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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BRADFORD

HIS HONOUR JUDGE ANDREW HATTON T20207212

[2024] EWCA Crim 1496

CASE NOS 202302375/B4 & 202302773/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 10 October 2024

Before:

LADY JUSTICE WHIPPLE DBE
MRS JUSTICE McGOWAN DBE
HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

REX
V
HUSSAN SYED BUSHARAT
BABER HUSSAIN

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MR M MAGARIAN KC appeared on behalf of the Applicants

J U D G M E N T

LADY JUSTICE WHIPPLE:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that 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 first applicant is Hassan Syed Basharat. He was convicted at Bradford Crown Court of three counts of rape following a trial before His Honour Judge Andrew Hatton. On 18 February 2022 he was sentenced to a term of 12 years' imprisonment.
3. The second applicant is Baber Hussain. He was convicted at Bradford Crown Court of six counts of rape following two trials before the same judge. On 18 February 2022 he was sentenced to a term of 13 years' imprisonment.
4. There were five co-accused, one of whom was Imran Sabir whose conviction was overturned by the Court of Appeal on 16 June 2023, see R v Sabir [2023] EWCA Crim 804. His successful appeal has been the prompt for the present applicants to apply out of time for leave to appeal. Their applications were refused by the single judge and they are now renewed. We note that Imran Sabir has since been re-tried and was convicted of the offences with which he was charged.
5. The applicants are both represented by Mr Magarian KC who did not appear below and is freshly instructed. The former advocates are aware of these applications.

The facts

6. The case concerned allegations of historical sexual abuse of the complainant KC. The

facts are set out in detail in the Criminal Appeal Office summary and what follows is merely an outline.

7. Counts 9 to 11 concerned Basharat. The complainant stated that she knew Sabir and Basharat as they worked at a shop in Keighley. She said that the offending took place between 2009 and 2010 when she was aged 15. She said that the property above the shop was used by these two men to ply her with alcohol and thereafter they vaginally raped her. She said she was taken to the flat on around 10 occasions. Sabir, who was the older of the two males, would be waiting in the flat for them. Most of the time Sabir and Basharat would have vaginal sexual intercourse with her. This was count 9, a single incident, and count 10, a multiple incident count relating to allegations of vaginal penetration by Basharat.

8. The complainant attended an identification procedure and identified both Sabir and Basharat. She stated that Basharat was known to her as "Bash". She described him as the male who would pick her up and take her to the flat so that he and Sabir could have sex with her. She also said that he had access to a derelict house in Drury Lane where he used to take her in order to have vaginal sexual intercourse with her, that being the subject of count 11.

9. At trial, Sabir called evidence from a witness called Sheila Carruthers. Ms Carruthers stated that she lived in the flat above the shop from January 2009 to April 2010. She said that she rented the flat from Sabir and she had not at any stage moved out for any lengthy period of time. Further, that there was never any indication that Sabir or anyone else had been in the flat without her permission during that time. She said she did not allow anyone in the flat to socialise or hold parties. She said she recognised the complainant as a customer of the shop downstairs where she sometimes worked.

10. Counts 17 to 23 concerned Hussain. The complainant stated that she was introduced to him when she was 14 or 15 years old. She only knew him by the nickname "Kash" as he refused to tell her his full name. Although she had told him that she was 16 years old, she stated that when he did subsequently find out that she was only 15 he still continued to see her. She said that she was seeing Hussain for around six months. Initially Hussain would take her for a drive and they would just spend time in each other's company. However he subsequently wanted to have sexual intercourse with her. She said that Hussain would come to her home in his car whilst under the influence of alcohol and sometimes drugs and he would take her to places in order to have sexual intercourse with her. She said that she performed oral sex on him. Count 17 was a single incident count and count 18 was a multiple incident count relating to allegations of oral rape by Hussain.
11. On Valentine's day she said that he took her to a hotel in Bingley. She stated that they argued because Hussain saw some love bites on her neck and he mistakenly thought they had been given to her by someone else. They later had sexual intercourse but the complainant said it was painful. She asked Hussain to stop but he refused to do so: that was count 19.
12. When they returned to her home address she said that he continued to have vaginal sexual intercourse with her: count 20, a single incident count.
13. She stated that he also had vaginal sexual intercourse with her in various other locations which he took her to: these allegations were reflected in count 21, a multiple incident count.
14. She said that he did whatever he wanted to do and at times he would hurt her during sex, for example by biting her. On a further occasion she stated that he took her to an area near a pub and anally raped her: that was count 22. She said that whenever she was

menstruating he would not want to have vaginal sex with her and would make her have anal intercourse instead: that was count 23, a multiple incident count.

15. She described Hussain as being controlling at times and at one point even taking her mobile telephone away from her. She stated on one occasion that her mother had returned home to discover Hussain in her bedroom, whilst she was in her underwear and Hussain was fully clothed. Her mother had thrown him out of the house and told Hussain that her daughter was only 15 years old.
16. The complainant discovered that she was pregnant by Hussain and she subsequently had a termination in May 2010.
17. The prosecution case was that the applicants had groomed and sexually abused the complainant as alleged. The defence case for Basharat was denial on the basis that he had been mistakenly identified by the complainant. The defence case for Hussain was that sexual activity with the complainant had been consensual, that he had been in a relationship with the complainant and that she told him that she was 17 years old. Thus the issues for the jury were, first of all, the credibility of the complainant; secondly, whether they were sure that the complainant had correctly identified Basharat; thirdly, whether they were sure that Basharat had raped the complainant as alleged; and fourthly, whether they were sure that Hussain had engaged in sexual activity with the complainant without her consent.

Ruling on submissions of no case

18. Trial counsel for Hussain submitted that there was no case to answer in relation to counts 17 and 18 which were counts of oral rape relying on R v Galbraith (1981) 1 WLR 1039.

19. The submission was advanced because the only evidence on those counts was adduced during re-examination of the complainant. The facts giving rise to those counts had not been mentioned in any of her ABE interviews. There was no direct evidence that she had not consented, or that there was no reasonable belief in her consent. It was submitted that the only basis on which these counts could be left to the jury would therefore be on the basis of vitiated consent within the context of grooming. But, so it was said, the complainant had given clear evidence that she had consented to vaginal sex after she had "sucked him off" and the necessary inference was that she genuinely consented to oral sex as a prelude to vaginal sex.

20. The judge dismissed that application. He noted the cases of R v Ali and another [2015] EWCA Crim 1279 and R v Usman and others [2021] EWCA Crim 502. He held that although the evidence in relation to the offences of oral rape had only arisen during re-examination, there had been nothing improper in the method of the introduction of this evidence and that it fell to be considered by the jury alongside all of the other evidence in the case. Further, there was evidence which was capable of demonstrating that Hussain had groomed the complainant, had supplied her with alcohol and had exhibited controlling behaviour towards her. Thus there was evidence on counts 17 and 18 upon which a jury properly directed could conclude that the offences had occurred.

Grounds of appeal

21. In his grounds of appeal for Basharat, Mr Magarian advances three grounds against conviction, all of which take their starting point from Sabir.

    a. First, he says that the judge did not adequately direct the jury in relation to the issue of identification. This breaks down into two limbs. First, that the judge did

not sufficiently explain the significance of the evidence from the defence witness Sheila Carruthers when giving his direction; and secondly, that the judge erred in failing to provide written directions in relation to the issue of identification to the jury and that there was a delay in coordinating the oral direction he did give with his summary of the evidence, so that in that respect too there was a failure to convey the significance of this evidence to the jury.

b. His second ground is that the judge's directions in response to the Crown's suggestion that Sheila Carruthers had committed housing benefit fraud were inadequate.

c. Third, he submits that if the directions in Sabir's case had been full and fair, that would have benefited Basharat given that the two defendants' cases were inextricably linked.

22. In his grounds of appeal for Hussain, Mr Magarian advances three grounds of appeal. The first and second are closely linked.

a. By the first he argues that the judge should have stopped the case against Hussain at the close of the prosecution case.

b. By the second he argues alternatively that the judge ought to have exceeded to the submission of no case to answer on counts 17 and 18.

c. By the third he submits that the judge failed to adequately direct the jury on the issue of consent. This third ground is built on analogy with Sabir's case in that it is said that the judge failed to draw the threads together on the question of consent by drawing attention to, for example, the relatively small age gap between the complainant and Hussain, her willingness to be in a relationship with him and the fact that she had lied about her age.

23. Mr Magarian has expanded these various grounds with commendable skill and we are grateful to him.

24. These applications are resisted in the Respondent's Notices which have been lodged on behalf of the Crown.

Basharat's applications

25. The first ground, first limb, relates to the evidence of Sheila Carruthers. She said she had been living in the flat throughout the material time. In Sabir the Court of Appeal was critical of the judge's treatment of her evidence: see paragraphs 49 to 51 in particular of that judgment. The first ground, second limb, relates to the judge's legal directions on identification. In Sabir the Court of Appeal was critical of the judge's failure to give tailored directions on identification in writing: see paragraphs 38 to 47 of that judgment.

26. The issue for us is whether these defects identified in Sabir translate to Basharat's case and thus give rise to an arguable ground of appeal against conviction. In our judgment they do not.

27. In Sabir, the court rejected Mr Magarian's submission that if Miss Caruthers' evidence was accepted then the complainant's evidence must be wrong. That submission is echoed in Mr Magarian's submissions before us today and we likewise find no merit in it.

28. But the court in Sabir did accept there was an important clash of evidence between Miss Caruthers and the complainant, which clash was not specifically drawn to the attention of the jury: paragraph 50. The court further concluded that the failure to point the jury to the potential impact of this clash was a material flaw in the summing-up in Sabir's case: paragraph 51. That, in combination with a number of other failures, led to the conviction being quashed in Sabir's case.

29. We accept Sabir as our starting point. We have therefore considered the potential impact of the flaw identified by the court in relation to Ms Caruthers' evidence as it applies in Basharat's case. Ms Caruthers' evidence was summarised by the judge and would have been in the jury's mind: see page 176D to 180C of the summing-up transcript. The jury would have recognised that her evidence was not necessarily incompatible with the complainant's allegations, some or all; this was a point made in Sabir at paragraph 50. The issue for us therefore relates to the potential impact of the judge's failure to direct the jury on the clash of evidence in the context of Basharat's case: Sabir at paragraph 51.

30. The Crown's identification case against Basharat was different from and notably stronger than the case against Sabir.

31. Paragraph 4 of the Respondent's Notice sets out the features of this case which distinguish it from Sabir. There are a number of points in that list. There are two that are particularly striking. The first is that Sabir had noticeable eczema on his skin and a lazy eye - two physical features not mentioned by the complainant at any point. This was a weakness in the Crown's case against Sabir. One of the key criticisms in Sabir was the judge's failure to highlight that weakness in his summing-up to the jury. There is no similar weakness in the Crown's case against Basharat. Secondly, in Basharat's case the complainant picked him out at an identity parade and knew him as "Bash", his acknowledged nickname. Mr Magarian has, in submissions today, sought to diminish the significance of that evidence, on the basis that the complainant's knowledge of his name could have had an alternative explanation – in that there was evidence from both complainant and Basharat that Basharat was in the area after 2007 both during the indictment period and after the indictment period. But all that evidence was before the jury and does not undermine the point that the complainant knew Basharat by name,

which remained a notable point of strength in the Crown's case against Basharat.

32. The potential significance of Ms Caruthers' evidence was very substantially lower for Basharat than it was for Sabir because the identification case against Basharat was so much stronger against Basharat than Sabir. The clash of evidence was before the jury, although we acknowledge not highlighted specifically, and was there for the jury to consider alongside all the other evidence in the case against Basharat.

33. This ground was addressed comprehensively by the single judge in terms with which we agree: see paragraphs 8 to 13 of that refusal. We note Mr Magarian's point in relation to paragraph 12(v) of the judge's reasons and we have already addressed that.

34. After careful consideration we are satisfied that the judge's failure to spell out the potential significance of the evidence of Miss Caruthers is not sufficient to give rise to an arguable ground of appeal by Basharat, by contrast with Sabir.

35. As to the second limb of ground one, we are satisfied that the judge's delivery of the identification direction orally rather than in writing and the delay between giving it orally and the summing-up of Basharat's evidence do not give rise to an arguable ground of appeal. The single judge noted that this point was discussed in Sabir but it was not the reason that the Court of Appeal quashed the conviction. In this case, where the identification evidence in relation to Basharat was so much stronger, the argument is a makeweight.

36. The second ground in Basharat's case is hopeless for the reasons given by the single judge. The judge gave the jury a very clear direction to ignore the suggestion that Ms Caruthers might have been involved in housing benefit fraud: see page 15B to G of the transcript of the summing-up. The point was touched on again when the judge summarised Basharat's evidence at page 181F. It was not necessary for the judge to give

any further direction beyond that. The jury were fully alert to the dangers of reliance on this evidence.

37. The third ground suggests that the inextricable linkage between Basharat's case and Sabir's case means that defects identified in Sabir's case necessarily knock on to Basharat's case and undermine his conviction. We have already addressed and rejected that submission. It is not arguable. It was recognised in Sabir that the significance of identified shortcomings would vary depending on the particular case: see paragraph 44 of that judgment. The shortcomings identified in Sabir's case do not arguably put Basharat's conviction in doubt for reasons we have already given.
38. There is in the circumstances no need to consider the application for an extension of time which we refuse, as we refuse leave.

Hussain's applications

39. The first and second grounds are connected. The issue in Hussain's case was consent. It was for the jury to determine whether the complainant consented or if she did not whether Hussain had a reasonable belief that she had consented.
40. We agree with the single judge's analysis and have nothing of substance to add. Where a vulnerable or immature individual is alleged to have been groomed by the defendant, the question of whether real or proper consent was given will usually be for the jury: see R v Ali and R v Usman. The case against Hussain was properly left to the jury.
41. The submission of no case in fact only related to counts 17 and 18. The submission was advanced because the complainant's evidence of anal rape was only elicited in re-examination at trial. But the judge was right to conclude that that evidence, although it came late, was properly admitted. There is no arguable basis for suggesting that these

counts should not have been left to the jury.

42. The third ground relates to the way the judge directed the jury on consent. His direction was thorough: see part 1 of the legal directions at page 24G to 27D given orally and in writing.

43. Like the single judge, we find no merit in the suggestion that the judge was required to do more than this. There is no proper comparison to be drawn with cases where *identification* is in issue. The jury rejected Hussain's case and were sure that any consent was not genuinely given and was not reasonably believed to be genuine.

44. There is no need to address the application for an extension of time. We dismiss both applications advanced by Hussain.

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

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