Neutral Citation No, [2024] EWCA Crim 1148

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT MANCHESTER
HHJ JACKSON T20207553

CASE NO 202301884/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 18 September 2024

Before:
LORD JUSTICE DINGEMANS

MR JUSTICE LINDEN

MR JUSTICE CALVER

REX
V
LOGAN GALBRAITH

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MS C RIMMER appeared on behalf of the Appellant.

MR M KELLETT appeared on behalf of the Crown.

J U D G M E N T
(Draft Approved)

LORD JUSTICE DINGEMANS:

Introduction

1. This is an appeal against conviction which raises an issue about the judge's ruling under section 41 of the Youth Justice and Criminal Evidence Act 1999 ("the YJCEA 1999"). On 9 May 2023, in the Crown Court at Manchester, the appellant (who was then aged 51) was convicted after trial by a majority of 10:1 of assault by penetration (count 2), sexual assault (count 3) and attempted rape (count 4). He had been acquitted of sexual assault which alleged sexual touching of the complainant's breast over clothing at an earlier occasion at work. On 4 July he was sentenced to a total of 7 years 5 months' imprisonment. The surcharge of £170 was ordered. The Registrar has identified that it should have been £181 but that is not an issue before this Court.
2. This is an appeal to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. The complainant has the benefit of lifelong anonymity.

Factual background

3. In the spring and summer of 2019, the complainant worked as a part-time waitress at a bar in Oldham. She was in her early 20s. The appellant was then the manager of that bar. On 22 July 2019, the appellant asked the complainant whether she wanted to meet for a drink. He had previously made it clear that he was attracted to her and she had told him that he was too old for her. Despite that, the complainant got on with the appellant and agreed to meet him. They went to numerous bars and drank a substantial amount of alcohol. At one stage, the complainant was punched by a woman whose partner she was talking to and she later kissed or was kissed by a man she had not spoken to. After that incident, the appellant made clear that he was unhappy with the complainant, calling it "disgusting". The complainant was annoyed by the appellant's comment and left to get

the train home.

4. The complainant did not have a clear recollection of how she got to the railway station and remembered being sick on the platform, and that was captured on CCTV. She recalled speaking to the appellant on the phone who said he would pick her up in a taxi because he was staying in a hotel nearby in the city centre. There was then a gap in her memory because the next thing she remembered was the appellant opening the door to his hotel room. However, she could not remember how she got there or the appellant arriving at the station. CCTV evidence showed that they arrived at the hotel at 1.28 am in the morning. When she entered, she felt sick again and went to the bathroom. The appellant then picked her up off the floor and put her on the bed. The complainant said she was sick in a bin by the bed and lay on her back.
5. The appellant then began to undress her from her bottom down. She told him "no" and tried to push him off but she did not have enough strength due to her consumption of alcohol. The complainant said the appellant began to touch her with his hands and tried to kiss her. He pushed her down and put one hand around her throat and began to choke her. He used his other hand to digitally penetrate her vagina (count 2) and then he performed oral sex on her (count 3). The complainant tried to pull his hand away because she could not breathe.
6. When asked about the choking incident, the complainant said: "It was hard, painful. I couldn't breathe. My ears were ringing and I was telling him, trying to say get away but I couldn't talk. I had my hand trying to peel his fingers off my neck and that's why I think I passed out or blacked out." She did not ask the appellant to do it and did not want it to happen. The complainant then said the next thing she remembered was waking up with the appellant half on top of her touching her. The appellant was trying to put his penis in

her vagina (count 4, attempted rape). She tried to push him off and said "no" but he carried on.

7. The complainant said she managed to get him off, put her clothes back on and said she was leaving. The appellant asked where she would stay and whether she would like to make it a regular thing, and that he would give her £250 if they had sex every Monday. The complainant said "no" and the appellant grabbed her hand and put it on his penis. The complainant then left and the appellant gave her money for a taxi.
8. The complainant tried to call a friend at 5.26 am and went to Manchester Piccadilly railway station. She complained about what had happened and reported the matter to the police just after 6.00 am. She was picked up by her father from the station. The appellant sent a text to the complainant at 05.39 hours saying, "I promise to be discreet" and the appellant was himself later arrested at 07.52 hours in the hotel.
9. The prosecution case was that the appellant was attracted to the complainant and, despite knowing she was not attracted to him, sexually assaulted her while she was intoxicated, despite her telling him "no" and attempting to push him away. The prosecution relied on the evidence from the complainant, the evidence of a recent complaint from a friend of the complainant, and evidence from PC Robins, who took the initial account from the complainant.
10. After interviewing the complainant, the appellant was arrested and he was told in a pre-briefing that the allegations against him were that he had digitally penetrated the complainant, that he had licked her vagina and that he had choked her. There was also evidence as part of the prosecution case from the officer in the case regarding the appellant's interview. In the appellant's interview he said all sexual activity was consensual, and that he had choked the complainant at her request. There was CCTV

footage from that night and Agreed Facts which included phone records showing the times at which the complainant had attempted to call her friend.

11. The defence case was one of consent and in the Defence Case Statement, the appellant stated they had gone to sleep before engaging in sexual activity and that the complainant had not left the room after sexual activity had finished but they had fallen asleep. It was later that morning that she had left the room.

The section 41 application

12. So far as is material, counsel for the appellant applied to question the complainant about her statement in her ABE interview, in response to a question by the interviewing officer that, in the context of a past consensual relationship with a female, that she had been choked. The prosecution had proposed to edit out any reference to sexual history, including the reference to the consensual choking in the past. The defence opposed that and sought leave to put to the complainant, in cross-examination, that she had instructed the appellant to choke her, and that that was a feature of a sexual experience that she had consented to previously. The proposed questions for the section 41 application were:

> "You describe being choked by a girl you were dating on an occasion prior to these allegations; did that happen whilst you were engaging in sexual activity with her?
> Did you want that to happen?
> Did you enjoy being choked by her?
> Did you ask Mr Galbraith to choke you?
> Did you ask him because you had enjoyed choking as part of the sex in the past?"

13. The judge ruled that the issue in the case was one of consent and in addition whether the appellant choked the complainant but only at her request. The complainant made only a brief reference to the past incident when she had been asked about it by the police and made it clear she had not asked for it to happen on that previous occasion. It was not

clear if it had happened more than once, nor how it came to happen in the circumstances in which she consented to it. There was no evidential basis, the judge said, for contending that it was a sexual practice that she liked to engage in and had done so on a number of occasions. The case law had been considered and the need to focus on the key factor as to whether the circumstances of each case, namely the past choking and the incident described in the context of the present case were similar as to permit its admission in evidence.

14. The judge found that the circumstances of the two choking events were completely different. The appellant was 48, the complainant was 21. He was her employer and whilst the complainant described herself as bisexual, he was a male and one whom she had previously made clear that she had no sexual interest in. He accepted in his interview that he offered to pay the complainant £250 for meeting and having sex every Monday night. The circumstances of the events were not the same and the happening of them was no more than coincidence. There was no evidential basis for considering that the two events were so similar as to warrant admission. There was also the key distinction as to who asked for it to happen. The complainant described an aggressive assault, whereas he described himself as reluctant to choke at the complainant's request.

15. Section 41(2) of the YJCEA was considered by the judge, namely whether the refusal to admit the material might result in the unsafe conviction. The issue was one of consent and the complainant's account was that she did not consent to any of it. The decision not to give permission to cross-examination of the complainant on this matter would not render the trial unfair. The court noted the questions sought to be asked, and took the view they would inevitably lead to an inquiry into the complainant's sexual interest history with her former partner. The trial continued. The complainant was

cross-examined. She was also recalled following the evidence of a defence witness.

16. The defence case remained consent. The appellant gave evidence that in July 2019 he was 47 and a manager of the bar that he worked in. He had lived in Australia for around 19 years but moved back to the UK in 2017. The complainant began working in the bar in April 2019. He was attracted to her and had told her, though the complainant had politely said that he was too old for her. They and others went for drinks from time to time. On the night of the incident they had been out and the complainant had kissed a male. He told her it was disgusting; the complainant had got annoyed and walked off. Shortly after, he had called the complainant to make sure she was okay and she told him that she had missed her train. He collected her and took her to the hotel because she was drunk.

17. At the hotel, the complainant went to the bathroom and tried to sleep on the floor. He told her she could sleep in his bed, she said "okay". He did not see her be sick and she did not pass out at any point. They slept for a bit and then woke up and spoke about the earlier incident. He had admitted in the conversation that he was jealous and the complainant cuddled him. He took her clothes off and performed oral sex on her and digitally penetrated her. She made sounds and the complainant had asked him to choke her. He had never done it before and was a bit shocked but did as instructed. He used very light force and the complainant did not push him away when he tried to have intercourse with her. The complainant had straddled him and he then performed oral sex on her again. He fell asleep and when he woke up the complainant was dressed and said she was heading off as her family would be concerned. He did ask if they could do it every week and he did say he could pay her. They agreed on £250 per week and then he gave her some money for a taxi and she left. When he later texted, he said he would be

discreet, and that was a reference to their arrangement. He thought that the complainant had complained about him because she was insulted when he had said, "You can be my Monday girl".

18. The appellant also called two female employees at the bar to give evidence on his behalf. They gave evidence that they had never witnessed anything to be concerned about on nights out and another one gave evidence, that she had been approached by the police but did not want to give a statement as she thought it would be used for the prosecution. She had spoken to the complainant after the incident, and the complainant said she had blacked out and could not remember.

The grounds of appeal and respective cases

19. Ms Rimmer, on behalf of the appellant, submits that the judge ought to have acceded to the application brought under section 41 of YJCEA 1999 and in failing to do so precluded the advance of a legitimate and fundamental aspect of the defence case. These aspects were that first, the appellant had volunteered to the police during his interview that the complainant had asked him to choke her during their interaction. It was an unusual and conspicuous feature of the case. Secondly, the complainant thereafter went on to confirm that, unknown to the appellant, that she had engaged in consensual choking previously. Thirdly, it was such unusual and similar conduct that it made the claim by the appellant more likely and the probative value of the evidence was substantial, as it went to the heart of the issue in the case whether the appellant had choked the complainant without invitation forcefully to the point of her passing out, or whether she did, or may have, instructed the appellant to do it, which without the explanation and her past activities may have seemed unlikely. It was submitted that all that was required was a similarity in any respect in relation to the conduct and reliance was placed on paragraph

135 of *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45. In oral submissions, Ms Rimmer emphasised the words "in any respect" set out in section 41(3)(c)(i) of the YJCEA 1999 and said that the choking was unusual. Ms Rimmer accepted that there was no evidence adduced about whether the practice of choking during sex was usual or unusual but said that there was no need to do so in the particular circumstances of this case.

20. Mr Kellett, on behalf of the respondent prosecution, submitted that the application to question the complainant about choking in the past did not meet the criteria in section 41. The judge was right to conclude that the two choking events were completely different because, on the complainant's account, one occurred while she was in a consensual sexual relationship, and not at her request but where she acquiesced, and the other occasion occurred, according to the appellant, due to initiation by the complainant. The two events were no more than coincidence.

21. We are very grateful to Ms Rimmer and Mr Kellett for their helpful written and oral submissions.

Relevant statutory provisions and law

22. Section 41 of the YJCEA 1999 provides:

> "Restriction on evidence or questions about complainant's sexual history.
> (1)If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a)no evidence may be adduced, and
> (b)no question may be asked in cross-examination by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.
> (2)The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—
>
> (a)that subsection (3) or (5) applies, and

(b)that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3)This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a)that issue is not an issue of consent; or
(b)it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
(c)it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i)to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
(ii)to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event
that the similarity cannot reasonably be explained as a coincidence.
(4)For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5)This subsection applies if the evidence or question—

(a)relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
(b)in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6)For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

> (7)Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—
>
> (a)it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but
> (b)it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.
>
> (8)Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section."

23. In *R v A (No 2)*, the House of Lords considered section 41 of the YJCEA. It was held that the legislature had pursued a legitimate objective to protect complainants in sexual offence cases from indignity and humiliating questioning and to correct myths that a woman who had previous sexual intercourse was more likely to consent and less credible. The House of Lords decided the test of admissibility under section 41, when read in the light of the Human Rights Act 1999, and paying due regard to the importance of seeking to protect the complainants from indignity and humiliating questions, was whether the evidence is so relevant to the issue of consent that to exclude it would endanger the fairness of the trial. There was some discussion about the provisions of section 41(3)(c) and what might be explained as a coincidence in the judgment of Lord Clyde at [135] and in the judgment of Lord Hutton at [159]. Further authorities on section 41(3) are considered in Archbold (2024) at paragraph 8-210 and Blackstone's (2024) at paragraph F7.43. As was made clear in *R v Harris* [2009] EWCA Crim 434; [2010] Crim LR 54, sometimes issues of similarity are easy and sometimes they are not easy and the question in such a case will be whether the judge adopted a view on similarity which was open to him.

Judge's ruling was right and a safe conviction

24. In our judgment, the trial judge was right, in the particular circumstances of this case, to decide that the proposed questions on behalf of the appellant about whether the complainant had been choked in the past during a sexual encounter were not permissible under section 41(3)(c)(i) of YJCEA 1999. This is because the past choking of the complainant was not so similar that the similarity could not reasonably be explained as coincidence.

25. The complainant had replied in her ABE interview, when asked if she had been choked before: "I haven't asked someone to do that but it's happened before with... like a girl I'd been dating." The appellant had said in the police interview, and his case at trial was, that during sex he was fingering the complainant vigorously with two digits and she looked at him and said, "Logan, choke me". The difference was in the previous incidents. The complainant had permitted the choking to happen in a previous relationship but had not asked for it to happen. There was no similarity with the appellant's case that the complainant had asked to be choked after a night out, drinking with a person with whom she had had no previous sexual relationship. The trial remained fair, even though the appellant was not entitled to ask the complainant whether she had been choked before during sexual activity.

26. Further, there was nothing in the judge's ruling on section 41 which rendered the appellant's conviction unsafe. There was nothing to suggest that the complainant had obtained any sexual gratification from being choked. In the course of the ABE interview, the complainant had said she had not asked the appellant to choke her and shook her head when asked whether she had got any sexual gratification from it. As it was, the judge's ruling rightly prevented the complainant, who the jury was sure was the victim of sexual

assaults and an attempted rape, from the humiliation of being asked about her previous sexual appearances when they were not relevant to the issue at the trial, namely whether the events of the relevant morning were consensual or not.

Conclusion

27. For the detailed reasons given above, the appeal is therefore dismissed.