



Neutral Citation Number: [2022] EWCA Crim 1668

Case No: 202103513 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM KINGSTON UPON THAMES CROWN COURT

His Honour Judge Davies

Ind. No. T20207330 T20207331

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2022

Before :

LORD JUSTICE DINGEMANS

MRS JUSTICE MCGOWAN

and

HIS HONOUR JUDGE PICTON

Between :

Ellis Cloud

Applicant

- and -

Rex

Respondent

Ms Joanna Hardy-Susskind (instructed by Tuckers, Solicitors) for the Applicant
Ms Nicola Merrick (instructed by the CPS) for the Respondent

Hearing dates : 9 December 2022

Approved Judgment

This judgment was handed down remotely at 1 pm on 19 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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Lord Justice Dingemans :

Introduction

1. This is an appeal against convictions for assault by penetration and rape against two separate complainants which raises issues about whether to order joinder, separate trials and bad character.
2. On 14 October 2021, in the Crown Court at Kingston Upon Thames following a trial before His Honour Judge Davies and a jury, the appellant (who was then aged 43 years) was convicted of one count of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (count 1) and one count of rape, contrary to section 1 of the Sexual Offences Act 2003, (count 2) in respect of the complainant referred to as A, and two further counts of rape, (counts 3 and 4) in respect of the complainant referred to as B. A and B have the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992.
3. On 10 December 2021, the appellant was sentenced to an extended sentence of 20 years, pursuant to section 279 Sentencing Act 2020, comprising 15 years' imprisonment with an extension period of 5 years on count 3. Concurrent sentences of different length were imposed on counts 1, 2 and 4.
4. The grounds of appeal (as re-ordered as a result of the oral submissions) are: (1) The separate indictments relating to A and relating to B should not have been joined. No cross-admissibility application was ever made by the prosecution at the trial, which suggests that the proceedings should not have been joined or should have been heard separately; (2) The appellant's previous conviction for sexual assault of a child under 13 should not have been admitted; (3) If the conviction was admissible, it was only relevant to counts 1 and 2 because it bore no resemblance to the allegations made by B.

Factual background

5. On 13th November 2019, A went to a bar with friends. They met the appellant (who was unknown to A) and agreed to return to his house for more drinks. Having consumed alcohol and cocaine, A fell asleep on the appellant's bed.
6. The prosecution case was that in the early hours of 14th November 2019, the appellant digitally penetrated A whilst she was asleep (count 1). She woke up and mistakenly thought she was in her own bed and being touched by her boyfriend. The appellant pulled down A's trousers and inserted his penis into her vagina (count 2). A rolled over and saw that the appellant was assaulting her. She immediately left the bedroom and told her friend that she wanted to leave. Later, she told him that she had been woken by the appellant having sex with her.
7. In relation to counts 1 and 2, the defence case was that A consented to the sexual activity or alternatively, the appellant reasonably believed that she was consenting. The appellant gave evidence that he met A at a bar. She and her friends agreed to come to his house. A was flirtatious before she went to bed. He got into his bed and she deliberately pressed her buttocks against him. He thought that she was continuing to flirt. She guided his hand to her groin and he believed that she was initiating sex. He put his hand into her trousers and penetrated her vagina with his fingers. He accepted

thrusting his penis in the vicinity of A's vagina but was unclear if he had penetrated her. She then got out of the bed and left his house.

8. In relation to counts 3 and 4 the prosecution case was that the appellant was in a casual relationship with B. She invited him to her home on 24 November 2020. However, he did not reply to her invitation for several hours and she wished to go to sleep, so she messaged him and asked him not to attend. Despite her message, he arrived at her home in the early hours of 25 November 2020.
9. B stated that the appellant arrived at her home in the early hours of 25 November 2020. She refused to let him in and he broke the door to gain entry. She attempted to calm him and he offered her a line of cocaine, which she accepted. He remained angry and demanded oral sex. She refused but he threatened her, so she reluctantly performed oral sex (count 4). He pulled her hair and slapped her before raping her and strangling her (count 3). He eventually fell asleep and left the following morning.
10. The defence case was that he had consensual sex with B and she had lodged a false allegation in the hope of receiving a compensation payment. The appellant stated that he had told B that he was being investigated for rape when they met. It did not appear to bother B and they started a "drug fuelled sexual relationship". She invited him to her house and he arrived in the early hours. He knocked on her door but she did not answer. He then "accidentally" broke her door in his attempt to gain entry. He entered the flat and discovered that she was asleep. He woke her up and they used cocaine before having consensual oral and vaginal sex. He accepted that it was rough sex and he held her neck. This was his attempt to "spice up" the sex. He said that she had made a malicious and false allegation in an attempt to claim compensation. He had previously told her that complainants could apply for compensation and that he believed B would receive approximately £10,000, irrespective of whether there was a conviction.

Ruling on joinder

11. The appellant originally faced two indictments. Counts 1 and 2 were on the first indictment and what became counts 3 and 4 were on the second indictment. At a directions hearing the prosecution applied to join the indictments, submitting that the offences were of a similar character as they involved sexual violence against women and were committed whilst the appellant was under the influence of cocaine. Moreover, the appellant's defence to counts 3 and 4 was that B had made a false allegation because of information she had been told about A. The defences were therefore linked.
12. The defence resisted joinder and submitted that if joined, the trials should be heard separately. The two sets of offences were separated by a year and did not amount to a spate of offending. They were very different and no live witnesses, save for the officer in the case, overlapped. The offences were different. They involved different complainants in different locations and in very different circumstances. A's allegations involved a chance encounter with a previously unknown woman. There was no violence or threats. In contrast, B's allegations involved a known partner and the use of violence. Moreover, the defences raised distinct issues. In relation to A's allegation, the appellant's defence was that A consented or he reasonably believed that she was consenting. In relation to B's allegation, all the activities and force were consensual.

13. The judge joined the indictments. The judge found that the allegations were of a very similar nature being sexual penetration without consent, albeit with different issues in each case, and the appellant would not be subject to improper prejudice if a jury were to be properly directed as to how to treat the evidence of these two allegations. After this ruling, preparations for trial continued.

Ruling on bad character

14. In 2015 the appellant pleaded guilty to sexual assault of a child under 13 which had occurred in 2013, contrary to section 7 of the Sexual Offences Act 2003. The prosecution case was that after a night of drinking in 2013, the appellant removed his clothes, got into the 12 year old victim's bed and rubbed her breasts and vagina. He denied the allegations in interview and described them as "malicious".
15. At the trial, the prosecution sought to adduce the conviction on the basis that it demonstrated propensity to commit offences of the type charged, pursuant to section 101(1)(d) of the Criminal Justice Act 2003. The defence resisted the application. It was submitted on behalf of the appellant that the previous conviction was not capable of establishing propensity, as it was not sufficiently similar to the offences on the indictment. Moreover, the appellant disputed the prosecution's summary of the facts underpinning the previous conviction and for that reason, the admission of the conviction would generate significant satellite issues.
16. The trial judge admitted the conviction. The judge concluded that there were marked similarities between the previous conviction and the offences on the indictment. In relation to counts 1 and 2, the appellant was alleged to have got into bed with the sleeping complainant. For that reason, the previous conviction was capable of demonstrating a propensity to commit offences of the type charged. Whilst there had been a gap in offending, the admission of the evidence did not cause the appellant any impermissible prejudice.

The summing up

17. The judge reminded the jury of the burden and standard of proof, and the fact that speeches and a summing up were not evidence. The judge warned the jury against an emotional response to the evidence.
18. The judge said "you are considering four counts. You must give separate consideration to each of them and you will be asked for separate verdicts in respect of each. Four verdicts in all. Those verdicts do not have to be the same ... they could be different depending on the conclusions you reach." The judge then set out the elements of each of the four counts and produced written routes to verdict for each of the separate counts.
19. The judge dealt with: assumptions; delays; distress; the effect of alcohol and drugs; past complaints; and special measures; before turning to what the judge called the final topic which was bad character.
20. The judge said "I deal first of all with the defendant's conviction from 2015 and in approaching this evidence, bad character as a whole, you should be careful not to let prejudice creep into your deliberations, particularly since this offence from 2015 involved a child ... This is not a trial by prejudice."

21. The judge then said “you have heard the details of his previous conviction from 2015 relating to an incident in 2013 and I must direct you as to the relevance of this evidence. What use is it for you? The prosecution say that the conviction shows that the defendant had a tendency to commit offences of the type on the indictment. In particular, the offence against [A] but also to Ellis Cloud’s claim that the allegation was malicious as he said is the case with [B]’s allegation now. The defence argue ... that the conviction does not help you in deciding the issues in this case. The defendant, as you know, pleaded guilty in 2015 and he is in law, presumed, therefore, to be guilty of that offence on his own admission, sexual assault, touching the vagina of that girl. He says during evidence that he did not, in fact, commit this offence. Well, in this event, he bears the burden of displacing that presumption by proving that it is more likely than not that he did not commit the offence.”
22. The judge then summarised the relevant facts of that offence which was that he had climbed naked into bed behind a female child of 12 in her bed at night when she was asleep. The judge said “you have to decide whether the conviction does show that at the relevant time, 2019 and so on, the defendant had a tendency to commit sexual offences in this way, climbing into bed and touching a female from behind and a tendency to respond to any allegations by saying that they have been made maliciously as in the suggestion now made about [B]’s complaint.”
23. The judge said that if they were not sure that the appellant had that tendency then they must ignore it, but if they were sure that it did show such a tendency then this might support the prosecution case and it was for the jury to decide whether it did so and if so to what extent. The jury were expressly warned that they must not convict the defendant wholly or mainly because of that conviction noting that the fact that someone had previously committed such an offence did not prove that he did commit the alleged offences on the occasions that they were considering. The judge warned the jury that the conviction “may only be used as some support for the prosecution case if, having assessed the evidence, you are satisfied that it is right to do so”. The jury were warned against using it as a shortcut meaning by taking the approach “he did it then and so he must have done it again”.
24. The judge also recorded that Mr Cloud had made an attack on the character of the complainants saying that each had lied about him. The judge said that as a consequence the jury had heard about other convictions recorded against Mr Cloud stating “this is because you are entitled to know about the character of the person who makes these allegations when you are deciding whether or not they are true”. The judge then summarised the prosecution and defence cases on the respective use that might be made of Mr Cloud’s convictions from 2014. After speeches the judge continued his summing up and addressed the evidence relating to the separate counts on the indictment in a fair and balanced manner.

Joinder and separate trials

25. We consider that the judge was entitled to join the two indictments. It was common ground that there was a statutory power to order the joinder. The procedure set out in the Criminal Procedure Rules at Crim PR Part 3.29 had been followed.
26. The question then arose as to whether the judge should have ordered separate trials of the offences. Crim PR Part 3.29(4)(a) provides that the “defendant may be prejudiced

or embarrassed in his or her defence (for example, where the offences to be tried together are neither founded on the same facts nor form or are part of a series of offences of the same or a similar character)”. In this case the judge was right to conclude that the offences against A and the offences against B formed part of a series of offences of the same or a similar character, because they concerned sexual offences, including rapes, alleged to have been committed against A and B. There were a number of other common features including offending committed when the appellant was under the influence of alcohol or drugs.

27. Ms Hardy-Susskind is right to point out that the prosecution did not apply for or ask the judge to make a direction about the cross-admissibility of the evidence of A and B in respect of each other. Ms Hardy-Susskind acknowledged in her submissions that in the circumstances of this case and with the directions that the judge had given on bad character and separate consideration of the counts that had been given, no further directions on the admissibility of A’s evidence on B’s case, and vice-versa, were required or would have been of any benefit to the appellant. Ms Merrick stated that the issue of a direction on the cross-admissibility of A’s and B’s evidence had been overlooked by the prosecution, and submitted that if such a direction had been asked for, it would have been given.
28. We agree that in this particular case, given the way it was presented at trial, and in the light of the directions from the judge on the extent to which bad character evidence could be used, and the direction to consider the evidence for each count separately, the judge was not required to give further directions on separate treatment of the respective complainants and the respective counts. This means that it is not necessary to address the approaches set out in *R v Adams* [2019] EWCA Crim 1363; Crim LR 2020, I, 69-71 and *AHC v R* [2022] EWCA Crim 925 save to say that we agree with the observation made in both cases that “everything depends on the directions and facts of a particular case ...”.
29. We also consider that if a cross-admissibility direction had been asked for in this case, it is likely that it would have been given. An early consideration of whether a direction on cross-admissibility should be sought, and the giving of appropriate notice, will avoid some of the issues considered in *R v Adams* and *AHC v R*.

Bad character

30. The appellant challenges the admission of his previous conviction for sexual assault of a child under 13. The agreed statement of facts recorded that the appellant had pleaded guilty to the offence, and that the prosecution case was that he had got into the bed of a 12 year old daughter of a woman he had been seeing while staying at her property. He had been naked and had touched the child on her vagina. Mr Cloud had said in police interview he had been in drink and had gone to the wrong bedroom because that had been the bedroom which he and the mother had previously used. He had cuddled the child before realising he was in the wrong room. At trial the appellant had given evidence to the effect that he was not guilty of the 2013 offence and that all he had done was get into the wrong bed when he had been affected by drink and had cuddled the child thinking it was his partner.
31. Ms Hardy-Susskind submitted that the 2013 offence did not establish any relevant propensity, and even if it did it should have been excluded. This was because of the

particular prejudice caused by sexual offences against a child, which were governed by different statutory provisions than adults and which meant that the appellant was swimming against a tide of prejudice. In any event, if this bad character was admissible in respect of A's allegations, then it had nothing to do with B's case.

32. Ms Merrick submitted that the evidence about the 2013 offence was properly admitted. It showed a propensity to commit sexual offences in general when under the influence of drink or drugs and in particular against sleeping females. The judge was right not to exclude it because its probative value exceeded any prejudicial effect. It was admissible in respect of the counts for both A and B, and the appellant had described both the original 2013 allegation and the allegation against B as malicious. Further the appellant made a sustained attack on B's character, contending that she had manufactured the complaint against the appellant for money, and as such, the conviction was also admissible pursuant to section 101(1)(g) of the Criminal Justice Act 2003 ("CJA 2003").
33. In our judgment the evidence of the 2013 offence was relevant to an important matter in issue between the prosecution and defence pursuant to section 101(1)(d) of the CJA 2003. This was because it established a propensity to commit offences of the kind with which he was charged, pursuant to section 103(1)(a) and 103(2) of the CJA 2003. It was common ground that just one prior offence might establish such a propensity, compare *R v Burdess* [2014] EWCA Crim 270. In our judgment the 2013 offence was capable of establishing a propensity on the part of the appellant to commit sexual offences when under the influence of drink or drugs. Further there were obvious particular similarities, namely getting into bed with a sleeping female to commit sexual offences, in the way that the appellant had carried out the offence in 2013 and the allegation made against him by A. The fact that the appellant had accepted his offending in 2013 by a guilty plea but maintained a defence that he reasonably believed that A was consenting did not undermine the relevance of the previous conviction.
34. In circumstances where the 2013 offence had been admitted in relation to A in our judgment the judge was entitled to leave the offence in 2013 as relevant to the allegation made by B, because of the propensity to commit sexual offences. In the circumstances of this case we do not consider that the judge was required to direct the jury that the 2013 offence had no relevance to B, although the directions the judge did give highlighted the particular relevance of the previous conviction to the allegations made by A.
35. While the reaction of a defendant after the commission of an offence may be relevant to establishing a propensity (for example an offender leaving the equivalent of a mark by way of calling card) we do not consider that the appellant's reported response to an allegation of sexual offending that it was malicious can establish a relevant propensity. Although the judge did ask the jury to consider whether the appellant's response might establish such a propensity, the focus of the direction was whether there was a propensity to commit sexual offences.
36. The conviction for the 2013 offence was also admissible under section 101(1)(g) of the CJA 2003 because the appellant had made a serious and sustained attack on B's character. The real issue in relation to section 101(1)(g) is whether the earlier conviction should have been excluded pursuant to section 101(3) on the basis that it has

such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

37. We therefore turn to consider whether, even though the conviction was admissible pursuant to section 101(d) and section 101(g), it should have been excluded.
38. In our judgment the judge was entitled to take the view that the earlier conviction did not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. We accept Ms Hardy-Susskind's point that a conviction for sexual offending relating to a child is a matter which requires to be carefully considered, because of the understandable reaction to reports of sexual offending against children, but we do not consider it accurate to describe the appellant as swimming against a tide of prejudice. The judge did give careful directions warning about the dangers of prejudice affecting the jury's deliberations. Further this was not a case where the previous conviction had been admitted only because of the attack on B's character (and if that gateway had stood alone, different considerations might have applied) but it was relevant to the issue of propensity as set out above. The judge could therefore properly conclude that there was not such an effect on the fairness of the proceedings that the previous conviction ought to be excluded. We note that the judge was able to deal with the appellant's evidence that, in fact, his conviction in 2015 for the 2013 offence was wrongful (notwithstanding his guilty plea) and the trial was not derailed by satellite issues about the earlier conviction.

Safe convictions

39. We do not consider that the judge directing the jury to consider whether the appellant had a tendency to respond to any allegations by saying that they had been made maliciously renders the appellant's convictions unsafe. This is because the 2013 offence was properly admitted and was relevant for the jury to consider whether the appellant had a propensity to commit sexual offences. Further the reference to the response to the complaints was not the focus of the propensity alleged against the appellant. The judge had given appropriate warnings not to convict wholly or mainly because of the previous conviction and not to use the previous conviction as an impermissible shortcut. We are sure that the convictions are safe.

Conclusion

40. For the detailed reasons set out above the appeal against conviction is dismissed. We are very grateful to Ms Hardy-Susskind and Ms Merrick for their helpful written and oral submissions.