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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 10 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE WARBY

HIS HONOUR JUDGE PICTON

R E G I N A

v

S.R.

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Mr Neil Raki appeared on behalf of the **Appellant**
Ms Heather Stangoe appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. **LORD JUSTICE HOLROYDE**: This is an appeal by leave of the single judge against conviction of an offence of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003. The grounds of appeal contend that the appellant did not have a fair trial, and his conviction is unsafe, because the judge unfairly interrupted defence counsel's closing speech and summed up the facts of the case in an unbalanced way, thereby undermining the appellant's case
.
2. The victim of the offence, to whom we shall refer as G, is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter shall be included in any publication if it is likely to lead members of the public to identify her as the victim of this offence. In view of the past relationship between the appellant and G, and the fact that they have two children, it will be necessary for the appellant's name to be anonymised in any report of these proceedings.

3. The appellant is now aged 36. He and G were in a relationship for a number of years, and they have two children. The relationship broke down, largely it seems as a result of the appellant's misuse of controlled drugs and alcohol, but he remained in contact with G and the children and visited their home from time to time. On occasions, he stayed at their home. There was only one bedroom, which the children shared, and G slept in the living room. One such occasion was in March 2018, when G accepted that she had consensual sexual intercourse with the appellant.

4. The appellant next stayed at the home in July 2018. G permitted him to stay, so that he could see the children, and also because he said he was homeless. The appellant took exception to the fact that G either had, or hoped to have, a relationship with a black man who lived near her, to whom we shall refer as K. He admitted that he had referred to K in racist and insulting terms, which he said he did in order to "wind up" G.

5. There was a conflict of evidence as to whether there had been sexual activity between the couple during the two days when the appellant was staying in G's home before the events in the early hours of 10th July 2018 which gave rise to the charge.

6. As to those events, it was common ground that during the previous evening and into the night-time the appellant was drinking heavily and taking cocaine. G went to bed, leaving him in the kitchen. The prosecution case was that at about 5 am the appellant came into her room. He was very drunk and abusive and shouted at G about her seeing or wanting to see K. He began to pull her pyjama bottoms off. She struggled, telling him to stop. He managed to take her bottoms off and poured coconut oil over her whilst shouting, "This is what you want". He then held her down with one hand and with the other inserted his fingers into her vagina. He kept pushing until the complainant heard a loud pop. She suspected that at that point his whole fist entered her vagina. The appellant shouted, "This is what you want, a big black cock". At this point she was screaming and

bleeding profusely from her vagina. The appellant let her go and G ran to the bathroom. Soon after she left the house, with a pillow between her legs to stem the bleeding, and went next door to the home of her cousin. The cousin gave evidence that when G arrived, she was bleeding from her vagina and "going in and out of consciousness". Her evidence was that G said, "I don't know what he's done. He's shoved his whole arm in me." When describing this, said the cousin, G made a "punching motion".

7. G also made a complaint to her aunt. The police and ambulance service were called. G was taken to hospital. An operation was carried out under general anaesthetic to repair a 10-cm laceration of the inside left wall of her vagina. There was a small bruise on the introitus of her vagina, and the blood clot 5 cms x 4 cms was seen on the left vaginal wall. A blood transfusion was necessary because she had lost a substantial quantity of blood.

8. When the police arrived at G's home the appellant did not open the door and entry was forced. The appellant was wearing only a blood-stained towel and was heavily intoxicated. A large amount of blood was seen on G's bed, there was a trail of blood going from that room to the bathroom, and a towel and pillow, heavily bloodstained, were in the bath. The appellant was abusive and aggressive to the police. In interview under caution he made no comment to any of the questions.

9. The trial was heard in the Crown Court at Snaresbrook in December 2018.

10. The appellant's evidence to the jury was that he and G had had consensual sexual intercourse several times during his stay - something which G had denied in her evidence. He said that on the night of 9th July 2018 they had both consumed cocaine, and he had also drunk brandy. He said that the sexual activity which resulted in injury to G's vagina had been consensual, with coconut oil being used as a lubricant. He said that G had initiated it, holding a vibrator and saying she wanted a big black dildo. G had then said she wanted to be "stretched", and with her consent the appellant had inserted his fingers into G's vagina together with his thumb. He said that he had done so gradually at first but with more force and more dynamically following vocal encouragement from G. He denied that he had used anything like a punching motion. He said that G encouraged him to insert his fingers and hand further into her vagina. He said that was something they had done before, though G had denied that suggestion when it was put to her. The appellant said that as he was masturbating her with his hand, G said "something had popped". He had accompanied her to the bathroom to assess the injuries and, he said, had encouraged her to call an ambulance, but she did not want to do so and instead went to her cousin's house. The appellant thus admitted that he had caused the injury to G but said that the injury was unintended and accidental in the course of consensual activity.

11. At the conclusion of the appellant's evidence the judge asked a number of questions

seeking clarification of aspects of the appellant's evidence. As we understand it, she did so because they were questions which had been raised in notes sent by members of the jury and which had not thus far been specifically addressed by either counsel. No complaint is made about the terms or the manner in which those questions were answered.

12. The issue for the jury was one of consent. The evidence clearly involved a head-on conflict between G and the appellant as to the circumstances and manner in which he had put his hand into her vagina.

13. Mr Baki, who represented the appellant at trial as he does in this court, submits that the judge had made a number of rude and aggressive interruptions in the course of his examination-in-chief of the appellant. But the first point he makes in pursuit of his grounds of appeal is focused on an intervention by the judge during his closing speech. At a point in that speech when Mr Baki was making submissions about G's account of how the appellant put his fist into her vagina, the judge intervened to say that the appellant had admitted putting his fist into G's vagina and that it was not helpful to analyse it further because "the jury do not have to decide how the injury was caused, or which of them is correct". Mr Baki disagreed, saying that whilst it was agreed that the appellant's fist went into G's vagina, the appellant's account of gradually easing his fingers and hand in, and then becoming more vigorous, was very different from G's account. He said that he was "inviting the jury to consider the version of events put by one party as opposed to the other". He said that his submissions related to the whole series of events that had been described and indicated that, with the judge's leave, he would like to continue. The judge at this point commented "I am warning you about the way I will put it", and when Mr Baki said that he did not understand what the judge meant, she responded, "I mean that I will tell the jury the way to approach this evidence". Mr Baki accepted that the judge would do so and moved on in his speech to say more about the circumstances of the relevant events.

14. Mr Baki submits that this was an unfair, incorrect intervention which not only undermined the submissions he was making but also undermined his own credibility before the jury. He argues that in that way the appellant's case was seriously undermined.

15. He couples that submission with a second ground of appeal, to the effect that the judge's summing-up of the evidence was "weighted heavily against the appellant". Developing this submission in oral argument this morning, Mr Baki particularly draws attention to a passage in the summing-up when the judge said this (at page 13H-14C):

    i. "The injury -- which is clearly a ghastly one, 10 cms, and I think we had a demonstration, but you will know what 10 cms are, there is no need to analyse the injury any further -- it was caused by the insertion of the hand into the vagina. It is obvious, is it not, to

anybody, particularly the ladies here, that that part of our anatomy is built for a particular purpose, and it is not for inserting a fist, so the injury is not in any way consistent, as Mr Baki said, with the defendant's version of events. It is not. The fact is that it is the result of the insertion of the defendant's fist into an area of anatomy, and as a matter of common sense that must have been hugely painful, and you know about the extensive bleeding.

ii. What you need to decide is not how the injury was caused, because it is admitted. You need to decide whether [G] consented to the insertion of the fist, and if she did not consent, what was in the defendant's head when he put his fist in? That is your job."

16. Mr Baki accepts that the judge's definition of the issue which the jury had to decide was in itself correct, but he criticises what preceded it in that passage as a further instance of the judge incorrectly and unfairly criticising his submissions. Mr Baki tells us that there had been a stage in the proceedings, after closing speeches but before the summing-up, when the judge had apologised to him for her intervention in his closing speech. That, however, was an apology made in the absence of the jury, which was not repeated in the presence of the jury.

17. The combined effect of these matters, submits Mr Baki, is that the appellant's case was utterly undermined. He emphasises that this was a case which substantially turned on the jury's assessment of the conflicting accounts given by G on the one hand and by the appellant on the other. He argues that the judge's intervention and subsequent comment in the summing-up were incorrect but extremely damaging to the appellant's case. On those grounds, he submits, the conviction is unsafe.

18. For the respondent, Ms Stangoe, who also appeared below, disputes the assertion that the judge's manner was rude or aggressive. She submits that the judge had been correct to intervene in Mr Baki's closing speech because he was making submissions about the mechanism of the injury which were irrelevant to the issue of consent and which could tempt the jury into improper speculation about what medical evidence might have shown had any been adduced. She submits that in intervening as and when she did, the judge did not in any way comment on the plausibility of the respective accounts of G and of the appellant, nor did she interrupt Mr Baki's submissions on that aspect of the case. The judge referred only to the cause of the vaginal injury.

19. Ms Stangoe agrees that earlier in the trial the judge had more than once interrupted the examination-in-chief of the appellant, but says that the judge's interventions had been appropriate and indeed necessary because leading questions were being asked by Mr Baki on contentious aspects of the evidence.

20. As to the summing-up, Ms Stangoe opposes the assertion that it was unbalanced or unfair. She submits that it is significant that no complaint is made about the terms in which the judge summed up the evidence relating to the cause of the injury. Thus, in so far as the judge had given a warning as to how she would leave the matter to the jury, Ms Stangoe points out that in the event no criticism is made of the manner in which it was left to the jury.

21. We are grateful to counsel for their written and oral submissions, upon which we have reflected. We say at once that we see no merit in Mr Baki's criticism of the judge's interventions during the examination-in-chief of the appellant. We are satisfied that each of those interventions was necessary and appropriate because Mr Baki was asking leading questions about highly contentious aspects of the case.

22. Mr Baki is, however, on stronger ground in his criticism of the judge's intervention during his closing speech. It seems that the judge thought that Mr Baki was making submissions about the mechanism by which the presence of the appellant's hand or fist inside G's vagina had resulted in the 10-cm laceration. Given that there was no dispute but that the appellant's hand or fist had somehow caused that injury, it is understandable why on that basis the judge was anxious that the jury's focus might be diverted from the real issue of consent.

23. The judge was, however, mistaken in her view. We have the advantage, which the judge did not, of a transcript of exactly what Mr Baki said. Having carefully considered that transcript, we are satisfied that Mr Baki's submissions to the jury related not to the mechanism of the injury but to the circumstances and manner in which the appellant had inserted his hand and fist into G's vagina. The jury's assessment of the conflicting accounts in that regard was plainly relevant to their decision on the issue of consent. Mr Baki was making a legitimate jury point to the effect that G's account, including (at least at one stage) a reference to a punching motion, was inherently implausible, whereas the appellant's account of a gradual and consensual introduction of the hand, assisted by lubrication, was more credible. His references to injuries were made in the context of a legitimate jury point to the effect that the jury might find it difficult to accept G's account of a struggle in which she tried to prevent the appellant from sexually assaulting her, when little or no injury indicative of such a struggle was found on her. Whether those points would carry any weight with the jury is, of course, a different question; but Mr Baki was entitled to make them and, with respect to the judge, we are satisfied that her intervention was based on a misunderstanding and was unfair. It is very unfortunate that the intervention was made in those circumstances, and very unfortunate that the jury were present throughout the exchange between judge and counsel. If the judge felt it necessary to intervene, because she felt that counsel was in danger of leading the jury into speculation about an irrelevant matter, it would have been better for her to have asked the jury to retire so that she could raise her concern with counsel in the absence of the jury.

24. As to the summing-up, we have considered the passage to which Mr Baki particularly invites our attention. We are bound to say that the first part of that passage is somewhat difficult to follow. The important feature of it, however, in our view, is that the passage ends with the judge correctly identifying for the jury that the key question for their decision was whether or not G consented to the insertion of a hand or fist and, if not, what was the appellant's state of mind when he inserted it. More generally as to the summing-up, we accept that in terms of the number of pages of the transcript the judge spent more time reminding the jury of G's evidence than she did in reminding them of the appellant's evidence. We do not, however, see any unfair or prejudicial imbalance in the way in which the judge summarised the conflicting accounts. The appellant's version of events could properly be summarised quite briefly, for on his account the couple engaged in consensual activity which needed no explanation other than mutual desire, and which unfortunately ended in accidental injury.

25. In those circumstances the issue in this appeal is whether the judge's intervention in Mr Baki's closing speech rendered the trial unfair and the verdict unsafe. In Inns [2018] EWCA Crim 1081 this court summarised fundamental principles relating to the role of the judge as a neutral umpire, who must not appear to be taking sides. Singh LJ, giving the judgment of the court in that case, referred to a number of earlier decisions including Hamilton, an unreported case in 1969, in which Lord Parker CJ said this:

    i. "Interventions which may lead to the quashing of a conviction are (1) those which invite the jury to disbelieve the defence evidence in such terms that they cannot be cured by telling the jury that the facts are for them, (2) those which make it impossible for counsel to present the defence properly, (3) those which have the effect of preventing the defendant from doing himself justice and telling his story in his own way."

26. Plainly the effect of any judicial intervention on the fairness of the trial and the safety of a conviction will depend upon the specific facts and circumstances of the individual case and the manner and content of the intervention.

27. As we have here rejected the criticism of the interventions made during the examination-in-chief of the appellant, this is not a case in which it could be said that the judge had prevented the appellant from giving his best account of himself in the witness box. We have therefore considered whether the judge, by her intervention during Mr Baki's closing speech, improperly entered the arena, or invited or appeared to invite the jury to reject the appellant's defence, or prevented counsel from presenting the defence case properly, or otherwise denied the appellant a fair trial. We are satisfied that she did not. As we have said, her intervention was based on a misunderstanding and was unfair to Mr Baki. That is very regrettable. However, nothing which the judge said in that intervention was capable of giving the appearance of favouring the prosecution case over the defence case. Her point that the jury did not have to decide precisely how the vaginal wall came to be lacerated was correct as far as it went, albeit that was not the

point about which Mr Baki had been addressing the jury. Without dwelling on the details of the transcript, it is apparent that Mr Baki was able to continue his closing speech without any apparent loss of structure or force. The conflict of evidence between G and the appellant was stark, and we cannot see that this intervention could have caused the appellant any prejudice in the jury's decision on the central question of whether they were sure that G's account of a violent sexual assault was truthful, honest and reliable.

28. It is clear from the jury's verdict that they were so sure. There was compelling evidence to support their verdict, and the appellant's case was gravely undermined by his own conduct after the injury had been caused, which the jury were very likely to think was not the behaviour of a man who had accidentally injured his partner during consensual sexual activity. For those reasons, notwithstanding Mr Baki's submissions, we are satisfied that this conviction is safe. The appeal accordingly fails and is dismissed.