[2018] EWCA 3000 (Crim)
2017/00058/C4 & 2017/01279/C4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 8th November 2018

B e f o r e:

LORD JUSTICE BEAN

MR JUSTICE KING

and

THE RECORDER OF WESTMINSTER
(Her Honour Judge Deborah Taylor)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

MOHAMMED SADEER

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Miss A Johnson appeared on behalf of the Appellant

Mr N Usher appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE BEAN:

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Nothing may be published which would tend to identify the complainant.

2. The complainant in this case, "RP", then a teenage girl, met the appellant, whom she knew as "Sid", who was with two or three other men. The men took her to an address in Morley Street in Rochdale, where she was anally raped. After this had occurred, the appellant asked RP to perform oral sex on him. She refused. She vomited over him and the oral sex did not take place.

4. These events formed part of the prosecution case at a trial before His Honour Judge Potter and a jury in the Crown Court at Manchester. There were other defendants charged in respect of other incidents, but we need not be concerned with them.

5. The appellant was charged with kidnapping (count 1), to which he changed his plea to guilty before the trial. He was also charged with one offence of inflicting grievous bodily harm on a different victim (count 8), to which he again changed his plea to guilty.

6. At the trial with which we are concerned, the appellant was charged with the rape of RP. The particulars of that charge against the appellant (count 11) specified that in his case this was an allegation of anal penetration. The appellant's case in respect of this allegation was that he was not present at the time of the incident at all.

7. RP's evidence in chief was given by way of the playing of the video-recording of an Achieving Best Evidence interview. When she was cross-examined, it became clear that she was unable to identify the appellant as having taken part in the act of anal rape. At the conclusion of her evidence, the prosecution applied for leave to amend the indictment to add a new count (count 14)

charging the appellant with attempted rape, the particulars of which were that he attempted to "intentionally penetrate with his penis the mouth of [RP], who did not consent to the penetration", and it was alleged that he did not reasonably believe that she did consent.

8. Extracts of the most relevant parts of the complainant's recorded evidence in chief are helpfully set out in the Grounds of Appeal drafted by Miss Johnson, who represented the appellant at trial as she has before us:

> "Q. How long did this [the anal rape] go on for?
> A. About half an hour.
>
> Q. And how did it end?
> A. Cos they'd finished then … And Sid went to pull his pants down and I was sick all over him.
>
> Q. You were sick, sick on …
> A. Yeah, cos I was drunk and I puked and then, I think that, that's when they took me home. …
>
> …
>
> Yeah, and then after that [having described another man known to her as Ali as the first male to have anal sex with her] I just blocked it all out. I just can't remember it. Then I remember Sid but I couldn't get up cos I was in that much pain and I couldn't really sit up but Sid said, 'Come on, give us a blow job'. I went 'No'. And then I sat up cos I were really drunk and I was sick all over him. I know he said somat and then dropped me off at my sister's, finished and then just dropped me off."

A little later she said:

> "I don't think Sid did anything because he asked for a blow job and do you know when you've done that you're not going to ask for somat else, innit, so, but when I said no I was sick all over him …
>
> Q. So after the rape had finished can you say Sid asked you for a blow job?
> A. Yeah, I was sick all over him.

Q. Were you still on the bed at this point?
A. I've got up, I've got up and then, erm, he asked for it. Then he sat down and I was sick all over him.

Q. This is in the bedroom?
A. Yeah.

Q. Where did he sit?
A. On the, I think he was, yeah, oh, no, he was in, he was sat on the bed cos I've got up then.

Q. So he was sat on the bed?
A. Yeah.

Q. You got up?
A. Yeah.

Q. And he asked you for a blow job?
A. Yeah, and I was sick all over him.

Q. You was sick all over him. Did he have his penis out?
A. Yeah. Is it done now?"

9. Miss Johnson tells us, and we accept, that RP did not give any further detail about the request for oral sex in the course of either cross-examination or re-examination.

10. Skeleton arguments were submitted by Mr Usher for the prosecution in support of the application to amend the indictment, and by Miss Johnson for the defence opposing it. The application was granted. As the prosecution had anticipated, the defence made a submission at the close of the prosecution case that the appellant had no case to answer on count 11 (the allegation of anal rape), and the judge directed a verdict of not guilty on that count.

11. Miss Johnson also submitted that the evidence on count 14 did not amount in law to an attempt at oral rape and that this count also should be withdrawn from the jury. However, that submission was rejected by the judge.

12. In due course the appellant gave evidence. He denied presence at or involvement in the

incident at all.

13. The judge gave the jury extensive written directions relating to each of the fourteen counts on the indictment. Under the heading "Count 10" (which related to a different allegation of attempted rape made against another defendant in respect of a different complainant), the judge said this:

> "I have already provided you with the legal definition of the offence of rape.
>
> An attempt to commit an offence amounts to an offence if the defendant does an act which is more than merely preparatory of the offence itself or, to put it another way, does an act indicating he has embarked upon the crime properly intending it should take place – that is actually trying to commit the offence itself, as opposed to simply getting himself ready to do so.
>
> The circumstances of what took place need to be considered by you in determining if there have in fact been acts undertaken by the defendant which are more than merely preparatory towards the commission of the offence."

14. Count 14 was the only other allegation of attempted rape in the case. The judge said:

> "I have already provided you with how the law defines an attempt to commit an offence and how this applies to an offence of attempted rape.
>
> You will recall I looked at this when reviewing count 10 and you should apply the directions I gave you then as to this to count 14 as well (see page 15 above)."

As the last words emphasise, the jury had these directions in writing – and rightly so.

15. In the narrative section of the summing-up, we find this (at page 21):

> "She [the complainant] says in the immediate aftermath of this

> ordeal [the anal rape], the [appellant] approached her as she lay on a bed, and asked her to give him oral sex, taking his penis out of his trousers as he did so. She said no and was then sick over him. The prosecution say [RP's] description of what the [appellant] did at this point amounts to an offence of attempted oral rape. They say him approaching her where she lay, requesting oral sex and taking his penis from his trousers are acts which are more than merely preparatory of the offence of rape, particularly in the circumstances apparent at the time, [RP] having already been raped moments before, drunk, distressed, in pain and clearly vulnerable.
>
> The prosecution say the [appellant] acted intending to commit oral rape, and his attempt only failed when penetration did not take place, [RP] being sick upon him, having made it clear she did not want to perform oral sex upon him. The prosecution say it would have been clear in the circumstances that [RP] did not consent to any sexual activity, and the [appellant] could not possibly have believed she would consent, given the position she found herself in.
>
> The defence case upon this count is that this incident never happened. [RP's] evidence is incapable of making you sure that it did, [RP] having given evidence that is inconsistent."

The judge then went on to say that the appellant denied ever having any sexual contact with RP and denied ever going to the address in Morley Street with her, or indeed anyone else.

16. With respect to the judge, we think that this is an inadequate summary of the case for each side on count 14. Miss Johnson submitted, as she was entitled to do, that, even if everything happened as the prosecution alleged, that was still not enough to constitute the offence of attempted rape. But the way the judge put the case at page 21 of the summing-up, whatever he had earlier put in his legal directions, seems to us to have encouraged the jury to think that the choice was between accepting the prosecution case, in which event they should find the appellant guilty; or accepting the appellant's case that he was not there at all.

17. At any rate the jury convicted the appellant on count 14. He appeals against conviction by leave of the single judge. The appeal is brought on two grounds: first, that the acts alleged by the

prosecution were only preparatory and could not properly found a conviction for attempted rape; and second, that the application to amend the indictment to add count 14, after the complainant had given evidence, was made too late and should have been rejected.

18. We heard argument on the first ground only. On the view we have taken on the first ground, it became unnecessary to consider the second ground. Our provisional view was that the amendment was not made too late, but it is unnecessary to go into that further.

19. We return to ground 1. The distinction between acts which are merely preparatory to the substantive offence and those which amount to an attempt to commit the substantive offence derives from section 1(1) of the Criminal Attempts Act 1981, which provides:

> "If with intend to commit an offence to which this section applies a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

This statutory test is not really capable of much elaboration. Mr Usher's Respondent's Notice referred us to *R v Qadir and Khan* [1997] 9 Archbold News 1, where it was said that "attempt begins at the moment the defendant embarks upon the crime proper, as opposed to taking steps regarded as merely preparatory". This is not much more than a paraphrase of the statute itself.

20. The prosecution had to satisfy the jury both that what the appellant did was more than merely preparatory and that he intended to proceed to have oral sex, even if the complainant did not consent.

21. We accept Miss Johnson's submission that at the close of the prosecution case there was no case to go to the jury on either of these two elements. Mr Usher submits that each of them can be

deduced from the context. He accepts that, out of context, what the appellant did could not amount to an attempt; but he submits that, following on as it did from the complainant being anally raped when the appellant was present, the jury were entitled to conclude that the appellant taking his penis out of his trousers and asking for a "blow job" was more than merely preparatory.

22. We do not agree. Nor do we agree with Mr Usher's similar submission in respect of the mental element of the crime, that the context showed, or entitled a jury to conclude, that the appellant intended to proceed irrespective of the complainant's consent or otherwise, and was only stopped from doing so by the fact that she was "sick all over him". But the context was, as we see it, entirely equivocal. The jury had to proceed on the assumption that the appellant had not taken part in the anal rape of the complainant, notwithstanding that he had had the opportunity to do so. Then, after taking his penis out of his trousers, he did not simply advance on RP and try to put his penis into her mouth, but asked her for a "blow job", to which she answered "No". Later, he drove her home. The context did not get the prosecution over the hurdle of having to show that the appellant intended to proceed, irrespective of lack of consent.

23. It follows that, for both reasons, we consider that the submission of "no case to answer" on count 14 should have been upheld. Accordingly, the appeal against conviction on this count must be allowed.
