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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 869



No. 202202372 B2

Royal Courts of Justice

Tuesday, 11 July 2023

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE TURNER
HER HONOUR JUDGE MUNRO KC

REX
V
JOSEPH RAYMOND ANNETTE-NORMAN

REPORTING RESTRICTIONS APPLY
Sexual Offences (Amendment) Act 1992

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Ms O. Daly appeared on behalf of the Applicant.
The Crown were not represented.

J U D G M E N T

HER HONOUR JUDGE MUNRO KC:

- 1 This is a renewed application for leave to appeal against conviction, leave having been refused by the single judge.
- 2 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.
- 3 On 22 June 2022, in the Crown Court at Plymouth, the applicant, who was then aged 26, was convicted of two counts of rape (counts 1 and 2). He was acquitted of count 3, another allegation of rape. On 8 September 2022, the applicant was sentenced to concurrent terms of four years less one day's imprisonment on each count.

The Factual Background

- 4 The then 23-year old applicant and the then 20-year old complainant ("R") first had contact through the Tinder dating website. They then began to talk over Facebook through January 2019. The messages between them had contained highly sexualised content and clearly contemplated that they would at some stage engage in sexual activity. However, they had not met face to face until the date of the alleged offences. In the early hours of 18 March 2019, after both had been drinking, they arranged to meet. The plan was for the applicant to go to R's student accommodation and then to have sex. They met in the common room area, where they engaged in consensual kissing.
- 5 R invited the applicant up to her room where they continued kissing, got undressed and began to have sexual intercourse. During the initial consensual intercourse the applicant bit R's neck. R told the applicant that she did not like it and asked him to stop. The applicant said that he would but he then bit the front of her neck and pushed down on her chest. She asked him to stop again. The applicant said, "Sorry, I will," but again did not. Eventually, the applicant got off R. He then tried to get her to put his penis in her mouth. She said no because she was not comfortable with it. However, the applicant put his hands around her throat, forcing her to open her mouth, and put his penis into her mouth. That oral rape was the subject of count 1 on the indictment, particularised as follows, ("*to reflect grabbing her throat, forcing her to open her mouth and putting his penis in her mouth after initial sexual intercourse*"). The applicant then bent R over the bed and had sexual intercourse with her from behind. She asked him to stop. She did not want him there anymore. The applicant did not stop. The vaginal rape was the subject of count 2 on the indictment, particularised as follows, ("*to reflect turning her around and having vaginal intercourse with her from behind*").
- 6 In her ABE interview, R stated that after the vaginal rape, the applicant again said that he wanted to put his penis in her mouth as he had not yet ejaculated. She said,

"He does that again, grabs me by the hair. He didn't put his hand around my throat this time, but this time he does it and then he stopped and I pushed him away, put my hands against his thigh and ... I pushed myself back, and as I was, like, I'm not comfortable with that, and he says, 'Ok, sorry.' I was, like, 'You should probably leave now.' He then got dressed and left."
- 7 That second alleged oral rape was the subject of count 3. It was particularised as follows,

("to reflect grabbing her by the hair and putting his penis into her mouth on the last occasion"). As we have said, the applicant was acquitted of count 3.

- 8 After the applicant had left, R, who was crying, contacted her friends who came to her room and she told them what had happened. Thereafter, they called her mother and then the police. R was in a very distressed state. A bruise was found on her neck consistent with the bite to which she had referred. She had also suffered bruises to her right knee as a result of her knee banging against the wooden bed when the applicant penetrated her from behind.
- 9 The applicant had gone to his girlfriend's house. He was arrested at 09.51. On arrest, he said,

"I cannot understand why this is happening. I know who you're talking about, she invited me over."

- 10 In interview, the applicant produced a prepared statement which read:

"Following communication on social net-working sites and some discussion by mobile phone I attended the address of [R] in the early hours of 18th March 2019 at her invitation.

In the course of previous communication she expressed a strong interest in meeting for sex and had disclosed details of her particular sexual preferences.

She directed me to her address by voice call and was waiting in the entrance area to her block when I arrived. She let me in and led me to her room, having kissed me.

We kissed more in her room. We removed our clothes, engaged in foreplay and sexual touching and proceeded to full penetrative sex. Everything which happened was entirely consensual. No pressure was applied in either direction.

Whilst having intercourse I did nibble or bite her neck. This was not forceful, and she gave every appearance of enjoying herself. Though we had both been drinking alcohol beforehand there was no miscommunication or ambiguity.

When she indicated that she did not wish to continue I stopped immediately. At no stage did I coerce her or force her in any way.

I asked her if she would prefer me to leave. She said she would prefer me to leave. I got up, got dressed and left."

- 11 Having provided that prepared statement, the applicant then answered "no comment" to the questions.
- 12 The applicant's case at trial reflected his prepared statement. He said that everything which happened between him and R was consensual, and when she indicated that she did not wish to continue he stopped immediately.

The Trial

- 13 The prosecution case was that R did not consent and that the applicant knew she did not consent or did not reasonably believe that she consented. To prove the case, the prosecution relied on (1) evidence from R and (2) complaint evidence to prove consistency. The defence case was that R consented to all the sexual activity and that throughout the defendant believed she was consenting.
- 14 An edited version of R's ABE interview was played at trial. She was cross-examined. During cross-examination, she agreed that she kissed and cuddled the applicant in the foyer and that the plan was for them to have sex. She agreed that they initially had consensual sex but things changed once the applicant bit her neck. She then told the applicant to stop but he did not. She agreed she did not cry until the very end of the incident, and that the sexual activity came to a sudden and awkward end.
- 15 Significantly, during re-examination, R indicated that after the applicant had penetrated her from behind she asked him to stop and that he did so, and that was when he left.
- 16 The applicant gave evidence that he was 23 at the time and whilst he had a girlfriend, they were trialling a more open relationship at the time. He and R agreed to have sex and did so. He did nibble her neck at some point during their encounter but it was not extreme and he did not ever grab her throat. He did have his hand on her head while she performed oral sex on him. He recalled a sudden awkward atmosphere during their encounter. He asked her whether she wanted him to leave, and he did so. He did not see her crying. He left because he felt confused and embarrassed. He later tried to call her to see if she was ok and to find out what had gone wrong. When later interviewed by the police, he answered "no comment" and submitted a prepared statement as advised by his solicitor. He was not used to that type of environment, in other words, being in the police station. He had no doubt that the complainant was consenting throughout.
- 17 The applicant's girlfriend also gave evidence on his behalf. She said that the applicant had told her that he had had sex with the complainant. A number of character references were also read.
- 18 The issues for the jury were, as we have said, consent and reasonable belief in consent. The jury found the applicant guilty on counts 1 and 2 and acquitted on count 3. There was a clear difference between R's account and her ABE interview about an alleged second oral rape, and her account in evidence explains the jury's not guilty verdict on count 3.

Grounds of Appeal

- 19 The original grounds of appeal which were drafted by the applicant as assisted by trial counsel, were: (1) that the verdicts were inconsistent, and (2) that wrong decisions were taken by the judge in response to a jury request to be reminded of part of R's evidence. The single judge dealt with those grounds and refused leave to appeal conviction on 9 December 2022. Those grounds are not pursued before us.
- 20 Following refusal by the single judge, perfected grounds of appeal were set out in a 20-page document dated 21 May 2023 drafted by fresh counsel, Ms Daly, who appears before us today. There were two fresh grounds, namely (1) the judge failed to direct the jury on how to approach the applicant's "no comment" interview, and (2) the judge's directions on the burden and standard of proof required to prove lack of consent and lack of reasonable belief in consent were not sufficiently clear.

- 21 The prosecution, in their respondent's notice, submit: (1) the applicant relied on a prepared statement and was cross-examined. The judge did not consider that an adverse inference direction was necessary based on the evidence given; (2) the judge gave clear written directions which included the definition of rape. The verdicts on counts 1 and 2 were consistent with the evidence at trial, as was the acquittal on count 3.

Discussion

- 22 Ground 1: lack of "no comment" direction. We have quoted the prepared statement in full above. In cross-examination, the applicant was mildly criticised for the lack of detail in that statement. His explanation was that he had never been in that situation before; he was advised by his solicitor to do a prepared statement and after that to answer no questions.

- 23 In discussions between counsel and the judge relating to a section 34 direction relating to the "no comment" interview, the judge said:

"I don't want to go anywhere near it. It is hugely circular and a page and a half of utter garbage really. The current specimen direction doesn't really get to grips with it any more than the old one did, and I'm just going to say nothing really."

- 24 Defence counsel said that her approach depended on what the Crown was going to say about it. Mr Burns, counsel for the prosecution, did not invite a section 34 direction and pointed out that he had only suggested in cross-examination that the applicant could have elaborated further in his defence statement. Accordingly, both trial counsel agreed with the judge's proposal that no direction be given.

- 25 In his summing-up, the judge said:

"He was interviewed by the police, and it was an alien environment for him. He answered no comment on the advice of his solicitor. The solicitor wrote the prepared statement and the solicitor told him this was how things were done in these sorts of cases."

- 26 Ms Daly contends that either a full section 34 direction ought to have been given or that the jury ought to have been specifically directed not to hold the applicant's "no comment" answers against him.

- 27 Ground 2: insufficiently clear legal directions. The judge gave a clear direction that the jury should consider each count separately and return separate verdicts. The judge gave the jury a route to verdict document which read:

"You will arrive at safe verdicts in this case if you simply ask on each count as follows:

'Am I sure that the defendant behaved as alleged in the bracketed words beneath the particulars of offence and at the time he did so [R] was not consenting to that activity and the defendant did not reasonably believe that she was consenting?'

If, on any count, you are so sure you will find the defendant guilty of that count, if you are not sure

you will find him not guilty of that count."

28 The judge then went on orally:

"So just as an example have a look ... at your indictment, look at Count 1 and there are some words at the bottom below, below the particulars of offence, they're in brackets to reflect grabbing her throat, forcing her to open her mouth, putting his penis in her mouth after the initial sexual intercourse.

So you need to ask if the defendant behaved as alleged in those bracketed words and then ask whether you are sure that at [the] time he did so [R] was not consenting to that activity and he did not reasonably believe that she was. That's the way through the indictment on each count separately."

29 Ms Daly submits that where the issue of reasonable belief in consent is so crucial, it is particularly important for a jury to understand that each element of rape has to be proved to the criminal standard. She submits that by "rolling up questions" it is likely to have been difficult for a jury to understand they needed to be sure both of absence of consent and absence of belief in consent.

30 We note the following further passages in the summing-up. Earlier in the written directions, the judge said:

"Next, rape. This offence is proved if you are sure that the defendant intentionally penetrated the vagina or mouth, depending upon the count, of [R] with his penis, that she did not consent to the penetration, and the defendant did not reasonably believe that she consented. A person consents to penetration if they agree by choice to the penetration and have the freedom and capacity to make that choice.

Whether a belief is reasonable is to be determined having regard to all the circumstances including considering any steps which the defendant has taken to ascertain whether the complainant consents, so that's the definition of rape."

31 Secondly, we note that whilst the judge did not include written directions on the burden and standard of proof, he corrected that omission by including a full and clear direction on both matters at the end of his summing-up of the evidence.

Conclusions

32 Ground 1: the applicant gave a prepared statement which clearly set out his defence. He also gave a consistent account at trial which, very largely, reflected his version of events as set out in the prepared statement. He added some more detail in his evidence about which he was briefly challenged. The prosecution did not seek a section 34 direction, nor did the applicant's counsel.

33 We are of the firm view that this case did not require a section 34 direction. In the light of the detail in the prepared statement, it was wholly unnecessary to direct the jury in the terms of the specimen direction. On the other hand, we agree that it would arguably have been preferable for the judge to give the jury a short direction to the effect that the applicant had not relied on any material matter at trial which he might have mentioned in his prepared statement and that, therefore, the jury should not hold his "no comment" answers against him. The judge's failure to do so on all the facts of this case, however, did not in our view render the convictions unsafe.

34 Ground 2: it is obviously unfortunate that the judge omitted from his written directions a direction on the burden and standard of proof. However, he corrected that omission by very

clear directions right at the end of his summing-up when they would have been in the forefront of the jury's mind as they retired. In his written directions and in his route to verdict and in his oral comments during the course of his summing-up, the judge emphasised that the jury had to be sure about each ingredient. Whilst he might have divided the ingredients up into sub-paragraphs, his failure to do so did not render them unclear.

35 We are entirely satisfied that the judge dealt adequately with the ingredients of rape and the burden and standard of proof in regard to each of the matters which the prosecution had to prove. That the jury clearly understood the directions is perhaps evidenced by the verdict on count 3.

36 For those reasons the application is refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.