

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300307/B5
[2023] EWCA CRIM 1182



Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 19 July 2023

Before:

LADY JUSTICE SIMLER DBE

MR JUSTICE GARNHAM

MRS JUSTICE THORNTON DBE

REX

V

RS

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MR K SCARSBROOK appeared on behalf of the Appellant.
MR D SCUTT appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. 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 section 3 of the Act.
2. Between 16 and 19 January 2023, the appellant was tried by HHJ Patrick and a jury at Bristol Crown Court on a three-count indictment. Counts 1 and 2 were attempts to choke, suffocate or strangle with intent, contrary to section 21 of the Offences Against the Person Act 1861, while count 3 was assault by penetration, contrary to section 2 of the Sexual Offences Act 2003. He was acquitted on 19 January 2023 on counts 1 and 2 but convicted on count 3, and now appeals that conviction with leave of the single judge.
3. There is a single ground of appeal that the judge failed properly to direct the jury in relation to their approach to considering counts separately, and the need for them to be sure of the absence of consent or the reasonable belief in consent in relation to count 3, assault by penetration. The appellant contends that the questions posed to the jury, in the Route to Verdict, had the effect of removing this consideration from their deliberations and, in the circumstances of this case, especially in the context of the jury note to which we shall refer, this conviction is unsafe. The appeal is resisted.
4. We are grateful to Mr Scarsbrook who appears for the appellant as he did below, and to Mr Scutt for the Crown, who also appeared at the trial, for their assistance on this appeal.

The facts

5. The Crown's case at trial was that the complainant (to whom we shall refer as "CB") had known the appellant for two years. They saw one another every so often. She lived in Bristol and he travelled there regularly to see family or friends. On these occasions he would sometimes meet her and sometimes sleep at her address. CB's evidence was that the first time they met one another they ended up returning to her address and having consensual anal sex. After that time, her evidence was that although he stayed with her on other occasions, and asked her to have sex, she refused.
6. On 14 June 2020, the appellant had been staying in Bristol with his brother but was asked to leave. He was then sofa surfing and called CB to ask if he could stay with her. She agreed and he was invited to her one-bedroom flat, arriving in the afternoon or early evening of 14 June. They spent the evening together.
7. CB's evidence was that he began to pester her for sex and that after some resistance she acceded. They had consensual anal sex during which the appellant wore a condom which he discarded in her bin. The next morning CB told him that she did not wish to have sex with him again as she did not feel respected, and when he asked her for sex later that evening, she initially said she did not wish to but later decided to allow sexual activity to start. She described the activity as consensual to begin with it. After a few minutes, she said that he lay behind her and as she reached back with her hand on his penis, he began to choke her with his arm around her neck. She described being choked hard and felt worried about losing consciousness. She was later to say in evidence that she made clear that she did not consent by saying "no" and by attempting to fight off his arm. Those are the facts of count 1. The appellant inserted a finger or fingers into her anus (count 3) and her evidence was that there was some scraping inside her anus, and she said "stop" and "no". He then removed his finger or fingers from her anus. He was still behind her and

she felt movement and assumed that he was masturbating. The appellant ejaculated and wiped a mixture of ejaculate and other matters on her body and attempted to slap it into her face. CB managed to get up and went to the bathroom to clean herself in distress. He attempted to follow her but she slammed the door in his face and asked him to leave. Once she had cleaned herself up, she said that he became apologetic, trying to hug her, and saying that he did not know why he had behaved in that way. She went to another room in the flat and settled down on the sofa to sleep and after a short period he came into that room and led her back to bed. She went with him voluntarily, but she said within seconds he became aroused again and choked her again. That was count 2. At that stage, she stopped him and went back to the sofa for the rest of the night and in the morning told him to leave, and he did.

8. Over the following days, she disclosed what had happened to four people, all of whom were called to give evidence at the subsequent trial. She took part in an ABE interview which was played as her evidence-in-chief at trial.
9. For his part, the appellant attended a voluntary interview on 8 October 2020. His case throughout was that CB had lied. He said they had known one another for about three years. They had had sex around 12 times during that period. He said that sex on 14 June was consensual vaginal sex using a condom and nothing was said about it the following morning. They spent the day together, during the course of which, he had an angry argument with his then current girlfriend, and CB overheard the argument. She became angry at him and took him to task for calling that girlfriend names. CB accepted that this conversation and phone call took place in cross-examination.
10. After spending 15 June together at her flat the appellant said they started having consensual vaginal sex, again using a condom. During the sexual activity CB asked him

to perform oral sex. He refused and said she should perform oral sex on him instead. He accepted that he had put his thumb slightly into her anus and rubbed it. He said she gave no indication that she did not consent to this. After he had inserted his thumb, she again asked him to perform oral sex. When he refused she said words to the effect of “well stop that then, I don't like it” referring to his thumb. At that alarm bells rang, and he ceased sexual activity stepping back from the bed. He removed the condom. She asked him to come back to bed. An argument started during which he swore at her and called her “a bitch”. This argument went on until CB left to sleep on the sofa. The appellant denied any strangulation occurring at any stage. He denied putting multiple fingers deep into CB's anus. He said he had worn a condom. He accepted that he may have said something like “I don't know why I'm like this” but it was referring to the language used in the argument.

11. Two condoms were recovered from her bedroom, one containing liquid which was semen and provided a full DNA profile of the appellant. On the exterior of this condom was a red/brown stain which tested positive for faeces. The second condom was not tested but contained liquid and on a visual inspection showed no evidence of the presence of faeces.
12. The defence, in due course, applied at the start of trial, to adduce evidence of prior sexual activity between CB and the appellant, pursuant to section 41 of the Youth Justice and Criminal Evidence Act 1999. His case on count 3 was that he had a reasonable belief in consent founded on the fact that CB had, on previous occasions, licked his anus and inserted a finger into his anus. This, coupled with the history of the two performing anal sex, led him to believe that activity around the anus would be consented to on the night in question. This application was allowed. Questions were

drafted and approved by the trial judge and no issue is taken with this aspect of the trial.

13. CB's ABE interview was played to the jury, and she gave evidence in accordance with its contents. She accepted that the appellant had had a phone call with another woman in her presence, and that she had told him off for his language. She maintained that he only wore a condom on the first night.
14. The four complaint witnesses were called by the prosecution, and gave broadly consistent accounts, albeit there were inconsistencies between their accounts and the account given by the complainant. The forensic evidence was presented by way of agreed facts.
15. The appellant gave evidence in accordance with what he had said in his police interview. He said that he had had anal sex with CB before but accepted he had not said that in interview. He gave his reasons for a belief in consent, as we have just indicated. He denied any strangulation. In cross-examination, he was challenged as to the length of time he knew CB and the number of times they had had sex and why he had not told the police about what he now said about her open mindedness about anal sexual activity. It was suggested to him that he was lying and that he had been manipulating CB into having sex with him. He denied those suggestions and did not call any other evidence in support of his own case.
16. Before the summing-up and once the evidence had concluded, the judge produced some proposed written directions which incorporated a Route to Verdict. These were given to both counsel to consider overnight and were discussed the following morning. The written directions included standard directions in relation to the role and responsibilities of judge and jury, the approach to the evidence and the burden and standard of proof. There was reference to the Route to Verdict and various other directions in relation to

the evidence were given.

17. No criticism is levelled at the vast majority of those directions. The directions did not however contain any reference or instruction about the need to consider each count on the indictment separately, highlighting to the jury that the evidence in relation to each count was different and need not necessarily lead to the same conclusion. The Route to Verdict did not contain any questions for the jury about the need to decide on intent for any one of the three counts.
18. In the course of discussion between counsel and the judge on the morning of the summing-up, Mr Scarsbrook raised the lack of any direction about the appellant's reasonable belief in consent on count 3. The judge made clear that, in his view, the case involved a straightforward binary conflict of fact and, again in his view, counts 1 and 3 effectively stood or fell together, so that there was no need, in light of that factual position, for a separate direction on intent in relation to count 3. That was also the view, as we understand it, of Mr Scutt who prosecuted.
19. The result was that the Route to Verdict on count 1 was phrased as follows:

“32. Are we sure that, just before [CB's] anus was penetrated, RS tried to choke or strangle her?”

If you answer yes, then he is guilty of count 1. If no, then he is not guilty.”

Although, as we were told, both counsel were slightly uncomfortable about the lack of any question as to intent, both concluded that it was adequately covered in the earlier direction and, in any event, the appellant was acquitted on count 1.

20. So far as count 3 is concerned, the Route to Verdict read as follows:

“34. Are we sure that [RS] penetrated [CB's] anus with his finger in the context of choking or strangulation?”

If you answer yes, then he is guilty of count 3. If no, then he is not guilty.”

21. That direction must of course be seen in the context of the other written directions given by the judge. These were as follows:

“27. For the purposes of this trial, in law it is an offence if a person intentionally penetrates the anus of another with a part of his body where the penetration is sexual, where the other person does not consent to the penetration and where the defendant does not reasonably believe that she does consent.

28. Normally, it is necessary for me to go on to give you further directions about the different parts of the offence but in this case it is not necessary because the questions you need to decide are not about law, but are about the facts. Let me explain why.

29. I will start with counts 1 and 3. You know that the prosecution’s case is as follows. On the night we are concerned with, [CB] and [RS] started to have sex entirely consensually. However, RS then began to choke or strangle [CB] before taking his hand off her neck, and inserting fingers into her anus, before pulling out some faeces and slapping it on her face. It follows that on the prosecution’s case, there could be no possibility either that [CB] was consenting to what was happening, nor that the defendant could reasonably have believed she was consenting.

30. [RS’s] case is that he did not choke or strangle [CB] at all. Whilst he did put a thumb in her anus, he thought she would consent to it, but when she said no, he immediately took his thumb out.

31. If what he said is or might be true, he is not guilty. Only if you are sure that [CB's] account is true will you find him guilty.

32. It follows that you need start by thinking about the circumstances in which [CB’s] anus was penetrated. Then ask yourselves:

Are we sure that, just before [CB's] anus was penetrated, [RS] tried to choke or strangle her?

If you answer yes, then he is guilty of count 1. If no, then he is not guilty.”

22. In the judge's summing up of the evidence consent was again discussed. The judge said the following:

“Now, pausing there. It’s important to remember, you, I’ve explained to you that ordinarily, one of the issues you might have to deal with is the issue of consent, and you heard Mr Scarsbrook talking about consent in his closing address to you. Consent doesn’t in reality, arise here, because it’s accepted that if what [RS] says in his evidence happened, then he had a reasonable belief in the consent of [CB]. And the Prosecution’s case is, well, if she was, if what happened, as she described it, then there’s no issue of [RS] knowing that she was not consenting.

But it’s important to remember that consent is about freedom to make a choice and making a choice. There’s no such thing, as you will all understand, as a general consent to sex. Every person is entitled to consent or not to consent to every piece of sexual behaviour on every single occasion. That someone has done something once with a person or with someone else does not of itself mean that they want to have it with everybody always. I’m sure you understand that.”

23. Following their retirement, the jury sent a note to the judge, on 19 January, at 1.05pm.

The note read as follows:

"1. Why has the judge not mentioned intent on point 32 of the guidance?

2. We all understand that there are three separate charges.

i. Point 34.2 of the guidance confuses us.

ii. We feel it suggests we consider choking as part of the charge of Count 3.

iii. It is not written in the charge.

iv. Please reference judge's advice."

24. There was a discussion between counsel and the judge about that question as is to be expected. Mr Scarsbrook mentioned his earlier concern that the issue had been presented to the jury as a binary decision that counts 1 and 3 stood and fell together. Counsel then standing in for Mr Scutt on behalf of the prosecution, raised his concern at the lack of a direction as to reasonable belief in consent in the Route to Verdict itself. The judge said that he had dealt with the point at paragraph 25 of the legal directions. That direction did not of course deal with reasonable belief in consent. The jury's question was ultimately answered by the judge in the following way:

"25. I deal with the issue of intent in paragraph 25, where I say: in law it's an offence for a person to attempt to choke, suffocate, or strangle another person with the intention of enabling himself to commit an indictable offence. You decide what a person's intention was from all the circumstances of the case, and in particular what he said and did before the alleged offence, at the time of the alleged offence, and immediately after the alleged offence is said to have been committed. A sexual assault is an indictable offence."

25. The judge continued:

"And a sexual assault, pausing there, includes being against somebody when you're naked and touching, if you are doing so without their consent. So that would be a sexual assault. I didn't mention intent in respect of Count 1, because everyone accepts that, in, in this case there are effectively two conflicting versions of events, [CB's] account and [RS's] account. If what [CB] alleges actually happened, then it follows the choking or strangulation was with the intention of enabling him to commit an indictable offence, and in this case, a sexual assault or a sexual touching. So far as 34 and the second question is concerned:

'Are we sure that [RS] penetrated [CB's] anus with his finger in the context of choking or strangulation?'

Again, I've been inviting you to concentrate on the factual account,

because if you are not sure that it was in the context of strangulation, then you would not be sure of her account. And in those circumstances, you would find, be finding him not guilty. Does that assist you? You look puzzled. Who is, who is chairing your deliberations, please?"

26. A juror responded "Me" and the judge continued:

"... all right. I can't get involved in a to and fro. If you've got further questions, then you need to express those. But, the, the, the reality, going back, the, there's, there's a straight conflict of evidence here. You will bear in mind this. Firstly, that it's for the Prosecution to make you sure of the Defendant's guilt. It follows that on his account, if what he says is true or might be true, then he will be not guilty of the charges. It's only if you are sure of [CB's] account that you would find the Defendant guilty. All right?"

But the reality is, you need to look at the evidence and the as, as, as I've said, there's a straight conflict of fact here, really. It's, and by which I mean [CB] says one version, the Defendant says another. Before you can commit the Defendant, you have to be sure that her evidence is true and accurate. If you're not sure, then it follows that the Defendant's account might be true. Therefore, you would find him not guilty in respect of that part of the case which you are not sure of her evidence on.

I don't know that I can put it any more straightforwardly or help you with the issues in a clearer way. But I'm very happy to consider any questions that you have. I'm concerned because you look puzzled."

27. At that point, the juror said: "Can I speak to you?" The judge made clear that there could not be a conversation between him and the jury and made clear that if the jury had any continuing concern that they should put it in writing and that it would be answered but that otherwise there could not be a continuing debate. Verdicts were returned later that afternoon, about an hour-and-a-half after those exchanges, in the terms to which we have already referred.

The appeal

28. Mr Scarsbrook contends that the Route to Verdict did not contain the necessary requirement that the jury consider consent and reasonable belief in consent as a critical element of the offence in count 3. Furthermore, the directions did not include the guidance that is standard in cases of this kind on the approach to considering counts separately. In his submission, the judge had plainly decided that the case was a straightforward binary conflict of fact, that counts 1 and 3 effectively stood or fell together, and that there was therefore no need to direct the jury on intent in relation to ground 3, despite the concerns he had raised.
29. The effect of the judge's direction, in response to the jury note and the Route to Verdict, was that the jury were effectively being asked to consider counts 1 and 3 together. While the appellant accepts that the two verdicts on these counts are not so inconsistent that no reasonable jury could have arrived at them, nonetheless it meant that the jury was reaching a conclusion in relation to count 3 merely "in the context of choking or strangulation". Mr Scarsbrook emphasised the fact that reasonable belief in consent was raised in the defence statement and in the closing submissions, but whilst there was a reference to it in the summing-up, it was not referred to in the Route to Verdict which is clearly where the jury's mind was focused.
30. The failure, in these circumstances, to direct on the elements of the offence, and to deal with the matters just mentioned, had the effect that the jury was approaching count 3 without a proper direction on consent reasonable belief as to consent. The further direction given by the judge to the jury following their question, only served to confuse the position and not to clarify.
31. For his part Mr Scutt submits that the directions provided by the judge were adequate.

This was a case where the factual position was binary and everybody understood and expected that counts 1 and 3 would stand or fall together. That was the approach he too had adopted. Mr Scutt reminded us that the written directions provided to the jury were agreed: paragraph 25 sufficiently identified the elements of the count 1 offence, paragraph 27 set out the elements of the offence of assault by penetration, and in the round, these paragraphs clearly set out the contrast between the prosecution's case based on CB's account and the defence case based on [RS's] account. They were diametrically opposed accounts and critically, he submitted, the jury were sufficiently directed to the issues of consent and reasonable belief in consent as they applied in light of the evidence in this case.

32. Moreover, it was idle to think that by the time the jury considered their verdicts, they were only focused on the Route to Verdict and not on the directions set out on the previous page of the document. The fact that the judge commented on jurors looking puzzled does not mean there were ongoing concerns and in fact that, there was no further note sent by the jury, nor any further request for clarification received. He submitted that the conviction on count 3 was consistent with the jury being sure that CB had been choked and strangled albeit not sure it was with the intention to penetrate, but sure of penetration, as she had described it. Inevitably, if they accepted her account, they must have concluded that the appellant's account was not reliable or to be accepted. In the result, although the jury found their way to separate verdicts in this case, the criticisms made by the appellant do not lead to the conclusion that the verdict is unsafe. To the contrary, it was wholly justified on the law and the evidence, and not unsafe.
33. The question for this court on any appeal against conviction is whether the conviction is safe or not. We have been persuaded by the submissions made on behalf of the appellant

by Mr Scarsbrook that the appellant's conviction on count 3 is unsafe and must be quashed. Our reasons follow.

34. As the appellant submitted, paragraphs 33 and 34 of the written directions appear to merge the facts concerning counts 1 and 3 and do not, in our judgment, make clear that the jury was required to consider them separately. Despite the judge's failure to direct the jury about the need for separate consideration of the counts, and his apparent conclusion that counts 1 and 3 would stand or fall together because the strangling or choking was a precursor to the assault, the jury were plainly alert to the problem. Their note indicates that they understood the need to consider the counts separately. They correctly identified that paragraph 34 of the directions referred to choking when it should not have done, and they asked expressly about intention. Their verdicts confirm the view that they understood the difficulty. But the problem remained that the inclusion of the words "in the context of choking and strangulation" remained in the direction on count 3, without any clarification from the judge.
35. The judge presented the jury's task as a binary one. They had to decide which account to accept and that would be determinative. Consistently with that approach, the judge explained that the issue of consent did not arise because, on the complainant's account, it was clearly not present, nor could there have been any reasonable belief in consent having been given. The difficulty, however, is that on the appellant's account, he maintained that he had a reasonable belief in consent. The linkage of these counts on the facts in the Route to Verdict and directions suggested, and it was the expectation of all involved, that the jury would accept the whole account of one or other of the participants and that would lead inevitably to their verdicts on counts 1 and 3 together.
36. It is unfortunate, we think, that the judge repeated and compounded the errors in his

answer to the jury and somewhat ironic that the judge's answer to their questions directed them, in effect, to acquit on count 3 in circumstances where they acquitted on count 1. But that is not what happened. Although, as recognised by the appellant, this is not a case of inconsistent verdicts, the result is that in circumstances where the jury decided to acquit on count 1, as they were entitled to do, the only direction they were effectively left with in relation to count 3 was paragraph 34 of the written Route to Verdict, which focuses only on the act of penetration and not on the question of intention or reasonable belief in consent. In other words, as Mr Scarsbrook submitted, having acquitted on count 1 because they were not sure about strangulation, the jury approached count 3, not in the context of strangulation as they were directed to do, not assessing consent or reasonable belief, but in some other unknown way.

37. It seems to us that absent an express direction that they could only consider count 3 if satisfied of the appellant's guilt on count 1, so that a verdict on count 3 would not even be taken if there was an acquittal on count 1, a separate consideration direction was essential. Moreover, in those circumstances, an express direction was also necessary to the effect that the intent direction in paragraph 25 applied to count 3 as well as count 1, and that the jury would have to consider the question of consent as referred to in paragraph 27. As matters stood, it seems to us that paragraph 27 of the directions, which did contain an appropriate direction on consent, was too distant and was undermined by what came afterwards, both in the Route to Verdict and in the discussion the judge had with the jury when they highlighted their concern. Despite its earlier mention, the Route to Verdict effectively asked the jury to ignore any assessment of consent or reasonable belief in consent and instead, to focus on the penetration in the context of strangulation.

38. In the circumstances of this case, we do not consider the fact that belief in consent was

referred to in paragraphs 25 and 27 could rescue the position in light of what followed. The fact that the jury did not seek further clarification following the exchange that we have referred to does not, in our view, mean that the jury were clear about the relevant law. It seems to us that the evident confusion expressed and recognised by the judge, and the fact that the juror wished to ask further questions contradicts this submission.

39. Accordingly, we have concluded that we cannot be sure the jury were approaching count 3 by reference to any or proper directions on consent and/or the reasonable belief in consent given that the Route to Verdict in effect, invited them to ignore any assessment of those issues and to analyse the penetration in the context of strangulation. The further direction given by the judge reiterated his earlier binary view of the case and did not clarify matters for the jury. There is a real risk that the jury simply concluded that because the appellant accepted some penetration, he must be guilty and did not consider the question of intention or belief in consent at the appropriate time.

40. For all those reasons this appeal is allowed. The conviction is unsafe and must be quashed. We will hear counsel in relation to what should come next.

Discussion and short break in proceedings

LADY JUSTICE SIMLER: The directions we make are as follows. We allow the appeal. We quash the conviction on count 3. We order a retrial on count 3, the conviction that has been quashed. We direct that a fresh indictment be served in accordance with the Criminal Procedure Rules 10.8(2), and that means that the prosecution must serve a draft indictment on the Crown Court officer no more than 28 days after this order. We direct that the appellant then be re-arraigned on the fresh indictment within 2 months, and that is a strict two month time limit, and I urge all those here to act with expedition. There is no power to specify a different period and there are very real difficulties in relation to

extending time.

We direct that the venue for retrial should be Bristol Crown Court, with the resident judge to determine who is responsible for the trial but that it should be a different judge.

We make an order under section 4(2) of the Contempt of Court Act 1981 that restricts reporting of these proceedings until after the conclusion of the retrial. I think that concludes the directions that we need to make. Questions of bail shall be for the Crown Court.

LADY JUSTICE SIMLER: I have dealt with cases where time had been allowed to run on and that has led to very real difficulties.

MR SCUTT: If I have anything to do with it will not run.

LADY JUSTICE SIMLER: Thank you, Mr Scutt. Very good.

[RS], I hope you have understood what has been said. Your appeal has been allowed and your conviction on count 3 has been quashed. There will however be a retrial and that will be dealt with in due course. Have you understood that?

THE APPELLANT: Yes, yes, I do.

LADY JUSTICE SIMLER: It may be that your counsel will have a conference with you from the booth outside Court after we terminate this link, so do not go away.

THE APPELLANT: Okay.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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