IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 200

CASE NO 202102082/B5

Royal Courts of Justice
Sitting at Cardiff Crown Court
The Law Courts
Cathays Park
Cardiff
CF10 3 PG

Thursday 3 February 2022

Before:

LADY JUSTICE NICOLA DAVIES DBE
MRS JUSTICE JEFFORD DBE
MRS JUSTICE THORNTON DBE

REGINA
V
ALED IWAN HOLLOWAY

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MR A GREENWOOD appeared on behalf of the Applicant

J U D G M E N T

1. MRS JUSTICE JEFFORD: The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under these 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.
2. On 17 June 2021 in the Crown Court at Cardiff, the applicant, then aged 32, was convicted on one count of rape, contrary to section 1 of the Sexual Offences Act 2003 (count 2 on the indictment) and on one count of assault by penetration, contrary to section 2 of that Act (count 4 on the indictment). The applicant was acquitted on four further counts of sexual offences.
3. The applicant was refused leave to appeal by the single judge and now renews his application to appeal against conviction.
4. In brief, the background facts are as follows. The complainant met the applicant in January 2020 and they began a relationship. They would use drugs on occasion. On 18 June 2020 they had taken drugs and sexual relations had taken place between the complainant and the applicant during the evening.
5. The prosecution case was that the applicant raped the complainant anally (count 2) and also penetrated her anus with his fingers (count 4). The applicant recorded the entire episode on his mobile phone and the footage lasted about 40 minutes. We will come to a more detailed description of that footage in due course.
6. The complainant did not remember what had happened during the evening. She had taken morphine tablets and, possibly, pregabalin to help to ease withdrawal from heroin. The applicant fell unconscious and the next thing she remembered was waking up and

smoking weed. The applicant was talking to her and said that he could not believe that she did not wake up last night; that he had "fucked her in her sleep" and "torn her arse to pieces"; and that he had videoed it. The complainant was concerned about the fact that whatever had taken place had been videoed. Her evidence was that she had not agreed that the applicant could do anything to her before she fell unconscious.

7. Messages were found on the applicant's phone which were sexualised messages between him and the complainant. In her ABE interview the complainant stated that these would mainly have been about bondage, normal sex and anal sex. The complainant agreed with the officer asking questions that some of the messages discussed fantasies about rape. The complainant then went on to say that she never asked the applicant to rape her and only asked him to tie her up, that her rape fantasy was about when she was conscious, that it was not her understanding that when she was asleep her anus would be penetrated, and that these fantasies had not been discussed leading up to the events of 18 June 2020.
8. In his defence statement the applicant said that the complainant was interested in sadomasochistic sexual practices and pornography, and that he and the complainant had previously discussed rape fantasies, including a desire to engage in sexual relations in which one partner was unconscious and woke during the act of sexual intercourse.
9. The defence case therefore was that the complainant had given her consent to what was done to her in advance. The prosecution case was that she had not given such consent in advance. The prosecution case was also that she could not and did not do so when she was unconscious.
10. The first trial began on 22 March 2021 and lasted about eight days. There were 10 counts on the indictment. Counts 9 and 10 related to a charge of harassment and were the subject of successful submissions of no case to answer. Count 7 was an offence of

robbery of which the applicant was acquitted. Count 8 was an offence of assault occasioning actual bodily harm on which the jury was unable to reach a verdict. Counts 1 to 6 were all sexual offences and alleged vaginal rape, anal rape, assault by penetration of the vagina, digital penetration of the anus, attempted oral rape and attempted assault by penetration (namely placing a fist in the anus). The jury was unable to reach a verdict on any of these counts. These counts were the subject of a retrial which resulted in the convictions on two counts with which we are concerned.

11. As we have said, the Crown's primary case was that the complainant had not given the advance consent that the applicant relied upon. The Crown had however an alternative case that consent, if given, had been withdrawn. That case turned on the evidence from the video footage and the words used by the complainant at the time that the footage showed the acts happening which gave rise to the counts of anal rape and assault by digital penetration of the anus.

12. The Respondent's Notice set out in some detail how this evidence came to be given and we summarise the position as follows. At the first trial the footage was available and was played on the first day of trial. Some parts of the complainant's body had been pixilated. It seemed that the complainant could be heard to utter some words, but they could not be made out. At the end of the first day the judge asked the prosecution and the defence to compile a schedule of what was shown on the footage and, as far as possible, what could be heard. That was done and an agreed document was produced and put before the jury. There was nothing in that document that indicated that words had been said that amounted to a withdrawal of consent. When the jury retired they were given the footage on a USB stick to be played on the court laptop. When the footage was played on that laptop some more words were picked up.

13. At the end of the trial and after the jury had failed to reach verdicts, the prosecution said that they would pixilate the footage further and that they would seek to enhance the audio. A direction was given to that effect.

14. That led to the police producing further transcripts of the audio which were uploaded to the Digital Case System on 5 May 2021. That was over a month before the start of the retrial on 10 June 2021. The transcript was set out in columns with timings, a transcript of the audio and a written description of the video. Under the heading of Clip 4 the following appeared:

> "At 14:19:22 [inaudible] sounds like [name of complainant] is saying 'Stop it, off me'.
>
> At 17:07:26 [inaudible] sounds like [name of complainant] is saying 'don't, it hurts'.
>
> At 17:16:02 [inaudible] sounds like [name of complainant] is saying 'get off me'.
>
> At 17:21:14 'off me'."

15. At the same timings on the footage, the applicant was seen repeatedly penetrating the complainant's anus with his penis and on one occasion with his fingers.

16. The defence did not agree that these words were used.

17. In the course of the trial the jury saw and heard the recordings. They were provided with the transcripts but on the basis that the defence did not agree that the transcripts were accurate in terms of the words used.

18. The applicant gave evidence. He was cross-examined about the words used by the complainant and it was put to him that the complainant was protesting. The applicant did not accept that and said that he could not make out what was being said, or that he

thought that she was saying something like "take that off" rather than "get off me".

19. The applicant argues, first, that he was prejudiced by the way in which this alternative case (that the complainant had withdrawn consent) was introduced. It is submitted on his behalf that the prosecution prejudicially changed its case in the prosecution's final speech to the jury, inviting the jury to consider matters which, whilst part of the factual matrix, did not relate to how the prosecution had put the case both at the first trial and in opening the case on the second trial. The applicant argues that when the Crown opened the case to the jury it was put only on the basis that the complainant had not given advance consent to the acts that took place. The alternative case as to withdrawal of consent previously given was not addressed and he complains that he was prejudiced by the way in which that alternative case was introduced. In particular, he says that he was prejudiced by this case being introduced by the prosecution after the discussion relating to the legal directions.

20. The single judge saw no merit in this case and neither do we. We cannot see anything in the way in which this alternative case was put before the jury that could in itself have given rise to any prejudice or unfairness or render the conviction unsafe. As we have set out, the defence was well aware that there was evidence relied on by the Crown that the complainant had said words which could be construed as objecting to what was being done to her and as a withdrawal of consent, if any had been given. The evidence was put before the jury and the case was put to the applicant. The defence did not accept that the words had been said and the applicant's evidence about that was before the jury. Nothing in the prosecution's closing speech to the jury could have taken the defence by surprise and no objection was raised at the time. It is difficult to see what further evidence could have been adduced by the defendant had the alternative been raised in the prosecution's

opening speech. There was, in short, no prejudice.

21. The applicant's further grounds of appeal all relate to the judge's directions of law. Those grounds of appeal are put as follows:

    (1) That there was no direction on the issue of capacity and/or self-induced intoxication.

    (2) That there was inadequate emphasis given to the prosecution case that the complainant could not consent and therefore withdraw consent.

    (3) That there was an inadequate direction in respect of the withdrawal of consent.

22. We take these three grounds together. The judge's written legal directions, which were fully discussed with counsel at the time, addressed the issue of consent. This was a split summing-up and the directions were given to the jury before closing speeches. The legal directions included the following:

> "It is the prosecution case that [the complainant] did not consent to any of the acts set out, and that whatever her fantasies might have been there was no consent to Mr. Holloway doing what he [did] whilst she was asleep or unconscious in respect of any count.
>
> It is the defence case that [the complainant] did, before becoming asleep or unconscious on the 18th June, consent in that she said she wanted the defendant to rape her whilst she was unconscious or asleep, and that consent covers all of the acts which happened."

23. The judge then said that he would give legal directions about consent which the jury must apply to the facts as they found them. He continued:

> "The relevant time for consent is the time of penetration or attempted penetration, and any consent must relate to penetration. That does not of course mean that consent to that penetration cannot be given before it happens, as is suggested by the defendant in this case, but if it is so given it must cover the act of penetration or attempted penetration which you are considering.

The prosecution must prove, so that you are sure of it, that when Mr. Holloway did the (admitted) acts of penetration or attempted penetration with regard to whichever of counts 1 – 6 you are considering, [the complainant] did not consent to it. A person consents to something if she agrees to it and is capable of making a choice and is free to do so.

Reasonable belief in consent

If the prosecution have proved to you that [the complainant] did not consent, they must also prove that Aled Holloway did not reasonably believe that [the complainant] consented.

This involves two questions:

(1) Did Mr. Holloway genuinely believe, or may he have genuinely believed, that [the complainant] consented? and
(2) If Mr. Holloway did or may have believed that [the complainant] consented, was his belief reasonable?

For question (1), if you are sure that Mr. Holloway did not genuinely believe that [the complainant] consented, then question (2) does not arise and you do not need to consider it.

But if you decide on question (1) that Mr. Holloway did genuinely believe or may have believed that she had consented, you must then decide question (2): whether his belief in her consent was reasonable. Whether or not his belief was reasonable is for you to decide once you have considered all the evidence. You must decide whether an ordinary reasonable person, in the same circumstances as Mr. Holloway, would have believed [the complainant] was consenting. This includes looking at any steps Mr. Holloway took to find out whether she was consenting or not.

The fact that Mr. Holloway gave evidence that he thought that it was reasonable is something for you to take into account but the question is whether, in your view, it was reasonable, not whether he thought that it was.

It is the prosecution case that during the sexual activity [the complainant] used words to indicate that she was not consenting. The defence submit that she did not use any intelligible words. Whether she did so is a matter for you to decide on your interpretation of what you heard on the video.

Your conclusions about this will be important when you are answering two questions:

(1) whether you are sure that [the complainant] did not consent; and
(2) if you are sure that she did not consent, whether you are sure that Mr. Holloway did not reasonably believe that she consented;

Your final decision must be based on all the evidence."

24. The legal directions therefore expressly addressed the words that the complainant was said to have used, the approach the jury should take to them and their relevance to the questions the jury had to ask themselves. These were clear and appropriate directions. They did not make express reference to withdrawal of consent, but we cannot see that that is material as both the issues of whether the complainant was consenting and the applicant's reasonable belief were firmly before the jury. The absence of a discrete direction about the specific scenario in which there was not consent at the time of the relevant acts of penetration because consent had been withdrawn comes nowhere close to a basis on which the conviction might be said to be unsafe. We note further, as did the single judge, that it was not argued by the defence either at the stage of discussion of legal directions or after the prosecution speech, that the judge ought to have given some further direction as to withdrawal of consent or capacity to withdraw consent, if the jury were sure that the words used indicated lack of consent.
25. During retirement, the jury then sent a note to the judge which asked: "Could we have information on the withdrawal of consent during the act of penetration?" The judge discussed the response to that question with counsel. The judge sensibly construed it as a request for directions.
26. Counsel for the applicant submitted that the question raised a problem in that the

prosecution was "riding two horses" - an expression that was repeated before us today. That is, he said, that on the one hand the prosecution was saying that the complainant lacked the capacity to consent and on the other hand that she was capable of withdrawing consent.

27. Counsel for the applicant submitted at trial that if the judge directed the jury that she had capacity to withdraw her consent, that would result in a conviction. He submitted that any direction should focus on the defendant's state of mind, that is, the question of reasonable belief. He further submitted, in summary, that a direction should be given as to whether the complainant could intend to withdraw consent when intoxicated or under the influence of drugs. Reference was made to the issue that arises as to intoxication in crimes of specific intent.

28. At the earlier stage of the discussion of the legal directions counsel had raised the possibility of a direction in relation to intoxication. The only issue that could arise was whether intoxicated consent was nonetheless consent. On the facts the issue did not arise as the consent relied on by the defence was that given in advance and it was agreed that no such direction was necessary. The point in respect of withdrawal of consent could only be the converse point, namely that withdrawal of consent when intoxicated could still be a withdrawal of consent.

29. In response to the question from the jury and following this discussion with counsel, the judge gave the following answer:

> "Where consent to a sexual act has been given, a person is entitled to withdraw consent at any stage. If consent is intentionally, that is deliberately and with knowledge as to what is being indicated, withdrawn during the act of penetration, and that is done to the knowledge of the person doing the act then any penetration thereafter is penetration which is not consented to."

30. The judge intended his emphasis on intentional withdrawal of consent to capture any issue of capacity. We note that the legal directions which we have recited made no express reference to capacity. That reflected the fact that the applicant's defence was that the complainant had consented in advance and at a time when no issue of capacity could arise and not that she had given that consent when the acts were in fact being carried out. The jury was further reminded that if they were sure consent had intentionally been withdrawn they still had to consider the question of the defendant's reasonable belief in consent.

31. The applicant's grounds of appeal that no direction was given as to capacity and/or self-induced intoxication and that inadequate emphasis was given to the prosecution case that the complainant could not consent, seemed to us to go to the same point. As we understand it, at its highest the applicant's argument was that, as the prosecution's case was that the complainant lacked capacity to consent because she was unconscious, the jury ought to have been told that she similarly lacked capacity to withdraw consent. That was the submission that was made to the judge at trial and that submission was and is, in our view, unsustainable. As the single judge said, it is perfectly possible for a complainant to lack the capacity to consent and at the same time to protest at what is happening to her, evidencing her lack of consent.

32. Nor in our judgment did this point need to be set out for the jury in any legal direction. Had the defence case been that the complainant had given consent at the time the acts were being carried out, the prosecution's case would have been that she lacked capacity to consent because she was unconscious and that the rebuttable presumption in section 75 of the Sexual Offences Act 2003 was engaged. But that was not the issue between the prosecution and the defence. No directions were given to the jury in this respect and

nothing more needed to be said.

33. Mr Greenwood has submitted that the issue of capacity ought to have been the subject of further elucidation and that further guidance on the approach that the jury should take to the evidence ought to have been given once the jury had asked the question that they asked. But the judge's direction that focused on what amounted to a withdrawal of consent was wholly adequate and all other matters were questions of fact for the jury which were clearly still left to the jury.

34. So far as intoxication is concerned, as we have already said this was on analysis no more than an argument that the judge ought to have directed the jury that the complainant could intend to withdraw her consent even if intoxicated. Whether she had that intention was a matter for the jury. We cannot see that that would have assisted the applicant or added anything to the direction given.

35. In this case the complainant was sufficiently conscious to say something. It was entirely a question of fact what she said and whether it amounted to a withdrawal of consent. In his original directions the judge put the question for the jury in relation to the words used in terms of whether the complainant was not consenting. Following the jury's question he gave an answer that expressly addressed the possibility of withdrawal of consent. We can see no error in that, nor can we see why, once the question was framed in terms of withdrawal of consent rather than lack of consent, a direction as to capacity became necessary when it had not been before. Further, if the jury considered that consent had been withdrawn, it was made clear to them that they still had to address the further questions which had been set out for them in the legal directions as to what the applicant genuinely believed and whether his belief was a reasonable one. It did not follow, as counsel submitted at trial and has submitted to us, that a conviction was inevitable.

36. We agree with the single judge that this appeal has no real prospect of success and we refuse the renewed application for leave to appeal.

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