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No: 201801091/B2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 30 June 2020

LORD JUSTICE HOLROYDE

MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE MICHAEL CHAMBERS QC

(Sitting as a Judge of the CACD)

R E G I N A

v

MUHAMMAD ALI

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Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
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The Applicant appeared in Person (Via Telephone Link)

The Crown did not appear and was not represented

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 2 February 2018, after a trial before HHJ Lambert and a jury in the Crown Court at Bristol, this applicant was convicted of an offence of rape. His application for leave to appeal against conviction was refused by the single judge. It is now renewed to the full court.
2. The victim of the offence (to whom we shall refer as "T") is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter shall be included in any publication if it is likely to lead members of the public to identify her as the victim of the offence.
3. In 2016 and 2017 the applicant and T were living together. They had met at a drug rehabilitation centre. T had been the victim of physical and sexual violence in the past. During the relationship she used significant quantities of sedatives, some of which were provided by the applicant. In March 2017 T reported to the police that she had found footage on her mobile phone showing that, in November 2016, the applicant had recorded himself having sexual intercourse with her whilst she was asleep. She did not feel strong enough to pursue her allegation of rape at that stage. Her relationship with the applicant continued. He soon became aware that she had reported to the police that he had raped her.
4. T was later to allege that there were other occasions when the applicant had raped her as she slept. One such occasion was on 4 June 2017. Social media communication showed that in the early hours of the previous morning the applicant and T had had a row, which culminated in the applicant telling her to leave. A combination of still and video footage on the applicant's phone showed that for about an hour at around midday T had been so deeply asleep as to appear unconscious. The video footage showed the applicant having sex with her whilst she was in that condition.
5. On 5 June 2017 T and the applicant married. They continued to live together.
6. Later in June 2017 the police were called to an incident at the applicant's home. T alleged that she had been assaulted. She also alleged the incidents of rape.
7. The applicant was charged with four counts of rape. Count 4 related specifically to rape on 4 June 2017. He was also charged with an offence of assault.
8. The applicant's defence to the rape charges was that all sexual activity had been consensual, that T had given him permission to have sex with her when she was asleep and that on 4 June 2017 they were having sex to "make up" after their row the previous night.
9. At a trial in December 2017 the jury found the applicant not guilty of assault but could not agree a verdict on any of the counts of rape. At the retrial of those counts the jury found him guilty on count 4 and not guilty on the other three counts of rape. It should be noted that the evidence considered by the jury included a document signed by T in which she said that all sexual activity had been consensual, that "in the videos I was awake but my eyes were closed" and that her allegations were false. Her explanation for this document was that she had been told that the applicant, who had been remanded in custody, had become suicidal in prison, and she did not want him to kill himself. She

- had therefore agreed to sign the document, even though she did not want to do so.
10. The same solicitors and counsel acted in both the original trial and the retrial. Following the conviction fresh solicitors and counsel were then instructed. Counsel gave two advices on appeal. He settled grounds of appeal contending that the conviction on count 4 was inconsistent with the acquittals on the other three counts and that there had been a failure of legal representation, in that trial solicitors and counsel had failed to take sufficient steps to challenge T's credibility. Ten different categories of failure were identified though no details were given. Reference was made to the retraction letter but not to any recording of something said by T in the telephone conversation. A third ground of appeal based on non-disclosure by the prosecution was put forward but quickly abandoned.
 11. The prosecution opposed those grounds of appeal in a respondent's notice in which each of the ten categories of alleged failure of representation were shown to be unfounded. The single judge considered these grounds of appeal and on 7 February 2019 refused leave to appeal.
 12. The applicant himself then put forward amended grounds of appeal dated 10 June 2019. He made further complaints about his legal representatives, including, for the first time, a complaint that they had failed to make use of a video recording of a phone conversation between one Umair Mukhtar and T. These amended grounds were taken up by counsel who had been instructed post trial. He settled further grounds, seeking leave to vary the existing grounds and seeking to rely on fresh evidence relating to the video recorded phone call.
 13. It seems that in early March 2020 the recently-appointed solicitors and counsel declined to act further. Later that month the applicant, in person, put forward what was said to be final grounds, the document appearing to consist of counsel's grounds amended in manuscript. Then in early June 2020 the applicant put forward yet further grounds. The exact scope of these is far from clear.
 14. As we understand it, the applicant wishes to argue that the verdicts were inconsistent, that the trial representatives failed adequately to address the crucial issue of T's credibility and that fresh evidence should be admitted relating to the phone call involving Mr Mukhtar which the applicant asserts was available to his trial representatives. The evidence on which he has sought to rely is a statement from his sister to the effect that she was in a car with Mr Mukhtar when he recorded the phone conversation; a statement from a solicitor instructed post trial, saying that the recording was given to him by the sister; and a transcript of the conversation so far as it can be heard. There is no statement from Mr Mukhtar himself and no indication of the circumstances in which the call took place, though it is said to have been before the first trial.
 15. The transcript of the phone conversation is incomplete and partly incoherent, but it is capable of being understood to mean that T did not consent to the first occasion when the applicant had sex with her as she slept, but that "in the end I agreed to it" and that "I just accepted it towards the end". The transcript includes statements by Mr Mukhtar to the effect that the applicant was having a difficult time in custody.
 16. The applicant waived his legal professional privilege, and the responses of the trial representatives have been obtained. The trial solicitors indicate that in advance of the first trial, the applicant's sister sent an e-mail referring to the recorded phone call and acknowledging that T had said in it that she did not consent to the first occasion. The

solicitor asked her to send him this recording but she never did. The solicitor made contact with Mr Mukhtar and asked him to provide the recording. He did not send it either. He later contacted the solicitors to say he wanted nothing further to do with the case.

17. Both solicitors and counsel took the view that even if it was possible to obtain the recording and to adduce it in evidence, it could prove harmful to the defence case. Given that the defence case was that T had always consented, it would have been damaging to adduce evidence to the effect that she did not consent on the first occasion.
18. As will be apparent the proposed grounds of appeal have repeatedly been expanded and amended. In R v James [2018] EWCA Crim 285; [2018] 1 Cr App R 33, this court emphasised that, as a general rule, all grounds of appeal should be advanced in the application for leave to appeal against conviction. An applicant who later wishes to advance further grounds which have not been considered by the single judge must make an application for leave to vary and address all relevant factors. Such an application faces a high hurdle.
19. In considering whether this applicant can clear that high hurdle, we take into account the fact that he is acting in person. We have, exceptionally, heard oral submissions from him today.
20. We are satisfied that there is no merit whatsoever in the ground of appeal alleging inconsistent verdicts. It is impossible to argue that there can be no rational explanation for the differing verdicts. The jury were correctly directed that they must consider each count separately. Given T's apparently comatose state over a period of about an hour on 4 June 2017 (as shown in the still images and video footage), and given that the applicant knew she had already reported him to the police for raping her as she slept, there was ample basis for the jury to be sure that all of the legal ingredients of the offence of rape were proved on that occasion, and that his evidence about that occasion was untrue, even if they were unsure whether there had been previous rapes.
21. Nor can we see any merit in the criticisms made of trial solicitors and counsel in the original grounds of appeal. We are satisfied, from the solicitors' responses, that the applicant instructed them after having withdrawn his instructions from two previous firms and that he was in frequent contact with them to give instructions, as indeed the applicant has confirmed in his oral submissions today.
22. It is clear from the respondent's notice that T's evidence was thoroughly tested in cross-examination. We find it striking that the applicant himself does not assert that he expressed dissatisfaction during either the trial or the retrial with the way in which the defence case was being conducted. We infer that he must have been content with the advice he received and the decisions taken as to what matters should or should not be pursued in evidence. The applicant's oral submissions to us this morning confirm that that is a proper inference.
23. We also find it striking that the applicant in his copious writings to this court shows no understanding of the obvious potential for his case to be damaged by some of the matters he now says should have been pursued but were not. We can see no basis on which it can be said that there was a failure of competent representation, still less that there was a failure such as to cast doubt on the safety of the one guilty verdict which was returned.
24. As to the proposed additional ground of appeal, based on the phone conversation between Mr Mukhtar and T, we are satisfied that there is no arguable basis for admitting any fresh

evidence. We are prepared to assume, for present purposes, that the recording is genuine. Section 23 of the Criminal Appeal Act 1968 requires the court to consider, amongst other things, whether there is a reasonable explanation for the failure to adduce the evidence at trial. There are two reasons why this recording was not given in evidence. The first is that, contrary to the applicant's assertion, it was never in fact provided to the trial solicitors; but it could have been and, if the applicant really wanted to rely on it, it should have been.

25. The second is that, knowing what the recording contained, the applicant's trial representatives took the view that its potential for harming the defence case made it inappropriate to seek to rely on it. It is clear that they communicated that view to the applicant. It was an entirely reasonable view for them to take. It is difficult to see how any other conclusion could have been reached. The transcript raises more questions than it answers. It contained what, on the face of it, is evidence of at least one rape. It is inconsistent both with the defence case and with the retraction letter on which the applicant relied, and it could well have been seen by the jury as another example of pressure being put on T by one of the applicant's friends. We infer that the applicant must at the time have been satisfied with the good sense of the decision not to seek to adduce this evidence. No explanation has been put forward as to why, if he was not so satisfied, he did not urge his trial representatives to make use of the recording in his retrial, even if it had not been used in the first trial. Nor has any explanation been put forward as to why this ground of appeal was not advanced until more than a year after the original grounds of appeal were settled and after the single judge had refused leave to appeal.
26. We are therefore satisfied that there is no arguable ground on which the safety of this conviction can be challenged. The application for leave to vary the grounds of appeal and the renewed application for leave accordingly fail and are 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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