no comment" stance in interview until the disclosure to him of the forensic evidence that semen had been found on the cushion of the sofa on which B had said the rape had taken place. He then made a prepared statement to the effect that nothing had happened sexually between them that evening. Later, in his defence statement, he said that she had masturbated him on that sofa that night whilst he was asleep and without his consent. That was not a complaint. It was his explanation for his semen being found on the sofa.

20. The Applicant as defendant and B as complainant were not required to be treated in exactly the same way, even though the Applicant's explanation was that it was B and not he who was the perpetrator of actions that may have amounted to sexual offences. There are various ways in which the evidence of a defendant and that of a complainant are treated differently. For example, the availability of special measures and a good character direction. These differences reflect a number of matters, for example that the defendant bears no burden of proof and in certain circumstances the complainant properly requires some degree of reasonable protection. As we have indicated, the purpose of the trial was to determine, not whether they believed the Applicant's version of events, but whether they were satisfied to the criminal standard that B's version of events was essentially true. Although that in itself required the jury, before returning a guilty verdict, to consider and reject that the Applicant's version of events might be true, that was the purpose of the trial. The jury were told and reminded several times as to where the burden of proof lay, and that the principal evidence upon which they must base their decision was essentially that of B.

21. In our view, the judge's summing up with regard to these issues cannot arguably be faulted. He set out fairly and fully (at transcript vol IV, pages 42D-G and 44 and

following) the Applicant's response to each allegation made by the Crown. In the circumstances of this case, we do not consider anything else further was required. The conviction is not unarguably unsafe on the basis of this ground of appeal.

22. Second, Mr Bajwa submits that the judge erred in the manner in which he dealt with the evidence of the Applicant's wife and colleague with regard to what might be described as "recent complaint", i.e. the complaint that he had been sexually assaulted by B that evening.

23. During the course of the trial, the Crown called recent complaint evidence from B's friend C and her sister D. In his turn, the Applicant called evidence from his wife, E, that on 6 November 2013 (three and a half weeks after the night of the incident and following his return home after his arrest), the Applicant told her that the complainant had masturbated him whilst he was asleep on the sofa; and from a work colleague, F, to the effect on 10 November 2013 (four weeks after the night of the incident and four days after the Applicant's arrest), he had told her that B had put "her hands inside his pants" whilst he was asleep on the sofa.

24. Again, it is submitted that the judge should have treated this evidence of D and F essentially in the same way that he treated the evidence of C and D which spoke of recent complaints of B to them. Mr Bajwa makes no complaint about how the judge treated the evidence of C and D, but he submits that the Applicant was entitled to essentially similar treatment for the evidence of recent complaint upon which he relied.

25. However, as Mr Bajwa accepts, the recent complaint provisions in s. 120(4) of the Criminal Justice Act 2003, which provide that under certain circumstances a previous statement by a witnesses is admissible as evidence of any matters stated of which oral evidence by him would be admissible, are not applicable here because the condition in s. 120(7)(b) (that the relevant offence is one to which the proceedings relate) is not satisfied.

26. Nevertheless, Mr Bajwa submits that s. 120(2) applies. That provides as follows:

> "If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible."

27. We accept, at least for the purposes of this application, that that provision does apply here.

28. Ms Heeley QC for the Crown submitted that the reference to "witness" in that provision does not apply to a defendant. However, again for the purposes of this application and in the Applicant's favour, we accept that it does. The Crown's case at trial was that the Applicant had fabricated the allegation that B had sexually assaulted him. He gave evidence. Therefore, his statements to his wife and colleague to which we have referred, if and in so far as they were accepted by the jury, were "admissible

as evidence of any matter stated", namely that B had sexually assaulted and masturbated him without his consent on the relevant evening.

29. Mr Bajwa submitted that the judge erred in failing to direct the jury that this was evidence of that matter. In the judge's directions to the jury, he set out the relevant evidence of the two witnesses and then continued:

> "As I have already directed you, it is a matter for you to determine the accuracy and reliability of each of these witnesses."

30. Mr Bajwa complains that the judge erred in not going on to say that, in so far as this evidence regarding what he told E and/or F was or may have been true, the jury should take that into account in assessing the truthfulness of the Applicant's version of events in the Applicant's favour. That is a narrow point, but one which Mr Bajwa submits is at least arguable for the purposes of this application.

31. However, again, we do not find anything exceptional or arguably wrong with the directions given by the judge; and certainly nothing that arguably might render the conviction unsafe. We consider that as matters were left with the jury, they were at least adequately directed that, to the extent that they found the evidence of either E or F accurate and reliable, that was evidence that they would have taken into account in the Applicant's favour in assessing the truthfulness of his version of events. Any more detailed direction that might have been given, as Mr Bajwa accepts, would have had to have attached various caveats, including the caveat as to the timing of this evidence in the chronology of the events, namely that, to the extent that they considered this evidence might be true, then the Applicant told these two people that he had been assaulted only after he knew of the version of events that B had given to the police albeit before the availability of the forensic evidence. In all of the circumstances, Counsel then representing the Applicant may have preferred the direction that was given rather than a fuller direction that set out, as it must have done, these various caveats. In any event, we consider that the direction that was given to have been adequate. Again, we do not consider the verdicts arguably unsafe on this ground.

32. We consider that Mr Bajwa has made his submissions on the Applicant's behalf as well as they could have been made. However, for the reasons we have given, we are unable to accept that any is arguable. The directions of the judge to the jury were, in our view, unimpeachable. Furthermore, the evidence against the Applicant was strong and his explanation for the damning forensic evidence was, if not fanciful, inherently improbable. Whilst the findings of fact were of course a matter for the jury, on the evidence they had we consider their verdicts are entirely unsurprisingly. In any event, in our view, they are not arguably unsafe.

33. For those reasons this application is refused.

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