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IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA Crim 1298

Case No: 2020/00137/B3



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 11th September 2020

LADY JUSTICE CARR DBE

MRS JUSTICE McGOWEN DBE

MR JUSTICE MARTIN SPENCER

REGINA

- v -

TERRY LARKIN

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Miss A Johnson appeared on behalf of the Applicant

Mr I West appeared on behalf of the Crown

JUDGMENT

Friday 11th September 2020

LADY JUSTICE CARR:

Introduction

1. On 11th December 2019, following a trial in the Crown Court at Sheffield before His Honour Judge Michael Slater (“the judge”) and a jury, the applicant (now 56 years old) was convicted of assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861 (count 3). He was acquitted of two counts of assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (counts 1 and 2).

2. On 13th December 2019, he was sentenced to three years' imprisonment.

3. The applicant's application for leave to appeal against his conviction has been referred to the full court by the Single Judge. It is an application based upon fresh evidence in the form of a witness statement from a Ms Shireen Robinson ("Ms Robinson") which the applicant seeks leave to adduce. We considered the witness statement and allowed Ms Robinson to give oral evidence before us by way of video-link during the course of the hearing on a provisional basis only, without first determining the admissibility of the evidence.

4. We have had the benefit of written and oral submissions from Miss Johnson for the applicant and Mr West for the respondent, both of whom appeared below.

5. 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.

The Facts

6. In overview only, the applicant and the complainant ("AB"), who was 39 years old at the material time, had previously been in a relationship. On the evening of 11th November 2018, the applicant collected AB from a local public house. AB's 16 year old daughter ("XY"), who had been in the public house with her mother, had telephoned the applicant and asked him to collect her mother as she was drunk.

7. The applicant drove AB back to her home and remained there with her. The prosecution case was that, whilst there, he assaulted her. A few hours later, XY arrived home and was concerned that her mother was injured. The applicant left AB's home. Shortly thereafter, a neighbour took AB to hospital.

8. A subsequent medical examination of AB recorded 45 sites of injury, the majority of which were bruises consistent with punches and pressure applied around the neck. There were bruises to her face, head, neck, back, breasts, buttocks, arms and legs.

9. The prosecution relied on evidence from AB and XY, both of whom gave oral evidence and were cross-examined. AB's evidence was to the effect that, once back at her house, the applicant became angry and accused her of having a relationship with a new man named Kyle. He ran a bath for her, forced her to strip naked and then dragged her upstairs by her hair. He began to punch her, to strangle her and to bang her head on the floor. AB alleged that at this point the applicant also sexually assaulted her by inserting his fist into her vagina and anus. As already indicated, he was acquitted by the jury on those two counts (1 and 2).

10. AB stated that when they were in the bathroom the applicant strangled her and put her head under the water in the bath. He threw her into the bath. Her mouth was bleeding and she begged him to stop. She said, "You're going to end up killing me", to which he replied, "I want to kill you, I want to kill you". He dragged her out of the bath and they ended up downstairs, where he carried on hitting her and banging her head. At some point, Kyle Buckley, whom AB had recently met, knocked on her front door. She answered the door and spoke to him briefly. He was annoyed that she had been talking about him in the public house earlier that day. The applicant then appeared, she said, and told Kyle to go away. The applicant dragged AB back into the front room and continued to beat her.

11. AB's evidence was that the applicant fetched a knife from a kitchen drawer. She managed to take the knife from him, as she begged for him not to kill her. The knife broke in the process, but she managed to put it back into the drawer. The applicant continued to punch her to the face, to hit her head on the floor and to strangle her.

12. AB said that XY arrived home at around 10.30pm. The applicant told AB to tell XY that she had fallen down the stairs. XY asked the applicant what he had done to her mother and asked to phone her father, which the applicant did not at first let her do. He locked the door and put the key into his pocket. XY was eventually able to call her father. The applicant then threatened XY with another knife he had taken from a knife block. AB managed to take the knife away from the applicant. AB and XY were able to force the applicant out of the house and they then locked the door behind him. AB said that she later went to hospital with XY. A neighbour drove them there.

13. When she was cross-examined, AB conceded that she had drunk a considerable amount of alcohol at the public house, but she denied that she had fallen into the bath through drunkenness and denied having lunged at the applicant with a knife.

14. XY stated that on the relevant day she had been in a public house with her mother, younger sister and her mother's uncle and partner. She had been coming and going between the public house and a friend's house that day. She collected her mother and younger sister from the public house, at which point there were no signs of injury to her mother and nothing to suggest that she had been involved in a fight. XY said that she returned home at around 10.30pm. When she arrived, the applicant answered the door. She saw her mother on the sofa wrapped in a blanket; she had no clothes on. Her face was bruised; she had a large lump on her forehead, and her lip and nose were swollen. She had markings to her neck and further bruises to her cheeks and eyes. Her legs were bruised. XY said that her mother looked petrified and would not speak. AB told her that she had fallen down the stairs. XY went upstairs to use the bathroom and noticed spots of blood there and on the wall outside the bathroom. She asked her mother why there were spots of blood there. The applicant responded by repeatedly and aggressively telling her mother, "You slipped in the bath and downstairs". Her mother said, "Yeah, I fell down the stairs". But when the applicant was out of earshot, her mother told her, "He did this".

15. XY said that she was crying and upset and asked the applicant if she could call her father. After half an hour or so, the applicant let her use his mobile telephone to call her father. She told him what had happened and that the applicant would not let her out of the house. The applicant appeared in the room and spoke to the father on the telephone.

16. Shortly thereafter, XY said that she, her mother and the applicant were all in the kitchen. Her mother went to sort out a broken cutlery drawer, but it fell to the floor spilling its contents. The applicant gave her mother some clothes to put on. He then picked up a knife from the floor and pointed it at XY. The blade was very close to her. He also pointed it at

AB who managed to grab the knife and throw it across the kitchen.

17. XY said that she and her mother managed to push the applicant towards the door. He opened the door and left the house. XY eventually took her mother to hospital.

18. XY was also cross-examined. Amongst other things, she stated that her mother did not go for the applicant with the knives whilst screaming.

19. The prosecution also relied on the evidence of Dr Stuart Hamilton, a forensic pathologist. He stated that there were 45 sites of injury to AB. Many of the injuries present were consistent with AB's account. Although the applicant's account could not be excluded, his version of events did not account for all of the injuries.

20. The jury also heard evidence from AB's neighbour and evidence from Michael Ward, the bar manager at the public house. He had stated that whilst AB had been drunk and loud on the relevant night, she was not being aggressive. He had not seen her fighting with anyone and there were no visible injuries or marks on her when she left the public house that night.

21. The applicant gave evidence in his defence at trial. The defence case, in summary was that AB was lying as to how she had come by her injuries. They could have been caused by a number of different incidents, including in the five minutes when she was off camera at the public house and had gone to visit someone else's house a few doors away. XY had described her mother as "kicking off" at this house. She could also have been injured after the applicant left her house. Kyle Buckley could have inflicted the injuries. He had turned up at the home on the relevant night and was clearly angry with AB. His previous convictions showed that he was a man with a violent disposition. AB had sustained further injuries at home as a result, said the defence, of falling into the bath and then falling down the stairs, and then attacking the applicant. When in the kitchen later, AB had taken two knives from a drawer, each with a blade of around six inches in length and lunged at the applicant. She had shouted that she was going to "fucking kill" him and stab him. It was suggested that she might have been motivated to make the allegations against the applicant to pay him back for threatening to inform Social Services about her drinking and care of her younger daughter.

22. Two further witnesses were called on behalf of the applicant. Michael Andrews gave evidence that he had been in the public house on the relevant evening. AB, whom he had seen previously there, had been pushing and shoving him whilst he was smoking outside. He had asked her to stop, but she refused. She was extremely drunk and aggressive, according to him. She had slapped his face and then her daughter had dragged her away.

23. Luke Walker (XY's ex-boyfriend) gave evidence concerning AB's behaviour during a family holiday in 2018 and her behaviour and drinking generally.

24. The defence also relied on character witnesses, including evidence from the applicant's former partner, Ruth Badbury, and the mother of their daughter, Vanessa.

25. The defence submitted that there were significant discrepancies between the accounts that AB had given elsewhere: to her neighbour, to the medical staff treating her that night, and to the police when interviewed. For example, the medical notes made when she was at hospital recorded her stating that she had fallen downstairs, though she denied in evidence that she had said this. It was submitted that there were other discrepancies, including telling an alcohol counsellor that the applicant had come to her house that night under false pretences.

26. It was suggested on behalf of the applicant to the jury that these discrepancies undermined

AB's evidence as a whole. She had not sustained any injuries to her hands from a knife. She had lied about other matters, such as that she had not spoken to the applicant for two months before this incident and that the applicant was the source of her alcohol dependency. It was further advanced on behalf of the applicant that AB's issues with alcohol, about which she lied, further affected her credibility. Her four drink-related previous convictions indicated that she had a tendency to become violent and aggressive when in drink. It would be more likely that she would be injured in an alcohol-fuelled fight of her own making, or prone to injury from falling down.

The evidence of Ms Robinson and the circumstances of its production

27. The written evidence of Ms Robinson is contained in a statement dated 31st January 2020. There, in summary, she states that she has been a friend of AB for some 13 years. She was contacted by AB from a new telephone number in early 2019. AB had asked whether Ms Robinson had been in touch with Vanessa. Ms Robinson said: "Not for years". She asked why AB was interested. AB then asked if Ms Robinson had spoken to the applicant. At first, Ms Robinson did not know who she was talking about, but then realised it was the applicant with whom she had previously spoken by telephone and on Facebook.

28. According to Ms Robinson's written statement, AB had gone on to say that the applicant had sexually assaulted her, about which Ms Robinson questioned her. AB then sent Ms Robinson some police images of her face, showing bruising. Ms Robinson states that she asked AB if she was sure, since AB was always drinking and would usually call when drunk. She said that AB started to shout and ask again if she had been in contact with the applicant's daughter. Ms Robinson told AB that her allegations were very serious. In her written statement, Ms Robinson goes on:

"9. [AB] explained that [the applicant] went to pick her up as she was drunk and with [XY] ... She said that they went back to her home and that she had attacked [the applicant] with a knife. I asked her why she did this, but she didn't go into much detail and simply said that she pulled a knife on him.

10. She then said that she had fallen into the bath but in the next breath she said [the applicant] had pushed her into the bath and tried to drown her. She said that they then went to bed and she woke up sore the next day. She didn't give any further details and she didn't say anything about reporting this to the police.

..."

29. The circumstances surrounding the provenance and timing of this statement are said to be as follows. The applicant's solicitor, Mohammed Asif of Opus Law, has provided a statement, dated 3rd February 2020, stating that on 31st July 2019, the applicant attended his office and advised that Ms Robinson had telephoned him by mistake, believing that the telephone number belonged to AB. She had told him that AB had told her that she had attacked the applicant with a knife on the night of the incident in November 2018. Mr Asif says that the applicant told him that he would attempt to make further contact with Ms Robinson to ascertain if she was willing to provide a statement. A few weeks later, the applicant explained to Mr Asif that he had made several telephone calls to Ms Robinson and had left voice messages but had not received any response. He had also left a message for her on her Facebook page, to which she also had not responded.

30. We note at this stage that Ms Robinson's statement is completely silent on the question of any contact between her and the applicant in 2019, or as to why she failed to respond to any of the messages said to have been sent.

31. Following his conviction on 11th December 2019, the applicant was released on conditional bail prior to sentence.

32. In the very early hours of 13th December 2019 (the day of sentence), Mr Asif received an email from the applicant attaching a written statement or letter from Ms Robinson (which we have not been provided with). He states that the applicant had informed him that contact was made with Ms Robinson by Vanessa following his conviction. Mr Asif states that, using contact details provided by Vanessa on 6th January 2020, Mr Asif contacted Ms Robinson on 7th January 2020 by telephone. She stated that she was at work and did not have time to speak. They arranged to speak at 4.30pm that day; but when Mr Asif called, Ms Robinson's mobile telephone was switched off. He sent her an email on 8th January 2020 but received no response. Ms Robinson, however, called Mr Asif on 16th January 2020, during which call Mr Asif was able to take a statement which was drafted and sent to her the same day. An electronically signed statement was received on 31st January 2020.

Grounds of Appeal

33. For the applicant, Miss Johnson, who fairly concedes the inconsistencies in Ms Robinson's oral evidence to which we will come in a moment, submits that the conviction is, nevertheless, unsafe. The fresh evidence from Ms Robinson further demonstrates that AB's account in evidence was untrue. Its significance is such that, when it is added to the other concerns about AB's credibility and reliability which themselves give cause for doubt, it renders the conviction unsafe. In answer to questions from the court, Miss Johnson submitted that the evidence would go not only to AB's credibility and reliability but could also stand as evidence proving the truth of what AB had allegedly said to Ms Robinson. Again, when questioned by the court, Miss Johnson suggested that such evidence (hearsay as it would be) could have been and would have been admitted under section 114(1)(d) of the Criminal Justice Act 2003; that the evidence was important in the context of the case as a whole. Thus, overall, Miss Johnson submits that the evidence is capable of demonstrating that AB's account was untrue; it would have been admissible at trial had it been available; Ms Robinson had not contacted the applicant with the statement and her whereabouts were unknown. It is said to be in the interests of justice for this court to receive it.

Grounds of Opposition

34. Mr West opposes the application. He submits that the evidence of Ms Robinson is not credible. Moreover, the fresh evidence does not go to any fact in issue in the trial. At most, it goes to credibility. The grounds for admission of the evidence under section 114(1)(d) are not made out. The brunt of the defence case at trial was an attack upon the credibility of AB. Even when taken at its highest, Ms Robinson's evidence is not sufficient to make the conviction unsafe. The jury saw AB and had the benefit of her credibility being challenged and challenged hard in cross-examination. Further, it is clear that the applicant and his legal representatives were aware of Ms Robinson's evidence prior to the commencement of the trial. It is said that no satisfactory explanation has been given as to why the evidence was not formally obtained.

Analysis

35. Section 23 of the Criminal Appeal Act 1968 provides materially as follows:

"(1) For the purposes of an appeal or an application for leave to appeal, the Court of Appeal may, if they think it necessary or

expedient in the interests of justice:

...

- (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard to –

- (a) whether the evidence appears to the court to be capable of belief;
- (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings below;
- (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

36. The overarching test is, therefore, whether the interests of justice require the fresh evidence to be admitted. But the four factors identified in section 23(2) require particular consideration. Ultimately the question will then be whether or not the conviction can be said to be unsafe.

37. As the Single judge identified, the stand-out feature on this application, beyond issues relating to Ms Robinson's credibility, is the timing of the production of her evidence. Ms Robinson was identified by the applicant, on his evidence, as a potential witness as long ago as July 2019. She was readily locatable, as evidenced by the fact that she was located by Vanessa in December 2019 within 24 hours or so of the applicant's conviction. There is no reasonable explanation for the failure to adduce her evidence at trial. Reasonable efforts by the applicant and/or members of his family and/or his solicitor could and would have resulted in the obtaining of Ms Robinson's evidence in very good time for trial.

38. As to whether or not Ms Robinson's evidence is capable of belief, it is unnecessary for present purposes for us to rehearse the oral evidence given by her in this court. It suffices to say that we find her to be a wholly unreliable witness. First, her evidence was that it was she who contacted Vanessa a day or two after the applicant's conviction, after 13 years of no contact, simply because Vanessa was a friend. This is an extraordinary coincidence and, in any event, inconsistent with Ms Robinson's written statement that it was Vanessa who contacted her on 12th December 2019.

39. Secondly, Ms Robinson initially said that her contact with Vanessa, XY and the applicant had all taken place around the same time and that that time was November and December 2019. That is wholly at odds with the other evidence to which we have referred. Ms Robinson's evidence generally was highly inconsistent both as to the dates of contact, the sequence of contact, and the reasons for and the contents of the contact in question.

40. Thirdly, and by way of further example, when Ms Robinson was asked why she was prepared to help with her evidence to this court, she said that she wanted to help because she "knew about the incident". However, when asked why she had not responded to the Facebook request from the applicant, which she remembered about for the first time, it would appear, today, she answered that she was reluctant to be a witness then because she had only heard one side of the story. That very much begs the question of why she is prepared to be a witness now.

41. Finally, Ms Robinson denied receiving any of the telephone calls or voice messages which the applicant says that he sent to her. One or other of them cannot be providing reliable evidence.

42. Thus, when considering the question as to whether or not Ms Robinson's evidence is capable of belief, we find that it is not capable of belief.

43. Allied to that is the question of admissibility. We query whether or not the evidence would have been admissible even on the limited question of credibility but we certainly have grave doubts as to the admissibility of the evidence under section 114(1)(d) of the Criminal Justice Act 2003, not least having regard to the factors identified in section 114(2).

43. Further, we do not consider that the fresh evidence might afford a ground of appeal, or that it is in the interests of justice to admit it. The applicant ran a sustained and vigorous attack on AB's credibility and her version of events by reference, amongst other things, to her recorded behaviour in the public house, her irresponsible parenting, alcoholism, antecedents and the inconsistencies in her accounts. He alleged outright that AB was lying and for a specific motive.

44. These matters were all spelt out for the jury by the judge in his summing-up. Early on in his summing-up he referred to AB's various accounts to others. He directed the jury as follows:

"You are entitled to take into account what the complainant told these various people when assessing the consistency and credibility of her allegations, and the defence positively invite you to do this, because their submission is that if you compare it with what she told the police in her interview, and indeed what she told you, they say ... there are significant discrepancies which tend to undermine her evidence as a whole in the case. Well, that is a submission you will no doubt carefully consider."

45. The judge went on a little later to refer to AB's issues with alcohol and past convictions for driving whilst under the influence of drink. He recorded the defence submission that these matters showed AB's tendency to become violent and aggressive in drink, making it more likely that she would be injured in an alcohol-fuelled fight of her own making, or prone to injury from falling down. Further, submitted the defence, when so affected, her ultimate recollection was likely to have been impaired.

46. The judge also reminded the jury in detail of the cross-examination of AB over 12 pages of transcript. He pointed out at various times the discrepancies relied upon by the defence.

47. Putting it shortly, the evidence of Ms Robinson, even if credible and reliable, would have

been little more than "more of the same" material with which to challenge AB's credibility. The fresh evidence could not be said to be of such weight as to have cast a substantially new or different light on the issues and evidence already before the jury so as arguably to render the conviction unsafe.

48. As the respondent submits, the applicant put up a vigorous defence. It is significant also that what AB is said to have said to Ms Robinson was not clear, or indeed necessarily inconsistent with the prosecution case on the key issue of how she came by her injuries. Thus, she certainly told Ms Robinson at one stage that the applicant had pushed her into the bath and tried to drown her. To the extent that AB may have been clear in saying that she attacked the applicant with a knife, it was common ground that the involvement of a knife or knives only arose just before the applicant left AB's house.

48. For all these reasons, we decline to grant leave to adduce the evidence of Ms Robinson. Nor would we grant leave to appeal against the conviction which we consider to be unarguably safe.

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

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