IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03525/B1
[2023] EWCA Crim 1420

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 27th September 2023

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE JEREMY BAKER

MRS JUSTICE LAMBERT DBE

R E X

- v -

"B K I"

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Mr D Emanuel KC appeared on behalf of the Appellant

Mr D Atkinson KC appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 27th September

LORD JUSTICE HOLROYDE:

1. In July 2015 this appellant was convicted of the rape of his daughter, to whom we shall refer as "C". His application for leave to appeal against that conviction was refused by the full court in 2016. His case now returns to this court on a reference by the Criminal Cases Review Commission ("CCRC"), which takes effect as an appeal against conviction.

2. C is entitled to the lifelong 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 her as the victim of a sexual offence. In view of the familial relationship between the appellant and C, he must not be named in any report of these proceedings and must instead be referred to by the randomly chosen letters BKI.

3. C's parents separated when she was 5 years old. She lived thereafter with her mother. It is apparent that she had a very troubled childhood and adolescence. For about a decade she had little to do with the appellant. She made contact with him in the summer of 2012 and thereafter moved to live near to him, in the home of her half-sister, another daughter of the appellant. The appellant employed her in his business.

4. In the early hours of 1st December 2012, after an evening out with her friends, C (then aged 16) returned to her half-sister's house. She was intoxicated. She found the door of the house locked and so went instead to the appellant's home, where she was able to let herself in.

5. At 3.55 am, C rang for an ambulance. She was found by a paramedic lying on the pavement near to the appellant's house. Whilst being taken to hospital by ambulance she

said: "My father was trying to have sex with me". At hospital she was noted to be distressed. A urine test showed the presence of high levels of alcohol and some cocaine. She refused to provide an account to the police.

6. The appellant was arrested later that day. When interviewed under caution, he said that he had been woken by a phone call from C, saying that she needed money. She had come to his house and he had given her money for her taxi fare. She then left the house, but returned a short time later. Following an intervention by his solicitor to the effect that insufficient disclosure had been given of what was alleged, the appellant said nothing further about what had happened from that point onwards.

7. On 28th December 2012, C was interviewed under the Achieving Best Evidence ("ABE") procedure. She said that the appellant had offered her his bed, saying that he would sleep downstairs. The appellant had, however, come into the bedroom, removed her clothing as she lay on the bed, and raped her. She had then grabbed her clothes, run from the house and called for an ambulance.

8. Intimate samples which had been taken from C in hospital revealed the presence of semen with a DNA profile matching the appellant on a high vaginal swab.

9. The appellant and his then solicitor were aware of that finding when he was interviewed for a second time on 20th March 2013. He said that when C came to his house, he had thrown some clothes and bedding down the stairs to her and told her that she could sleep on the settee. He had then fallen heavily asleep because of a combination of alcohol and the medication which he was taking. He said that he had woken to find C straddling his thigh, masturbating him with one hand and herself with the other. He said that he did not, to his knowledge, ejaculate. He had told C to go back downstairs and she had then left the house.

10. Thus, the principal issue in the criminal proceedings was whether the jury could be sure that the appellant's semen was present in C's vagina because he had forcibly had sexual intercourse with her against her will, or whether it may have been the case that C had either placed his penis inside her, or had introduced the semen into her vagina on her own finger, as he slept or became awake.

11. The case was first tried in the Crown Court at Derby in late 2014. C gave evidence and was cross-examined on behalf of the appellant by his then counsel, Miss Louise Blackwell QC. C refused to answer a number of questions and said that she had no memory of the rape. An issue subsequently arose in relation to expert evidence, which led to the jury being discharged before the close of the prosecution case. A fresh trial was directed.

12. The prosecution wished to conduct a further ABE interview of C before the fresh trial began. C repeatedly refused; and when an interview did eventually take place, she refused to engage with the process.

13. The second trial, before Her Honour Judge Shant QC and a jury, took place in July 2015. C again gave evidence. In her ABE interview, which was viewed by the jury, she had become upset and had said that she "did not want to do this anymore" and would not go to court. C appeared to be intoxicated when she entered the video-link room. She was taken to hospital, where she told medical staff that she had taken a large quantity of diazepam.

14. Having been discharged from hospital and having returned to court the following day, she initially refused to watch her ABE interview and could then be seen apparently asleep on the floor. The trial was therefore adjourned to the following day. Prosecuting counsel asked some supplementary questions, to which C responded by saying that she "did not want to do

this". She walked out of the video-link room. She was persuaded to return, visibly distressed, but quickly walked out again. Upon her further return she again became upset at one of prosecution counsel's questions, began to cry, and again left the room.

15. In the early part of her cross-examination, C said that she did not want to talk about what had happened, could not remember what had happened and wanted to "get out of here". The judge allowed a number of breaks in the proceedings.

16. On the following day, during her cross-examination, C continued to say that she wanted to go. When defence counsel began to put parts of the appellant's case, C repeatedly said that she did not know. When counsel turned to events in the bedroom, C said that she had heard the appellant's side at the first trial. She said that it was untrue, it was disgusting and it was making her sick. She then walked out of the room for the fourth time.

17. The judge, concerned that C might leave court and not return, told counsel to put her case on the actual rape and then to stop. C returned in tears to the video-link room, said that she just wanted it to be over, and then, when cross-examined about the allegation of rape, she left for a fifth time. She was once again persuaded to return. After some short further questioning, her evidence was concluded. That was towards the end of the conventional court day on a Friday afternoon. Before sending the jury home for the weekend, the judge said to them that it was important for the jury to have "very much at the forefront of your mind" that defence counsel had had to abridge her cross-examination on a number of topics. She said this to the jury:

> "You saw Miss Blackwell cross-examine the complainant. That was not a complete cross-examination in the sense that there are a number of topics on which she would have like to ask the complainant about matters. There are a number of topics on which she abridged her cross-examination. In other words, she

> might have built up to it in other circumstances, but here she has gone straight to the end question, as it were, so that it is not cross-examination that was completed in the way that it would in ordinary circumstances.
>
> My interruptions were designed to ensure the flow of cross-examination continued in the sense that the witness continued to answer questions. But please bear this in mind. The defendant is entitled to cross-examine a complainant. He is entitled to have his case put, and that is what Miss Blackwell was doing, and the inability to do that on some topics and the inability to cross-examine in an unabridged way may well prejudice him in certain areas, and I will come back to that later when I give you directions of law. But I wanted you to be aware at this stage that the defendant has not been able to complete cross-examination in the way that it would ordinarily be completed in a criminal trial by being able to go through all the topics and ask questions that are not, as it were, abridged."

The judge went on to tell the jury that on the Monday she would read to the jury a list, to be prepared by defence counsel, of the topics about which counsel would have liked to ask C. We understand that was done. The judge also read to the jury the transcript of C's cross-examination from the first trial.

18. In addition to C's evidence, the evidence from the paramedic who found C, and that of a police constable who spoke to her in the hospital, the prosecution relied on expert evidence consistent with, and indeed supportive of, the prosecution case to the effect that the finding of the appellant's semen in C's vagina was more consistent with vaginal intercourse than with the scenarios suggested by the defence.

19. The jury were provided with agreed facts which recorded in considerable detail the problematic behaviour of C during much of her young life. She had made allegations of sexual assault and rape against more than one person, none of which had led to any prosecution. She had been hospitalised for alcohol and possible drug abuse. She had engaged with the Child and Adolescent Mental Health Service. We do not know what

discussions between counsel led to the formulation of the agreed facts which went before the jury.

20. The appellant gave evidence which was broadly consistent with his second interview. The defence also relied on expert evidence, largely agreed by witnesses on both sides, that it was medically possible for the appellant to have been masturbated to ejaculation whilst asleep. The defence also called evidence from character witnesses, and evidence as to the appellant's relationship with his daughters.

21. The judge gave a detailed summing-up, but did not return to the question of the truncation of counsel's cross-examination of C.

22. On 17th July 2015, the appellant was convicted. He was subsequently sentenced to nine yeas' imprisonment.

23. As we have said, an application was made for leave to appeal against conviction on no fewer than 17 grounds, supported by a lengthy advice by Miss Blackwell QC. Leave was refused on the papers by the single judge. The application was renewed at an oral hearing before the full court on 8th June 2016. The judgment of the court on that occasion refusing leave to appeal is available under neutral citation [2016] EWCA Crim 4. It is unnecessary for us to repeat all that is there recorded.

24. The matter was referred to the CCRC in March 2020, supported by an Advice by Mr Emanuel KC, who now appears for the appellant. The CCRC concluded that there was a real possibility that this court would find the conviction unsafe because of the combined impact of two material non-directions and imperfect directions, namely a failure to direct the jury to try the case dispassionately, and a failure to direct the jury as to how it may treat C's display of

emotion and distress whilst giving evidence. Those two reasons have become the first ground of appeal, which contends that the conviction is unsafe because the jury were given no direction regarding C's visible distress and upset during her evidence, and in particular were not directed that distress is not necessarily a reliable indicator of truth and that they should try the case dispassionately, ignoring emotion and sympathy.

25. The appellant is entitled to argue that first ground because of the CCRC's referral. In addition, he seeks leave to argue two further grounds of appeal, which were considered by the CCRC but were not relied upon as reasons for the referral. Ground 2 is that the jury were not directed as to the prejudice caused to the appellant by the inability fully to cross-examine C. Ground 3 is that the jury were wrongly directed that they could conclude that the appellant had fabricated his defence after the first interview in circumstances when he had not.

26. We have had the advantage of most skilful written and oral submissions by Mr Emanuel for the appellant and by Mr Atkinson KC for the respondent. We are very grateful to both of them.

27. As to the first ground of appeal, Mr Emanuel invites our attention to a specimen direction which was included in the Crown Court Bench Book which was current at the time of the second trial. This referred to the experience of the courts that those who have been victims of rape react differently to the task of speaking about it in evidence, with some displaying obvious signs of distress, and others not. The specimen direction continued:

> "Conversely, it does not follow that sign of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness' account. It all depends on the character and personality of the individual concerned."

We note in passing that the current guidance given to judges in the Crown Court Compendium is in rather different terms, and forms part of a warning against certain assumptions which jurors might mistakenly make. We are, however, concerned with the guidance available to the judge in 2015.

28. Mr Emanuel acknowledges that a direction to that effect was not mandatory in all cases of alleged rape, but submits that it was necessary in this case because the jury had witnessed C showing extreme distress. He took us in detail to passages in the transcript of C's evidence in support of his argument that her presentation is properly described as one of distress, rather than of any other emotion. Similarly, Mr Emanuel submits that a direction modelled on another specimen direction in the Bench Book should have been given, to the effect that the jury must approach the case dispassionately, and warning them that feelings of sympathy for a distressed witness would not assist them in deciding whether the allegation had been proved. Mr Emanuel points to a number of cases in which similar grounds of appeal have been considered. In particular he submits that he can derive considerable support from the decisions of this court in *R v JS* [2019] EWCA Crim 2198, *R v Bennett* [2023] EWCA Crim 795, and *R v FL* [2023] EWCA Crim 710. In *JS*, for example, this court allowed an appeal because the credibility of the complainant was held to be critical to the jury's assessment of the evidence, and in the circumstances of that case the failure of the judge to give the two directions relating to the complainant's distress rendered the convictions unsafe. Mr Emanuel submits that in this case also C's credibility was critical. The jury had to consider an allegation which could give rise to disgust. They had observed C's visible distress and knew of her report that she had taken an overdose because she had had to attend court. They also knew that she had shown distress during cross-examination in the first trial. Mr Emanuel suggests that it is highly likely that the jury would have been affected by what they saw. It

was therefore essential, he submits, that the judge should have directed the jury that C's distress did not mean that she must be telling the truth. He submits that trial counsel must at the time have missed the point that directions for which he contends were essential in the circumstances of this case, and must have missed it again when preparing her Advice and Grounds of Appeal.

29. As to his second ground of appeal, Mr Emanuel submits that trial counsel was unable to cross-examine fully and that C's evidence was therefore not as fully tested as it should have been. The jury therefore did not have the opportunity, which they should have had, to see how C responded to the details of the appellant's case and how she reacted when challenged as to inconsistencies in her account. The reading to the jury of the cross-examination from the first trial was an inadequate substitute and did not avoid the prejudice caused to the appellant. Mr Emanuel goes on to submit that the judge was required to direct the jury that the appellant had suffered prejudice through no fault of his own, that the deficiencies in cross-examination were relevant to the prosecution's duty to prove the case, and that the jury should be warned of the danger of relying on evidence which had not been properly tested. The judge did not give such direction, despite the indication she had given when addressing the jury immediately after C's evidence ended.

30. In his third ground of appeal, Mr Emanuel points to the fact that the appellant in his Defence Statement had waived legal professional privilege to the extent of revealing that before his first interview under caution he had given an account to his then solicitor which accorded with the general nature of his case at trial. Although the jury were not told of this during the trial, the solicitor's notes of the instructions which the appellant had given at the police station include the following:

"I was awoken to find [C] sat across me, completely naked,

> masturbating herself. I think she was having sex with me. I did have a semi-erection. I was confused with what was happening. When I became fully aware of what was happening - I stopped it. Said it wasn't appropriate behaviour for father + daughter."

31. Mr Emanuel submits that the prosecution should therefore not have been permitted to invite the jury to infer that the applicant had failed to answer questions in his first interview because he had subsequently fabricated his account to explain why his semen was found in C's vagina. Further, he submits that the judge should not have directed the jury as she did on this topic. In any event, he argues, the jury were misled. Mr Emanuel acknowledges the need for a defendant to bring forward the whole of his case at one trial and the difficulties consequently faced by an appellant who seeks to raise on appeal a point based on evidence which was available at the trial. But, he submits, the appellant has suffered an injustice which should be corrected.

32. Mr Atkinson, resisting the appeal, accepts that the judge did not give the directions which the appellant now submits should have been given. He further accepts that such directions could have been given and that the judge would not have been open to criticism if she had given them. But, Mr Atkinson argues, those directions were not mandatory and were not necessary in the circumstances of this case. If it was an error on the part of the judge not to give them, or not to give any of them, it was not a material error and does not render the conviction unsafe. He submits that C was a challenging witness for all concerned; that the jury had every opportunity to observe and assess her; that she was obstructive and angry, rather than distressed (as the complainant in *JS* had been); and that her conduct would have been likely, if anything, to disadvantage the prosecution rather than the defence. Further, the jury were clearly directed to try the case on the evidence. Mr Atkinson points to case law confirming that it was not mandatory for a specimen direction to be given in the terms set out in the Bench Book, or in similar terms, and that the consequences of a failure to give a

direction will depend on the facts and circumstances of the case. In particular he relies on *R v G (AI)* [2018] EWCA Crim 1391, where at [22] Simon LJ observed that those who chose not to avail themselves of the draft directions provided in what is now the Crown Court Compendium were at risk of introducing error in the summing up. He continued by saying this:

> "… although this court can read a transcript of the summing up, the transcript cannot replicate the dynamics of the trial. Nor sometimes will it reveal what was really in issue and what was not. It may therefore be important to see whether trial counsel raised an issue in relation to the summing up that they heard in the light of their understanding of the issues. … Such an omission is not dispositive of an appeal based on errors in the summing up but is nevertheless a matter to be borne in mind."

33. Mr Atkinson points out that trial counsel did not at the time ask the judge to give either of the directions which are now said to have been essential. Mr Atkinson also points out that when summing up the evidence in relation to the paramedic who had found C upset and tearful, the judge directed the jury as follows:

> "Now, this evidence may amount to support for her account, but be careful. You can only use it in this way if, firstly, you are sure that it is distress and that it is genuine distress, and secondly, even if you find that it is genuine distress, that you are sure that it is as a result of being sexually assaulted by him, rather than for any other reason: for example, something that she had done, or consumption of drugs or the like. That is dealing with distress."

34. In relation to grounds 2 and 3, Mr Atkinson submits that both were advanced and rejected when the appellant first applied for leave to appeal. As to ground 2, he further submits that the judge, as the full court had found in 2016, did sufficiently direct the jury that there should be no prejudice against the appellant as a result of the fact that his case could not

be fully put. He argues that it is not permissible for the appellant now to raise the same point again and that the CCRC were correct not to rely on this ground as a reason for referral.

35. As to ground 3, Mr Atkinson points out that at trial and in the previous application for leave to appeal against conviction, the core argument was that no adverse inference could be drawn from a failure to answer questions in the first interview, because the allegation was at that stage lacking in detail and it was not reasonable to expect the appellant to answer the questions. Mr Atkinson submits that it is clear from information provided by defence counsel to the CCRC that a tactical decision was taken at trial not to adduce the contents of the solicitor's attendance note, and that the appellant himself when giving evidence did not refer to what he had told his solicitor. Mr Atkinson argues that fresh evidence should not be permitted at this stage, because it was open to the appellant to advance that argument at trial if he wished to do so. We note that in any event, no application has been made for leave to adduce any fresh evidence.

36. We have summarised these competing submissions very briefly, but we have considered all the many points made on each side. Having reflected on them, we reach the following conclusions.

37. As to ground one, it is common ground between counsel, and we agree, that there was no mandatory requirement for directions of the kind to which Mr Emanuel refers to be given in every case involving an allegation of rape or other serious sexual offence. The issue, as we see it, is whether such directions were necessary in all the circumstances of this case. More precisely, the issue is whether such directions were necessary to the extent that it was not open to the judge in the proper exercise of her discretion to omit them, and, if so, whether her omission renders the conviction unsafe.

38. In that regard, we agree with Mr Atkinson that it is important to analyse the nature of C's conduct in her ABE interview and at court in both trials. In many rape and serious sexual offence cases, a complainant will become greatly distressed when giving evidence, and it will often be apparent to the jury that her distress becomes evident when questioning relates to intimate matters and challenges the truthfulness of her account. Such was the case in *JS*, in which we note the prosecution conceded on appeal that a direction should have been given.

39. Here, in marked contrast, C was not only distressed, but was also reluctant to engage with the trial process and oppositional both to prosecution and to defence. She was a most difficult witness to manage for all concerned, including the judge. Her repeated statements that she did not remember and that she did not want to continue were positively helpful to the defence. We agree with Mr Atkinson that her repeated walking out of the video-link room during the short examination in chief, and her general attitude to the proceedings, was capable of undermining the prosecution case. Moreover, the transcript of defence counsel's lengthy closing speech shows that she had ample material to deploy in attacking C's character and credibility.

40. Although the judge did not give the directions which Mr Emanuel says were necessary, she did give a correct direction in relation to the paramedic's evidence of C's distress, and she did direct the jury that they must try the case on the evidence. We accept Mr Emanuel's submission that neither of those directions provides in itself a complete answer to his argument, but they are matters to be borne in mind when considering whether it was necessary for the judge to say more than she did. We think it very significant that defence counsel – who had raised many other points with the judge during C's evidence and before and during the summing up – did not at the time ask for any further direction to be given. Nor did the omission to give the suggested directions feature in her lengthy Advice and Grounds of Appeal, drafted at a time when it could no longer be suggested that counsel may

have missed an important point in the heat of the moment. Nor did prosecution counsel invite the judge to say more than she had done. We emphasise that the basis of this ground of appeal is not that a direction was given which was incomplete or inappropriate in its terms, but rather that an essential direction was omitted altogether. The failure of defence counsel at trial to raise such a point at the time is not, of course, necessarily fatal to a valid ground of appeal; but it is often a good indication of whether a particular omission seemed important at the time to counsel who was immersed in the trial and well able to judge the significance of a particular point not being made. So, too, is the failure to raise the omission as one of many grounds of appeal put forward by trial counsel within the appropriate time limit after the trial.

41. In those circumstances, we are not persuaded that it was necessary for the judge to give either of the suggested directions. Nor are we persuaded that her failure to do so renders this conviction unsafe. We accordingly reject the first ground of appeal.

42. As to the second ground, this court in 2016 rejected a similar criticism. At [51] of its judgment the court said:

> "We would stress at the outset that we think that the trial judge conducted this trial with conspicuous fairness and dealt with the difficulties presented by the witness with sympathetic restraint and a light touch. … The result of the judge's approach was that the witness did succeed in giving evidence and did answer questions and indicated her willingness to do so. True it is that Miss Blackwell was not able to conduct a full cross-examination, but the judge dealt with that fairly by referring to the answers given in the previous trial."

43. There is, in our view, no basis on which the appellant can now be permitted to re-run that same argument. The CCRC considered it, but did not make it a ground for their referral. Leave is therefore required. We are not persuaded that there is any reason why leave should be granted. In any event, even if this ground could properly be brought before the court, it

must, in our view, fail on the merits. The jury saw the circumstances in which defence counsel was unable to cross-examine as fully as she wished. The judge immediately addressed them about that inability in terms to which no objection can be taken. The judge thereafter did all she could to ensure that the defence were able to convey to the jury the points which counsel would have wished to explore and indeed had explored at the first trial. C's brusque assessment of the propositions which were put to her as "disgusting" shows that it could not be assumed that further cross-examination would all have proved helpful to the appellant. Given that the jury had observed the stop-start process of C's evidence over several days, and given C's responses to the questions which were asked, we are not persuaded that it was necessary for the judge to direct the jury that the appellant may have been prejudiced because they had not observed C's response to every question which might have been asked.

44. Ground 3 is, in our view, an impermissible attempt to run the appellant's case in a way other than that which was taken at trial. All the material on which Mr Emanuel now relies in support of this ground was available at trial and could have been, but was not, adduced in evidence. Instead, an entirely different challenge was made to the prosecution's argument that an adverse inference could be drawn from the appellant's failure to mention important matters in his first interview. Detailed submissions were made to the judge as to why no adverse inference should be permitted. Defence counsel advanced every possible argument in that regard, but conspicuously did not advance the point now argued.

45. We agree with Mr Atkinson that we are entitled to infer that a tactical decision was taken at trial not to rely on what had been said to the solicitor. That tactical decision cannot be said to have been unreasonable. The notes taken by the solicitor did not fully explain the finding of the appellant's semen, and we can well see why counsel may have felt that detailed consideration of those notes carried real risks for the appellant. Moreover, as the summing

up made clear, one of the inferences which the prosecution invited the jury to draw was that at the time of the first interview the appellant "was waiting until the scientific evidence was served to see whether that was positive or not and then constructed a false accusation against C in an attempt to answer the case he had to meet". The solicitor's note of the appellant's instructions at the police station could not, in our view, provide an answer to that suggested inference. In those circumstances, we accept Mr Atkinson's submission that the appellant cannot satisfy the criteria in section 23 of the Criminal Appeal Act 1968 for the admission of fresh evidence.

46. We have given careful consideration to Mr Emanuel's powerful submissions as to injustice, but we are not persuaded by them in circumstances where we do not know precisely what considerations defence counsel had in mind. We do not know what discussions she had with the appellant as to the points to be mentioned or not mentioned at trial, or any discussions she may have had with prosecuting counsel.

47. For those reasons we refuse the application for leave on grounds 2 and 3, and we dismiss the appeal on ground 1.
