

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Neutral Citation Number: [2021] EWCA Crim 1767

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100103/B4



Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 12 November 2021

LADY JUSTICE MACUR DBE

LADY JUSTICE CARR DBE

MR JUSTICE MURRAY

REGINA

V

ABDUL NOOR

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

NON-COUNSEL APPLICATION

J U D G M E N T

1. LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where 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.

Introduction

2. On 15 December 2020, in the Crown Court at Harrow before HHJ Thompson, the applicant (then aged 51) was convicted after trial of one count of sexual assault contrary to section 3 of the Sexual Offences Act 2003. On 15 February 2021 the applicant was sentenced to 12 months' imprisonment.
3. This is his renewed application for leave to appeal against conviction and a three-day extension of time. The applicant is no longer in custody. We grant the necessary extension of time: the delay in question is short and the applicant (in his letter of 14 May 2021) explains the reasons for it. It arises through no fault of his own: he did not receive notice of the single judge's refusal until 11 May 2021.

The Facts

4. The facts, prosecution and defence cases, together with the evidence relied upon, are set out sufficiently for present purposes in the Criminal Appeal Office summary. The focus of the application is on the judge's ruling on whether to give a direction under section 34 of the Criminal Justice and Public Order Act 1994 ("a section 34 direction") in relation to the applicant's failure to mention in interview that the complainant "AB" had fallen asleep in his car and that he had attempted to awaken her.
5. Counsel for the defence submitted that a section 34 direction should not be given in relation to that failure. In evidence, it was said that he did not seek to suggest that he was certain that she was asleep, rather he suggested he could not get her to answer him. This was consistent with the answers that he gave in interview.
6. The judge however ruled that a section 34 direction should be given. In his evidence to the jury the applicant had said that he had to wake AB because she had fallen asleep. This was not something mentioned in his interview. Instead, when he had been shown the CCTV footage and asked to account for the time spent in the car outside on AB's road he answered "no comment". For that reason, said the judge, the jury was entitled to conclude that he had invented that account and tailored it to meet the prosecution's evidence.

Grounds of Appeal

7. It is said that the judge erred in giving a section 34 direction. It was a fact that AB had fallen asleep in the car; indeed it was a fact relied upon by the prosecution. There could therefore be no basis for directing the jury that it could draw an adverse inference that the applicant had fabricated that fact following interview. Reliance is placed on R v Kenneth James [2003] EWCA Crim 3080, ("*James*") where it was held that it cannot in general be regarded as appropriate to invite a jury to draw an adverse inference from a failure of a

defendant to mention a true fact which is part of the prosecution case.

Discussion

8. In our judgment, the judge was unarguably entitled to give the section 34 direction. The applicant's initial account in interview was that he had collected AB and that she remained awake throughout the drive to her home. He was then shown the CCTV footage suggesting that his car had been on AB's street for approximately 20 minutes. Following his consultation with his solicitor, thereafter the applicant exercised his right to silence. He was then specifically asked whether she fell asleep or had to be roused awake. He remained silent. His account at trial was not consistent with his account in interview; for at trial he stated that AB had initially been a difficult passenger but had eventually fallen asleep. When he arrived at her street he did not know her house number. He said he spent about 5 minutes trying to wake her up. She eventually woke up and told him to drive a short distance. He moved slowly and she then fell back asleep. He again roused her and she then pointed at her house to which he then drove.
9. Albeit that it was part of the prosecution case that AB was asleep in the taxi (when she was assaulted), it was nevertheless open to the judge to give a section 34 direction in relation to the applicant's failure to mention in interview that AB had fallen asleep and, more significantly, that he could not wake her - something given as an explanation for the lengthy period of time spent on the street where AB lived. That was something which was not part of the prosecution case or agreed. The jury were entitled to draw the inference from that failure that he had invented his account to the jury, tailoring it to meet the prosecution case.
10. This reveals the flaw in the applicant's analysis by reference to *James*. (There is in fact a far more recent line of cases to similar effect as *James* (see R v Webber [2004] UKHL 1; [2004] 1 WLR 404 at [28]; R v Wheeler [2008] EWCA Crim 688 at [10]; R v Chivers [2011] EWCA Crim 1212 at [43] and R v Zeinden [2012] EWCA Crim 2489 at [16]). The jury were not being invited to consider drawing an adverse inference that he had fabricated the (true) fact that AB had been asleep in the taxi; rather it was being suggested that he had fabricated the suggestion that he had tried to wake her (twice), such that this might explain the 15 minutes spent by him in the street where AB lived. The jury were being invited to draw the inference more generally that, because of the failure to mention the fact that AB was asleep and that he attempted to but could not wake her, that the applicant's version of events was untruthful. The suggestion was not that he was inventing the fact that AB was asleep - the suggestion was that his failure to mention that she was asleep in interview and could not wake her raised the inference (i) that it was not true that she had been asleep and he had tried but could not wake her and (ii) that his version of events initially was untrue and thereafter tailored to meet the prosecution case.
11. In any event, there was a strong and compelling case against the applicant. AB's evidence was consistent and reliable. She complained the next day to her boyfriend and to Uber in messages which went before the jury, and to the police six days later. The CCTV and GPS evidence showed that the applicant's car arrived on AB's street approximately 15 minutes before she left the vehicle and the applicant was unable to

explain satisfactorily what had occurred during that period. The GPS evidence showed that the car had moved past AB's home to a quieter part of the road.

12. The conviction is not arguably unsafe therefore in any event.

Conclusion

13. For these reasons the renewed application for leave to appeal against conviction will be refused. Further, we make an order, under section 18(6) of the Prosecution of Offences Act 1985 for the applicant to pay the reasonable costs of the transcripts in the sum of £81.32 pence.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk