IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 505

No. 202201625 B2

Royal Courts of Justice

Tuesday, 4 April 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE COCKERILL
MR JUSTICE JOHNSON

REX
V
VICTOR MARKE

REPORTING RESTRICTIONS APPLY:
Sexual Offences (Amendment) Act 1992

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MR J BOURNE appeared on behalf of the Crown.

MR F McGRATH appeared on behalf of the Applicant.

J U D G M E N T

MR JUSTICE JOHNSON:

1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. Under those provisions, where a sexual offence has been committed against a person no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

2 The facts of this case have been fully set out by the Criminal Appeal Office. In summary, on 11 May 2022, in the Crown Court at Nottingham, the applicant was convicted of eighteen sexual offences committed against two complainants. He was subsequently sentenced to a total of 14 years' imprisonment.

3 He renews his application for leave to appeal against conviction following refusal by the single judge.

4 He contends that the trial judge, HHJ Watson, was wrong to direct the jury that they were entitled to treat the evidence of each of two complainants as being cross-admissible in respect of the allegations made by the other complainant.

5 The applicant was a martial arts instructor. The first complainant (who we will call "C1") attended a martial arts class from when she was aged ten. She said that the applicant groomed her over a period of years and that over a period of months, between 2002 and 2003, when she was aged fifteen, he started to touch her sexually, initially over her clothing and then under her top and then putting his hand down her trousers.

6 The second complainant ("C2") also trained in martial arts, including attending one of the same clubs as attended by C1, where she had seen C1. Between 2005 and 2008, when C2 was aged between thirteen and fifteen, she said that she had stayed in the applicant's home, the applicant suggesting that that would enable her to have extra training and to escape from a troubled home life. She said that whilst she stayed with him overnight, he engaged in sexual activity with her, penetrating her mouth and vagina with his penis. He also caused her to engage in sexual activity with his partner.

7 C1 reported her allegations to the police when she took up a job which involved training in safeguarding, and she thought it important to report what had happened. She did not initially give the police C2's name when they asked about other people that she knew from martial arts training, but she did give C2's name when she was prompted by her father. The police approached C2, who gave the account that we have briefly summarised. A message on C1's phone showed that she knew that the police had spoken to C2 and that C2 had disclosed information to them.

8 In the course of the trial the judge ruled that the evidence of each complainant was admissible in respect of the charges concerning the other complainant. Both complainants were students of the applicant. Both were identified by him as being talented in martial arts. In both cases, that provided a reason for the applicant to give them additional attention and support. It was, said the judge, for the jury to decide whether they could exclude concoction or contamination. If the jury were able to exclude that, then they would be entitled to consider and cross-refer the allegations and the evidence in support of each set of complaints when considering the other complainant's allegations.

9 We are grateful to Mr McGrath, who has appeared *pro bono* on this renewed application. In his submissions in support of the renewed application for leave to appeal, Mr McGrath submits that the judge erred by not making any reference to *R v Chopra* [2007] 1 Crim App Rep 16, which emphasises the importance of ensuring that the possibility of collusion or contamination can be excluded. The applicant says that the judge should have considered this issue for himself rather than leaving it to the jury.

10 He also submits that the charges concerning C2 were weak and that allowing C1's evidence to support the case against the applicant in respect of C2's allegations had the effect of allowing the Crown to bolster a weak case.

11 In his oral submissions, Mr McGrath focused on the message on C1's phone to which we have referred and which raised a question as to how she knew that C2 had been spoken to and had made complaints about the applicant's conduct.

12 He also relied on the obligation on the court under s.107 of the Criminal Justice Act 2003, which requires that where bad character evidence has been adduced and the court is subsequently satisfied that the evidence is contaminated, and that the contamination is such that a conviction would be unsafe, that the court must either direct the jury to acquit the defendant of the offence or discharge the jury.

Discussion and decision

13 In *R v Chopra*, this court upheld a trial judge's ruling on cross-admissibility of allegations of sexual abuse made by separate complainants. At para.25, Hughes LJ said:

> "… we are satisfied that this evidence was, as the judge ruled, available to the jury if it accepted it and if collusion and contamination was excluded on a basis of cross-admissibility each to support the other."

This does not mean that it is for the judge to be satisfied to the criminal standard that the possibility of collusion and contamination has been excluded before the matter can be left to the jury; rather, the question of collusion or contamination is for the jury, so long as the jury, properly directed, can safely exclude the possibility of collusion and contamination.

14 There was not at any stage any application for the case to be stopped under s.107 of the 2003 Act. We do not consider that anything in s.107 imposed an obligation on the judge, when determining the bad character application, to make a positive finding one way or the other as to whether there had been contamination. As the single judge observed, there may be cases where the risk of collusion or contamination is such that the judge should not leave the issue to the jury but otherwise this is an issue for the jury. Here, a properly directed jury was entitled, on the evidence, to conclude that there was no collusion or contamination.

15 The judge did properly direct the jury. As Mr McGrath accepted, the written rulings before the jury were flawless. The judge made it clear that before the jury could rely on the evidence of one complainant in respect of the allegations made by the other, they would have to be sure that they had not put their heads together. In his summing-up, the judge identified the evidence that was relevant to contamination and, in particular, the message on C1's phone. Once contamination was excluded, the allegations made by each complainant were logically probative of the allegations made by the other. That is because, first, it is inherently unlikely that two separate complainants would independently make up allegations that they had been abused by the applicant in broadly similar circumstances and, second, if the jury were satisfied that the applicant had behaved in the manner alleged as against one of

the complainants, then it would be more likely that he had done so in the manner alleged by the other.

16 It is not a case of cross-admissibility being used to bolster an otherwise weak prosecution. It was a case where the evidence was mutually admissible on well-established principles, as recognised in *Chopra* and in many other decisions of this court.

17 We therefore dismiss the renewed application for leave to appeal.

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