IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202201326/B4 & 202201570/B4

Neutral Citation No.: [2023] EWCA Crim 1450

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 18 October 2023

Before:

LADY JUSTICE ANDREWS DBE
MRS JUSTICE CHEEMA-GRUBB DBE
HER HONOUR JUDGE DHIR KC
(Sitting as a Judge of the CACD)

REX
V
KHALIFA MUGHAL
WASEEM ADALAT

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MR S WOOD KC appeared on behalf of the Applicant MUGHAL
MR A IQBAL KC appeared on behalf of the Applicant ADALAT

J U D G M E N T

RESTRICTED ACCESS

1. MRS JUSTICE CHEEMA-GRUBB: The provisions of the Sexual Offences (Amendment) Act 1992 apply to a number of the offences in these renewed applications. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the same Act. We will refer to the two particular victims concerned in this hearing as XY and ZA.

2. An order under section 4(2) of the Contempt of Court Act 1981 has previously been made in relation to outstanding Crown Court trials. We have been told that there are at least two further trials to be heard involving the first applicant and we make an order that the publication of any further report of these proceedings and this judgment shall be postponed until the conclusion of all trials arising out of the same series or further order. This order is necessary to avoid a substantial risk of prejudice to the Administration of Justice in those or other proceedings. It will cease to have effect once the series of trials is completed.

3. On 1 April 2022 following a trial of several defendants for sexual exploitation of young girls and other offences before His Honour Judge Gibson and a jury in the Crown Court at Bradford, Khalifa Mughal, then aged 38, was convicted of perverting the course of justice (count 8), one count of rape (count 24) and one count of supplying a controlled drug to another (count 25). He was acquitted of another count of rape (count 23). Waseem Adalat, then aged 35, was convicted of three counts of rape (counts 16, 17 and 20). He was acquitted of assault (count 22). The trial was one of a series focused on the activities of a group of men in Halifax, West Yorkshire.

4. On 4 May, Khalifa Mughal was sentenced to a total of 12 years' imprisonment which was reduced on appeal to 10 years. On 19 May, Waseem Adalat was sentenced to a total of 12 years' imprisonment. His sentence was the subject of an Attorney General's Reference heard on 15 November 2022. The court granted leave, reviewed the sentence and quashed it, substituting a total sentence of 14 years and six months.
5. Both men now renew their applications for leave to appeal against conviction following refusal by the single judge. The proposed grounds engage with rulings made during the course of the trial, following half time submissions of no case to answer against Khalifa Mughal and an application to stay the indictment for abuse of process on behalf of Waseem Adalat.
6. Both applicants require, respectively, permission to renew an application for leave out of time and for an extension of time in which to seek leave to appeal. In both cases the responsibility for the delays lie with the legal teams and we would have been minded to grant the extensions required had there been any merit in the proposed grounds of appeal.
7. The case in outline. A girl, XY, was born on 30 August 1994. She was 13 to 14 years old at the time of the offending which took place in 2007 to 2008. Another girl, ZA, was born on 24 January 1993. She was 14 to 15 (nearly 16) at the time of the offending. Khalifa Mughal was 25 at the time of the offending and close friends with another offender, Metab Islam. Waseem Adalat was aged 22 and close friends with another offender, Asad Mahmood, who was aged 21 at the time of the offending.
8. In 2007, XY alleged that she had been raped on more than one occasion by the first applicant, Mughal. A police investigation was commenced and in February 2008 he was charged with two offences of the rape of XY. After he was charged an incident occurred on 7 February 2008 in Halifax Town Centre when the applicant threatened XY and told

her she must change her account. That led to the first applicant being arrested for perverting the course of justice. Metab Islam was present with the first applicant on that occasion in Halifax Town Centre.

9. The applicant was remanded in custody, and he was charged with witness intimidation. His trial was fixed for June 2008. In the meantime, Islam with, it was alleged by the prosecution, the encouragement of Khalifa Mughal, brought significant pressure to bear on XY and her mother in order to ensure that the prosecution of the first applicant was dropped. As part of that process, Islam befriended XY's mother and began a relationship with her. He visited their home regularly between February and June 2008 and appeared, XY said, to be a "good guy". He made it clear over the course of at least three months that if the case was dropped all of their difficulties would disappear. He sought to persuade XY to change her account so that the first applicant would be acquitted. He made veiled threats about the consequences if they did not do as he suggested.

10. Shortly before that earlier trial in 2008, XY's mother submitted a letter to the prosecution which stated that XY had told Mughal that she was 16 years of age at the time of the offences of rape - indeed this was something she had already said in her ABE interview. Furthermore, that she had consented to what had taken place. XY gave evidence at that trial consistent with the content of the letter. In the event, on the judge's direction, in light of the evidence, the first applicant was found not guilty of the trial counts charging sexual activity with a child and witness interference which related solely to the comments made in Halifax Town Centre.

11. Following an approach by ZA as an adult to the police a fresh investigation was opened. XY was interviewed again and as well as reiterating the sexual offences committed against her, she described the way that Islam had behaved towards her and her family and

the steps he had taken to persuade her not to give evidence against the first applicant. She also said that the applicant had driven past her house on a few occasions before he was arrested in 2008 but she did not know if he had seen her.

12. In the subsequent trial the prosecution said that the two men had worked together to influence XY before the first applicant's remand in custody and the efforts continued by Islam afterwards. The evidence of the events on 7 February 2008 was called in relation to count 8 because it was relevant to the case against Islam, although the first applicant had been acquitted of that specific charge in 2008. The Crown relied on it to show that at that stage the two men were working together, the applicant admitting in interview that he and Islam were together at the time of that incident.

13. The jury was asked to infer that the joint intention to dissuade the complainant from giving evidence persisted and that the actions taken by Islam once Mughal was in custody were a continuation of the collective venture. The first applicant was of course the person who stood to benefit.

14. The allegation of rape against Mughal in the trial arose from the evidence of ZA who had met him shortly before she became 16. She stayed the night at his family home on one occasion when the events giving rise to counts 23 and 24 occurred. She had told him she was 16 years old. They had vaginal sex, to which she had not objected. He wanted to penetrate her anally which she initially objected to but was persuaded to allow. It hurt and she told him "no" but he did not immediately stop, only relenting when she was crying; albeit she agreed in cross-examination that this was not long after she had told him to stop. She gave contradictory accounts prior to the trial about whether the applicant had given her cocaine; initially saying that he gave her weed but never cocaine and in a subsequent ABE interview that he gave her cocaine on the end of a key on one

occasion which she sniffed. This was indicted as count 25. The prosecution relied on her evidence, the fact that she knew the applicant's correct name and identified him, and evidence of telephone contact between them.

15. The defence case was that he was not a party to the actions of Islam towards XY and her mother. In relation to ZA, although it was difficult to recall precise details of events which took place more than 12 years earlier, all sexual activity between them was consensual or he reasonably believed she consented and he had never supplied her with cocaine. The applicant did not give evidence or call any evidence in his defence.

16. Turning to the second applicant, counts 16, 17 and 20 reflected a number of occasions in 2008 when ZA was 15 years of age and a passenger in a car with both Waseem Adalat and Asad Mahmood. Those men were dealing in drugs at the time. The applicant knew her age. She performed oral sex on him in the car on a regular basis as "payment" for drugs and alcohol supplied to them by the men. Count~16 charged a single incident of oral rape. The oral rapes charged in counts 17 were left to the jury as having taken place on at least three occasions. However her evidence was that she met the first applicant nearly every day during the period from mid-2008 possibly through to the year 2009. She thought she had performed oral sex on him frequently; she thought about 50 times.

17. On a specific occasion both men, with others, vaginally raped ZA at a flat whilst she was intoxicated by alcohol and drugs and this would have been obvious to those present. As well as ZA's narrative evidence, the prosecution relied on her identification of the second applicant on an identification procedure and on circumstantial evidence including the fact that from May 2009 his father and then the applicant himself were the registered keeper of the make and colour of car the witness described. In addition, there was evidence demonstrating telephone contact between ZA and the second applicant.

18. The defence case was that he had never met ZA. He believed she had made the allegations against him at the behest of an enemy of his called Malik. The applicant had been in and out of prison around 2008 and had also been in Pakistan for part of that period. Efforts were made to substantiate the details of his defence, including the absence from the jurisdiction. There was evidence indicating that the applicant had surrendered his passport to the police in 2013 as a condition of bail. It could not be located and in due course the prosecution admitted it appeared to have been lost by the police. Following his police interview early in January 2018, at which he said he had travelled to Pakistan for a period of six weeks or so in 2007 or 2008, the police had failed to make prompt enquiries of the National Borders Targeting Centre until the relevant time period for the preservation of records was passed.

19. The proposed grounds of appeal for Khalifa Mughal are that the trial judge erred in refusing submissions of no case to answer on counts 8 and 25, the applicant having been acquitted of count 23. Mr Wood KC, who appears to make the applications at his own expense and without expectation of remuneration, argues in clear and helpful submissions that the convictions on counts 8 and 25 are unsafe because there was insufficient evidence upon which a properly directed jury could have convicted. He does not seek leave to argue that the conviction on count 24 is unsafe.

20. On count 8 the submission before the trial judge addressed the requirement of the close of the prosecution case that there be sufficient evidence that the crime alleged has been committed by the defendant, the first limb of the test described in R v Galbraith (1981) 73 Cr.App.R 124 CA. Mr Wood also relied on iterations of the test in R v Goddard and Fallick [2012] EWCA Crim 1756 at paragraph 36 and R v Masih [2015] EWCA Crim 477 at paragraph 3. He argues that there was no evidence the applicant was acting

together with Islam once the applicant had been remanded into custody. In particular, there was no evidence that the two men had been in contact with each other and the mere fact that the applicant stood to benefit from what Islam was doing, should the jury be sure that Islam did what the prosecution alleged, was insufficient to prove a continuing joint enterprise between them.

21. The prosecution conceded inevitably that their case on count 8 against this applicant could not include the alleged incident in Halifax early in February 2008 which had led to his remand into custody because that had been litigated at the earlier trial and the applicant had been acquitted. XY had been asked if she was aware of any suggestion that the applicant was behind what Islam was doing to her and her family after the applicant was remanded in custody or that he had asked Islam to do it. Her response was that there was nothing said, but there would not be because that would be giving the game away. This was characterised by the defence as no more than an assumption or guess.

22. In a concise ruling, the judge summarised the background and acknowledged that the relevant parts of Islam's action took place at a time when there was no evidence of any contact between him and the applicant. However, he accepted the prosecution submission that a combination of evidential factors gave rise to an inference of collusion which the jury was entitled to draw and therefore the case on count 8 should be for them to decide. He summarised the test, it is accepted correctly, as:

> "... whether or not a properly directed jury could convict this defendant on the available evidence, it is not whether every jury would convict. So, I ask myself whether a properly directed jury on this evidence taken at its height could exclude the possibility that [Islam] was 'acting off his own bat' as it was put in argument."

23. The absence of any direct contact between the two men was highly relevant, he

concluded, but the jury was entitled to consider the overall course of conduct revealed by the evidence. Mr Wood rehearses this argument but like the single judge we find no reason to criticise the judge's approach or his conclusion. We can see no support for the suggestion that the judge placed undue weight on the evidence of what happened in February 2008 in Halifax. Whilst it was entirely open to the jury to conclude that Islam may have wished to influence the complainant to assist his incarcerated friend without the knowledge or connivance of this applicant, it was equally open for the jury to be sure that the prosecution were correct that these two close friends set out on a joint effort to avoid the applicant being convicted and once he was incarcerated his ally continued the attempt even if the applicant was not aware of the details of what he did.

24. While the February 2008 incident was admitted as evidence of the offence against Islam alone, and the jury had to be directed to ignore that part of the evidence in the case of this applicant, except in so far as it was relevant to bad character, that situation is no different to many multi-handed cases in which a specific piece of evidence is admitted against one defendant but not necessarily admissible against another. If there is a suitable direction to the jury, no injustice ensues.

25. In respect of count 25, Mr Wood argued and reiterates before us, that the evidence offended the second limb of the test in R v Galbraith in that it was of a tenuous character because it was consistent. This it certainly was. At trial, having agreed in her evidence during cross-examination that the applicant had never supplied her with cocaine, in re-examination she confirmed that part of her later ABE interview in which she said he had, on the one occasion with the drug on the end of a key but this had not happened on a night when they had sexual relations. Mr Wood points out that all the previous inconsistent statements about the supply of drugs were not said to be precursors to sex

and so this answer was by way of a non-sequitur. Again, we are not persuaded that the judge fell into error in leaving this contradiction and the explanation for it to the jury to consider. There was ample evidence upon which the jury could assess the reliability of the witness. Furthermore, we do not consider it arguable that a failure by the prosecution to ask the witness to explain the inconsistency was a necessary precondition to the jury being allowed to consider this count. The jury had seen the complainant and had heard her explanation. There was, on the face of it, an explanation for the inconsistency which the jury could accept if they were sure it was true.

26. In respect of both count 8 and count 25 we have considered the legal directions and summing-up, neither of which is criticised by Mr Wood, and rightly so. The judge set out the competing positions clearly against the burden and standard of proof. He gave a full direction as to joint responsibility and the requirement that the jury must be sure that at the time of anything done by Islam a common purpose was in existence between the applicant and his co-defendant to pervert the course of justice and also that what Islam said or did could not on its own be evidence of that common purpose. The judge also gave a full circumstantial evidence direction.

27. In relation to Waseem Adalat, it is to be argued that the judge should have stayed the proceedings because prosecution failures, combined with delay, meant that the applicant could not be tried fairly. Trial counsel mounted an argument at the close of the Crown's evidence that the continued prosecution of the second applicant was an abuse of the process of the court, given the loss of his passport and the failure of the prosecution to carry out enquiries promptly with Border Force. In essence the argument was that the absence of the passport, in combination with a paucity of evidence as to the applicant's actual travel movements in 2008, deprived him of crucial exculpatory evidence which he

would have sought to deploy in support of an alibi or at the very least to significantly undermine the evidence of ZA that she had been raped by him very frequently over an extended period in 2008.

28. The defence relied upon a number of authorities including the judgment of Treacy LJ in D [2013] EWCA Crim 1592 in which the court considered how to assess the degree of prejudice to the defence in such applications:

> "... it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

29. It was argued that this was a case in which a judicial direction would be insufficient to prevent unfairness of such a degree as required the court to intervene and stop the prosecution altogether.

30. In response the prosecution observed that the indictment dates were widely drawn from January 2007 to January 2010. The applicant had told the police in his interview in 2018 that he had been abroad in 2008 for about six weeks but he was not abroad for a long time. He was asked subsequently about telephone contact between him and ZA, particularly in 2009, and although he denied such contact he did not suggest he was

outside the jurisdiction then. Furthermore, in a defence statement dated August 2020 he did not suggest he was not present in the United Kingdom over the relevant time in 2008. In a supplementary defence statement in February 2022 he said he was "in and out of the country" and prison but not that he was incapable of committing the offences because he was simply not in the jurisdiction.

31. The prosecution also relied on the applicant's failure to provide any particularised details of his best recollection of what travel arrangements he had made over the period described by ZA, whether by reference to other witnesses or other documentary material. As the trial had proceeded, the absence of the passport and the police failure to make specific inquiries had, the prosecution said, been promoted to a significance they could not actually sustain. Had the passport been located, it may have assisted the prosecution as much as or more than the defence. The jury would be fully informed of the position and appropriately directed.

32. In his ruling the judge crystalised ZA's allegations as being likely to have occurred during the period of March and December 2008. This was the relevant period. The applicant had said in a police interview that he had been in and out of prison and also in Pakistan for some of that period. He said he had been married in Pakistan before 2008 and he went abroad in 2008 to bring his wife to the United Kingdom. He had been away for six weeks or so. According to official records he was in custody for periods during 2007 and for a period of approximately six weeks in January to February 2008, but not for the remainder of that year. There was evidence to suggest he had surrendered his passport to the police in 2013 and it was not returned to him. The judge dealt with the application on the basis that it could be demonstrated that the police had mislaid it, albeit bad faith was not suggested, and that checks were not made with the Border Agency promptly when

they might have been.

33. However, the judge was not persuaded that this evidence was crucial to the defence case and he applied the guidance we have already set out. He concluded that the missing information might have provided the applicant with at least a partial alibi for the relevant period in 2008, against which ZA's account could have been tested. However, the applicant did not suggest he took frequent trips to Pakistan and any alibi supporting his recollection would at best have been incomplete. Accordingly, the loss of the evidence, whilst prejudicial, was not to such a degree that he could not be fairly tried, provided a suitable direction was given to the jury to consider this feature of the evidence in his favour fairly alongside a direction on the impact of delay in the proceedings generally. A stay of a prosecution, being a measure of last resort, was not justified.

34. Mr Iqbal KC rehearses the arguments put before the trial judge. He submits that the facts of the applicant's case were not comparable to those involving mere delay. The judge was wrong to assess the significance of the missing evidence as less than highly valuable and probative in favour of the defence. This is a case, he says, in which there was negligence on the part of the prosecution despite the absence of bad faith and this was a relevant feature which the judge did not consider sufficiently. He also wishes to argue that the defence could not produce any other evidence that would carry such authority as a documented travel history from a passport in support of the impossibility of the applicant committing the alleged offences or, as he says, to undermine the totality of the complainant's evidence.

35. We find this last submission somewhat surprising given the applicant had never said it was impossible for him to have committed the offences because he was out of the country for a substantial period of time. We do not accept that in such a case where any visit out

of the country would have been to the Indian subcontinent, therefore by plane, to visit family members and to ensure the entry into the jurisdiction of his wife, that there was no other evidence possibly available to the applicant. Irrespective of that detail, we are not persuaded that the judge fell into any error in his legal approach or his judgment refusing the application to stay the indictment. The judge provided the jury a full direction as to the potential prejudicial impact of delay on the defence case. In particular in respect of this applicant the judge explained the disadvantage from delay compounded by the issue of the lost passport and the absence of official information about any trips that the second applicant had made during the relevant period. The judge told the jury that had a reliable record of any periods he was abroad for in 2008 been available it would have been important evidence in his case. Not being in possession of those records made it more difficult for him to be precise in his defence in relying on alibi. This was something also to be taken into account in his favour. The jury was given a full alibi direction, including that the burden lay upon the prosecution to prove that the alibi put forward was false.

36. Having considered the applications on the part of both applicants, independently and for ourselves, whilst we are grateful for the helpful submissions of counsel we are in agreement with the single judge. Accordingly, the extensions of time required and the applications for leave must be refused.

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

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