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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
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Friday, 22 February 2019

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE STUART-SMITH

HIS HONOUR JUDGE PAUL THOMAS QC
(Sitting as a Judge of the CACD)

R E G I N A
v
ANTHONY HUTCHINGS

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Mr T E Clark QC appeared on behalf of the **Applicant**

Mr C May appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

LORD JUSTICE GREEN:

A. Introduction

1. On 29 November 2017, in the Crown Court at Canterbury, the applicant pleaded guilty to two counts of assault occasioning actual bodily harm (counts 3 and 5); and perverting the course of justice (count 10). On 7 December 2017, the applicant was convicted of two counts of false imprisonment (counts 1 and 2); encouraging or assisting the commission of an offence (count 4); three counts of rape (counts 6, 7 and 8); and assault by penetration (count 9). On 8 February 2018, the applicant was sentenced to an extended sentence of 20 years, comprising a custodial term of 16 years on count 5. Custodial sentences were imposed for all other counts to run concurrently.

2. The single judge has referred to this court an issue concerning the written directions of the trial judge as to the law on consent and in particular the scope and effect of section 75(2)(a) of the Sexual Offences Act 2003. This is a provision which it is argued before us is problematic in numerous respects. The case raises various points about the structure of directions that should be given to juries on this provision.

3. There is also before the court an application for permission to adduce fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1963.

4. Before dealing with the issues, we turn to summarise the facts relevant to the issues arising.

B. The Facts

5. There were two complainants. The first complainant, A, was the applicant's partner of 12 months. At the time of the incidents concerned she was 4 months pregnant by him. The second complainant, B, was the foster daughter of the partner of the applicant's father. All the offences on the indictment were said to have occurred on 22 July 2017 at the home address of the applicant's father. To put the issues arising into context, it is necessary to summarise the evidence of the principal witnesses given at trial.

6. The evidence of A was that the applicant was her partner and that they were visiting his father in Kent. They had been sleeping in the summer house. In the course of the morning and early afternoon of 22 July 2017, the applicant and B were smoking crack cocaine in the summer house. A was smoking cannabis. The applicant became convinced that some of his cocaine was missing. He became abusive and threatening. He accused A and B of stealing it. He made A stand on the bed whilst he conducted

a search of her which included an intimate search of her vagina and anus. She was scared so did what she was instructed to do.

7. The applicant vacillated between blaming A and B but then settled upon B as the most likely thief. He threatened to kick their heads in. He had possession of a machete. He instructed A to assault B and eventually A felt compelled under threat of violence to carry out his command, so she stabbed B in the leg. This did not apparently elicit any admission as to the theft from B.

8. A felt that she was trapped in the summer house. B then appeared to confess that she had in fact taken the crack cocaine and she stated that it was in the main house. A believed that this was untrue, and that B wished only to create an excuse to get out of the summer house. The applicant, A and B then went to the house. The applicant was said to be in a furious mood and was punching B. In the house the applicant's father offered to give him money to buy more drugs. The applicant then ordered A and B back to the summer house. He screamed and shouted at them to search harder for his drugs. He kicked A in the leg, causing a bruise. He blocked their exit so that they could not escape.

9. The applicant's stepmother arrived, and she attempted to calm the applicant down. She obtained money and along with A and the applicant, they travelled to Herne Bay to acquire more cocaine. During the journey the applicant abused A. He called her a slag. He accused her of infidelity, including with B. In order to placate him, A agreed. But this simply led to an escalation of the violence. The applicant hit her in the face, causing a bruise to the eye and making her nose bleed. This is one of the assaults which the applicant ultimately came to accept that he caused.

10. Having acquired more drugs, they returned to the house, where the applicant consumed more cocaine. The applicant and A retired later to bed in the summer house. The applicant grabbed A by the throat. He told her that she would never breath again. This left visible bruising. He told her that if she confessed to infidelity, he would not harm her. A said in her evidence that she was terrified and so agreed. But the applicant then forcibly put her head in his lap holding A there, and punched her repeatedly in the face causing further bruising. She was crying and he told her to shut up. He threatened to kill her if she went to the police. But he said that if she did contact the police, what he had done to A would in any event be worth the jail time.

11. He then demanded that A "suck his dick". She felt that she had no option but to comply. She performed oral sex upon him. He then told her to bend over and despite her protests he anally penetrated her. He then told her to turn again and he vaginally penetrated her with his penis. At this time he was holding a hammer. He inserted the handle into her anus. He then penetrated her anus with his penis and told her to insert the handle into her vagina. He ejaculated and pushed her to one side, calling her a tramp. According to A, the sexual activity was not consensual. She made that clear to the applicant. She had

been compelled by violence and threats of violence to submit. The following morning, the applicant refused to allow A to leave the summer house or to have access to her mobile phone.

12. As far as A's relationship with B was concerned, she did not know her well. She accepted that she had threatened B with a metal bar when she thought that B had stolen the drugs. However, at the time the applicant was threatening both of them and that was the reason that she had used violence. She had been forced to stab B. She accepted that at first she had not wished to speak to the police when they came as a result of a complaint by B. She wished to save the applicant. She did not wish to see him arrested, which would have prevented him from attending his brother's funeral. She was worried about her own position since she had stabbed B and was worried that she might also be arrested. She denied that she was making up allegations of rape.

13. As a result of the violence perpetrated upon her by the applicant, she had injuries to the neck where the applicant had kicked her, injuries to her thigh where he had kicked her, injuries to her eye where he had punched her and kicks to the stomach. We have seen photographs of the injuries. She ultimately spent 2 weeks in hospital being treated.

14. We turn now to the evidence of B. She gave evidence that on the day in question they had been smoking cannabis but not crack cocaine. The applicant and A had been arguing. The atmosphere was not good. The applicant started to say that his cocaine was missing. He made A strip and he conducted an intimate search of her. He then turned his attention to B. He was agitated and cross. He threatened to beat her up if she did not find the cocaine. He grabbed a machete. He told A and B that they could not leave until he found his drugs. He would hurt them if they did not search. The applicant picked up other weapons. He kicked B to the ribs and A to the leg. He threatened them with a saw. He hit B to the face with the saw, which caused injuries. He refused them permission to leave the summer house.

15. The applicant took a metal bar and told A to hit B with it, otherwise he would beat the baby out of her. A was crying and said that she could not. He handed A a small knife and he threatened A with violence; so A eventually stabbed B in the leg. The applicant then punched A and threw her across the room. At that point B said that she did have the crack cocaine and that it was in the house. She was hoping that they could escape the summer house and obtain assistance. In the main house she did not, however, have the cocaine or know where it was. The applicant screamed and punched her repeatedly. Eventually the applicant's stepmother came home and lent him money. They went out to secure drugs and the atmosphere calmed. But the applicant continued to make threats. Later he broke a coffee cup, which he used to stab B with and he punched her. She was covered in bruises. The stepmother intervened and B left to go to her sister's house. She informed her sister of what had happened and the police were called. In cross-examination, she denied that A had caused the injuries as opposed to the applicant. She said that A had stabbed her only under duress.

16. The stepmother also gave evidence, but she was not a direct witness to much of that which was complained of. Her evidence was largely consistent with the evidence of A and B.

17. The applicant gave evidence. His case can be summarised in the following way. He had started to smoke crack cocaine following the death of his brother. On the day in question he noticed that some of his cocaine was missing and he suspected B of being a thief, but not A. He accepted that he got angry but he denied that he had behaved in the violent manner alleged. The applicant's father had told him that B deserved "a slap", so the applicant had hit her with the back of his hand. He also accepted that he had cut B with a cup which broke when he threw it at her. He denied punching, kicking, cutting or threatening her with weapons as alleged. All of the other injuries had been caused by A, who was jealous of B. A and B had been fighting. During the journey to purchase drugs A admitted that she had been unfaithful and in consequence he accepted that he had hit her with the back of his hand, but this was the sole violence that he perpetrated against her.

18. Things were calmer when they returned from buying the drugs until he mentioned the name of another woman that he had been seeing and having an affair with. He said that A then became angry and tried to take his prescription medication from him. He calmed her. He reassured her and they had consensual intercourse orally, vaginally and anally. They used items such as a hammer as stimulants and for pleasure. There had been no misunderstanding. The complainant was simply lying when she said that she had protested and been in pain and had cried. All of the activity was consensual. It was only on the following morning when the applicant said he proposed to go back to Northampton to see the other woman and B had said that police were on the way that A became upset with him.

19. He accepted that he had lied in interview. He accepted now that he had assaulted both A and B but not in the manner or to the degree alleged. He could not tell the truth to police because if he had done so bail would have been refused and he would not have been able to attend his brother's funeral. He accepted that he had attempted to escape from the police when he was first arrested. In cross-examination, he denied that he had a tendency to be violent to women. He accepted that in the past he had on one occasion thrown an item at his aunt but this was in self-defence. He had pleaded guilty when charged. He accepted that on another occasion he had slapped a woman but this was not his partner, she had been a prostitute who had spat at him.

20. We now turn to the issues arising in the appeal and we start with the question of fresh evidence.

C. Fresh evidence

21. The applicant seeks permission to adduce the evidence of Mr Wayne Woodman and Mr Warren Gowers. Short witness statements of their evidence have been produced to the court. We can summarise so far as relevant their evidence as follows. Mr Woodman was a neighbour of the applicant. His family garden is situated to the rear of the applicant's garden separated by a narrow alleyway. Mr Woodman was familiar with the applicant. He did not appreciate the noise regularly made by the applicant coming and going up and down the alleyway at night since this would wake up the dogs who would bark and this would keep Mr Woodman's young son awake. The applicant was frequently coming home late at night with items suspected to have been stolen. Mr Woodman recalls the applicant having had an argument with a friend of his, in the course of which the applicant had attacked the friend. The applicant and A would be loud and would swear at each other in the back garden or in the alleyway when they were around. A was sometimes as loud and as aggressive as the applicant.

22. On the day in question, Mr Woodman was helping his neighbour, Mr Gowers, to build a fence around his hot tub. He did not hear anything of note during the night. Had someone been shouting for help from inside the summer house, he would have heard it. At the weekends he tended to go to bed at 1.00 am or 2.00 am and regularly went to his garden to smoke. He recalled being in his neighbour's garden at approximately 8.30 am on the morning after the incident in question and he observed the applicant seeking to escape from the police.

23. Later, the applicant was working in the garden chopping up something which sounded like metal, which Mr Woodman assumed to be a stolen bike. The applicant was telling A to "fuck off". He smacked her in the face. He was unable to see the back garden where they were but he could hear the back door so he was able to work out when the applicant was in the garden. When the police arrived, the applicant attempted to flee. He jumped over the fence into Mr Woodman's garden and he ran past Mr Woodman and Mr Gowers and down the side of the house and away from the site. Later, the applicant told Mr Woodman that he did not know why the police had come around, it was perhaps because he had been in an argument with his sister the night before and A had beaten her up.

24. In an addendum to his statement dated 26 February 2018, Mr Woodman said that had there been any form of disturbance in the summer house, he would have heard this. He would have heard if someone was crying. The soundproofing on the houses on the estate was poor.

25. The second statement is from Mr Warren Gowers. He became familiar with the applicant as a neighbour. His parents live in the house which adjoins his back garden. He would say hello to the applicant now and again. He recalled the applicant jumping over his back fence to escape the police. He had been working with Mr Woodman at the time. Mr Gowers had been in the back garden sitting in his chair. Being disabled, he was unable to move around very much. He was aware of the applicant and A coming out

of the summer house about half an hour before the police turned up. They had been staying in the summer house for a week or so. At that point they were not arguing or acting unusually but they might have been swearing a bit at each other. That was how their general conversation with each other would proceed. He heard on one occasion the applicant leave the summer house and go to the main house. He did not recall A following him. He was able to see the kitchen of the main house from his window. When the applicant entered the house he was not accompanied by A. When Mr Gowers saw A she did not appear to him to be submissive. If there had been shouting from the summer house it would have been audible. In the summer he left his back door open because of the dogs but he did not hear anything of relevance overnight until the morning. When he later saw A he did not recall seeing injuries to her face.

26. An application is now made pursuant to section 23 of the Criminal Appeal Act 1968 to adduce the evidence of Mr Woodman and Mr Gowers. According to the evidence of the applicant's solicitor, set out in a statement of 27 February 2018, the explanation for not having taken statements from these witnesses earlier is, in summary, twofold. First, nothing given to instructing solicitors by way of instructions from the applicant put them on notice that these were witnesses of relevance. Second, there was nothing indicating that Mr Woodman would have been present in his back garden during the morning and in the lead up to the police arriving. It was not therefore expected that he would have seen or heard anything of interest in relation to the case. There was nothing which would indicate to a diligent and responsible solicitor that the evidence would have been relevant. The applicant would not know the sleeping arrangements of either man and would not have known that they were observing his and A's movements on the morning after the alleged rapes.

27. We bear in mind the matters we must have regard to under section 23(2). We in particular focus upon the matters identified in section 23(2)(b), (c) and (d). We have not considered it either necessary or expedient to hear oral evidence from the witnesses. We have instead taken the witness statements at face value for the purpose of our analysis. We have concluded that the evidence of these witnesses is not admissible. This is for a number of reasons.

28. First, in our judgment the evidence of both witnesses was readily available to the applicant at the time of the incidents in question. It would or should have been obvious that one way to rebut the evidence of the complaints that there was an ongoing violent commotion which might have supported the applicant's case was to make enquiries of neighbours. Obvious questions to pose to them would have included whether they had seen or heard anything. Both witnesses are direct neighbours. Both were present at the time and known to be so. Mr Clark QC, who appeared for the applicant, has argued that in these legal aid constrained times making such enquiries was neither proportionate nor necessary. We do not accept this explanation. No reason has been advanced before us which provides a proper or plausible explanation for the failure to make what we consider to be elementary enquiries of these witnesses at the time.

29. Second, the evidence is circumstantial, unparticularised, cast in the highest level of generality and of marginal, if any, relevance. The most relevant part of the evidence concerns what the witnesses say that they neither saw nor heard. For this to be relevant, the acts of violence and assaults which formed the basis of the charges would have had to have taken place both in a place and at a precise point in time when the witnesses could see or hear the assaults. If, for instance, the actual assaults had occurred at a point in time when the witnesses were asleep or making coffee or otherwise indisposed, then evidence that they heard or saw nothing has no value. The time frame covered by the witnesses is vague but would appear to be something in the order of 24 to 48 hours. It is at the highest level of generality. It is impossible with any degree of confidence to know what either witness was doing at any particular point in time or how this might have related to the criminal acts which are complained of and which might, or might not, have generated noise which was audible and over what distance.

30. Third, the unreliability of this evidence is compounded by a number of factors. The applicant, albeit belatedly, admitted the commission of a series of acts of violence upon A or B, yet both witnesses deny having heard or seen even this violence, and if they failed to hear this admitted violence, why should they have heard or seen other violence? Moreover, Mr Gowers says that when he saw A the day after the alleged incidents, he does not recall seeing any marks of violence upon her, yet this court has seen the photographs of A's face and body and the damage inflicted by the applicant is palpable and prominent. If the witness is in error about this or if his recollection is so vague on this, then this again casts doubt upon the quintessential reliability of his evidence and his evidence, that it is significant that he neither saw nor heard anything.

31. Fourth, as to the issue of consent in relation to the sexual assault, this evidence has even less value. The evidence of A in relation to the assaults was that she succumbed out of fear, not least because the applicant was in possession of a hammer. She does not say that she screamed repeatedly or loudly or so as to raise an alarm. So the absence of any resulting noise is not surprising.

32. We have no reason to doubt the veracity of either witness. We treat their statements as reflecting the best evidence that they are capable of giving. But, in our judgment, the evidence is so unparticularised, vague and unspecific that it is incapable of bearing any material probative value. For these reasons, whether taken individually and/or collectively, the application to adduce fresh evidence is rejected.

D: Section 75(2) Sexual Offences Act 2003: Consent

33. We turn now to the matter referred to the full court by the single judge. This concerns the judge's directions on consent. The judge directed the jury in line with section 75(2)(a) of the Sexual Offences Act 2003, which, in essence, creates

a presumption that there was no consent to a sexual act if immediately preceding it the complainant was in fear of immediate violence from the defendant.

34. Mr Clark QC, for the applicant, based upon his detailed written submissions which set out the case law and critical commentary, says that section 75 is one of those "*terrible*" statutory provisions that never applies and almost always leads to successful appeals if used. He refers to the authoritative text by Rook and Ward "*Sexual Offences, Law and Practice*" (5th Edition) where the authors observe that the presumptions rarely arise in practice (page 117) and that in the experience of the authors many members of the Bar feel that Section 75 "*arises in circumstances where it is clearly does not*" (footnote 363).

35. The section provides as follows:

> "75 Evidential presumptions about consent
>
> (1)If in proceedings for an offence to which this section applies it is proved—
>
> (a)that the defendant did the relevant act
>
> (b)that any of the circumstances specified in subsection (2) existed, and
>
> (c)that the defendant knew that those circumstances existed, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
>
> (2)The circumstances are that—
>
> (a)any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
>
> (b)any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
>
> (c)the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;
>
> (d)the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e)because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f)any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3)In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began."

36. It follows that a precondition for the operation of the rule relating to presumed absence of consent is that the applicant was "*at the time of the relevant act or immediately before it began using violence against the complainant or causing the complaint to fear that immediate violence would be used against him*".

37. In the present case, the applicant argues that in interview and in evidence before the court he had stated that there was no violence at the time of the sexual activity and that A had consented to all such activity. It is said that it follows that the judge's directions both in summing-up and in the route to verdict were wrong in law. It is, in addition, contended that the presumption was wrongly elevated by the judge from a rebuttable presumption to an irrebuttable one: see *R v Kapezei* [2013] EWCA Crim 560.

38. We turn to our conclusions upon this issue. It is necessary first to set out the directions given by the judge on this issue. They were carefully crafted. They were provided in full to each member of the jury in writing. We consider it convenient to set out that written version in full:

"**COUNTS 4, 5, 6 and 7 relate to sexual activity, which the Crown say occurred without [A]'s consent**

1. As there is no dispute that oral, vaginal and anal intercourse took place and that during vaginal intercourse the handle of a hammer was inserted into [A]'s anus, the central and in reality, only issue for you to determine in respect of these counts is whether the prosecution have made you sure that the acts took place without the consent of [A].

2. A person consents to something if, being capable of making a choice and being free to do so, they agree to it.

3. Submission because of the fear of the consequences of not doing so is not consent.

4. Indeed, the law is that a person is to be presumed not to be consenting, if at the time of the sexual activity or immediately before it began, the defendant was using violence toward them or was acting in a way that caused them to fear immediate violence would be used against them.

5. Although in respect of each of these sexual offences, once the prosecution has proved that [A] did not consent, they must also prove that D did not reasonably believe that she consented, this issue does not really arise in the circumstances of this case because here the two accounts given of the surrounding circumstances to the sexual activity (which both agree took place) are starkly different.

6. [A] has given evidence that AH used violence towards her immediately before the acts of penetration and threatened her with violence if she did not comply with his sexual demands. Her evidence is that throughout she was telling him No and begging him to stop but he ignored her and carried on.

7. If you are sure that this was what happened then it would not be possible to conclude that in those circumstances she would be in a position to give free and informed consent and there would, clearly, be no possibility that any reasonable person could believe she was consenting. Particularly because a belief in consent can only be reasonable if it could be held by the defendant had he been sober.

8. It is also no part of Mr Hutchings' case that he believed that if the circumstances were as [A] had described he could reasonably believe that she was consenting. His evidence about what happened when they had sex is very different.

9. AH has given evidence that following the argument earlier in the day, they had made up and there was no violence or threats immediately before or during their sexual activity and at no time did [A] say anything of the sort she has now described, to indicate that she did not consent to all that happened. Indeed, it is his case that she was a willing and active participant in all their sexual activity that night.

10. In these circumstances, if you accept what [A] has said, the defendant will be guilty, if on the other hand, you consider that what AH has said is or might be true, he would be entitled to be found not guilty.

11. In such circumstances, you may well conclude, that the issues for you to determine are really more factual than legal.

> 12. In determining this issue, the two central aspects you will have to determine are
>
> (a) whether you are sure that AH used or threatened [A] with physical violence immediately before the acts of penetration and
>
> (b) whether you are sure that [A] communicated that she was not consenting.
>
> 13. If you are sure that violence was used or threatened immediately before or during the acts of penetration, it would be very difficult for you to conclude that [A] was able to make a free choice and the assumption would be that she would not be consenting to what it is accepted happened.
>
> 14. Equally if you are sure that [A] was telling AH in the clear and repeated way she has described, that she was not consenting, no one, least of all AH or anyone on his behalf could possibly contend that she was, nor could there be any reasonable belief that she was consenting.
>
> 15. If on the other hand you find that despite what had passed between the two of them earlier in the day, [A] was, or may have been, able to make a choice and chose, or may have chosen, to have sexual intercourse in the ways described then she will have consented and the defendant will be entitled to be found NOT GUILTY."

39. As to the complaints made, we do not accept them. In our judgment, the directions given by the judge on this issue were adequate and realistic and tailored to the true issues arising. This was a case where, as the judge properly observed, the central, and in reality only, issue for the jury to determine was whether the prosecution had made them sure that the sexual acts occurring took place without the complainant's consent. There was no dispute as to the occurrence of the sexual acts and it was common ground that during the alleged vaginal rape the applicant was in possession of a hammer. Equally, it was not in dispute that the various forms of vaginal, oral and anal penetration occurred. Equally, it was not in dispute that the applicant had inflicted violence upon A. The only question was consent and as to the timing of the violence.

40. We make a number of observations about the directions which the judge gave.

41. First, the judge made clear to the jury that the issue whether the applicant had used violence towards A immediately before the act of penetration and threatened her with violence were matters the jury needed to consider. This is evident from paragraphs 6 - 10 of the directions. The case in reality boiled down to two starkly different version as to what had occurred. As the judge pointed out in paragraph 10, the verdict of the jury would flow, more or less inevitably, out of the choice they made as to whom to

believe. If they had believed the applicant's version of events, then they would not only find that there was consent but that there could not be any offence and the applicant would be entitled to be found not guilty. If however they rejected his account then, on the facts, it is very hard to imagine how they could then find consent. In such circumstances he was bound to be convicted.

42. Second, we reject the contention that the directions turned a presumption into an irrebuttable conclusion. It is correct that in law judges must be very careful in their choice of words not to suggest to the jury that the presumption was irrebuttable: see *R v Kapezei*. In deciding whether a judge has erred it is necessary to look at the direction as a whole so that its effect on the jury can be assessed. The judge expressly uses the phrase "*presumed*" in paragraph 4 where he is summarising the law and it is true that he did not proceed to explain what a rebuttable presumption was. We take the view, reading the directions as a whole, that in the circumstances of this case, which turned on facts and not law, this was a common-sense way to proceed. The judge explained in paragraph 8 that it was no part of the applicant's case that if the jury believed A, and therefore disbelieved him, that he would then be arguing that notwithstanding the violence A still consented. The structure of the directions makes clear that if the jury considered that the applicant's version of the facts were either correct or "*might be true*" that he would be entitled to be found not guilty. Based upon the structure of the questions posed to the jury in the circumstances of this case, we cannot see that any form of irrebuttable presumption was created. Put shortly, the issue was not a live one and there was no need to direct the jury on a hypothetical matter focusing upon circumstances when the presumption might be rebutted.

43. Third, standing back, we have reviewed carefully and comprehensively the summing-up of the judge in relation to the facts of the case. We detect nothing which is inconsistent with the approach which the judge set out in his legal directions. The judge made clear that there were two wholly different and conflicting accounts as to the events which occurred. The judge reminded the jury of the defendant's evidence. There was, in our view, no real scope for confusion as to the issues arising.

E: Inconsistency Between Route to Verdict and Legal Directions

44. We have also reviewed the route to verdict. Mr Clark QC says that the formulation in that document is inconsistent with the directions and the summing-up. The questions in the route to verdict are undoubtedly terse and abbreviated. It is clear however that they were drafted not as a document to be read standing-alone but were intended to be understood in conjunction with and subject to the written directions. In our judgment, it is clear from reading the summing-up that the jury would have seen the route to verdict as a component part of the more detailed written directions. They would have read them as subject to those directions. We see nothing wrong in principle with a judge providing the jury with a shortened route to verdict where it is clear that it is to be read by the jury in conjunction with the written directions. What ultimately matters is whether, when read as

a whole, the documents furnished to the jury arm them sufficiently to address the questions they must answer. In the present case, in his detailed oral summing-up, the judge when dealing with the giving of verdicts, reminded the jury expressly of the need to have recourse to the written legal directions as their guide.

45. We concur with the overall analysis of the judge in his summing-up on the evidence, that in the circumstances of this case it was the facts and not the law that mattered. In the transcript of the summing-up at page 10B, the judge stated at follows:

> "In these circumstances, therefore, if you accept what [A] has said the defendant would be guilty of the counts of rape and non-consensual penetration. If, on the other hand, you consider what Anthony Hutchings has said is or might be true, well he'd be entitled to be found not guilty. It really does, again, boil down, essentially, to factual decisions about what you conclude you can be sure happened. In such circumstances you will conclude, I imagine, that the issues for you to determine are really more factual than legal in respect of each allegation."

46. We agree. Judges are encouraged by the Criminal Procedure Rules to focus upon the *"real*" issues in the case. And the judge did so.

47. Finally, had we concluded that in any respect the judge had made an error in his directions, we would nonetheless have found that the conviction was safe. The evidence was very strong against the applicant. Once the jury had formed conclusions about the facts, the verdict followed and would not have been clouded, obscured or diverted by any species of legal nicety. We observe that in a number of cases before the Court of Appeal where adverse observations were directed at the direction given to the jury on this issue, the court nonetheless uphold the convictions: see *R v Shauji Zhang* [2007] EWCA Crim 2018; and *R v Lewis Mba* [2012] EWCA Crim 2773. In these circumstances, the application is refused.

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