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IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA CRIM 197

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 11 February 2020

B e f o r e:

LADY JUSTICE SIMLER DBE

MR JUSTICE LAVENDER

THE RECORDER OF MANCHESTER
HIS HONOUR JUDGE STOCKDALE QC

R E G I N A

v

GAVIN MICHAEL KIRKHAM

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Mr Christopher Harding appeared on behalf of the **Appellant**

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

This is an appeal to which the provisions of the Sexual Offences (Amendment) Act 1992 apply so that no matter relating to a victim of a sexual offence 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 such a victim. The prohibition applies unless waived or lifted.

On 23 July 2019, in the Crown Court at Preston, the appellant was convicted of a series of sexual offences and on 24 July 2019 was sentenced by Her Honour Judge Lloyd as follows: on count 1, a sexual assault contrary to section 3 of the Sexual Offences Act 2003, there was a 12-month term of imprisonment concurrent to the sentence on count 5; on counts 2 and 3, assault by penetration contrary to section 2 of the Sexual Offences Act 2003 and a further sexual assault, a term of 4 years' imprisonment on each count to run concurrently with the sentence on count 5; on counts 4 and 5, both rapes contrary to section 1(1) of the Sexual Offences Act 2003, a term of 12 years' imprisonment concurrent on each count was imposed.

The appellant appeals against sentence with leave of the single judge and renews his application for leave to appeal against conviction and for a representation order after refusal by the same single judge. We deal with the conviction application first.

The facts

The sexual offences all occurred during the early hours of the morning of 13 August 2016. The evening before (12 August 2016) there was a party at the appellant's home to celebrate his

40th birthday. The appellant was then in a relationship with the paternal aunt of the victim of the offences, to whom we shall refer as 'AB', and AB attended the party with her boyfriend intending to stay the night in the appellant's spare room with her boyfriend. AB was then 17 years old.

During the evening AB was drinking alcoholic cocktails and felt quite drunk. Her parents, also present at the party with other family members, left at around midnight. Shortly afterwards, AB decided to go to bed. She remembered later the appellant and her boyfriend sorting out the bedding and the appellant tucking her into bed. She was still wearing her clothing at this time. AB was later to say that the appellant left the room briefly, before returning and putting his fingers into her mouth. She pretended to be asleep and did not respond to or participate in what he was doing, either at that point or throughout the period of the incidents to which we now refer.

The appellant pulled up her skirt and touched her vagina over a bodysuit and her underwear (count 1). He then moved his hand underneath her clothing and penetrated her vagina with his fingers (count 2). The appellant then left the room briefly (AB thought for about 10 seconds) before returning and trying to kiss her on the lips. She did not respond. He pulled up her bodysuit, kissed her breasts and licked her vagina (count 3). He adjusted her clothing slightly and again left the room. When he returned shortly afterwards he continued to try to kiss her and lick her vagina. He then removed his penis from his trousers and inserted it into her mouth (count 4). As she was not responding he tried to penetrate her vagina with his penis but did not fully penetrate her and did not ejaculate (count5). She recalled him going away to check the door, before coming back and continuing to assault her. He then penetrated her vagina with his fingers again, before leaving the room. He did not subsequently return to the bedroom.

AB cried for a while and then fell asleep. She recalled her boyfriend coming to bed but could not tell him what had happened. The following morning, she pretended everything was fine, but, having left the appellant's house, became distressed and disclosed to her boyfriend what had happened. She subsequently confided in another friend, and the incident was disclosed to her mother and thereafter promptly reported to the police, who arrested the appellant at around 8 am on 14 August 2016.

In police interview, the appellant denied the allegations and said he had engaged in consensual sexual activity with AB. He said she had reacted positively to what he was doing and that if at any point he thought she was not consenting he would have stopped.

The trial

At trial the defence case was that AB was not telling the truth about what had happened and that all the sexual activity was consensual.

The appellant gave evidence at trial. He described consuming a lot of alcohol during the evening. Later, he saw AB and her boyfriend going upstairs to the spare bedroom and remembered that the bed had not been made up. He went upstairs and helped AB's boyfriend put sheets on the bed. He said that he was then left alone with AB in the bedroom. He went to say goodnight to her and give her a hug, and they ended up kissing. He accepted he had touched her leg and her vagina both over and under her clothing. He said she was fully aware of what was happening and did not at any stage resist. He said she did not tell him or do anything to indicate that she was not consenting. He said she performed oral sex on him and then he penetrated her vagina, first with his fingers and then with his penis. He said he had to leave the room on two occasions to check on his son. After the second time, he returned to the room to find AB under the bedclothes and apparently asleep. He therefore left her alone. He denied taking advantage of her and

denied he had developed a sexual interest in her.

In addition to his own evidence, the appellant relied on evidence of his previous good character and on positive good character evidence from his employer and a former manager.

The jury were told about an earlier incident that had occurred in 2015 when it was alleged by AB that the appellant touched her leg while they were sitting on a sofa. There was a contested application relating to the admission of that evidence, which was bad character evidence, and it was admitted.

In her careful directions to the jury the judge directed them as to how they should and could deal with that evidence, making it clear that before considering it they would have to be sure that the incident occurred; even if they were sure that the incident occurred, they would have to be sure that the incident was sexual; if they were sure that that incident involved a sexual assault, she directed them that they could consider whether it demonstrated a tendency to act in a sexual manner towards AB. She set out the defence case that if there was any touching of AB's leg by the appellant, it was an accident and not sexual and had no bearing on his state of mind in 2016. She also directed the jury, importantly, that even if they were satisfied that it did occur, it would be quite wrong and unfair simply to say that because the defendant has behaved in that manner towards AB on one previous occasion he must therefore be guilty of any count on this indictment. She went on to explain how they could take this evidence into account if they decided to do so and to remind them that they must look at all the evidence in relation to the counts on the indictment in order to determine their verdicts.

Ultimately the issue for the jury at trial in light of the stark conflict, was whether they could be sure that the sexual activity had occurred as alleged, that AB had not consented and that the appellant did not reasonably believe she was consenting.

The section 41 applications

The trial began on 15 July 2019, when an application was made on the appellant's behalf for leave to adduce evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999 of AB’s active sexual relationship with her boyfriend prior to 12 August 2016. The evidence was said to be relevant to the appellant's belief that AB was consenting. Furthermore, it was said that the fact of previous sexual activity with her boyfriend within seven days might account for certain clinical findings of reddening and a bruise, made by Dr Susan Lewis, who examined AB after the incident. The defence also argued that unless the jury were made aware of that sexual relationship, they would or could be left with the misapprehension that AB was not experienced and would not have had any idea as to how she may react to sexual stimulation. The defence also sought to adduce evidence that AB behaved in a flirtatious manner during the course of the party and in particular, having spilt some drink down her at one point, said words to the effect, "Oh you can see it glisten on my boobs".

The judge refused the applications. She held that the medical findings were wholly equivocal and neutral; they had no relevance to the case whatsoever. Secondly, she held that whether or not AB was in a sexual relationship with her boyfriend had no relevance to the appellant's belief that she would consent to sexual activity with him. She continued:

> "Bearing in mind the complete conflict in the accounts between each of them about how she reacted to the sexual activity, whether she was sexually experienced or not is, in my judgment, of absolutely no relevance to the defendant's reasonable belief as to whether she was consenting. ... She does not assert she was a virgin so that this needs rebutting. She simply says that she lay flat on her back and let it happen because she was scared ... Her previous sexual experience is of no relevance, nor is it admissible ..."

Finally, as regards the evidence of flirtatious behaviour, the judge noted that the appellant had not said in his police interview or defence statement that the comment was acting on his mind when the sexual activity subsequently occurred and she continued:

> "Any such comment or flirtatious behaviour cannot provide a reasonable ground for believing that she would have any sexual activity with the defendant, let alone full sexual intercourse."

The judge found that the intended questioning fell foul of section 41(3)(a). She found that it was not so similar to the sexual activity which occurred, and nor was it part as part of the event which was the subject matter of the charge. There was not the necessary temporal nexus between the flirtatious behaviour or comment taking place and the sexual activity.

Once the trial started two further applications were made on the appellant's behalf. Having obtained a further statement from Mr Seddon, an independent witness who gave evidence about the flirtatious comment made by AB, clarifying that the comment was made directly to the appellant, the judge was invited to reconsider her section 41 ruling. The judge concluded that even if directed at the appellant, that comment came nowhere close to evidence of a willingness to engage in sexual activity with him or anyone else and was not relevant to the issue of consent that night or any other night. It was not indicative of AB's state of mind in relation to sexual activity with the appellant and was not in any sense an invitation to sexual activity.

The defence also sought to introduce video footage from the party to contradict evidence given by AB's mother that AB was very drunk. The judge described what could be seen on the footage, namely AB standing next to a doorway for about two minutes. The judge refused the application on the basis that it did not demonstrate whether AB was or was not very

drunk.

The conviction application

In written grounds of appeal, developed orally, it is argued on the appellant's behalf that the judge's refusal to allow the defence applications to adduce relevant and admissible evidence and to cross-examine AB had the overall effect of rendering the appellant's trial unfair and his convictions unsafe. Mr Harding advances this argument on the basis of relevance to the question of consent only and not to the question of the appellant's reasonable belief in consent. He submits that looked at alone, the flirtatious comment in particular is an episode of behaviour that would have assisted the jury in deciding where the truth lay because it demonstrated sexual familiarity towards the appellant. Moreover, he submits it had even greater relevance in light of the admission of the bad character evidence about the incident in 2015 to which we have already referred. Mr Harding accepts that the evidence was not determinative but submits that is not the test. The test is one of relevance, and if relevant, the question for the judge was whether the exclusion of the evidence would prevent the jury from taking into account relevant material and lead to an unfair or potentially unfair verdict. He submits that the judge's ruling meant that the appellant could not put his full story to the jury; he could not address the bad character evidence that had been adduced; and he was prevented from giving evidence that might have had an impact on the jury's decision making on the question of consent. He submits that the judge erred in law by imposing too high a threshold for allowing this evidence to be adduced because, rather than adopting a test of relevance, she looked at whether the evidence was determinative.

We do not accept these submissions and consider that this application is not arguable. In our judgment the judge's careful reasons for repeatedly refusing these applications are

unimpeachable. There was a stark conflict in the accounts given by the appellant and AB. The appellant gave evidence that AB was actively compliant with and consenting to all that he was doing. It was AB's evidence, on the other hand, that she lay still, pretending to be asleep and did nothing whatever to participate in, encourage or consent to what was happening, feeling terrified, frozen with fear and willing his behaviour not to be real. The only issue for the jury was to determine whether the appellant's account was or might be true, or whether they were sure that AB's account was true. It was not suggested that AB was sexually naive, nor that she did not understand what was happening to her. Moreover, there was evidence before the jury that she was planning to share a bedroom with her boyfriend that evening and that was to be done with her parents' knowledge and consent. It is clear that the jury was not misled, and in our judgment, there was no proper basis for admitting evidence of a sexual relationship between AB and her boyfriend in the circumstances.

As to the flirtatious comment, there was no evidence whatever that this is what caused the appellant to act as he did. More importantly, in our view, the judge was unarguably right to conclude that this comment was utterly irrelevant to whether, later in the evening, AB consented to the sexual activity that undoubtedly occurred. The judge plainly adopted the correct test, as is reflected by the language of her ruling, and as Mr Harding was driven to concede. There is nothing in the judge's rulings at any stage to indicate that she adopted a test of considering whether the evidence was or could be determinative, rather than relevant.

So far as the video evidence is concerned, it was not the prosecution case that AB was incapable of consent due to intoxication. There was evidence that she was drinking and witness evidence that she had drunk too much based on the way she was acting. The judge

observed the video the defence sought to adduce and concluded that it was of limited assistance. We are quite satisfied that the judge was in the best position to determine to what extent, if any, the video could assist the jury and did so without arguable error or unfairness. In our judgment these convictions are not arguably unsafe in the circumstances and this application falls accordingly to be refused.

Appeal against sentence

We turn to deal with the appeal against sentence. The appellant was aged 42 at the date of sentence, born on 17 August 1976. He was of previous good character. No pre-sentence report was obtained before sentencing, for good reason.

The court had a victim personal statement from AB. In it she describes the toll the appellant's conduct has had on her mental health, her feelings of worthlessness and how this incident destroyed family relationships for her, with her aunt, her grandfather and her young cousin.

The judge concluded that the most serious of the offences (the rape offences) fell within category 2 harm of the sentencing guidelines because AB was particularly vulnerable due to her personal circumstances as a teenager who was drunk and unable to resist the assault. Looking at the appellant's culpability, there was an abuse of trust and the judge concluded that this was culpability A. That meant a starting point of 10 years, with a range of 9-13 years for a single offence. There were two rapes and other sexual assaults. The judge observed that the appellant was in drink. Against that, however, he had no previous convictions and there were character references that spoke highly of him. His work as a firefighter was to his credit. The judge did not accept that he was remorseful for AB's circumstances.

Mr Harding submits that the judge was wrong to find that AB was particularly vulnerable and to place the rape offences in category 2. He emphasises that the criterion is *particular*

vulnerability not simply *vulnerability*. He accepts that AB was somewhat vulnerable given her age and that she was drinking alcohol, but these are not particular vulnerabilities contemplated by the harm aspect of the guideline.

Mr Harding accepts culpability A because of the abuse of trust, but submits, in any event, that having taken a starting point of 10 years the judge either moved upwards to a sentence of 12 years after personal mitigation or failed adequately to have regard to the appellant's mitigation, in particular his positive good character, and to the undoubtedly long delay before his trial took place. Either way, the resulting sentence was manifestly excessive in the circumstances.

We see the force of Mr Harding's submission that AB did not fall into the category of "particularly vulnerable due to personal circumstances". In our judgment, though she was undoubtedly a vulnerable young woman, we can see no proper basis for concluding that she was *particularly vulnerable* as contemplated by the harm aspect of the Definitive Guideline. We consider that the rapes fell properly into category 3A of the guideline, as Mr Harding has submitted. That means a starting point of 7 years, with a range of 6-9 years for a single offence. Taking that starting point, it seems to us that the aggravating features identified by the judge would justify an increase above the starting point. In addition, there has to be an upwards adjustment to reflect the fact that this was not a single offence of rape but that AB was raped in different ways and was also sexually assaulted several times. It seems to us that the judge was entitled and correct to reflect the whole course of sexual offending on count 5 and to make all other sentences run concurrently. Adopting that approach and weighing all of the aggravating factors to which the judge referred and which we have just summarised, and the matters of personal mitigation available to the appellant, in our view the appropriate sentence after a trial in

this case was one of 10 years. A sentence of 10 years is commensurate with the seriousness of this course of criminal conduct and proportionate.

Conclusion

In the result, accordingly, we allow the appeal against sentence to this extent only. We quash the sentence of 12 years each on counts 4 and 5 and for those sentences we substitute sentences of 10 years each on counts 4 and 5 to run concurrently. The remaining sentences are undisturbed, as are the ancillary orders. The application for permission to appeal against conviction is refused for the reasons we have already given.

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

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