

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202202062/B3

Neutral Citation Number: **[2023] EWCA Crim 822**

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 29 June 2023

Before:

LADY JUSTICE ANDREWS DBE
MR JUSTICE CHOUDHURY
HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the CACD)

REX
V
EIRAJ ZARAZADEH

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

NON-COUNSEL APPLICATION

APPROVED J U D G M E N T

1. MR JUSTICE CHOUDHURY: *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. The applicant seeks leave to appeal against conviction, such leave having been refused by the single judge. The applicant also seeks an extension of time of almost nine years.
3. The background to this matter may be briefly stated as follows. On 23 December 2011 the complainant, who was aged 14 at the time, and her older sister, to whom we shall refer as B, visited the applicant's address. B was at that time the applicant's partner. The plan was to spend the evening together and stay at the applicant's house overnight.
4. After some time spent drinking, the complainant went to sleep in a double bed in the property. She expected to be joined later by B. B was very drunk but did later join the complainant in bed.
5. Sometime later the applicant joined the two sleeping sisters, climbing into the gap between his partner and the complainant. It was the prosecution's case that whilst the complainant slept the applicant removed her pyjama bottoms and knickers and penetrated her vagina with his penis from behind as she lay on her tummy. When the complainant woke up and realised what was happening, the applicant continued his actions, pulling the complainant's waist up and thrusting into her as she moved up the bed to get away from him.
6. When the complainant made a noise the applicant told her to be quiet. When the applicant got off her, the complainant found that she was wet and sweaty and assumed

that the applicant had ejaculated. She got up to leave. The applicant was alleged to have said "sorry" and asked the complainant not to tell her mum.

7. The complainant did in fact text her mother shortly afterwards saying that she had been raped. She had tried to alert B but B was described as being "too out of it".
8. The applicant's case was that he got into bed with the two sisters intending only to cuddle his partner, B, with whom he had just had sex on the sofa. He suffers from sleep apnoea and was tired having worked long hours. He said he soon fell asleep. He said he awoke to find the complainant had her bottom pressed into his groin and heard the complainant say: "You'd better stop what you're doing because of [B]". The applicant said that once he realised he was spooning the complainant instead of B, he immediately got up and apologised in case he had accidentally touched the complainant on her breast. He said he was fully clothed and did not have his penis out. It was also part of his case that, due to a medical condition, he had trouble with achieving an erection, needing a tourniquet around his penis to maintain an erection, and was unable to have sex in a horizontal position, thus rendering it impossible for him to have done what the complainant had alleged.
9. The incident was reported to the police the next day and the applicant was arrested. He gave no comment interviews. He said that the reason for so doing was that he did not want to answer any questions that might have led him to talk about his erectile dysfunction, which he found embarrassing. He also said he was tired and found the attitude of the police during one of the interviews to be cynical.
10. The applicant pleaded not guilty and an initial trial resulted in a hung jury. The applicant was convicted upon his retrial in September 2013 and was subsequently sentenced to nine years' imprisonment. He was released from custody in 2017. The appeal was lodged in June 2022 which was, as already noted, almost nine years out of time.

11. The applicant relies on four grounds of appeal. These grounds were drafted by the applicant and we deal with each one in turn.
12. The first ground of appeal is that there was fresh evidence from his former partner, B, which confirms his account that nothing untoward had occurred between him and the complainant. He contends that B was not called as a witness at trial by either the prosecution or the defence despite the obvious importance of her evidence. In particular, he says that B's evidence would have confirmed that he had had sex with B shortly before getting into bed making it unlikely that he would have had a desire for sex with the complainant so soon afterwards.
13. This ground of appeal is without merit. Section 23(2) of the Criminal Appeal Act 1968 provides that in considering whether to receive any evidence on an application for permission to appeal, the court should have regard to whether the evidence appears to be capable of belief, whether it might afford any ground for allowing the appeal and whether there is any reasonable explanation for a failure to adduce the evidence at trial. The evidence of B now relied upon by the applicant is not fresh evidence. This evidence was available at the time and could have been adduced then. There is no reasonable explanation for seeking to adduce it now.
14. Furthermore, it is clear from the papers that B was an unreliable witness as she gave no fewer than three conflicting accounts of events when interviewed by the police at the time, including on one account that she had had a lot to drink and could not remember anything. The varying accounts given by her explain why neither the prosecution nor the defence sought to rely on her testimony. Her evidence now suggests she was in control of herself and physically functioning throughout the evening. That evidence flatly

contradicts her earlier account and is clearly incapable of belief. In any event, the evidence, even if it were to be adduced, would not render the conviction even arguably unsafe. There was evidence before the jury, including from B's mother, as to her state of intoxication. Moreover, the judge expressly referred in his summing-up to the applicant's case that he had just had sex with B on the sofa before going to bed. In short, there is nothing in this evidence, even if it were to be considered, that would undermine the safety of the conviction.

15. The second ground of appeal is that mobile phone data in relation to the complainant's phone had been altered by the prosecution so as to present a misleading sequence of calls from C. The particular complaint is that two incoming calls times at 02.11 on the night of the incident were set out in the wrong sequence in the agreed facts. However, whilst there was an error, there is no credible basis for suggesting that this made any difference to the jury's assessment of the credibility of the complainant's account which is that she sent her mother a text message and that there were several calls between them before leaving the applicant's house. The applicant further suggested that the sequence was deliberately set out incorrectly in bad faith. That suggestion is wholly without substance. Given the lack of any prosecutorial advantage in the altered sequence, a far more likely explanation for the error, which formed part of the agreed facts, is human error.

16. The third ground of appeal makes a series of criticisms of the judge's summing-up. The single judge dealt with these as follows:

- i. "Ground 3 Summing Up.
- ii. The criticisms of the summing up do not establish grounds to argue that the conviction is unsafe.
- iii. Whether looked at individually or in combination, there is nothing

to show any misdirection in law or unfairness in the Judge's approach to the evidence. The judge gave the standard direction on how to approach the evidence of a complainant in a rape case, there is nothing unbalanced or unfair in pointing out that victims of sexual assaults react in different ways. The Judge would have been in error not to deal with this. He dealt with it fairly and in a balanced way.

iv. Bad Character.

- v. Evidence of the Applicant's involvement with cannabis could not have assisted the jury in deciding whether the complainant was truthful in her evidence that she was raped by the applicant. There would have been no purpose in giving a bad character direction when the evidence could not have been used to support the prosecution case. Tactically it was a reasonable and sensible decision not to highlight the information. The Judge repeatedly reminded the jury that must decide the case on the complainant's credibility.

vi. Lie.

- vii. The judge gave the proper and standard direction about the admitted lie. He told the jury that the lie did not establish the case against the Applicant and in particular, that if his explanation for the lie might be true then it was of little value. He reminded the jury that the test was whether the complainant was truthful and reliable.

viii. Defence Statement.

- ix. The judge did not direct the jury that they could use the defence statement as part of the case against the Applicant. That cannot have been detrimental to the defence case. He did not tell the jury that they could draw any inference against the defence case from the contents of the document. That was a favourable direction.

x. Scientific Evidence.

- xi. The jury had the agreed facts in writing and had them with them during their consideration of the evidence. The agreed facts made it clear that the scientific evidence showed no trace of semen or DNA when the complainant and her clothing were examined. The Judge had said that he would not deal with every point in his summing up and defence counsel had reminded the jury of this lack of scientific support for the prosecution case. There is nothing

in this point that undermines the safety of the conviction."

17. We agree entirely with the single judge for the reasons she gave.
18. The applicant made a number of further criticisms of the trial process. We can deal with these very briefly. He suggested the complainant's appearance on the video link was micro-managed so as to ensure a better impression was created with the jury. This is idle speculation on the part of the applicant. Any concerns about such matters ought to have been raised with the trial judge at the time.
19. The applicant also complains that the cross-examination of the complainant was disturbed by a knocking sound from the link room. Once again this is a matter which, if it was likely to impede the jury's assessment of the witness, ought to have been raised with the judge at the time.
20. The final complaint about the trial process is that the judge referred to the complainant by name whereas he only referred to the applicant as "the defendant". There is nothing in this point which amounts to a criticism of a practice that is normal in courts up and down the land every day.
21. The fourth and final ground is that the applicant's defence was poorly run by his legal advisers. We note that the applicant has previously brought complaints against his advisers which have not been upheld. The applicant disclosed a volume of material relating to these proceedings. This includes attendance notes of counsel's advice, counsel's response to the allegations of misconduct and the findings of the Chambers Disciplinary Panel largely dismissing complaints against counsel. Having considered this material in detail the court is in a position to assess this ground on its merits, notwithstanding the absence of any formal response from counsel and solicitors to the

allegations. It appears from the material provided that the applicant retained the same legal team over the course of a number of hearings over an extended period of time, including the initial trial, and that he was thoroughly advised throughout as to his options. This undermines his contentions post-conviction that he was somehow inadequately represented. We have considered the various complaints made about the conduct of the legal team and have reached the clear view that none of them, even if true, could arguably render the conviction unsafe.

22. The essential question for the jury was, as the judge stated, whether they could be sure that the complainant's account was true. The complaints about the content of the defence case statement, inclusion of bad character evidence and the alleged shortcomings in counsel's performance have little or no bearing on that essential question. We would add that the conclusions reached by the Disciplinary Panel as to counsel's conduct appear to us to be entirely justified.

23. For these reasons the application for leave is refused. Given the evident lack of merit in the appeal, an extension of time, even if otherwise justified, would be futile. As it is, there is no justification for the extension. As we have said, the evidence is not fresh evidence and the various grounds of appeal could readily have been pursued far sooner than they were.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the

proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk