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IN THE COURT OF APPEAL
CRIMINAL DIVISION

On appeal from Snaresbrook Crown Court
(His Honour Judge Falk)
[2024] EWCA Crim 958

Case No: 2023/01352/B1
2023/02842/B1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 9th July 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MRS JUSTICE THORNTON DBE

R E X

- v -

ALI NAQVI

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Miss D Fitzpatrick appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Tuesday 9th July 2024

LORD JUSTICE HOLROYDE:

1. This case concerns a sexual offence against a young woman to whom we shall refer as "C". C is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, nothing may be included in any report of these proceedings if it is likely to lead members of the public to identify C as the victim of the offending.

2. Following a trial in the Crown Court at Snaresbrook before His Honour Judge Falk and a jury, the applicant, Ali Naqvi, was convicted of two offences: count 1, an offence contrary to section 61(1) of the Sexual Offences Act 2003 of administering a substance to C with the intention of stupefying or overpowering her so as to enable the applicant to engage in sexual activity; and count 2, sexual assault of C, contrary to section 3 of the 2003 Act. The applicant was sentenced to concurrent terms of imprisonment of seven years on count 1 and 21 months on count 2.

3. His applications for leave to appeal against conviction and sentence were refused by the single judge. They are now renewed to the full court.

4. We express at the outset our thanks to counsel, Mr O'Donoghue and solicitors, Imran Khan and Partners, who have been good enough to act in these proceedings *pro bono*.

5. The applicant (now aged in his late 50s) professed an interest in photography. Through a trade website he came into contact with C, a 22 year old woman in France who worked as a model. The applicant said that he would pay her travel and accommodation expenses in coming to London for the purposes of a photoshoot. The applicant bought a one-way ticket

for C and met her on her arrival in London. She had understood that he would arrange hotel accommodation for her and that his female assistant would be present at a photoshoot which she expected would be held in a studio on the following day.

6. Instead, the applicant took her to an Airbnb flat, where he gave her champagne, offered her cannabis, caused her to shower, and took some photographs of her.

7. C became drowsy. She tried to call her then boyfriend, "B", who was in France. She asked the applicant to leave. He appeared to do so. He took the champagne bottles with him, after he had first washed clean her champagne glass. However, he had taken the flat keys with him and returned. He stripped off her clothing and tried to touch her vagina. She resisted as best she could.

8. By good fortune a doctor lived in an adjacent flat. He heard troubling noises and went to investigate. The applicant was reluctant to let him in, but the doctor could see C, who was naked and acting bizarrely. Concerned for her safety, the doctor tried to restrain her.

9. The police and an ambulance attended. C reported that she had been sexually assaulted.

10. The prosecution case was that the applicant had lured C to London by a pretence of wanting to photograph her and had spiked C's drink with MDMA, with a view to being able to engage in sexual activity with her. A high concentration of MDMA was found in a sample of urine provided by C. One of the champagne bottles recovered from the applicant's car also revealed the presence of MDMA.

11. The applicant's case was that he had done nothing wrong. He gave evidence that he had no intention of any sexual activity and had neither drugged C, nor removed her clothing. He

said that C had taken MDMA of her own volition, had become emotional after phone conversations with B, and had begun to damage the flat and injure herself. The applicant said that he had gone to his car and returned to find C naked. He had touched her only in attempting to calm her down and prevent her harming herself. He alleged that C and B had collaborated in making false allegations against him.

12. It is unnecessary to go into the details of other evidence on which the prosecution relied.

13. C had told the police that she had on a previous occasion been raped in France. The defence wished to cross-examine her about that allegation. The judge ruled that such cross-examination would contravene section 41 of the Youth Justice and Criminal Evidence Act 1999. There was, he said, no evidence that the allegation made to the French police was false, and the purpose of the cross-examination seemed to be to impugn C's credit. He did, however, permit cross-examination, which did not refer to any sexual contact, with a view to suggesting to C that the administration to her of a noxious substance, which she ascribed to the applicant, had in fact happened on a different occasion with another man.

14. The judge's written directions to the jury about the legal ingredients of the two charges included the following in relation to count 2:

> "The Crown's case is that he stripped her naked and was trying to touch her vagina. It is immaterial that he may not have succeeded, because if he was applying force to her by holding her down and stripping her naked in the circumstances where his purpose was to touch her vagina, then applying the definition of sexual activity above, you may have little difficulty in concluding that the assault was a sexual one."

15. The judge provided a Route to Verdict which in relation to count 2 asked a single question:

> "Have the Crown made you sure that the [applicant] was sexually assaulting [C] by removing her clothing and trying to touch her vagina?"

16. During their retirement the jury asked a perceptive question about count 2:

> "Can we clarify. The indictment does not state details about 'by removing her clothing and trying to touch her vagina', as described in the legal directions. Please clarify."

After a lengthy discussion with counsel, the judge said this to the jury:

> "So, my answer to your question is: You need to be sure there was a deliberate touching in circumstances that were sexual, and if you find that he was either – if you are sure that he was deliberately touching her and removing her clothing, and holding her and removing her clothing, or holding her and trying to touch her vagina or both, then the offence would be made out, but you must be sure of those elements. The [applicant's] case, so that you know … is that none of this ever happened, what he did was – well, she took her own clothes off, and the most he did was trying to protect her from injuring herself. If either of those might be right, then of course he is not guilty."

The jury thereafter convicted the applicant on both counts.

17. The applicant was of previous good character. At the sentencing hearing the judge had the assistance of a pre-sentence report and a psychological report relating to the applicant. He also had a Victim Personal Statement from C.

18. In his sentencing remarks the judge described the offending as "meticulously planned by a complete charlatan" who had no photographic skill and was motivated by his intention to

drug C and engage in sexual activity with her. The offending had had a profound effect on C, both physically and psychologically. He placed count 1 on the cusp of categories 1 and 2 in the relevant sentencing guideline, and count 2 in category 2A of the relevant guideline. The applicant's offending was aggravated by his persuading a young woman to leave her own country and come to a place where she was isolated. He had tried to prevent her from obtaining assistance and had tried to conceal evidence.

19. Mitigating factors were his previous positive good character, the absence of previous convictions, the passage of time since the offences, and the applicant's health problems. The judge took into account totality. He concluded:

> "For count 1, the starting point where I put this on the guidelines is six and a half years. It is aggravated to eight years to take account of the aggravating features and the facts of count 2 but it is mitigated down to seven years for your lack of previous convictions, your sharp decline in health, the delay and the personal mitigations that I have referred. Count 2 will be 21 months but that will be concurrent."

The judge accordingly imposed concurrent terms of seven years and 21 month' imprisonment.

20. The application for leave to appeal against conviction contends that the convictions are unsafe for a number of reasons. We have considered the written and oral submissions for the applicant and the written response of the respondent. We shall address each of the various points in turn.

21. First, it is said that the prosecution failed in its duty of disclosure and failed to comply with orders of the court in that regard. In particular, the prosecution had not made a timely download of messages stored on C's phone, thereby making it impossible for the applicant properly to advance his defence that C had colluded with B to make false allegations against

the applicant. The prosecution had also failed to collect CCTV recordings from the common parts of the block of flats which, it is said, would have enabled the applicant to prove the duration of his absence when taking items to his car and so enabled him to challenge the credibility of C's account. The prosecution had also failed to make enquiries of the French police in relation to suggested criminal conduct by C and B with regard to an animal rights campaign, a matter in relation to which C and B had been arrested, but had not been prosecuted.

22. We see no merit in these submissions. It is not clear to what extent, if at all, the prosecution were in breach of their duty of disclosure. But even if they were, the applicant has failed to put forward any arguable case that he was seriously prejudiced in his defence by the failure. C's phone was eventually downloaded by a defence expert. In any event, the defence had disclosure of the messages stored in B's phone. Both those witnesses could, therefore, be cross-examined about their suggested collusion. It is a matter of speculation what the CCTV footage from the common parts would have shown, and whether the applicant would have been assisted thereby. The applicant's representatives had the material to found cross-examination about the animal rights matter, and any wider allegations of criminal activity by C and B seem to have been speculative.

23. When complaint is made to this court that failures to recover or preserve evidence have handicapped the conduct of the defence case, it is not enough simply to point to the deficiency or failing and to suggest that the prosecution deserve criticism. In *R v RD* [2013] EWCA Crim 1592, this court said:

> "15. … In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly

> supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

24. The same principle has been repeated in other cases, for example: *R v PR* [2019] EWCA Crim 1225 at [65] ad [69], and *R v ANP* [2022] EWCA Crim 1111 at [17]. The principle also underlies this court's approach to complaints that important evidence, though gathered and preserved, was not disclosed to the defence.

25. The submissions in the present case amount, in our view, to speculation about what might have been shown by such limited material as is missing or was not disclosed. There is nothing of substance to cast doubt on the safety of the convictions.

26. Secondly, a complaint was made in writing that the judge insisted on bringing the case on for trial, despite the fact that defence counsel, who had only recently taken over the brief, said that he needed more time to prepare. That was a case management decision by the judge in a case in which the trial was in any event taking place four and a half years after the relevant events. It cannot possibly be said that the decision was not one which a reasonable judge could have taken. On the contrary, it was clearly correct.

27. Thirdly, it is said in the written grounds that the judge erred in refusing to permit cross-examination of C about the sexual aspect of her complaint to the French police. We disagree. There is, in our view, again a good deal of speculation involved in the applicant's submissions. There was no foundation for cross-examination to the effect that C had made a

false complaint to the French police. The cross-examination would, therefore, simply be intended to discredit C's testimony in this trial by reference to her sexual behaviour on a previous occasion and was accordingly irrelevant. No unfairness resulted from the judge's decision because he permitted cross-examination about C's report that on a previous occasion in France a drug had been administered to her, and about C's voluntary drug use on other occasions.

28. Fourthly, it is submitted that the judge erred in his response to the jury's question, wrongly altered his previous direction, and strayed into questions of fact which were reserved to the jury. We reject those criticisms. The jury's question exposed a deficiency or lack of clarity in the earlier direction. As a matter of law, the removal of C's clothing and/or the touching of her naked body were capable of constituting a sexual assault, whether or not the applicant also touched or tried to touch her vagina. The judge's revised direction was therefore correct in law. He rightly emphasised that it was for the jury to decide the facts and then to apply his direction of law to those facts.

29. Lastly, an attempt is made to invoke the phrase "a lurking doubt" used by this court in *R v Cooper* (1969) 53 Cr App R 82. That decision preceded the amendment of the Criminal Appeal Act 1968 which, with effect from 1 January 1996, provides that this court shall allow an appeal against conviction if they think that the conviction is unsafe and shall dismiss the appeal in any other case.

30. The law is now as stated in *R v Pope* [2012] EWCA Crim 2241; [2013] 1 Cr App R 14, in which this court, though not entirely rejecting the concept of a "lurking doubt", effectively relegated it to a ground of appeal which will only succeed very rarely and in wholly exceptional circumstances. At [14] Lord Judge CJ said:

> "… As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury. If therefore there is a case to answer and, after proper directions, the jury has convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe. Where it arises for consideration at all, the application of the 'lurking doubt' concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury."

31. The case with which we are concerned comes nowhere near surmounting that very high hurdle. The submissions relate to valid jury points which were no doubt considered by the jury. But the reality is that there was very powerful evidence of the applicant's guilt, and the jury plainly disbelieved his account.

32. We are, therefore, satisfied that there is no arguable basis for doubting the safety of both convictions.

33. We turn to the grounds of appeal against sentence. It is submitted that the total sentence was manifestly excessive and that the judge was wrong to take a starting point of six years and six months' custody.

34. In the circumstances of this case the guideline duty in section 59 of the Sentencing Code included by section 60(4)(a) a duty to decide which of the guideline categories most resembled the applicant's in order to identify the appropriate starting point. The proper approach is to identify that starting point and thereafter to adjust it upwards or downwards if necessary to reflect particular features of culpability and harm, before considering

aggravating and mitigating factors. We reiterate once again that it is therefore unhelpful to use the term "starting point" to refer to anything other than the starting point initially identified. Everything from that point onwards is an adjustment of the starting point.

35. Terminology apart, however, we can see no basis for challenging the total sentence. As the single judge observed, the judge's approach was, if anything, generous to the applicant and made a fair allowance for the mitigating factors.

36. This was very serious offending, and it is not possible to argue that the total term of seven years' imprisonment was even excessive, let alone manifestly so.

37. For those reasons both renewed applications fail and are refused.

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

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