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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202102301/B4
NCN [2022] EWCA Crim 1207



Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 2 August 2022

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE HOLROYDE)

MRS JUSTICE MAY DBE

MR JUSTICE GOOSE

REGINA

v

DAVID TAYLOR

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MS L KNOTT appeared on behalf of the Appellant.
MS C HOWELL appeared on behalf of the Crown.

J U D G M E N T
(Approved)

1. **THE VICE-PRESIDENT:** This appellant was a teacher, and latterly deputy head, at a boarding school attended by boys and girls who had shown behavioural problems. He was convicted of three offences of cruelty to boys in his care and a total of nine sexual offences against three girls in his care. He appeals, by leave of the single judge, against one of those convictions, an offence of rape of a girl to whom we shall refer as "C". She and the others who were sexually abused are entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of the offences.
2. All the offences were committed many years ago. The sexual offending was charged under the Sexual Offences Act 1956. In relation to C, counts 15 and 16 charged offences of indecent assault, contrary to section 14 of that Act, between January 1990 and January 1992, when C was aged between 14 and 16. Count 17 (the subject of this appeal) alleged rape, contrary to section 1 of the Act, during the same period.
3. C was aged 8 when she first attended the school. She was sent there because of her behavioural problems. From the age of 12 she was able to attend a mainstream school for her lessons, but she continued to board at the school until she completed her education at the age of 16.
4. During the relevant period, it was the practice for girls boarding at the school to be given a goodnight kiss by a member of staff. The prosecution case was that the appellant took that opportunity to kiss C inappropriately on the lips and using his tongue (count 15). This began when she was about 14. It progressed to sexual touching on occasions outside school hours, when the appellant would summon C to his classroom, put his hand inside her trousers and digitally penetrate her (count 16). C on these occasions put her hand inside the appellant's trousers and touched his penis. Sexual activity then progressed to at least ten occasions of vaginal sexual intercourse, either in a classroom or at the appellant's home (count 17). That continued until C left the school. She did not remain in contact with the appellant after she had left.
5. C was 42 years old when she gave her video recorded account of the offending. She said: "It was all consensual", adding: "You know, I was young and it shouldn't have happened, but at no time did I say 'no' to him." C also said that from about the age of 15 she was on the pill, but she was not asked to say why it had been prescribed for her.
6. In her evidence to the jury, C repeated that she had not made any complaint about the appellant, and was still not doing so, because: "I said 'yes', I knew what I was doing".
7. The prosecution case was put on the explicit basis that although C believed she had consented to sexual activity, she had not truly consented. She was a vulnerable child, who had been seeing a psychiatrist since she was aged 6 and who had continued to reside at a school with behavioural problems rather than in her parental home. She was in the care of the appellant and had been groomed by him. The prosecution pointed to what was said to be evidence of grooming by the appellant not only of C but also of other girls, which it was alleged showed a pattern of similar behaviour.
8. The defence case was that the goodnight kisses were given in the presence of a female staff member and were non-sexual. The appellant denied that any sexual activity of any kind had taken place. It was put to C in cross-examination that she had had no sexual relationship with the appellant. She reacted with evident surprise.

9. At the conclusion of the prosecution evidence a submission was made that there was no case to answer on count 17. Counsel on both sides put in helpful written submissions, in which reference was made to relevant case law: R v Malone (1998) 2 Cr App R(S) 447; R v Robinson [2011] EWCA Crim 916; R v Ali (Yasir) [2015] EWCA Crim 1279 and R v Usman [2021] EWCA Crim 502. It was submitted on the appellant's behalf that on C's own account she had been an enthusiastic participant who had willingly and actively consented. There was, it was submitted, no evidence of grooming.
10. The judge, HHJ Sjolín Knight, gave a careful ruling. She referred to the case law, noting that it was common ground at the Bar that Ali (Yasir) was the leading current authority on point. In summary, the judge identified the following features of the evidence as being important to her ruling:
 - (a) C was a vulnerable 8-year-old when sent to the school. The fact that she remained there, even when attending a mainstream school for her lessons, indicated both her own continuing problems and the lack of family affection and support for her at the time covered by the indictment;
 - (b) the appellant was 26 years older than C, in a position of trust as deputy head living on site and caring for C and other pupils. It was he who started the sexual contact and he who would summon C to come to him. C did not say anything to suggest she had a crush on him, and she did not make the running at any stage.
 - (c) C's description of the manner in which sexual contact began was very similar to that described by a second complainant and was also echoed by a third.
 - (d) the judge observed that people can be hard on themselves and for some the maxim: "I did that and I have to live with it" enabled them to move on with their lives.
11. The judge added:
 - i. "It is far from uncommon that a young person deprived of family love and support sees abuse as love or at least a price worth paying for affection. The only difference to [a second complainant] is that [the second complainant] has reappraised what happened to her. This conclusion does not require an overwriting of consent validly given at the time but, instead, a cool-headed legal appraisal of the full circumstances and whether they amount in law to consent."
12. We should explain that the reference to a second complainant arose because of a comparison which the Crown drew between that complainant's experiences and those of C.
13. The judge concluded that although it may not be the strongest case, there was sufficient evidence to go before the jury, who could properly find on the evidence that C's avowed consent was not in law consent.
14. In her later directions of law the judge instructed the jury as follows:
 - i. "58. To consent a person needs to know that they have a choice and can say no. Submission - that is, feeling one has no choice but to let the other person do what they want - is not consent.

- ii. 59. You are entitled to consider all the circumstances when you decide whether a particular complainant was consenting, including what that complainant says, but also their respective ages, that one was a pupil at this boarding school and the other was the deputy head, what had happened between them before the sex (if you accept the complainant's evidence about that) - what you might characterise as grooming the complainant in order to get her to submit to what he wanted to do.
- iii. 60. Whether a belief in consent in these circumstances would be reasonable is only evidence of whether or not the Defendant genuinely held the belief. The same circumstances mentioned in the preceding paragraph are relevant here, but so is what the Defendant says he believed. In this case the Defendant does not say he had a genuine belief in consent - he denies the sex took place at all."

15. In answer to a question from the jury the judge later added:

- i. "Having sex with a person isn't rape just because the other person is aged under 16. But just because a complainant says 'I consented', it doesn't mean that was legally recognised consent. The prosecution opened this case to you knowing that C says 'I consented' but they say to you that in all the circumstances that is not legally recognised consent. The defence say the sex just didn't happen."

16. No criticism is or could be made of any of those directions. However, Ms Knott, on behalf of the appellant, points out that the jury were directed that if they acquitted the appellant on count 17, there was no alternative charge to cover that sexual activity with C. She submits that the jury's question suggests a risk that the jury were sure that there was sexual intercourse and sure that it was wrong, but could only attach the label of rape to it.

17. Ms Knott's principal submission is that the judge was wrong to find a case to answer, where C gave clear evidence that she knew what she was doing and was a willing participant. Ms Knott accepts that grooming is capable of vitiating consent, but submits that there was no evidence that C was groomed. She argues that neither the nature of the school and the reasons for C's attendance there, nor the progression from kissing to sexual touching and then to intercourse, amounted to evidence of grooming. She further submits that there must in any event be evidence both of grooming and of its causative effect on a complainant's capacity to understand the decisions she makes.

18. For the respondent, Ms Howell submits that the judge was correct to leave the case to the jury. There was ample evidence of what she refers to the appellant's "predatory and grooming behaviour" towards those in his care, and the jury were entitled to consider all the evidence in the case, including C's demeanour when giving her evidence, to decide whether C was describing true consent, or the grooming of a vulnerable child who later

- struggled to come to terms with what had happened to her because she did not say "No".
19. That is, of course, a very brief summary of submissions made much more fully, both in writing and orally. We are very grateful to both counsel for their careful preparation of the case and for the skill which each has presented her oral submissions this morning.
20. In Malone (at page 457F), this Court held that the *actus reus* of rape is sexual intercourse with a woman who does not consent to that act, and that demonstration or communication to the accused of the absence of consent is not part of the *actus reus*. Roch LJ continued:
- i. "No doubt in order to obtain a conviction there will have to be some evidence of lack of consent to go before the jury. But what that evidence will be will depend on the particular circumstances of the case..."
21. In Robinson, a 12-year-old complainant gave evidence that she had never told the defendant to stop the sexual activity which took place or told him that she did not want him to do it. The trial judge, rejecting a submission of no case to answer, referred to the evidence of grooming. This court dismissed an appeal against conviction, saying that it was only in the clearest of cases that a judge could conclude that there was no evidence on which a jury could properly convict in a case of this kind. At paragraph 21, Elias LJ said this about grooming:
- i. "Grooming is not a term of art, but it suggests cynical and manipulative behaviour designed to achieve a particular sexual objective. Not all relationships with underage children can fairly be characterised as involving grooming, although many will. But even where they can, the fact of grooming plainly does not necessarily vitiate consent. Many a seducer achieves his objectives with the liberal and cynical employment of gifts, insincere compliments and false promises. But such manipulative and deceitful methods could not be relied upon to establish a lack of consent whenever the seduction was successful. The situation will often be no different where the complainant is under age. But where the exploitation is of a girl who is of an age where she does not, or may not, have the capacity to understand the full significance of what she is doing, and in particular, where, as here, there was evidence of acquiescence or acceptance rather than positive consent, we think that, as the judge found, it would be open to the jury to conclude that the complainant, perhaps out of embarrassment or some other reason, had in reality unwillingly gone along with the acts which she did not in fact wish to engage in."
22. In Ali (Yasir) the prosecution case at trial was that the defendants had targeted and groomed girls with the aim of using them for sexual purposes. The prosecution case was that the victims became sexually compliant and that any apparent consent on their part was not genuine. The defence case was that there was clear evidence of actual consent.
23. At paragraphs 56-61 Fulford LJ stated the principles to be applied in cases of this kind. At paragraph 56 he said:

- i. "There are many instances when the complainant's evidence as to whether she consented will determine if there is a case to go to the jury. In our judgment, however, in particular situations such as the present the prosecution is not obliged to call overt evidence from the alleged victim to the effect that he or she did not consent, given it is possible that the circumstances may have limited or distorted the individual's appreciation or understanding of his or her role in the sexual relations and the true nature of what occurred."

24. Fulford LJ then referred to the decision in Malone, and at paragraph 57 he continued:

- i. "One of the consequences when vulnerable people are groomed for sexual exploitation is that compliance can mask the lack of true consent on the part of the victim. As the judge directed the jury in the summing up in this case, where there is evidence of exploitation of a young and immature person who may not understand the full significance of what he or she is doing, that is a factor the jury can take into account in deciding whether or not there was genuine consent."

25. After referring to the passage which we have cited from paragraph 21 in Robinson, Fulford LJ at paragraph 58 said:

- i. "Although, as Elias LJ observed, grooming does not necessarily vitiate consent, it starkly raises the possibility that a vulnerable or immature individual may have been placed in a position in which he or she is led merely to acquiesce rather than to give proper or real consent. One of the consequences of grooming is that it has a tendency to limit or subvert the alleged victim's capacity to make free decisions, and it creates the risk that he or she simply submitted because of the environment of dependency created by those responsible for treating the alleged victim in this way. Indeed, the individual may have been manipulated to the extent that he or she is unaware of, or confused about, the distinction between acquiescence and genuine agreement at the time the incident occurred."

26. Finally, Fulford LJ reiterated the principle that a submission of no case to answer in circumstances such as these should only succeed in clear cases, saying at paragraph 61:

- i. "In summary, in a case in these circumstances in which a vulnerable or immature individual has allegedly been groomed by the defendant, the question of whether real or proper consent was given will usually be for the jury unless the evidence clearly indicates that proper consent was given."

27. That latter principle has recently been re-affirmed by this Court in Usman.

28. We respectfully adopt and endorse Fulford LJ's statement of the relevant principles in Ali (Yasir). Where an issue arises as to whether or not a complainant truly consented to sexual activity, her own assertion that she did will of course be weighty evidence for the jury to consider. In some cases, a judge considering a submission of no case to answer may conclude not only that the complainant's assertion is clear and unequivocal, but also that the jury could not properly conclude that she did not truly consent. But such cases will be comparatively rare, because it will generally be a matter for the jury to assess from the evidence as a whole whether they can be sure there was no true consent. To adopt and adapt a phrase used by the judge in the present case, it is generally for the jury to make a "cool-headed appraisal of the full circumstances".
29. We would add that it would be a mistake to think that the decision whether to allow a submission of no case to answer in a case such as this must turn on whether or not the conduct of the accused can be labelled "grooming". As Elias LJ pointed in Robinson, "grooming is not a term of art". It covers a wide range of conduct and, whilst it can no doubt be said that one can recognise it when one sees it, it is an imprecise term. There is no hard border between that which can and which cannot be labelled "grooming". In the present case, accordingly, it is neither necessary nor sufficient to decide whether Ms Knott is correct in her submission that there was no evidence of "grooming". The question is whether, taking the prosecution evidence as a whole, it was properly open to the jury to conclude that there was no genuine consent despite C's own evidence asserting the contrary. In the circumstances of this case, we do not accept that the jury could not properly have identified the appellant's conduct as grooming. But it was not necessary for them to be able to do so before they could be sure that there was no true consent.
30. In the circumstances of this case, we are also unable to accept the submission that there was clear evidence that C did understand the full significance of what she was doing, and did not merely acquiesce to the appellant's wishes under pressure. The important point, in cases such as this, is that even a clear and unequivocal assertion of willing consent by a complainant may have to be seen in the context of other evidence, and surrounding circumstances, which may cause the jury to conclude that the assertion is an unreliable guide to what was actually happening. It must be remembered that the conduct of an abuser may cause his victim not merely to acquiesce but also to perceive her own acquiescence as consent. Conduct which may be described as grooming, or analogous to grooming, is after all intended so to distort the victim's perception as to encourage her to engage in sexual activity which is inappropriate and wrong. In the present case the jury were entitled to regard C's words: "I was young and it shouldn't have happened but at no time did I say 'no' to him" as a telling indication of just such a subversive process having taken place.
31. The judge in her ruling, which we regard as exemplary, identified very clearly the features of the evidence which led to her conclusion that it was a matter for the jury. She was correct, for the reasons she gave, to reach that conclusion. It would have been wrong, and an improper usurping of the jury's function, to withdraw count 17 from them.
32. We should add that we see no basis for thinking that the conviction on count 17 is unsafe because the jury may wrongly have convicted of rape simply because the only alternative would have been outright acquittal, with no lesser alternative conviction being available to them. Jurors can be expected to follow the directions which they are given, and in our collective experience they do so. There is no reason to doubt that this jury would have

followed the judge's direction, and returned a verdict of not guilty, if they had not been sure that all the ingredients of the offence had been proved.

33. For those reasons, grateful though we are to Ms Knott for her careful submissions on the appellant's behalf, this appeal fails and must be dismissed.

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