

Neutral Citation: [2020] EWCA Crim 137

Case No: 201902005 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TEESIDE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2020

Before:

Lord Justice Simon

Mrs Justice Cutts DBE

and

Mrs Justice Eady DBE

Regina

v

Anthony Murphy

Mr Adam Birkby appeared on behalf of the **Appellant**

Ms Joanne Kidd appeared on behalf of the **Crown**

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 s.3 of the Act.

Lord Justice Simon:

Introduction

1. This appeal against conviction, brought with the leave of the SJ, raises issues as to the proper application of s.100 of the Criminal Justice Act 2003 ('CJA 2003'): the admission of a non-defendant's bad character. In this case, a defence witness.
2. On 2 May 2019, at Teeside Crown Court, the appellant (now aged 59) was convicted of oral rape (count 1), assault by digital penetration of the vagina (count 2), sexual assault (oral sex) (count 3) and vaginal rape (count 4). The jury were unable to agree on a charge of attempted anal rape (count 5) and this was ordered to lie on the file on the usual terms.
3. On 28 June, he was sentenced by the trial judge, HHJ Armstrong, to imprisonment for life on count 1, with a minimum period of 11 years specified under s.269(2) of the CJA 2003 and concurrent terms of imprisonment on other counts.
4. He appeals against conviction with the leave of the single judge.

The facts

5. The appellant had been released from prison in July 2018, having served 28 years of a life sentence for very serious sexual offences. He was living in a bail hostel when he met the complainant ('DV') and her partner ('SL'), in October 2018. The appellant quickly befriended DV and SL over the course of the week before the incidents giving rise to the charges. The appellant made clear to DV that he was interested in her. He constantly rang and texted. However, according to her account, she was not interested in him, since she had been in a relationship with SL for some 20 years.
6. The three of them spent time together in and around Middlesbrough; and also spent an evening at the home of the appellant's friend, Kenneth Milburn.
7. DV and SL offered to help the appellant to move from the bail hostel to a flat in Hartlepool; and he arranged to meet them at their house on the morning of 9 November. However, that morning, DV and SL argued about the appellant's intrusion into their lives and SL left their house in anger.
8. On the prosecution case, when the appellant arrived as arranged at around 8 am, DV invited him in and told him that SL had 'gone off on one'. Soon after this, the appellant grabbed her by the neck, called her a 'cockteaser' and forced her upstairs, where he told her to strip and attacked her. When he could not get an erection, he forced his penis into her mouth (count 1) and penetrated her vagina with his fingers (count 2). He threatened that he would kill her if she screamed; and performed oral sex on her (count 3). He repeatedly tried to put his penis into her vagina (count 4) and her anus (count 5); but could not maintain an erection. He eventually forced his penis into her mouth again and ejaculated, forcing her to swallow his semen. He then left the house.
9. DV took a bus to a MacDonald's in Middlesbrough, where she spoke to the manager, Beverley Dixon, whom she knew. She told her that she had been raped and Ms Dixon called the police. The appellant was arrested a short while later, having initially run

away from police. He was interviewed and gave an account that was consistent with his later evidence at trial: essentially that DV had consented to what occurred.

10. The prosecution relied on the evidence of DV and her partner SL, photographs of injuries to SL's neck and arms - which the prosecution said were consistent with her description of what had occurred, the evidence of DV's recent complaint to Ms Dixon and telephone call data. It also relied on the appellant's previous convictions.
11. The previous convictions were in the form of agreed facts. These consisted of convictions for rape offences against four victims: one occurred in 1980, two in 1982 and the fourth in 1991. Each was marked by extreme sexual violence. In three of the cases there was strangulation of the victim, and in two of the cases anal rape. He had admitted the offences in interview and received life sentences, with a minimum term of 10 years' imprisonment.
12. The defence case was that the appellant and DV had been in a 3-day whirlwind clandestine, romantic relationship behind SL's back. The bad character of SL was also admitted. In his case, this was in the form of a police intelligence report (dated 20 March 2003), which recounted the disappearance of DV in 2000. There was evidence to suggest that her disappearance might have involved a crime; and the police embarked on a national media campaign seeking further information. Some relatives of an elderly man that DV had befriended made contact with the police. The agreed facts recited that DV was furious at being found out as she had intended to disappear completely in order to escape from SL and what she described as a violent relationship, in which he used extreme violence against her.
13. The appellant gave evidence in which he described meeting DV and SL at the bus station in Middlesbrough in late October 2018. He told the jury that they had exchanged telephone numbers and that the three of them met up almost daily over the next week or so, including spending an evening at Kenneth Milburn's house on one occasion. While there he and DV had engaged in passionate kissing in the kitchen. In the morning of 9 November, he had gone to meet DV and SL at their house as arranged. He had a coffee with DV, and she told him of the argument with SL. She had invited him upstairs, where they had engaged in mutual oral sex and tried to have vaginal intercourse, although he was unable to maintain an erection. He had not tried to penetrate her anus. He had not assaulted her, either violently or sexually, and had not threatened to kill her. They had engaged in consensual sexual activity.
14. The Defence relied on the bad character of SL. DV gave evidence of his violence towards her; and the defence said that this was how she had sustained her injuries and why she denied that she had consented to the sexual activity with the appellant. The defence also relied on CCTV evidence of DV and the appellant together at McDonald's in Ormesby Way. The defence said it showed them cuddling. The prosecution said that it showed no more than the appellant putting his arm around DV.
15. The defence also relied on the evidence of Kenneth Milburn. He had met the appellant in the bail hostel, where they had both been living on release from prison. He had not stayed in touch with the appellant when he left the hostel; but had bumped into him again in October 2018 at the bus station in Middlesbrough. His evidence was that the appellant had introduced him to DV and SL, and they had all spent time together in the week prior to the alleged offences. In particular, they had all come to his house

one evening. He and the appellant had gone out to the back for a smoke, and DV had joined them. She had her arm around him, cuddling him and kissing the appellant on the lips. SL had remained in the sitting room. DV had explained that she was not in a relationship with SL, he just lived with her as he had nowhere else to go. The appellant had told Kenneth Milburn that he loved DV, and said DV felt the same.

16. He had called the appellant during the morning of 9 November as he knew that the appellant was moving, and they had arranged to meet up. The appellant had told him that he was on his way but did not turn up.

The Judge's ruling

17. After Milburn had been examined in chief, the prosecution applied to admit his previous convictions under s.100 of the CJA 2003. The convictions were for sexual assault of a child under 13, assault by penetration of a child under 13, rape of a child under 16, and offences of sexual assault and assault by penetration.
18. Ms Kidd submitted that Milburn's previous convictions went to the central issue of his credibility and were admissible under s.100(1)(b) CJA 2003. The evidence would assist the jury on his credibility and why he might be giving untruthful evidence. The evidence of his previous sexual offences would enable the jury to weigh his previous convictions in deciding why he might lie on behalf of a friend accused of such offences.
19. Mr Birkby opposed the application. First, he submitted that Kenneth Milburn's evidence that the appellant and DV were engaged in a clandestine, romantic relationship was of fundamental importance to the defence case and went to a critical matter in issue. His previous convictions were irrelevant as to whether he had lied on the appellant's behalf. Being a convicted sex offender did not mean that he was more likely to give untruthful evidence. He had pleaded guilty to all the charges to which the previous convictions related. The prosecution was seeking to prejudice the jury against him by introducing an illegitimate line of reasoning: because he was a sex offender, he must have helped another sex offender by lying. There was no evidence of collusion between them beyond the prosecution's assertion. Secondly, he argued that, even if Milburn's previous convictions had substantial probative value to an issue of substantial importance in the context of the case as a whole, the admission of the evidence would have such an adverse effect on the fairness of proceedings that it should be excluded under s.78 Police And Criminal Evidence Act 1984 ('PACE 1984'). By seeking to adduce the bad character of this important defence witness, the prosecution was attempting to destroy his credibility by appealing to a jury's most basic prejudices, that sex offenders would 'stick together'.
20. In his ruling, the Judge described Milburn's evidence as of considerable importance to the case. He had described DV acting in a sexual way towards the appellant when they visited his house in the days leading up to the alleged crimes. It had a direct bearing on DV's credibility because her evidence was in conflict with that of both the appellant and Milburn on this issue. He referred to a passage in *Blackstone Criminal Practice 2018* and the test for the admission of evidence under s.100(1)(b) of the CJA 2003. He considered that the reason why the convictions could be relevant was that it appeared that, very shortly after the alleged rape, there had been telephone contact between the appellant and Milburn, which prosecution was entitled to suggest was the

appellant and him putting their heads together to concoct a false story about what had occurred. The fact that Milburn had previous convictions for serious sexual offences, which had resulted him being in the bail hostel after release from custody at the same time as the appellant, explained how they came to know each other. Milburn's previous convictions were capable of providing a reason why he might lie. They had been in the bail hostel together and both had backgrounds of serious sexual offending. The prosecution was entitled to say that it was for this reason that they had 'put their heads together as fellow sex offenders'.

21. However, the Judge acknowledged that the potential prejudice might outweigh the probative value of the convictions, unless he limited the admissible evidence to the jury being informed that Milburn had convictions for 'serious sexual offences' (rather than the full details of his offending, which included familial rape); and that it was as a result of his release from prison having a sentence of imprisonment that he came to meet the appellant in the bail hostel.

The trial and summing-up

22. Following the ruling, Kenneth Milburn accepted in the course of cross-examination that he had previous convictions for serious sexual offences but denied supporting a fellow sex offender with lies. He had come to court to tell the truth on behalf of the appellant and had not been threatened or offered any sort of inducement to do so.
23. Following closing speeches, the Judge summed up the case to the jury; and no criticism is made of this summing-up of the evidence admitted under s.100. He directed the jury as to how they should treat Milburn's evidence:

Kenneth Milburn stated in evidence that he witnessed the complainant engaged in consensual kissing and embracing the defendant in his house on two occasions. If correct that would support the defendant's evidence and contradict the complainant's evidence on this point. The prosecution doesn't accept this evidence and suggests that the witness, Kenneth Milburn, has agreed to give untrue evidence in an attempt to assist the defendant. It's for you to decide whether or not you believe the evidence of Kenneth Milburn; and you've heard that Kenneth Milburn has in the past committed serious sexual offences and that he became friends with the defendant when they were both residents in the bail hostel when on licence.

Credibility of the witness is an important issue in the case for you to decide and it's important that you should know about the character of the person the prosecution suggest is giving false evidence to assist the defendant. The fact that a witness has committed serious sexual offences in the past does not mean he's incapable of telling the truth but it is something you may take into account when you're deciding whether or not the prosecution had made you sure of the defendant's guilt. It is for you to decide what importance you attach to it.

24. Later, after mentioning prosecution points that undermined Milburn's evidence about a 'romantic attachment' between DV and the appellant, the Judge added:

Ms Kidd suggested that they were thick as thieves or perhaps more aptly described as supportive sex offenders.

The appeal

25. Section 100 of the CJA 2003 is headed 'non-defendant's bad character'. The material part provides:

(1) In criminal proceedings evidence of bad character of a person other than a defendant is admissible if, and only if -

...

(b) it has substantial probative value in relation to a matter which -

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole

...

26. Subsection (3) sets out a number of factors to which the court 'must have regard' in assessing the probative value of the evidence for the purposes of subsection (1)(b); and subsection (4) makes clear that, where subsection (1)(b) applies the leave of the court is required if it is sought to adduce the bad character of a non-defendant.
27. The origin of this provision appears to be the Law Commission's Report 'Evidence of Bad Character in Criminal Proceedings' (LC no. 273, 5256, 2001), which intended to regulate the use of bad character evidence to undermine the credibility of witnesses, whether by adducing evidence or by cross-examination. In most cases it will be the defence which makes the application, and where it does so, the application of s.78 of PACE 1984 will not arise.
28. On the appeal, counsel made similar points to those they made before the Judge.
29. Mr Birkby argued that the underlying assumption, that 'sexual offenders stick together' was an objectionable basis for admitting Milburn's bad character. Since the prosecution had a sound factual basis for alleging collusion between the two men, the admission of Milburn's bad character was both unnecessary and prejudicial. Why, he asked rhetorically, should sex offenders stick together any more than any other category of offender? Furthermore, even if the evidence was admissible under s.100(1)(b), it should have been excluded under s.78 of PACE 1984 in view of its impact on the fairness of the trial.
30. Ms Kidd submitted that collusion between the appellant and Milburn was at the heart of the case. Milburn accepted trying to distract SL so that the appellant could isolate DV. There had been a telephone call between the appellant and Milburn shortly after

the appellant had left DV's house following what the appellant described as consensual sexual activity; and during his interview, soon after his arrest, the appellant had said that if the police approached Milburn, he would confirm that DV had confirmed her love for him. Following this Milburn had been seen by the police and, before being told the nature of the matter under investigation, volunteered that the appellant had been engaged in a clandestine relationship with DV.

Conclusion

31. Although s.100 of the 2003 Act is expressed in terms of the admissibility of evidence, it governs (as here) cross-examination about bad character, see *Brewster* [2011] 1 WLR 601 at [17].
32. A different approach may be required depending on whether the application to adduce the evidence is made by the prosecution or the defence. In the latter case, a defendant is entitled to deploy relevant material to defend himself against a criminal charge, see *Stephenson (David)* [2006] EWCA Crim 2325 at [27]; and *Brewster* (above) at [18]. If the prosecution makes the application, s.78 of PACE 2004, provides a residual check against the introduction of unfair evidence.
33. Whether evidence has substantial probative value in relation to the truthfulness of a complaint which is an important matter in issue, is a matter primarily for the trial judge with his feel for the case at the time, see *Stephenson (David)* above, also at [27].
34. Two questions arise under s.100(1)(b) as set out in *Brewster* at [23].
35. The first is:

whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. Just because a witness has convictions does not mean that the opposing party is entitled to attack the witness' credibility.
36. The second arises if it is shown that creditworthiness is an issue of substantial importance and is:

whether the bad character relied upon is of substantial probative value in relation to that issue. Whether convictions have persuasive value on the issue of creditworthiness will ... depend principally on the nature, number and age of the convictions. However, we do not consider that the conviction must, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as affecting the worth of the witness' evidence.
37. In the present case, the credibility of the evidence given on each side was of crucial significance. Either the appellant had engaged in consensual sexual engagement with DV as the culmination of a whirlwind clandestine relationship; or what he described

(with the evidential support of Milburn) was a lie. The question then was, whether a jury could regard his history of sexual crimes as affecting the value of his evidence?

38. Evidence of Milburn's bad character might fairly be regarded as providing an answer to the point directly raised by the defence. As the Judge reminded the jury in the summing up: 'Why would Mr Milburn lie? What's in it for him to do that?' The Jury might properly take the view that someone who had committed serious sexual crimes in the past might regard a sexual crime committed by the appellant differently to most members of society, and might therefore be susceptible to being approached after the commission of such a crime in order to assist the appellant, and be prepared to make a statement supporting his defence. Such behaviour might be more than the act of a public-spirited acquaintance giving dispassionate evidence.
39. Inevitably, the necessary assessment will be fact and case specific and the trial judge will be best placed to make the necessary determination. In this case, in our view, the Judge was entitled to admit the evidence on the basis that he did, and was right to avoid too much focus on the nature of Milburn's offending by confining it by the exercise of his judgement under s.78 of PACE 1984.
40. Mr Birkby frankly acknowledged, that the prosecution case against the appellant was strong; and we do not have any residual doubts about the safety of the convictions.
41. The appeal is dismissed.