Neutral Citation Number: [2020] EWCA Crim 1674

Case No: 201904043 and 201904237

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TRURO
His Honour Judge Carr
T20110338

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2020

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE PICKEN
and
HER HONOUR JUDGE WALDEN-SMITH

- -

Between :

Cameron Beresford	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Jo Martin QC and Audrey Archer (instructed by **The Registrar of Criminal Appeals**) for the **Appellant**
John Price QC and Kelly Scrivener (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date : 27 November 2020

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Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is the hearing of an appeal against conviction for rape. The appellant, Cameron Beresford, was convicted, by a majority verdict of 10 to 2, on 18 October 2019 in the Crown Court at Truro, following a trial before His Honour Judge Carr ("the judge") and a jury. The conviction was for the anal rape of the complainant, which occurred on 13 August 2016 at the Boardmasters Festival in Newquay, Cornwall. The complainant has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1982.

2. The appellant also seeks permission to appeal against sentence if the appeal against conviction is dismissed. The prosecution seek a retrial if the appeal against conviction is allowed.

Issues on the appeal against conviction

3. The appellant appeals on grounds that: (1) the trial was unfair because of impermissible interventions by the judge, particularly when the appellant was giving evidence; (2) the directions given by the judge relating to character, drunkenness and a motivation to lie were misdirections, and the judge should have invited submissions from counsel about his decision to give a propensity direction in relation to the bad character evidence; and (3) there was an irregularity with the jury because there was evidence that jurors ignored the judge's warning not to conduct internet research and a juror complained of impermissible pressure brought by other jurors to deliver what the juror termed the judge's verdict of guilty.

4. The prosecution: (1) accepts that the judge should not have made certain comments about the appellant's defence at the beginning of the trial, and accepts that one of the judge's interventions by way of questioning the defendant was in the form of impermissible cross-examination, but submits that this did not affect the safety of the conviction. The prosecution submits that the other judicial interventions were permissible; (2) submits that there were no material misdirections and the judge had distributed a draft of his directions and no objection was taken to it so that there would have been nothing gained by a discussion with counsel; and (3) submits that the police have investigated the complaints in relation to the jury, and it is common ground that the result of the investigation was inconclusive and there was nothing to affect the safety of the conviction.

5. We are very grateful to Ms Martin QC and Ms Archer for the appellant and to Mr Price QC and Ms Scrivener for the respondent for the very helpful written and oral submissions.

The respective cases

6. The complainant and the appellant were at the time boyfriend and girlfriend. They had a very intense relationship for about a year and a half. At the time of the alleged offence the appellant was aged 17 years and 7 months. The complainant was also aged 17 years. They shared a tent at the festival in August 2016 and there was a small blow-up mattress on which they slept. It was common ground that they had had

consensual vaginal intercourse before, and after, the festival. It was common ground that the appellant had on occasion put his hand over her mouth with her consent during consensual sex so that they would not make any noise. It was also common ground that they had never had consensual anal intercourse.

7. It was further common ground that after a day during which both the appellant and the complainant had been drinking they went to bed. The complainant was going to go to sleep and the prosecution case was that the appellant fingered the complainant's vagina and the complainant said "no". The appellant stopped but then put his finger into her anus and the complainant shouted "no". He then pulled down her shorts and inserted his penis into her anus. This caused pain to the complainant who froze. The appellant thrusted so hard that the complainant slid off the mattress and the appellant stopped. The complainant lay in tears on the floor of the tent but then pulled up her clothing and left the tent. The complainant said she had returned to the tent and slept in the doorway at night.

8. The complainant did not initially tell anyone of what had happened but when she spoke to the appellant he accepted that he had heard her say no but said it had been a mistake or the complainant had seen it in a different way. The complainant's evidence was that in discussions afterwards the appellant "tried to make me believe afterwards that it was a horrible mistake" and the complainant had at times "wanted to believe that it was a mistake and he, it wouldn't, it was a freak accident that would never happen again" but she said that he was very deviant.

9. The complainant later made complaints to others. The complainant and appellant exchanged text messages in which he said "I admit what I did and I admitted how wrong its was but I just said that I never meant to you at all xx". She had replied "you can't even fucking say that you raped me" to which he had replied "Im not denying that? I know what happened and ive tried to apologise but its just not possible to make that right :(". The texts continued with the complainant telling the appellant to say what happened. He replied "Okay but first understand this is going from what I honestly saw and heard at the time so any mistakes in my story are not me lying they are just what I may have not seen or heard at the time so please do not get annoyed, I am aware that I did not notice some things at the time xxx". He then texted "Well I first kissed you and fingered you and then put my finger near your bum, you said no, then I continued and put my finger inside you said no again in the process and then no another time before yelling it where I then stopped and apologised. I then began to kiss your neck and then began to have sex with you from behind … at the time I thought my penis was in your vagina but in reality it was in your asshole, this went on for a while and then you fell off the bed and started crying. I realised you were upset at this point and tried to cuddle you and say sorry but you pushed me away and wanted to get out and get away from me …".

10. The complainant and appellant had continued going out until they went to Spain in 2017. During that holiday the complainant woke up and realised that her clothes had been rearranged, and the appellant admitted that he had digitally penetrated her vagina. She split up from the appellant.

11. The case for the appellant was that they had been drinking at Boardmasters and both went to bed in the tent. They had kissed and cuddled and he said he had decided to touch her anus. The appellant accepted that the complainant had said "no" but he had

assumed that it was what he said was a "playful no" but when he realised she was not playing he stopped immediately. They then kissed and had vaginal intercourse when he was lying behind her. At one point his penis slipped out of her vagina and he mistakenly inserted it into her anus. She moved forward and this caused his penis to come out of her anus. The appellant accepted that the complainant had been upset on the floor of the tent and had then gone out of the tent. She had later returned to the tent and he had slept in the doorway to the tent that night.

12. The appellant's case was that the penetration of her anus was an accident which occurred during consensual vaginal sex, and he had told that to the complainant. They had exchanged text messages. He had only accepted that he had acted wrongly because otherwise she would not let the point go. In the texts he had made it clear that he had made a mistake and thought his penis was in her vagina.

13. The complainant and appellant had continued going out until they went to Spain in 2017. However the complainant had falsely accused him of assaulting her during the holiday. The appellant had a number of difficulties in his life, his father was dying from Huntingdon's disease, he had himself just been diagnosed with Huntingdon's disease, and in May 2017 he was preparing for exams and then going to university. The false complaint from Spain led him to break up with the complainant. The complainant had only reported him to the police because she was angry at the break-up of the relationship and angry that the appellant had blocked the complainant's number.

The investigation and preparation for trial

14. The complainant made a complaint to the police and an ABE interview took place with the complainant on 8 October 2017. The appellant was arrested at Southampton University, where he was a student, and interviewed at Southampton police station on 9 November 2017. He made a prepared statement. In that statement he admitted attending the festival with the complainant, stating that they had had fully consensual sexual intercourse on more than one occasion and she was always fully able to consent to these acts. He denied raping the complainant. The statement said nothing about anal intercourse.

15. Thereafter the appellant was released while further investigations were made. It was not until 11 March 2019, some 17 months later, that the appellant was charged. It seems that this delay was due to general delays in the investigation of rape and serious sexual offences. The appellant was committed for trial on 11 April 2019 and there was a Pre-Trial Preparation Hearing on 9 May 2019. The trial was listed as a fixture for Monday 14 October 2019.

16. Prosecuting counsel liaised with defence counsel about the editing of the complainant's ABE interview. It was agreed between counsel that the complainant's evidence about events in Spain should not be edited out. It appears that both prosecution and defence wanted this evidence to be adduced to explain their respective cases about why the relationship broke down. However it seems that there was no formal consideration of the fact that this was bad character evidence about the appellant which engaged section 98 of the Criminal Justice Act 2003, or that the appellant wanted to ask questions about the sexual behaviour of the complainant after

the festival which would engage the provisions of section 41 of the Youth Justice and Criminal Evidence Act 1999 ("YJCEA").

The trial

17. The trial commenced on Monday 14 October 2019. There had been a late change of prosecuting counsel because of an unrelated overrunning case. Newly instructed prosecuting counsel introduced counsel and stated that so far as she was aware the parties were ready for the trial to start. The judge then asked questions of both counsel to clarify matters which he had identified from pre-reading.

18. When clarifying that the defence was one of accident and that no issue of consent arose the judge summarised the defence as being that the appellant:

> "says by some, well, matter for the Jury, anatomical abnormality – he managed to find an orifice which was quite different from the orifice he was in before. That's accident, that's not consent".

19. The judge identified that what had happened in Spain was bad character, that no application had been made by the prosecution to adduce bad character evidence and having heard briefly from prosecuting counsel, stated that he would exclude all references to what had happened in Spain because it was not a separate count on the indictment (although it should be noted that this was because it occurred against an adult in Spain and there was no jurisdiction to try the matter in England) and because it was bad character evidence which the prosecution had not applied to adduce. However when defence counsel made it clear that the defence would want to put to the complainant that the reason that she complained to the police was because the relationship had ended and she was angry that the appellant had blocked her phone number, the judge told both counsel to seek to agree matters. In the course of these discussions when discussing the complainant's motive for making the allegation, the judge said:

> "if it is being suggested that she knows as a fact absolutely that it's false and that it was an entire accident, she knew from the beginning it was an accident -- then it seems to me, and that she has done this purely to punish him in some sort of Machiavellian way, which is always alleged in these cases and happens in about 0.00001% of real world that people operate in that Machiavellian way, which always looks great on paper but just doesn't actually happen in the real world, then it seems to me that she may well be entitled to say, no, it isn't just, this isn't me being angry that he's left me".

20. Complaint is made on behalf of the appellant that in these last two passages the judge made it clear that he considered the defence to be hopeless. This was not a pre-trial preliminary hearing where the judge was identifying issues, but was a case where the appellant, a young man of previous good character, was just about to face a trial for rape in front of a jury. It was said that the effect of the judge's interventions was to make the appellant believe that the judge was against him.

21. The prosecution accept that the judge should not have shared his apparent views about the merits of the defence just as the trial was about to start. However the prosecution

point out that the jury was not present, and that the appellant was able to give clear evidence a couple of days later without any apparent effect.

22. We accept that the judge should not have shared, in such direct terms, his own view of the merits of the defence. We accept that the judge at this stage was case managing the trial and was addressing issues of bad character and past sexual behaviour which should have been resolved before trial. However this was not a pre-trial preliminary hearing where permissible comment on the potential merits of a defence might assist both parties to focus on the issues, but the start of a trial in which a young adult of previous good character, who had been 17 at the time of the alleged offence, was about to face a trial by jury. There was nothing to be gained from the judge sharing his view that the defence could only succeed if there was some "anatomical abnormality" or from the judge sharing his past experience of false complaints in such terms. This is because at trial the judge's function is to provide a fair trial, and not to appear to take side with either prosecution or defence. However all of this did take place in the absence of the jury and we also record that the appellant did manage to give oral evidence.

23. In the course of further submissions from counsel the judge shared the view that the case provided a 'training session' in 'how these cases shouldn't be prepared'. The judge remarked that counsel were both 'mystified' at his concern with their inability to comply with the Criminal Procedure Rules, and the judge commented that it was 'the worst prepared sex case' he had ever seen. The judge stated that it was 'almost as if Section 41 never happened' and that the approach of the defence was 'contrary to every Court of Appeal authority of the last 15 years'.

24. Complaint is made on behalf of the appellant about the attitude of the judge to counsel. The prosecution submit that important issues relating to bad character and section 41 had not been properly addressed before trial and a court is entitled to expect counsel to be robust.

25. This was a case where the issues of bad character and previous sexual history should have been addressed before trial. Some of the judge's comments about counsel should have been more courteously expressed. That said, it is apparent that both counsel were able to continue and perform their roles with expertise throughout the trial.

The evidence of the appellant

26. During the appellant's evidence in chief the judge criticised counsel for the appellant for the way she was questioning the defendant saying: "You can control the witness, I'm sure" after the defendant had raised in evidence matters which were restricted under section 41 of the YJCEA.

27. Following questions by defence counsel to the appellant about the text messages, and following a question by counsel after the appellant had said he would read the text again and counsel had said "sorry, you weren't going to pretend that you didn't rape her" the judge said: "It's a little tricky to correct your own witness"; "Tempting though it is sometimes, you can't correct your own witness"; and, "Do you want to ask another question, a proper one?".

28. The questioning about the texts continued and the judge said "Sorry, I, I keep asking about leading. You're, you're reading whole chunks out -- With greatest respect, giving him the answer and then getting the response. It's, it, I'm not sure how helpful this is."

29. Complaint is made on behalf of the appellant that these interruptions made it difficult for counsel for the appellant to do her job. The prosecution submits that these were permissible interventions by the judge where the witness had strayed into impermissible areas, where there had been inappropriate questioning of the appellant by defence counsel, and where there had been a considerable amount of time spent on the texts.

30. In our judgment these were permissible interventions by the judge in the course of the trial. The judge had made a ruling under section 41 of the YJCEA which is not challenged on appeal, and the judge was right to ensure that the ruling was respected. There was some impermissible leading of the witness by counsel for the appellant and the judge was entitled to point that out, although many judges might have pointed out the matters in a different way.

31. In the course of examination in chief, and while defence counsel was still dealing with the text messages, the following exchange took place:

> **Judge:** Sorry, I, I just want to be clear. We're going through a lot of emails, but they seem, to all seem, messages, they seem, seem to have the same premise. Now, see if I'm fair. What you're saying is, is, in effect, you're admitting you raped her but only because you wanted to make her feel better?
> **Mr Beresford:** I wasn't admitting I raped her. I was just saying sorry for what happened.
> **Judge:** Well, hurt her.
> **Mr Beresford:** Like I said earlier, if it was an accident I still say sorry.
> **Judge:** The word accident never appears.
> **Miss Archer:** Your Honour, she uses the word "accident"
> **Judge:** Yes. He never does, not once, I've found.
> **Miss Archer:** Mr Beresford, in, in fact, there, there is a point, and I, I don't have it to hand, where she says words to the effect of it, it's not a, she says it's not a fucking mistake, Cameron, words to that effect. Your Honour, I'll find the, the reference.
> **Judge:** That's alright, you can find it if you need to bring it to the jury's attention. I , I couldn't find the word accident in any of his messages"
> […]
> **Judge:** It was just, I was just, you see, what's being suggested is you're admitting doing something more than a simple accident. As I understand it, you accept that's what those messages were meant to do, but you were, as it were, falsely accepting something you'd done just to make her feel a bit better?
> **Mr Beresford:** Yeah.
> **Judge:** How did you think it would make her feel better to falsely admit something you didn't accept you'd done?
> **Mr Beresford:** Because I'd gone down the route before of putting my side across and saying no, it was an accident. And she, she would blow a fuse. She'd lose her mind, and she wouldn't let me, let me put that side across. So

> the only way I found of keeping her happy was just to say what she wanted to hear.
> **Judge:** Which was that you'd raped her.
> **Mr Beresford:** No. It's just apologising.

32. Complaint is made on behalf of the appellant that this intervention on the texts took the form of impermissible cross-examination. The judge had wrongly said that there was no reference to accident, when the whole tenor of the appellant's texts had been to explain that he had made a mistake, albeit that the complainant did not accept that it was a mistake.

33. The prosecution submits that the judge was permissibly attempting to summarise the effect of the texts in circumstances after a long period of time had been spent reading them out, and that the judge had been entitled to ask the questions that he did.

34. In our judgment the judge was entitled to direct counsel to the issue in the case, namely the explanation for writing the texts in the way that they had been written, but any such intervention needed to be carefully expressed given the importance of the issue to both prosecution and defence. In his intervention the judge summarised the texts as meaning that the appellant accepted that he had raped the complainant, when his case was that he had not, but that he had avoided confronting her. The judge's intervention led to an unfortunate argument, in front of the jury, with both the appellant and counsel. It is not clear that the judge's intervention about accident was fair. This was because there were numerous text messages where the appellant had said (whether rightly or wrongly was for the jury) that the penile penetration of the anus was a mistake. The judge's question about how the appellant thought it would make the complainant feel had the effect of making the appellant look bad in the eyes of the jury, and had nothing to do with the issues in the case. It clearly communicated the judge's view that the appellant was a person who had humiliated the complainant by, at best, lying in texts to avoid a confrontation. It was unhelpful that at the end of the passage the judge repeated the statement that the appellant had admitted to the rape in the texts, when the appellant had made it clear that he contended that was not the effect of what he had written in the texts.

35. The appellant was cross examined about a relationship that he had had with his first girlfriend. It seems that this was in an attempt to show that he knew what he was doing with texts in a relationship.

36. Complaint was made that the judge did not intervene to prevent questioning of the appellant about his first relationship when it was said that the judge had given a section 41 YJCEA ruling to protect the complainant from inappropriate questioning. In our judgment there is nothing in this complaint. The questioning appears to have been in the context of texts, it was not directed to past sexual experiences, and it did not seem to progress very far before counsel moved on. Section 41 YJCEA exists to ensure that complainants have a fair trial on relevant evidence. This questioning of the appellant by prosecuting counsel was fair.

37. In the cross-examination of the appellant by the prosecution, the appellant complained of the judge's interventions on two particular occasions. The first was when the prosecution had asked whether it really was the case that the complainant had said "no" in a playful manner. The judge intervened and asked:

> **Judge:** Can you help me with how a playful no is not a real no?
> **Mr Beresford:** The -
> **Judge:** How, how you distinguish between the word no, which seems to have only one meaning, and being able to describe the nuance between it being a playful no and a really don't-do-this no.
> **Mr Beresford:** Well, before, in sex, she said no in a playful manner. It's, it's, I don't know, like the, almost the same no, say, if someone was tickling you. It was like, yeah, it was, it was the manner in which she said it. I, it wasn't serious.
> **Miss Scrivener:** But you'd –
> **Judge:** The –
> **Miss Scrivener:** Never –
> **Judge:** Non-serious no?
> **Mr Beresford:** Yes.

38. It is submitted on behalf of the appellant that this was classic cross-examination, but by the judge. It was for the jury to weigh up the appellant's case about whether "no" was understood by the appellant and complainant literally or in some other way, and it was not the judge's function to share his view that "no" had only one meaning. If the appellant's case was without merit that was for the jury to decide, it was not appropriate for the judge to force his views on to the jury.

39. The prosecution submitted that this was a permissible question, albeit one that many judges would not have asked, and the judge had clarified the appellant's case that it was a "non-serious no".

40. The second passage that the appellant relies on is the very final exchange, when the judge was asked whether he had any questions. The judge said he had one question, and the following exchange took place:

> **Judge:** You're aware from the very beginning it's an allegation of anal rape.
> **Mr Beresford:** Yes, I was told, yeah.
> **Judge:** Can you assist why there's no mention in your prepared statement to the fact you accidentally put your penis in her anus?
> **Mr Beresford:** I'm not sure why it wasn't in there. Personally I didn't physically write this statement. It was prepared for me by the legal counsel I was given. At the time I'd been arrested from, in my halls out the blue. I, I didn't know that I was going to be arrested at the time. I was arrested about 4 o'clock, 5 o'clock in the morning and then held in a cell until whatever time this was, about 1 o'clock, I believe.
> **Judge:** But, you see, you do go into detail about consensual sexual intercourse and putting your hand over her mouth, so there's quite a lot of detail.
> **Mr Beresford:** Yeah.
> **Judge:** The one detail noticeable by its absence is your entire defence. Can you assist with why that's the case?
> **Mr Beresford:** Can you restate that question –
> **Judge:** Yeah.
> **Mr Beresford:** Sir? I –
> **Judge** You go into some detail, sexual intercourse, the putting the hand over the mouth, because you wanted to deal with why that would have happened in case people saw that as problematic. You then go on to indicate how she's

> complained of rape, you say, after your separation. You've already been taken to that. But the one thing absent for somebody accused of anal rape is I think I should tell you I penetrated her anus but it was accidental.
> **Mr Beresford:** Yes, I, I did say that to my legal counsel, and the, I think he was responding to the small amount of information that the, that he'd been given in a, a very short time period, to write this and prepare the statement.
> **Judge:** Well, it's the single most important thing. If you said nothing else in your prepared statement one might imagine that you'd say that if it was the position.
> **Mr Beresford:** Yeah in hindsight I, I probably should have mentioned it and made sure it was clear.
> **Judge:** So it was an oversight?
> **Mr Beresford:**. Yeah, it was an accident. I, I should have put it in here, yeah.

41. The case for the appellant is that this was not clarification for the purpose of assisting the jury. This was nothing less than cross-examination by the judge on the prepared statement to suggest that there was "detail noticeable by its absence" which was "the single most important thing". It is submitted that the reality was that the appellant had been arrested in his halls of residence at university in the very early morning and it was not surprising that the prepared statement was not a complete document.

42. The prosecution submit that the judge was entitled to ask the question about the prepared statement because the jury might have raised it after retirement, but accept that the questioning was more in the nature of impermissible cross-examination. They submit that while the trial might not have been a thing of perfection, any impermissible interventions on the part of the judge did not render the conviction unsafe.

43. In our judgment both of these interventions by the judge in cross-examination crossed the permissible line between clarifying issues for the jury, and descending into the arena to support one side over the other. Prosecuting counsel had exposed the difficulties with the appellant's case about the "non-serious no" and the judge's intervention disclosed his own view that "no" in the relationship of the appellant and complainant had only one meaning. The questioning on the prepared statement was not helpful because prosecuting counsel had not cross-examined on the point. This was because although it was right that anal penetration had not been mentioned in the prepared statement, the appellant had set out his case that there was accidental (or mistaken as he put it) penetration of the anus during consensual vaginal intercourse which pre-dated the prepared statement in texts sent before he had been arrested. The effect of the judge's questioning was to state that the appellant had left out the single most important thing in the case, without any acknowledgement that he had already set out his case in texts which pre-dated the prepared statement.

44. The evidence for the appellant concluded just before lunch and the hearing was adjourned at 1311 hours. Over the lunch adjournment counsel for the appellant was discussing with the appellant the interventions made by the judge, counsel were preparing their speeches and the judge distributed draft written directions. Counsel were back in court at 1415 hours and made some typographical amendments but no amendments of substance. The case resumed at 1430 hours with the first part of the summing up, then closing speeches from counsel, and finally the concluding part of the summing up.

The summing up

45. The judge gave a propensity direction in relation to the evidence about what the complainant said had happened in Spain stating that it was 'said by the prosecution to be relevant to the question as to whether he has a propensity, in other words a tendency to commit offences of the kind of which he's now charged' and the propensity was said to be a failure to respect sexual boundaries.

46. Complaint is made that the bad character evidence had been admitted by agreement, and the prosecution had not put the case formally on the basis of a propensity not to respect sexual boundaries. It is submitted on behalf of the appellant that although the judge had circulated a draft direction containing the propensity direction he had not discussed it with counsel, and counsel for the appellant was at least for part of the lunch hour attempting to provide comfort to the appellant who felt completely undermined by the judge's questioning of him. It was further submitted that the judge had not made it clear that the jury had to be sure that the incident in Spain had occurred as stated by the complainant. The prosecution submitted that the judge's direction was a fair direction on the evidence and indeed did no favours for the prosecution. The judge had circulated the draft directions and counsel had been able to correct typographical errors and did not make any submissions about the propensity direction.

47. We consider that the direction did fairly identify that the jury had to be sure that the incident in Spain had occurred as related by the complainant before they could rely on it. Further it is common ground that the judge was entitled to direct the jury that it may use bad character evidence admitted under one gateway of section 101 of the Criminal Justice Act 2003 ("CJA 2003") for the purposes of another gateway under the CJA 2003, see *R v Highton* [2005] EWCA Crim 1985; [2005] 1 WLR 3472. A judge should discuss the directions that it is intended to give in relation to bad character with counsel, particularly if the evidence has been admitted through one gateway and the judge is proposing to give a direction about its use under another gateway. However in circumstances where draft directions had been circulated and no issue had been raised, and the direction did not distort the cases of either prosecution or defence, we are satisfied that this particular direction was permissible.

48. The second criticism made of the judge's summing up is that the judge gave a direction that a drunken intent was still an intent. It was submitted on behalf of the appellant that although this was accurate as far as it went, it was an irrelevant and misleading direction. This was because no issue had been raised to the effect that the appellant was so drunk that he was unable to form a specific intention. His case was that he had made a mistake, which might have been affected by drink, when penetrating the anus and not vagina. It was submitted that the judge should have explained that just as there can be a drunken intention there can also be a drunken mistake.

49. The prosecution submitted that the direction was conventional and limited, and would have assisted the jury if any were concerned about issues of intention in the light of agreed evidence about drinking.

50. In our judgment the judge was entitled to give the direction about a drunken intent being an intent, and it was not wrong. However if the judge considered that the jury

needed assistance on the effect of alcohol, it would only have been fair to tailor the directions to the specific issues in the case and make it clear "that a drunken accident is still an accident" for the reasons given by Hughes LJ in paragraph 23 of *R v Heard* [2007] EWCA Crim 125; [2008] QB 43.

51. Complaint was also made that the judge gave a written and oral direction about 'Motive for a False Complaint'. This direction set out that the jury were 'entitled to ask, in the circumstances of this case, whether there is any reason [the complainant] would invent these allegations' and that they 'may wish to look, as part of the evidence, at how the complaints were made and in particularly the timing and nature of those complaints'.

52. It was submitted on behalf of the appellant that this was an unbalanced comment which should not have been elevated to a written direction. The prosecution submitted that the judge was entitled to direct the jury in these terms. The judge had made it clear that there was no burden on the appellant to show the motive for the false complaint.

53. We accept that a judge is entitled to give a direction to the jury about whether the complainant has any motive for making a false complaint, so long as the judge makes it clear that there is no burden on the defendant to show such a motive, see *R v B* [2003] EWCA Crim 951; [2003] 1 WLR 2809. However if the judge is proposing to give such a direction and the defendant has advanced a reason for the complainant lying then a direction tailored to the particular case would pick up and remind the jury of that case in the direction. In this case the appellant claimed that the complainant was lying because he had ended the relationship and refused to take her calls, and the direction does not deal with those matters and it should have done. This is particularly so in circumstances where (whatever the judge thought of the point) the appellant had attached such importance to the issue that it had been agreed that events in Spain could be adduced before the jury.

54. Complaint was made that the judge had made an unbalanced comment in telling the jury that 'if the Defendant accidentally placed his penis in her anus, that was precisely the part of her anatomy he'd been interested in exploring shortly before, and received the response that he did'. It was pointed out that the judge had made no comments in favour of the appellant by way of balance, for example by referring to what were said to be discrepancies between the complainant's first and second ABE interviews about events in Spain. The prosecution submitted that this was a comment which the judge was entitled to make, and there was no fundamental imbalance in the summing up. In our judgment this was a permissible comment made by the judge.

55. Finally complaint was made about the good character directions because the judge's direction missed out words in the Judicial Compendium about good character being taken "in his favour". The prosecution submit that the character direction covered both limbs of the direction and was sufficient.

56. In our judgment the good character direction was a proper direction. The judge referred to both credibility and propensity, and there is no requirement to use any particular formula of words when summing up.

The complaint from the juror

57. After the jury's majority verdict had been delivered, one of the jurors expressed concerns in an email that two other jurors had arrived in court on the second day of deliberation with printed research concerning the difference between sexual assault and rape, and concerning the majority voting procedure. In a second email, the same juror stated that there was a feeling of pressure within the jury to return a majority verdict of guilty to give the judge his verdict.

58. The police carried out research and questioned members of the jury. It was common ground that the result of the police research was "inconclusive".

59. It is submitted on behalf of the appellant that juries have been discharged for conducting internet research where it has come to light before the verdict, and that in *R v Karakaya* [2005] EWCA Crim 346; [2005] 2 Cr App R 5 the conviction had been quashed because it was proved, from internet search material left behind after the jury had returned its verdict, that research had been conducted.

60. The prosecution submit that the judge had given the jury clear directions to report any matters of concern before the verdict was returned. They submit that the only reasonable inference to draw is that these complaints were simply a protest by a juror at a verdict with which they disagreed, see *R v Lewis* [2013] EWCA Crim 776.

61. We have looked carefully at the transcript of the proceedings to see if there was any information to support or undermine what was being said by the juror. We noted that two questions were asked by the jury in retirement, but they do not appear to relate to the alleged internet research. There is effectively nothing to show an irregularity with the jury apart from the juror's complaint, made after the trial had concluded in this case. As Gage LJ pointed out in *R v Adams* [2007] EWCA Crim 1; [2007] 1 Cr App R 34 "silence as to any such irregularity will … almost certainly mean that this court will assume that none occurred". We can see no permissible basis for accepting the complaints made by the juror and finding that any irregularity with the jury occurred.

Whether the conviction is safe

62. Impermissible judicial interventions and their effect on the safety of the convictions have been addressed in a number of cases. In *R v Hamilton* (113) Sol Jo. 546 Lord Parker CJ stated that whether judicial interventions would in any case give ground for a conviction to be quashed was only a matter of degree noting that interventions to clear up ambiguities and to ensure that a note is accurate were perfectly justified. He went on to say:

> "But the interventions which give rise to a quashing of a conviction are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury …. The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty … and thirdly, case where the interventions have the effect of preventing the prisoner himself

> from doing himself justice and telling the story in his own way".

63. The report of *R v Hamilton* in the Solicitors' Journal is very brief but in *R v Hulusi and Purvis* (1973) 58 Cr App R 378 Lawton LJ set out at pages 381-382 extracts from a transcript of Lord Parker's judgment when setting aside convictions for robbery where the appellant "was cross-examined by the judge – there is no other word for it – at very considerable length …". *R v Copsey* [2008] EWCA Crim 2043 was another case where the Court quashed a conviction where they found that the judge "took on the role of cross-examining in the way that is more suitable for a prosecuting counsel than for a judge".

64. It is not, however, every case where a judge acts impermissibly that will render a conviction unsafe. In *Randall v The Queen* [2002] UKPC 19; [2002] 1 WLR 2237 at paragraph 28 Lord Bingham stated:

> "While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders the trial unfair … But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."

65. In *Bernard v The State of Trinidad and Tobago* [2007] UKPC 34; [2007] 2 Cr App R. 22 the court stated that "in a case of procedural unfairness … determination of such an issue involves weighing the seriousness of the irregularities. If the defects were relatively minor, the trial may still be regarded as fair. Conversely, if they were sufficiently serious it cannot be accepted as fair, no matter how strong the evidence of guilt." In *R v Grove* [2017] EWCA Crim 1229 the court held that the judge's conduct in that particular case "crossed to the wrong side of the lines which Lord Parker and Lord Bingham drew".

66. It is apparent from the agreed submissions on behalf of both the appellant and respondent that there were some failings in the trial process. Further we have set out a number of other instances where we have accepted the submissions of the appellant that there were other impermissible interventions by the judge. The critical question for us is to attempt to weigh the effect of these impermissible interventions to see whether they undermined the fairness of the trial.

67. In our judgment the combined effect of these interventions was to make the trial process unfair. In part it was because the trial judge's interventions were so effective at showing the appellant in a very unfavourable light ("how did you think that would make her feel"), in part it was because the judge was cross examining very effectively for the prosecution while using his right to comment in a way that prosecution counsel cannot ("which seems to have only one meaning") and in part because the judge made a point on the prepared statement (missing out "the single most important thing") which lacked any balance by reference to the appellant's earlier texts to the

complainant about mistaken penetration. In making this assessment we have also taken account of the matters set out above in relation to the summing up, namely that there was no direction on a drunken accident nor a direction about the appellant's case on the complainant's motive to lie, although we do not consider that these omissions on their own would have made the conviction unsafe.

68. It is apparent from the Advices on appeal that the appellant, and his family, did not consider that he had a fair trial. It is well-known that a party to litigation may not be the best person to judge whether the proceedings have been fair, but in this case we conclude, with regret (because there will be a retrial which will add to the burdens on both complainant and appellant, see below), that the proceedings were not fair, and that the appellant's conviction must be quashed.

The application for permission to appeal against sentence

69. In these circumstances it is not necessary to address the application for permission to appeal against sentence.

Order for a retrial

70. It is agreed that the critical issue for us to determine is whether a retrial is in the interests of justice. It was submitted on behalf of the appellant that the appellant had served just over a year of his 4 year sentence (being approximately half of the custodial element) and at a time when COVID-19 had made imprisonment very difficult because of the extra amount of time of lockdown endured by prisoners. His diagnosis of Huntingdon's disease was relied on to show that the delays had a material extra effect. Reliance was also placed on the delays which occurred after interview and before charge. It was submitted that it would only be right to enable him to move forward without facing another trial. The prosecution submitted that the setting aside of the verdict meant that the complainant's case had, as a matter of fairness for her, to be heard again, that the protection of the public had required a lifelong order in relation to the sex offenders register for the appellant, and that it was possible to have a fair trial.

71. We are sure that it is in the interests of justice to have a retrial. This is so that both complainant and appellant can have a fair trial of the allegation that the appellant raped the complainant. We accept that time has passed, and that the appellant has suffered particular difficulties, but the complainant is also entitled to a fair trial of her allegation against the appellant. We will direct that the re-trial be heard in either Plymouth or Exeter.

Conclusion

72. For the detailed reasons set out above we allow the appeal against conviction and direct that the appellant should be retried.

73. In circumstances where there is to be a retrial we will restrict the reporting of this judgment until after the conclusion of the retrial pursuant to the provisions of section 4(2) of the Contempt of Court Act 1981. This is because the judgment contains details of the judge's reaction to the appellant's defence and our assessment of the

effect of the judge's questions on the appellant's defence. The parties are to notify the Registrar of Criminal Appeals when the retrial has concluded.