IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LEEDS
HHJ PHILLIPS T20207419

CASE NO 202300636/B1

[2024] EWCA Crim 1396

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 29 October 2024

Before:

LORD JUSTICE WARBY

MR JUSTICE GOOSE

HIS HONOUR JUDGE FLEWITT KC
(Sitting as a Judge of the CACD)

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V
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MS J SMART KC appeared on behalf of the Applicant.

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. On 6 August 2021, after a trial in the Crown Court at Leeds, the applicant was convicted of one count of rape. He was later sentenced by the trial judge (HHJ Phillips) to 8 years' imprisonment.

2. An application for leave to appeal against conviction was settled by fresh counsel, Ms Julia Smart KC, and filed on 27 February 2023, which was 523 days out of time, along with an application for an extension of time for seeking leave to appeal against conviction. Those applications having been refused by the single judge they are now renewed.

Anonymity

3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. That means that, during the lifetime of the complainant, nothing must be included in any publication that will be likely to identify her as being the complainant. We shall therefore anonymise her as "C". To protect her identity, we shall also use initials for some of the other individuals who feature in the factual background. For present purposes that background can be shortly summarised.

The Facts

4. On the evening of 29 December 2018, the applicant went out with two male friends, "M" and "A". The three men met up with a group of three women, comprising "C", her flatmate, "E", and a friend of theirs, "V", who was an ex-girlfriend of the applicant. The six spent time at a pub and at a bar together and then, in the early hours of 30 December

2018, they all went back to the home address of C and E. C and M, who had become friendly during the evening, went upstairs to her bedroom where they had consensual sex.

5. The case against the applicant was that he had gone upstairs and seen this happening. Later, when C was asleep, alone, he had come into her bedroom and, without her consent, had penetrated her vagina first with his fingers (count 1 on the indictment), and then with his penis (count 2). The prosecution case was that at that time M, A and E had all been out in the garden. They came in. E went upstairs and saw that sex was taking place under the covers. She told the applicant to stop and to get out. C then told E that the sex had been without her consent. Later, on 30 December, C gave a video recorded interview to that effect.

6. The prosecution case at trial relied on that interview and on evidence from E of what she had observed on entering the bedroom. The jury also had recordings of C's cross-examination and re-examination, both conducted in the Crown Court at Leeds in December 2020.

7. The applicant's case at trial was that C had consented to sex or, alternatively, that he had reasonably believed she had consented. In interview and in evidence at trial he denied having watched C and M have sex. His account was that he had stumbled into the bedroom when looking for the bathroom. Later, he had spoken to M and asked him if he could have sex with C. M had told him to ask C. The applicant had gone upstairs, identified himself to her and asked if he could get into bed. She had agreed. He had then penetrated her consensually. E had come into the room as the two were having sex and

had reproached C for being disrespectful because the applicant was an ex-boyfriend of V. The applicant had withdrawn when C made clear that she was no longer consenting. No other witness was called on behalf of the applicant.

8. The judge directed the jury as to the law and summed-up the evidence in a fashion that has not attracted any criticism. After a majority direction the jury (by that time reduced to 11) returned a verdict of not guilty on count 1 but convicted the applicant on count 2 by a majority of 10 to 1.

Grounds of appeal

9. The grounds of appeal are that the conviction is unsafe because (i) it is inconsistent with the acquittal on count 2 and/or (ii) the applicant's defence team culpably failed to call an important witness, namely M, who was available and willing to give evidence in support of the defence.

10. In her oral submissions today, Ms Smart KC has deployed ground 2 as an adjunct to count 1, a point that she concedes would not of itself justify the grant of leave to appeal.

Extension of time

11. We have considered the explanation given for the long delay in advancing these grounds. It is a detailed explanation. However, we do not consider it to be entirely satisfactory. The applicant's trial counsel (Mr Richard English) advised him promptly that he had an arguable appeal on the basis that the verdicts were inconsistent, yet no application was made at that time. That may perhaps be understandable on the basis that there was some

kind of falling out between counsel and the applicant's family and that there were funding difficulties. The process of securing a second opinion does explain some of the delay thereafter. But, in our judgment, a total delay of some 18 months in advancing the first ground of appeal is impossible to justify.

12. Ground 2 is different, as it involves criticism of the trial representatives. Quite properly some care was taken over this. For some of the period the solicitor concerned was absent from work and there was delay because of leading counsel's other commitments which is extended over many weeks. Even so, this is a challenge to conviction. Much of the material was available from a relatively early stage. It was not until a full year after leading counsel's instruction that the *McCook* process was initiated. We therefore agree with the single judge that as he put it "a greater sense of urgency really is required". That said, in assessing whether it would be in the interests of justice to extend time, we have considered the merits of both of the points now raised.

Merits

13. Each of these grounds faces a high hurdle. Each involves, in substance, an allegation that misconduct by key participants in the trial led to injustice. Taking the points in logical and chronological order:

    (1) An appeal based on complaints about the conduct of an appellant's trial representatives will only be allowed if the court is satisfied first, that no reasonably competent counsel could, in the light of the information available at the time, have taken the course that was taken, and secondly, that such incompetence led to identifiable errors or irregularities in the trial which themselves rendered the process

unfair or unsafe (see *R v Day* [2003] EWCA Crim 1060 at [15]).

(2) An appeal on the grounds that a guilty verdict is inconsistent with an acquittal on another count will succeed only if the court is satisfied that no reasonable jury, who applied their minds properly to the facts of the case, could have arrived at the conclusion being considered by the court. The appellant must show not only that the two verdicts are logically inconsistent but also that they are so inconsistent as to demand interference by the Court (see *R v Fanning* [2016] EWCA Crim 550; [2016] 2 Cr App R 1).

14. We do not consider that either of these tests is arguably satisfied here.

Not calling M

15. We have considered the MG5 summary of what M told the police and his written statement. M gave an account of his own conduct, his conversations with the applicant, and what he saw and heard when he followed E up the stairs to the bedroom. We have reviewed what the applicant's trial representatives have said about the decision not to call him and the contemporary records of that decision. It is clear that the lawyers took a proof of evidence from M, ensured that he was available to be called and gave the applicant advice about the wisdom of doing so, in the light of what M had said to the police as recorded by them. The advice can be readily understood. Some of what M had said would have supported the applicant's defence, if he had given evidence to that effect. Other parts of what he had said to the police would have been unhelpful. The lawyers bore in mind the inherent uncertainty about what M might say if called.

16. It is plain, and it is undisputed, that the applicant gave clear instructions that M should

not be called. Ms Smart has sought to reanalyse the pros and cons of the advice given and in her written grounds sought to persuade us in effect that the weak points of M's statement were peripheral and that the advice provided was unduly risk adverse to the point of incompetence. We cannot accept that analysis. In our judgment, a reasonable risk assessment was conducted at the time of trial. There is no question of the applicant having been browbeaten or misled. He took a properly informed decision and gave his legal team clear instructions which they followed. He may now regret that decision but there is no reasonable basis for allowing him to revisit it.

The Verdicts

17. We turn to the contention on which Ms Smart focussed her oral submissions, namely that the verdicts are inconsistent. The prosecution alleged two separate offences one taking place after the other. On each count the prosecution had to make the jury sure that the applicant engaged in the conduct alleged, that C did not consent to him doing so, and that he did not reasonably believe that she consented. The judge's legal direction and Route to Verdict, each given orally and in writing, included the standard direction to consider each count separately and that the verdicts did not have to be the same. The direction spelled out separately the ingredients of each offence alleged. As this Court has recently reiterated, if the defence disagrees with such an approach, it is normally incumbent upon them to ask for different directions (see *R v Mundle* [2024] EWCA Crim 1289 at [33]). It is evident that trial counsel did not do so here. We do not consider that he had any basis for doing so. The evidence on each count was different and the acquittal on count 1 and the conviction on count 2 are, in our judgment, plainly capable of a rational explanation. On C's account she was asleep and drunk at the time the alleged digital penetration began

and the applicant was behind her. At trial, the applicant accepted that there had been digital penetration but in interview he had denied that this took place. The jury may have been unsure on the point.

18. Alternatively, the jury may have thought it possible that the applicant reasonably believed that, as he was later to claim, C was awake and consenting to digital penetration and yet been sure that he did not reasonably believe that she consented to the subsequent act of penetration by his penis. He accepted throughout that he did so penetrate her. Her account, corroborated by E, was not only that she had not consented but also that he had continued after she had cried out to him to stop.
19. These are not the only possible reconciliations.
20. The main answer offered by Ms Smart relies on part of one sentence in the judge's written directions on the count of rape. She submits that the language used in that section of the document suggested to the jury that they would convict the applicant of rape if, and only if (to quote the document) they were "sure that C woke up and discovered that he was penetrating her vagina with his finger and was then forcing his penis into her vagina." In other words, Ms Smart submits that the judge directed the jury to convict of rape only if they were sure there had already been digital penetration.
21. We do not accept this analysis of the passage relied on. In any event, it is obvious, and the detailed written directions as a whole made it perfectly plain, that the two alleged offences of penetration were separate and distinct and required separate consideration. We are satisfied that is how the jury approached those two counts. We are therefore not persuaded that this case is analogous to the case of *R v Sham* [2016] EWCA Crim 1649, on which Ms Smart relied, in which, exceptionally, the Court felt driven to find the guilty verdict inconsistent with acquittals and therefore unsafe.

Disposal

22. For the reasons we have given, this renewed application is refused.

(Submissions re: sentence)

23. LORD JUSTICE WARBY: Ms Smart, this maybe my fault but the summary that we have identifies the only issue before us as the renewed application in respect of conviction and so does the list.
24. MS SMART: I do not know why that is I am afraid, because the two decisions from the single judge came on the same day in two separate documents. It may be that administratively only one of those documents was renewed. I was not aware that that was the position. My understanding was that both forms, as it were, had been submitted.
25. LORD JUSTICE WARBY: Well, as you know, the rule is that you get the criminal appeal office summary for review and comment. Unless it has been updated since the one I have, it says, it identifies the present proceedings as the renewal of the application in respect of conviction. That is on page 2.
26. MR JUSTICE GOOSE: Form NG.
27. LORD JUSTICE WARBY: Then it says underneath that: "The single judge has also refused an extension of time for leave to appeal sentence but that application has not been renewed and has therefore lapsed." That's what we are told and that is the basis on which we have acted -- or not acted, I should say.
28. MS SMART: Indeed, that may well be right. I am afraid I have not picked up on that point from the summary. I think the difficulty is that the document is together as an appeal against conviction and sentence and there were two separate single judges.

29. LORD JUSTICE WARBY: Well, I think it would be a mistake for us to embark on an application for renewal, which is out of time without having considered the matter, as you gather we have not, because we did not think it was before us. If the summary is correct and there has not been a renewal, then it is obviously open to you to seek to renew it out of time and to address that matter on a separate occasion. But I think, in all the circumstances, we will deal today only with the matter that we have dealt with. So it is open to you to come forward to the court and say there was an error and oversight of the kind that you have indicated there may have been. But certainly the Court has proceeded on the basis there was no renewal in relation to sentence.

30. MS SMART: So be it. Thank you very much, my Lords.

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