IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2022 02633 B5

[2023] EWCA Crim 1421

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 5 October 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE

MRS JUSTICE MAY

MRS JUSTICE ELLENBOGEN

REX
v
ELRYCK EGETON MEEK

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS SHENAIYA KHAREGAT appeared on behalf of the Applicant

J U D G M E N T
(Approved)

THE VICE PRESIDENT:

1. This applicant was convicted of six offences against his former partner. His application for leave to appeal against conviction was refused by the single judge. It is now renewed to the full court.
2. For about six months in 2021 the applicant was in an intimate relationship with Lorraine Kennedy (‘the complainant'). The prosecution case was that during that period the applicant engaged in controlling and coercive behaviour towards the complainant, causing her to fear violence (count 1); that he assaulted her by beating on a number of occasions (counts 2, 3, 5 and 6); and that he assaulted her occasioning her actual bodily harm (count 4).
3. The complainant gave evidence about each of those matters. For present purposes it is unnecessary to go into any detail. Parts of her evidence were supported by evidence from her daughter, and from a friend who had taken photographs showing bruising of the complainant. The prosecution also adduced evidence of messages stored on the mobile phones of the complainant and her daughter, which showed some of the communications passing between each of them and the appellant. In addition, there was evidence of the appellant's previous convictions, which were relied on as showing a propensity to use violence and to behave in a threatening way towards a partner.
4. The applicant's case was a denial that any of the alleged events had occurred and an assertion that the complainant had fabricated her allegations. He gave evidence to that effect.
5. Before coming to the grounds of appeal, we summarise briefly the chronology of relevant matters.
6. On 9 December 2021 a magistrates’ court sent the applicant to the Crown Court for trial.
7. In his Defence Statement dated 10 February 2022, the applicant sought disclosure of downloads of his own phone, which had been seized from him by the police, and the phones of the complainant and her daughter. He refused to provide the police with the PIN for his phone and it was not possible for the police to unlock it.
8. At a directions hearing on 31 May 2022 Her Honour Judge Brown, who was to be the trial

judge, refused a request for the applicant to be permitted to inspect his phone or to have it examined by an expert. She ruled that the applicant could instead provide his PIN so that the police could obtain a download. The judge further refused applications for downloads of the phones of the complainant and her daughter to be provided to the defence. Instead, the defence were to provide key search terms so that the prosecution could review the downloads for any disclosable material.

9. The trial was due to start on 25 July 2022. On 8 July the prosecution provided to the defence a bundle of some 450 pages containing extracts from the phone downloads. Ms Kharegat, who represented the applicant at trial as she does today, notified the court that she wished to have an application heard to vacate the trial on the ground that there was insufficient time to take instructions on this material.

10. In the event, that application was heard on the first day of the trial. It was refused, but after the jury had been sworn and the case opened, the judge allowed the afternoon for counsel and the applicant to consider the material. In giving her decision, the judge observed that the applicant was in custody and that the next available trial date would likely be a year later.

11. On 26 July 2022 a juror was ill. The jury were discharged. The judge rose briefly. When she returned to court, and before the new jury panel were brought in, she told the applicant that it had been reported to her that the applicant had made a gesture of pointing a gun at the complainant's mother, who was in the public gallery. That gesture had been witnessed by a member of the court staff. The applicant immediately denied doing so. The judge indicated that she would not take the matter any further, but warned the applicant that if he did any such thing again, he may well face other charges and may well be in contempt of court. The applicant became angry and swore at the judge. She rose to give him time to calm down.

12. When proceedings were resumed, counsel asked for time to put into writing an application that the judge should recuse herself on the grounds that she had shown apparent bias against the applicant by the manner in which she had dealt with the allegation of a threatening

gesture and by her earlier ruling on disclosure and her refusal to grant an adjournment. The judge made clear that she could see no possible reason to recuse herself. The applicant interrupted the proceedings, accusing the judge of bias, and was sent to the cells. The judge told counsel that she would proceed to empanel the jury and give her preliminary remarks, would then break for the short adjournment, and would then see whether the applicant wished to return to court. She made clear that he would be permitted to return if he wished to.

13. On 27 July the applicant was not brought to court from the prison at which he was held on remand. The court was informed by the prison that he had not been produced because he had tried to assault a member of staff and had had to be restrained. In response to an enquiry by the judge, the prison indicated that there was a difficulty about providing transport for the applicant that afternoon, but the applicant had said that he was willing to attend court that afternoon or on the following day. Having heard submissions, the judge ruled that the trial should continue in the applicant's absence; his conduct was tantamount to a refusal on his part to attend court that morning, and as a result of his conduct it was not practicable to secure his attendance that afternoon.

14. The applicant attended court and gave his evidence on 28 July. He completed his evidence-in-chief. We have read the transcript of his cross-examination of that afternoon. From the outset he was argumentative. He avoided answering questions and instead insisted on making comments and statements and asking questions of prosecution counsel. When the judge tried to explain to him the need to confine himself to answering questions, he spoke over her. When the judge eventually began to warn him of the possible consequences of the way he was behaving, he accused her of wanting to "kick him out of court", saying she "had done it loads of times already". Cross-examination continued for a time, but the applicant continued to make comments and criticisms rather than answering questions and the judge told him to return to the dock. The applicant accused her of being "a complete disgrace" and a racist. At that point, around 3.30 pm, the judge sent the jury home. She told the applicant that he could continue his evidence on the following day provided he would

answer questions rather than trying to make statements.

15. At the start of proceedings on 29 July, the judge asked the applicant if he wished to continue giving evidence by answering questions. The applicant replied that he believed she was racist, that he was holding *her* in contempt of court, and that he did not want to give evidence in her court. The judge asked the jury to rise. In their absence she told him that his conduct was unacceptable and sent him to the cells. She said he could return if he apologised and behaved properly. The applicant made clear he would not apologise for calling her a racist.
16. The defence case was then closed. The trial continued with the speeches of counsel and, on the following day, the summing-up.
17. In her summing-up the judge gave an explanation of the reasons for the applicant's absence at various stages of the trial, saying that it was necessary to do so in order to correct the misleading impression which the applicant had given to the jury.
18. The jury convicted of all counts.
19. At a later trial before a different judge the applicant was convicted of an offence of breach of a non-molestation order. He was sentenced for all the offences in February 2023.
20. Ms Kharegat has been good enough to appear today *pro bono*. We are grateful to her for doing so. In her written and oral submissions she advances six grounds of appeal, contending that the judge erred in the following respects.

Ground 1

The applicant's request to inspect his own phone, which was an exhibit in the case, was reasonable and should have been granted. He was under no duty to disclose his PIN.

Ground 2

The judge wrongly refused to order disclosure of the full download of the complainant's phone and to order a download of her daughter's phone. Such downloads would have shown the true relationship between the parties, would have shown that the complainant had

not been cut off from her friends and family as she claimed, and would have shed a light on the relationship between mother and daughter which was relevant to the applicant's case. Analysis of the complainant's phone would also have enabled the applicant to test the veracity of the photographs of injuries said to have been inflicted by the applicant.

Ground 3

The prosecution served the phone material more than a week later than had been ordered, leaving insufficient time for the applicant and his representatives to review it. The judge should have granted an adjournment so that the applicant could know the case against him.

Ground 4

The judge failed to consider the applicant's right to be present during the proceedings and the need for him to be able to give instructions during the trial, in particular in circumstances where it had been submitted that there was insufficient preparation time pre-trial. On 27 July 2022 the judge unfairly assumed that the applicant's absence showed him to be trying to control the proceedings and wrongly failed either to adjourn or to arrange for him to be brought to court later that day. In the result, the applicant was not present to hear the cross-examination of the complainant.

Ground 5

When the judge received the report of a threatening gesture, she unfairly reprimanded the applicant without giving him any chance to make representations. She thereby showed apparent bias and should have recused herself.

Ground 6

The judge's direction to the jury as to why the applicant had been absent for parts of the trial was unnecessary, was given in circumstances where the judge had initially said she would not give any such explanation in her summing-up, and resulted in prejudice to the applicant.

In her helpful oral development of her grounds this morning Ms Kharegat submits that individually and collectively those errors deprived the applicant of a fair trial and make his convictions unsafe.

21. We have reflected on the applicant's submissions and on the Grounds of Opposition which have been put forward in a Respondent's Notice. Our conclusions are as follows.

Ground 1

The judge was entitled to make the rulings she did. It would have been wrong to order the prosecution to allow the applicant access to the phone in circumstances where there was an obvious risk that he might delete material from it. No good reason was put forward why the applicant could not provide his PIN, thus enabling the police to make a full download which could be analysed by experts on both sides. True it is that the circumstances had not arisen in which failure to provide the PIN was a separate criminal offence, but the remedy for the alleged injustice was in the applicant's own hands. We would add that it is not clear to us how the trial could realistically have been carried on, if circumstances had been allowed to obtain in which the applicant was giving evidence about what was recorded on a phone which the prosecution were not allowed to see.

Ground 2

We cannot accept the submission that the applicant was entitled to the full download of the complainant's phone or that of her daughter, which would inevitably contain a great deal which was wholly irrelevant to these criminal proceedings. Insofar as the complainant had communicated with the applicant, he could of course have had access to what was recorded on his own phone if he had been prepared to disclose his PIN. Insofar as he asserted that the download would show that the complainant was living a social life inconsistent with the allegation in count 1, and/or would show that the photographs allegedly of her injuries had in some way been altered, and insofar as he was not merely hoping to be able to embark upon a lengthy fishing expedition, he could provide suitable search terms to the prosecution.

The prosecution had reviewed all the material and had complied with their disclosure duty.

Ground 3

The late service of the phone material is not condoned, but the reality was that counsel had sufficient time to take instructions upon it. Between them, she and the applicant knew what they were looking for. We acknowledge that the applicant himself had not received the material until very shortly before the trial, but his representatives had had it for two weeks and had therefore had the opportunity to identify parts of the material on which instructions would particularly be needed. In the circumstances, and given the very long delay which would arise if the trial date was vacated, the judge was entitled to refuse the application.

Ground 4

There is no basis for the suggestion that the judge failed to consider the applicant's rights. The reality was that he had chosen to behave in a way which made it impracticable for him to be brought to court at the appropriate time. The judge, who was placed in a very difficult position by the applicant's constant misbehaviour and who had to make decisions at short notice, needed to consider not only the applicant's interests but also those of the witnesses and the jury. The applicant had only himself to blame for being absent from parts of the trial. We note that he appears to have had no difficulty in being present, and conducting himself appropriately, when giving his evidence-in-chief. He chose to adopt a different attitude when his evidence was tested in cross-examination.

Ground 5

There was no arguable basis for an allegation of apparent bias, still less of actual bias. The judge's ruling as to the parameters of disclosure and her refusal of an adjournment could not possibly provide such a basis. They were case management rulings, which, if wrong, could in due course be the subject of an appeal. As to the reported gesture towards the public gallery, although the judge might have expressed herself more clearly, it was apparent that she did not intend to take the matter any further, was not making any finding against the applicant, and was merely warning him about his future conduct. She was doing all this in the absence of the jury. We sympathise with the difficulty which counsel faced when representing such a difficult lay client; but as the judge said, counsel do not merely act as a mouthpiece for whatever their lay clients may wish to say, and there was in our view no basis for an application for recusal to be made.

Ground 6

Again the applicant has only himself to blame. He had chosen to make, in the presence of the jury, vociferous allegations that the judge was treating him unfairly and was wrongly kicking him out of the trial. That was a deliberate misrepresentation of the facts. It placed the court in a most difficult position. It would obviously have been wrong to discharge the jury. The judge therefore either had to address what had happened or to risk the jury reaching their verdicts on the basis of a serious misrepresentation. In our view the judge was entitled to address the matter as she did. She rightly directed the jury that they must be careful not to allow the information about what had happened, both in their presence and when they were absent, to prejudice their consideration of the evidence.

22. For those reasons, grateful though we are for Ms Kharegat's assistance, we are satisfied that there is no arguable ground of appeal against the convictions. This renewed application accordingly fails and is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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