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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LUTON

HIS HONOUR JUDGE BLAKE CP No: 40AD122023

CASE NO 202304191/B4

Neutral Citation number [2024] EWCA Crim 1289

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 24 October 2024

Before:

LORD JUSTICE HOLGATE
MRS JUSTICE STACEY DBE
SIR NIGEL DAVIS

REX
V
PHILIP MUNDLE

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MISS L WIBBERLEY appeared on behalf of the Appellant
MR S WEIDMANN appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE HOLGATE: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 section 3 of the Act.
2. On 6 July 2023 in the Crown Court at Luton, the appellant pleaded guilty to one count of assault by beating of an emergency worker. On 30 October 2023 in the same court before His Honour Judge Blake he was convicted unanimously of one count of vaginal rape (count 1). The jury acquitted him of anal rape (count 2). No verdict was taken in respect of the alternative offence of attempted rape (count 3).
3. On 15 December 2023 the judge sentenced the appellant for the assault to imprisonment for 1 month and for the vaginal rape to an extended determinate sentence of 10 years 6 months (comprising a custodial term of 7 years 6 months and an extension period of 3 years) the sentences to run consecutively. He appeals against conviction for the rape by leave of the single judge, who also granted the short extension of time needed.
4. The central issue raised by this appeal is whether the jury's conviction on the vaginal rape was logically inconsistent with its verdict of not guilty on the anal rape.
5. On the evening of 14 April 2023 the complainant, to whom we shall refer as C, then aged 18 years, and her friend Cyla went out into Bedford to socialise. They consumed a large amount of alcohol. A witness, Ryan Durham described them as being very drunk. Nearly two hours after the incident C was nearly 2.5 times over the alcohol limit for driving.
6. Towards the end of the evening they came across the appellant, a stranger to them. They

engaged him in conversation. They walked down Silver Street and when they wanted to urinate C and Cyla entered an alleyway. The appellant followed. He left some four minutes later and rode off on his bicycle.

7. It was the prosecution's case that whilst in the alleyway the appellant took advantage of a drunk and vulnerable young girl and took the opportunity to briefly penetrate her vagina and then her anus.
8. The evidence upon which the prosecution relied may be summarised as follows. First, CCTV evidence showed the incident in the alleyway and some of the preceding events.
9. Second, C gave evidence. In her ABE interview of 16 April 2023, C said that the appellant approached her from behind and proceeded to insert his penis into her vagina and anus.
10. The judge summarised C's evidence in his summing-up. C told the police that she knew there was someone behind her because she heard his voice and could smell what he was wearing. Her best friend Cyla saw what was going on and she started screaming because she had seen a "random" putting his penis inside C. C said she could not see the man's face. He was dressed all in black. She told the police she thought his face had been covered with a ski mask: the defence made the point, repeated by the judge in his summing-up, that that part was clearly wrong.
11. When asked how she knew he came from behind C said: "Because I could feel his hands on my waist and could feel his penis, basically from the back end of it, like, inside my bottom." She said: "I don't know how far he put it in, into me, but I know it was there." She said: "I was standing up. I felt his dick inside me for approximately five minutes or two minutes or something like that. I cannot remember how long but it was there for a very long time ... I first felt the penis in ... ", and she wrote down on a piece of paper

during the interview, "vagina and bum". On this first occasion she underlined the word vagina. C said: "When I was trying to get him off, he's, like pulled out and then gone into that", and she wrote down or underlined at that point "bum". "I was trying to get him off. I was shouting and screaming at him, 'I need you to get off and leave me alone'... That's when my friend turned round and saw what was going on and she did try her best. I was getting really angry with him, trying to get him off and he just wouldn't and that's when he went."

12. C said "I was trying to move away from the situation but I couldn't because he was just there and I couldn't even move." When asked how close she was to the wall, she said that it had scratched her on the right thigh.

13. C said: "I felt his penis inside my bum", and then she confirmed that this is what she used to defecate. She said, "I remember going for a wee and then I stood up. He's come behind me. As I'm trying to sort myself out, he clearly thought it was OK to stand there and put his penis inside me twice. I felt him grabbing harder and trying to get somewhere. He's caused that pain down below where he's inserted himself into me." Asked how it ended she said: "My friend ran in front of a police van, and told them I was being raped."

14. Third, there was Cyla's evidence. She said that in the alleyway she turned her back on C. Then she heard C scream her name, petrified. She screamed three times, "Get him off me, I don't like it". When Cyla turned round, she saw the man behind C. He was penetrating her. C looked very scared. She tried pushing away two or three times but was unsuccessful. The man held her more tightly. A short time later Cyla banged on the window of a police vehicle and told officers that her friend had been raped.

15. In cross-examination Cyla denied that she had been the first to scream and in doing so

had raised a false alarm about rape. Cyla said that although she could not see any actual penetration, it had looked to her as if that is what was happening and at the time C was screaming "get him off me."

16. Fourth, there was evidence from police officer Sukhpreet Jatania. Officers spoke to C who was sitting on a small brick wall crying and highly intoxicated. C said: "He raped me ... We had some food and a guy raped me. Cyla saw me. I said, 'No' to him and without my consent he put twice his thing inside me and he said, 'Bend over, bend over'." C walked towards the alleyway and said: "That's where he raped me twice".
17. Fifth, the prosecution relied upon the fact that in his interviews the appellant answered no comment to all questions put by the police.
18. Sixth, agreed facts recorded that the analysis carried out on a number of DNA samples did not assist either way in addressing whether the appellant had engaged in vaginal and/or anal intercourse with C.
19. The appellant gave evidence. In summary he said that he and C had chatted in the High Street before they and Cyla reached the alleyway. The appellant said C flirted with him in the High Street. She touched him and said: "Oi, sexy guy on a bike, can I suck your dick. We need a wee. Come with me." There followed a discussion about having sex and the possibility of going to his place or to a hotel. The appellant said that in the alleyway C tried to initiate sexual activity with him, including oral sex on him. C asked him to penetrate her from behind. The appellant said he was not keen on that idea, suggesting instead that they went somewhere nicer and more comfortable. However, at C's request he tried to get into a position that would allow him to penetrate her from behind. He made preparations to engage in sexual intercourse but did not penetrate, or attempt to penetrate, either her vagina or her anus. His penis never entered her vagina or

anus because the position was too awkward and he decided that he did not want to. The appellant said that the sexual touching in the lead up to what happened in the alleyway was all consensual. C was mistaken when she said that she was penetrated. She had wrongly recalled what happened to her because of her intoxication and the reaction of her friend, who had got the wrong idea and shouted "rape".

20. During their retirement the jury sent a note to the judge seeking his assistance on the following question:

"Does penetration of the anus have to have penis into the anus, into the rectum, or is it as loose as penetration of the vagina? If the penis is in between the bum cheeks, is it penetration?"

21. The judge answered this question as follows:

"... the biology of the vagina is slightly more complicated. The biology of the anus is that there is one orifice. In order for penetration to take place, there would need to be some penetration of the orifice of the anus. It doesn't need to be full penetration but there would need to be some penetration of that orifice."

22. We are grateful to Miss Lucie Wibberley for her written and oral submissions on behalf of the appellant. We are also grateful to Mr Stefan Weidmann for the Respondent's Notice and his brief oral submissions today.

23. In summary, Miss Wibberley submits that the conviction on count 1 is unsafe because the jury's decision to acquit on the anal rape and to convict on the vaginal rape are logically inconsistent. She says that there was no evidential basis for the jury to be able to distinguish between counts 1 and 2. C's evidence was that the appellant penetrated both her vagina and her anus. The appellant said that he did neither. Cyla was unable to see whether penetration of any kind actually took place.

24. Miss Wibberley submits that the jury could not have acquitted the appellant in count 2 on the reasonable belief in consent issue, consistently with their verdict on count 1. Given the circumstances and short duration of the incident, any such finding against the prosecution's case would have been equally relevant to both allegations of rape. It is said that the jury must therefore have rejected the reliability of C's evidence on anal penetration and so, because vaginal penetration was dependent upon her evidence, the verdict on count 1 is unsafe.

25. Miss Wibberley also submits that having found C to be an unreliable witness, the jury improperly speculated under count 1 that the appellant penetrated C's labia but no further.

26. In support of her submissions, Miss Wibberley referred to Archbold 2025 at paras. 7-70 to 7-71 where the relevant case law is summarised. She submits that this is a case where counts 1 and 2 really stood or fell together. She relies upon para. 8 of the judge's written directions to the jury to support that contention.

27. Discussion

Counsel for the appellant accepts that no criticism can be made of the judge's legal directions or summing-up. We agree. The judge gave a clear direction to the jury on the relationship between the three counts on the indictment when they came to consider their verdicts. He did this in his oral directions to the jury and also in his written directions and route to verdict, which the jury had with them during their retirement.

28. The judge told the jury to consider the case for and against the appellant on each count separately. They could only convict on a particular count if they were sure of the appellant's guilt on that count. So their verdicts might be the same or different. Count 3, the attempted rape, was an alternative to counts 1 and 2, which they should consider first. If they should find the appellant guilty of the vaginal rape and/or the anal rape,

then they should not consider count 3. But if they found him not guilty on both counts 1 and 2 then they should go on to consider the allegation of attempted rape in count 3.

29. The judge also gave directions on penetration in which he again made it clear that the jury's verdict on counts 1 and 2 need not be the same. He said:

"The slightest penetration of the vagina or the anus for the briefest time will suffice to constitute the offence. The Sexual Offences Act 2003 ... defines the vagina as including the vulva, so penetration between the labia outside the vaginal entrance is sufficient. There doesn't, therefore, need to be full penetration. The prosecution do not need to prove that there was ejaculation or the use or threat of any force over and above the act of penetration. If you are not sure whether the defendant penetrated C's vagina with his penis then you find him not guilty on count 1. If you're not sure that he penetrated her anus with his penis then you'll find him not guilty on count 2. But if you're sure he intentionally penetrated her in relation to count 1, count 2 or both, then you go on to consider the issue of consent on that count."

30. The summing-up, written legal directions and route to verdict must be read fairly and as a whole. In our judgment, when that is done it is plain that the judge did not direct the jury that counts 1 and 2 stood or fell together. This is reinforced by the clear direction that the judge gave in his written route to verdict to the jury immediately before the questions he specified for count 3. The judge told the jury in unequivocal terms that they could reach either the same or different verdicts on counts 1 and 2.

31. In relation to the alleged inconsistency between the conviction on count 1 and the acquittal on count 2, the test to be applied was laid down in R v Durante [1972] 1 WLR 1612 and approved in R v Fanning [2016] 1 WLR 4175. The appellant bears the burden of satisfying the court that the two verdicts cannot stand together, meaning that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the conclusion they did.

32. In this case specifically the appellant must show that the claimed inconsistency renders the guilty verdict on count 1 unsafe: see for example Lord Phillips LCJ in R v Mote [2007] EWCA Crim 3131 at [15], cited in Fanning at paragraph [27]. As we have said, the appellant makes no criticism of the judge's directions to the jury.
33. As Lord Bingham LCJ said in R v W (Martyn) (unreported) 30 March 1999, cited in Fanning at [29], if the defence considers that two counts must, as a matter of logic, stand or fall together, such that it would of necessity be inconsistent for the jury to return a guilty verdict on one count and a not guilty verdict on another, they should ask the judge to give a direction to that effect. It would be anomalous that a jury directed that (1) the facts were for them, (2) they should consider the counts separately without any obligation to decide the counts relating to an offender in the same way, and (3) they should not convict unless sure of guilt on a count, to be held to have returned irrational or logically inconsistent verdicts because they took the judge's directions at face value and gave effect to them.
34. Here the appellant's counsel did not say to the judge that he should give a direction that counts 1 and 2 stood or fell together and should not be treated separately by the jury. The judge did not say that if the jury should return either a guilty or a not guilty verdict on count 1, then they would have to return the same verdict on count 2, or vice versa.
35. In our judgment there is no logical inconsistency between the jury's verdicts on counts 1 and 2. It was possible on the evidence before the jury for them to be satisfied to the criminal standard that penetration of the vagina including the labia took place but not penetration of the anus.
36. When talking about count 2 during the ABE interview, C said that the appellant had put his penis inside her bottom "at the back of me". She said that she did not know how far

it was put in. It was just there. When asked for what purpose she used the body part she referred to as "the bottom", C said initially that it was to urinate and defecate. Later when she was asked where she felt the appellant's penis first, she indicated on a piece of paper her vagina. She was asked what had happened next. C said that she was trying to get the appellant off her, he "pulled out" and "then gone into that", indicating the word "bum" on the same piece of paper. Later on, C was asked to clarify what she meant by "bum" and she said that it was the body part she used to defecate. In cross-examination counsel suggested that the appellant never put his penis into her "bottom", to which she replied, "he did".

37. With this loose use of language, it is hardly surprising that during their deliberations the jury asked whether penetration for anal rape had to be into the anus, the rectum, rather than simply "between the bum cheeks". The very way in which the jury formulated that question shows how carefully they followed the evidence. When the judge correctly directed them that there had to be penetration of the orifice of the anus, it is perfectly understandable that the jury were not sure on the evidence they had heard that that ingredient of count 2 had been established. That does not mean that the jury was bound to treat C's evidence as unreliable for the purposes of count 1.
38. There is no logical inconsistency between the jury's verdicts on the two counts. A jury properly applying their minds to the law and the evidence before them in this case could properly acquit the appellant on count 2 and convict him on count 1. In our judgment the conviction for vaginal rape on count 1 is safe.
39. For these reasons, the appeal must be dismissed.

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

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