IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202003149/B4

NCN: [2021] EWCA Crim 1774

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 2 November 2021

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

MR JUSTICE HENSHAW

REGINA

v

ALEX CADWELL

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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)

MR M KIMSEY appeared on behalf of the Applicant.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This a renewed application for leave to appeal against conviction in a case involving sexual offences against a 13-year-old girl, whom we shall refer to as "the complainant". She is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify the complainant as the victim of these offences.
2. The applicant pleaded guilty to a number of offences of making indecent images of children and sexual offences against a child other than the complainant. He was convicted after a trial of four offences against the complainant.
3. For present purposes we can summarise the relevant facts briefly. In July and August 2019, when the applicant was aged 20 and the complainant was aged 13, they met, initially online and later in person. From the outset, their online exchanges were sexualised. The complainant initially told the applicant she was aged 19 and later said she was 16. Both parties referred to the applicant as "daddy" and the general tenor of their exchanges was that the complainant was submissive to the directions of the applicant. In the course of their conversations the applicant, who could see the complainant on camera, caused her to penetrate her vagina with her fingers. They arranged to meet and discussed the sexual activities in which they would engage when they did so. On 22 August 2019 the applicant drove to a rendezvous with the complainant in a car park. They went together into the ladies' section of a nearby public lavatory where the applicant penetrated her mouth and her anus with his penis.
4. The applicant was charged with oral and anal rape of the complainant (counts 1 and 3), with alternative charges of sexual activity with a child (counts 2 and 4). He was also charged with two offences of causing or inciting a child to engage in penetrative sexual activity (counts 5 and 6) and meeting a child following sexual grooming (count 7). His defence was that the complainant had consented to all the relevant activity and that he had throughout believed her to be aged at least 16.
5. The judge, HHJ Lodder QC sitting in the Crown Court at Kingston upon Thames, correctly directed the jury that in relation to counts 1 and 3 the issue was whether they were sure that the complainant did not consent to the admitted penetration and that the applicant did not reasonably believe she consented. In relation to the other charges he directed them, again correctly, that consent had no part to play and that the issue was whether they were sure the applicant did not reasonably believe that the complainant was 16 years or older.
6. The jury acquitted the applicant of rape and of the offence charged in count 5 but convicted him on counts 2, 4, 6 and 7. They also acquitted him of an offence relating to another adolescent girl, about which we need say no more.
7. On counts 2 and 4 the applicant was sentenced to concurrent extended sentences of 15 years, each comprising a custodial term of 10 years and an extension period of 5 years. Shorter concurrent extended sentences or standard determinate sentences were imposed for the other offences of which he had been convicted by the jury or to which he had pleaded guilty. There has been no application for leave to appeal against sentence.
8. There are three grounds of appeal against the convictions on counts 2, 4, 6 and 7. Mr Kimsey, representing the applicant in this Court as he did below, submits that the judge fell into error in refusing an application pursuant to section 41 of the Youth Justice and Criminal Evidence Act 1999 to admit evidence of the complainant's prior sexual

behaviour; in refusing to allow the complainant to be recalled for further cross-examination following disclosure of further unused material; and in refusing to admit evidence of lies which the complainant was alleged to have told her mother.

9. The first of those rulings related to unused material which showed that the complainant had made Internet searches for pornography and had then engaged in sexualised online communications with a man referred to as "the Hampshire male". Initially, Mr Kimsey helpfully tells us, there had been limited disclosure of a summary of the communications with the Hampshire male; and his initial application was not pursued in the light of indications as to the material which would be going before the jury. Mr Kimsey did however later wish to cross-examine about the nature and extent of the pornographic material which the complainant had viewed, and as to why she had used search terms such as "sugar daddy". He submitted that this line of cross-examination was relevant both to the applicant's belief that the complainant was aged 16 or over, and to his belief in her consent to the relevant activity, on the ground that her use of sexual terminology and awareness of, for example anal sex, showed that she was not naive.
10. The second ruling related to an application which was made following the disclosure, in the period between the complainant's pre-recorded cross-examination and the start of the trial before the jury, of more detailed material showing that the complainant, during the same period as her online communications with the applicant, had sent sexually explicit images of herself to the Hampshire male and had engaged in online exchanges in which he too was referred to as "daddy". It was submitted that the complainant's activities with the two men (the Hampshire male and the applicant) were strikingly similar, and that cross-examination about this material was again relevant to the issues of the applicant's belief in her age and in her consent. It was further submitted that the material was relevant to demonstrate certain inconsistencies with the account which the complainant had given of her involvement with the applicant, and in that way to rebut aspects of the prosecution case.
11. The third ruling related to an application to adduce evidence of a WhatsApp conversation between the complainant and her mother, in which it was said that the complainant had falsely claimed to be bisexual in order to deflect her mother's attention away from the complainant's meeting with the applicant. Mr Kimsey submitted that the jury should know the full extent and nature of the lies told by the complainant because it was relevant to the issue of the applicant's belief as to her age.
12. The single judge, who considered the application for leave to appeal on the papers, found each of those grounds of appeal to be unarguable and accordingly refused leave. All three grounds are now renewed before the Full Court.
13. This Court has been assisted by the written and oral submissions of Mr Kimsey. He has helpfully pointed out a number of respects in which he says that the more detailed material disclosed in relation to the Hampshire male showed that some aspects of the evidence which the complainant had given about the applicant appeared not to be correct. He emphasised that the online chats with the two men were occurring during exactly the same comparatively short period. He relied upon the further material as showing that the impression conveyed by the complainant's evidence, namely that it was the applicant who had controlled their conversations and her activities, was arguably inconsistent with her behaviour towards the Hampshire male.
14. The core of Mr Kimsey's submissions to the court today, realistically recognising that he

needed to confront head-on the points made against him by the single judge in her decision refusing leave, was that the evidence which he sought to adduce was properly admissible, pursuant to the provisions of section 41 of the 1999 Act; that it should therefore have gone before the jury; and that the convictions are unsafe, notwithstanding the jury's acquittal on those charges which required proof of actual consent or an absence of belief in consent.

15. Mr Kimsey, in developing his submissions, points out that the nature of the applicant's defence was that the terms and manner of the complainant's communications with him led him to believe that she was aged at least 16. Mr Kimsey sought to argue that if the jury had known about the complainant's online communications with the Hampshire male, they would have found that relevant to how a reasonable man, in the applicant's position, would have viewed her apparent age.
16. We are grateful to Mr Kimsey for his submissions, all the more so because he has been good enough to appear before us today and to make those submissions acting pro bono. We are however unable to accept them. We can state our reasons briefly.
17. The charges of which the applicant was convicted did not, in law, involve any issue as to consent. It follows that any criticism of the judge's refusal to admit evidence or to permit cross-examination said to be relevant to the issue of consent cannot affect the safety of those convictions. As was pointed out in the respondent's notice, the primary basis on which leave to cross-examine was sought from the trial judge was that the material relating to the Hampshire male was admissible pursuant to either paragraph (b) or paragraph (c) of section 41(3) of the 1999 Act; but each of those paragraphs requires the evidence to be relevant to an issue of consent.
18. We have carefully considered Mr Kimsey's response to that point in his submissions to us today, and his argument that the evidence was also admissible to rebut aspects of the prosecution case. We remind ourselves that, at this stage of proceedings, the question which we have to decide is whether all or any of the grounds of appeal arguably cast doubt on the safety of the convictions with which the court is concerned.
19. As to the issue of the applicant's belief as to the age of the complainant, it is important to remember that it was common ground that the parties had engaged in the relevant sexual actives and that the complainant was in fact only 13 years old at the relevant time. The issue for the jury, on each of the relevant counts, was whether they were sure that the applicant did not reasonably believe that she was 16 or over. The focus therefore was on the applicant's belief at the time. The jury had the full text of the communications between the applicant and the complainant. They were able to assess, as part of the overall evidence in the case, what impression of the complainant's age could reasonably be conveyed by those communications. Like the judge, we are unable to see how the complainant's private internet searches for pornography or her behaviour with the Hampshire male, of all of which the applicant was unaware, could have any bearing on the core issue in the case. The applicant gave evidence in his own defence. He told the jury what he believed at the time about the complainant's age and why he believed it. His evidence in those respects could not be supported by reference to behaviour on the part of the complainant about which he knew nothing at the relevant time. The jury, as we have said, were able to make their own assessment of the extent to which the complainant's behaviour towards the applicant could reasonably have led him to believe that she was at least 16.

20. Notwithstanding Mr Kimsey's careful submissions, we are satisfied that the jury could not have been assisted in that task by hearing about her behaviour in private or towards a man other than the applicant. We would add that there seemed to be implicit in Mr Kimsey's submissions an unspoken assumption that the Hampshire male was deceived as to the complainant's true age. There is, as far as we are aware, no basis on which one could be confident that that was the case.
21. In short, we are satisfied that the evidence and material on which the applicant wished to rely was irrelevant to the issue before the jury. The judge's first and second rulings were, in our view, plainly correct.
22. We would add that there was, in addition to the material we have been discussing, expert evidence before the jury as to the complainant's apparent age; and the jury had photographic evidence showing her appearance at the time of the relevant events. The jury had, we are satisfied, ample basis for being sure that the applicant could not reasonably have thought her to be 16 or over.
23. As to the third ground of appeal, which Mr Kimsey indicated he did not wish to develop orally though did not abandon, we are again unable to see how reference to the detailed terms of the complainant's exchange with her mother could have assisted the jury to assess the applicant's belief as to her age. It was common ground between the parties that the complainant had lied to her mother. As the judge pointed out, there was no evidence as to whether the complainant's assertion of bisexuality was a lie. But even if it was, the applicant knew nothing about it, and it was irrelevant to his belief as to her age.
24. For those reasons, notwithstanding Mr Kimsey's diligent efforts on the applicant's behalf, we can see no arguable ground for challenging the safety of these convictions. This renewed application accordingly fails and is dismissed.