



Neutral Citation Number: [2020] EWCA Crim 820

Case No: 201901681C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WORCESTER
HIS HONOUR JUDGE TINDAL
T20177270

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2020

Before :

THE RT. HON. THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HON. MR JUSTICE SWEENEY
and
THE HON. MR JUSTICE MURRAY

Between :

ALEX HEPBURN
- and -
THE QUEEN

Appellant

Respondent

D Emanuel QC (instructed by **Draycott Browne Solicitors**) for the **Appellant**
M Moore QC and **S Morris** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 4 June 2020

Approved Judgment

The Lord Chief Justice :

1. Alex Hepburn appeals against his conviction of rape by leave of the single judge. He was convicted at the Crown Court at Worcester on 12 April 2019 on a count of oral rape but acquitted of vaginal rape. Both counts arose in connection with a continuous incident which occurred in the early hours of the morning of 1 April 2017. On 30 April 2019 he was sentenced to five years' imprisonment. The complainant has life-long anonymity and the protections accorded by the Sexual Offences (Amendment Act) 1992.
2. Mr Emanuel QC, who did not appear below, advances two grounds in support of the appeal against conviction:
 - i) The judge was wrong to admit a series of WhatsApp messages between the appellant and a number of his friends explaining a game they were playing (which had started that night) to have sex with as many women as possible before September and demonstrating their attitudes to women. Mr Emanuel submits that they were irrelevant and, even if wrong on that, should have been excluded as deeply prejudicial. He submits that the cross-examination of prosecuting counsel on the messages was unfair and, furthermore, that the judge's directions to the jury did not adequately warn against judging the appellant's morals and attitude to women. In consequence the conviction is unsafe.
 - ii) The verdicts of the jury were inconsistent, given that the only issue in respect of both counts was consent, with the consequence that the conviction in respect of the oral rape is unsafe.
3. The appellant and Joe Clarke were then both professional cricketers who played for Worcestershire County Cricket Club. They shared a flat in Worcester. On 31 March 2017 they had been out with a group including the complainant. She had an on-off relationship with Mr Clarke. It was a night of heavy drinking and clubbing. The complainant and Mr Clarke went back to the flat before 03.00. They went to his bed and had oral and vaginal sex before falling asleep. Mr Clarke woke up and felt sick. He went to the bathroom, vomited and ended up asleep on the floor there.
4. The appellant arrived home after Mr Clarke had decamped to the bathroom. There had been an arrangement that he and Mr Clarke would share his bed – at that time only a mattress on the floor – because other friends were due back to the flat and would use the appellant's bedroom and, if necessary, the lounge. None was present at the time of the incident and it was common ground that, because they did not have a key, if others had turned up either Mr Clarke or the appellant would have let them in. It was agreed that if either brought a girl home, the arrangements would have to be adjusted. The appellant went into Mr Clarke's bedroom. He got undressed. His account was that he did not realise that Mr Clarke had brought the complainant back to the flat and only became aware of her when he laid down on the mattress.
5. There was a stark conflict between the accounts given by the appellant and the complainant. She said that she woke up to find the appellant's erect penis in her mouth. She was groggy and thought it was Mr Clarke "being a bit cheeky". She performed oral sex for about ten minutes. They went on to have vaginal intercourse

but only because she thought the man was Mr Clarke. She described herself as still being intoxicated and sleepy with her eyes closed when these events happened. This, combined with the low lighting levels in the bedroom, meant she could not tell she was in fact having sex with the appellant. It was only when the appellant spoke with a distinctive Australian accent that she realised what was going on. She pushed him off and asked what he was doing and “where’s Joe?” The complainant said that she would not have consented to the sexual activity had she known that it was the appellant. After the incident was over she went to the bathroom and woke up Mr Clarke. She told him immediately that she had been raped.

6. The appellant’s account was that after he lay down, he saw a naked woman on the bed. He recognised her. They made eye contact and then she kissed him. He straddled her shoulders and she took hold of his penis and put it in her mouth. She was a fully engaged consenting partner. He had done nothing to mislead the complainant that he was Mr Clarke. The whole episode lasted 20 minutes. He had the impression that the complainant was enjoying herself. Nothing happened that made him think the complainant was not consenting to both the oral and vaginal intercourse. He agreed that the time came when the complainant said, “what are you doing?”, to which he replied, “what do you mean?” before she pushed him off and asked, “where’s Joe?”.
7. The prosecution also relied upon a series of WhatsApp messages to suggest that the appellant was indifferent to whether the complainant was consenting to sex. His motivation was said to be gaining points as part of a sexual conquest game which he, Mr Clarke and another club cricketer had agreed to play. The game had started that Friday night. Members of the team had played it before, and the ‘rules’ and ‘moves’ were recorded in a WhatsApp group chat called “Statchat”. It was essentially a competition to have sex with as many different women as possible before 15 September 2017.
8. In respect of each count the jury had to consider a series of issues before they could convict. First, that the complainant did not consent to the appellant (rather than Mr Clarke) inserting his penis into her mouth and vagina, as the case may be. If she did or may have consented, they would acquit. If satisfied that she did not consent, secondly, that the appellant did not genuinely believe that she consented. If sure that he did not hold that belief, the jury would convict. If he did or may have genuinely believed that the complainant had consented, the third question was whether that belief was reasonable. At this stage, if it was arrived at, a conviction could follow only if the jury was sure that the genuine belief was unreasonable.

Ground 1: The WhatsApp Messages

9. The trial in April 2019 was a retrial following the failure of an earlier jury to agree. The question on the admissibility of the WhatsApp messages was determined in advance of the first trial. The prosecution and defence were content to abide by the earlier ruling. There was no attempt on behalf of the appellant to revisit the earlier ruling in the light of how the evidence in respect of the WhatsApp messages had emerged during the first trial.
10. The prosecution sought to introduce WhatsApp messages exchanged both in the days leading up to the incident which gave rise to the charges but also from earlier, going

back to January 2017. During argument the judge indicated that he thought the messages immediately preceding 1 April 2017 might merit different treatment, as having ‘to do with the offence’ for the purposes of section 98(a) of the Criminal Justice Act 2003 (“the 2003 Act”), rather than bad character. It was on 27 March 2017 that there had been an exchange of messages setting out the rules of the game which had been written by the appellant. The game was to commence on 31 March which was their ‘first night out’ after Mr Clarke’s return to Worcester.

11. The judge admitted the 17 extracts from 27 March onwards but refused to admit the 39 earlier messages. He distilled the “unusual” key issue in the case as being whether the appellant genuinely and reasonably believed that the complainant consented to having sex with him. For that reason, he considered it “pivotal in this case to examine evidence that relates to Mr Hepburn’s attitudes towards sex and consent...”. He noted, by reference to the message explaining the rules of the game, that leading counsel for the defence had accepted the relevance of its subject matter. The judge indicated that he did not accept the direct relevance of the more historic messages. He rejected the submission that individual messages in the thread which followed should be excluded. All were material to the issue whether the appellant had a “lackadaisical or uncaring attitude on the question of sexual consent”. His primary conclusion was that the messages had “to do with the offence itself as alleged by the prosecution, they [were] part and parcel of the material which the prosecution [said] led [the appellant] to do what he did...”. However, if wrong about this, the evidence could be admitted as bad character, either because (i) it was “important explanatory evidence without which the jury would find it difficult or impossible to understand the behaviour of the defendant” which had to be understood through the lens of the ‘game mentality’; or (ii) it was “relevant to an important matter in issue between the prosecution and defence, namely the attitude of the defendant towards the question of consent...”. He refused to admit the more historic passages because (i) the prosecution had enough material in the later extracts to make the relevant point; and (ii) there were messages in the historic batch that were prejudicial and not related to these facts.
12. In his summing up, the judge explained the relevance of the ‘game’:

“... part of the prosecution evidence is that in the four days running up to this evening, Mr Hepburn, Mr Clarke, and their friends were playing a game, in effect to have sex with as many new women as possible. You may or may not feel such a game was sexist, and does not show Mr Hepburn in a good light. However, he is not being prosecuted for sexism, but for rape. These messages are only relevant to your decision insofar as you believe they shed light on Mr Hepburn’s attitude to sex with [the complainant].

The defence say the messages are irrelevant, because even if they show Mr Hepburn engaging in sexual banter, he and [the complainant] knew each other well, and he naturally assumed she knew it was him and consented, and did not realise if it was the case that she mistook him for Mr Clarke, and certainly did not impersonate him. If you agree, you should ignore the messages completely, as they are irrelevant.

However, the prosecution say that the messages are relevant because they show that night was the start of the game. Mr Hepburn wanted to collect as many sexual partners as possible, starting that night, and took his chance with [the complainant], knowing she was half-asleep, not bothering to check with her that she consented.

If you agree with that, you are entitled to take that into account as giving some support for the prosecution case, but only as part of the evidence. You must make your decision on all the evidence, not wholly or even mainly on the basis of the messages.”

13. The appellant argues that the WhatsApp messages made available to the jury were irrelevant and, in any event, so prejudicial that they should have been excluded even if relevant.
14. We are satisfied that the judge made no error in admitting the WhatsApp messages, starting with the one in which the appellant set out the rules of the game on 27 March 2017.
15. Whilst we doubt that they were admissible under section 98(a) of the 2003 Act, they were plainly so under the combination of sections 101(1)(c) & 102 (as being important explanatory evidence), and also under section 101(1)(d) (as being relevant to an important matter in issue between the parties, namely belief in consent).
16. Mr Emanuel is critical of the judge for failing in his ruling to deal distinctly with the issue of prejudice by reference to section 78 of the Police and Criminal Evidence Act 1984 or the regime for admitting bad character evidence under the 2003 Act (section 101(1)(d) & 101(3)). In our view, that is unfair to the judge. The question of the prejudicial effect of the WhatsApp messages suffused the submissions and discussion before the ruling and underpinned the judge’s conclusion that a large number of messages should be excluded. It is clear that the question was at the forefront of the judge’s consideration when the matter was resolved before the first trial.
17. So too is the criticism of the summing up. Mr Emanuel suggests that this case called for a clearer direction that the jury should set aside any revulsion they might naturally feel about the shocking disdain for women demonstrated by the WhatsApp exchanges. In the course of the application to admit the evidence the judge had made plain his revulsion at what the messages showed about the attitude of these men to women generally, simply sexual playthings with no concern for their feelings. It is always a matter of judgement for a trial judge to determine the extent to which a warning should be given to the jury in respect of any aspect of the evidence which does not amount, in the strict sense, to a legal direction. There is sometimes the danger of stating the obvious or of patronising the jury. Both should be avoided. In this case, as is apparent from the extract of the summing up we have quoted, the judge made clear that the appellant was not being prosecuted for sexism but rape and explained the relevance of the messages. There was no deficiency in the summing up.
18. The appellant contends that cross-examination on the WhatsApp messages not only illuminates the danger in admitting them but undermines the safety of the conviction.

Miss Moore QC, whose cross-examination it was, reminds us of the context. The complainant had gone home with Mr Clarke, with whom she had a relationship, and had never evinced any interest in the appellant. He accepted that. She explored why he took the opportunity to have sex with his best friend's girlfriend. In short, why he would do that to his friend? The cross examination was directed at the appellant's cavalier attitude to women and sex. She put squarely in the course of cross-examination the overall point:

“Q: Isn't this evening and what happened to [the complainant] a culmination of this unpleasant game, you not pulling that night and coming back and thinking ha, ha, I'll get one over on Joe with this sleeping girl. I know it's his girl. And I'm just – I want sex and I'm going to have it?

A: No.”

Miss Moore submits that questions to which the appellant now takes exception were directed towards his attitude towards consent, for example asking whether he thought he was God's gift to women.

19. There was one aspect of the cross-examination which provoked an objection from leading counsel for the appellant and with which the judge immediately agreed. It concerned not the details of the messages but an inquiry by counsel of how many women the appellant had slept with the previous year during the currency of the game and whether they were one-night stands or he had relationships with any of them. We agree that these questions would not have assisted the jury in determining the question of guilt or innocence. Promiscuity is not relevant to the issue of consent. That said, neither these questions still less the overall tenor of the cross-examination undermine the conviction.

Ground 2: Inconsistent Verdicts

20. The judge gave the jury the usual direction (to which no exception is taken) that the jury could deliver different verdicts on the two counts, not least because it was the prosecution case that the penetration of the complainant's mouth occurred when she was asleep whilst it was clear that she was awake, at least to some extent, when vaginal penetration occurred. The appellant's submission that the jury's decision to convict of oral rape, but acquit on the vaginal rape count, are irreconcilable is largely based upon a note it sent to the judge whilst in retirement.

21. The note read:

“Please could we have clarification of question 3 of the route to verdict. Are we looking at AH's 'belief in [the complainant's] consent was unreasonable' from the perspective of what an 'ordinary reasonable person would have believed' (as per the summing up document).”

22. Question 3 of the route to verdict formed part of the series of questions dealing with the oral rape count. Question 1 asked whether the jury was sure that the complainant did not consent. Question 2 continued:

“Are you sure that AH did not genuinely believe that [the complainant] consented?”

- If your answer is ‘Yes’ – i.e. you are sure that he did not genuinely believe that [the complainant] consented – your verdict will be ‘Guilty’ on Count 2 (for example, if she was asleep when he put his penis in her mouth or he believed she thought she was having sex with JC)
- If your answer is ‘No’ – i.e. you decide that AH did genuinely believe or may genuinely have believed that [the complainant] consented – go to question 3.”

Question 3 asked:

“Are you sure that AH’s belief in [the complainant’s] consent was unreasonable?”

- If you answer to is ‘Yes’ - i.e. you are sure that AH’s belief in [the complainant’s] consent was unreasonable – your verdict will be ‘Guilty’ on Count 2.
- If your answer is ‘No’ - i.e. you decide that AH’s belief in [the complainant’s] consent was or may have been reasonable – your verdict will be ‘Not Guilty’ on Count 2.”

23. The jury had the part of the summing up referred to in the question. The judge clarified the summing up by making it clear that if question 3 was in issue the appellant’s belief must be judged by the standards of ordinary, reasonable people.
24. The jury had retired to consider their verdicts at 11.36 on Thursday 11 April. They continued their deliberations the next morning and were given the majority direction at 11.49 before retiring again. The question came at about 14.00. The clarification was given a quarter of an hour later following which the jury retired once more. The jury went back into court at 15.41 and returned a unanimous verdict convicting the appellant on count 2. The jury then retired once more and returned a majority not guilty verdict on count 1 a few minutes later.
25. In view of the note, the judge sentenced the appellant on the basis that the complainant was awake throughout the sexual contact. That was an understandable, if possibly generous view.
26. There is a danger in over-analysis of a jury note with a view to discerning a common view amongst its members, especially in a case concerning consent. Moreover, a note may not illuminate with certainty where in a process of reasoning the jury has reached. A jury may return to matters earlier discussed, not least to assuage lingering concerns in one or more of its members.
27. In this case, it is entirely possible that some, or even all but one, of the members of the jury were sure that the complainant was asleep when the appellant placed his penis in her mouth. As the judge directed the jury, if that were the case questions 2 and 3

would not arise on the facts because no man could genuinely believe that a woman with whom he was barely acquainted and into whose bed he had climbed whilst she was asleep, could be consenting to sex whilst asleep. Others on the jury might not have been sure, in which case the further questions would have arisen for consideration. The verdict demonstrates that each member of the jury was sure that there was no consent for the purposes of the Sexual Offences Act 2003. At which stage in the analysis each individual member of the jury was sure of a lack of consent remains opaque.

28. Even if one starts from the premise that the complainant was awake at the outset, the jury could be sure she did not appreciate that it was the appellant with whom she was having sex at the beginning, and that he had no genuine and reasonable belief that she was consenting, but that things might have changed the longer the sexual contact went on without any outward demonstration of a lack of consent (accepted by the complainant) it is at least possible that by the time vaginal intercourse started the jury's conclusion about the appellant's belief and whether it was reasonable was different.
29. When giving leave to appeal against conviction the single judge expressed scepticism about whether there was anything in this ground. Having concluded that the appellant should be able to argue Ground 1 he did not shut out argument on this ground also. That scepticism was justified. We do not accept that there is any arguable logical inconsistency between the verdicts. In those circumstances it is unnecessary to consider the various authorities of this court that bear on the question of how to approach what, at first blush, appear to be inconsistent verdicts, still less to add to them.

Conclusion

30. Neither ground of appeal is established. The conviction is not unsafe. The appeal is dismissed.