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IN THE COURT OF APPEAL  
CRIMINAL DIVISION  
[2023] EWCA Crim 967

Case No: 2023/01945/B4



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 27<sup>th</sup> July 2023

**B e f o r e:**

**LADY JUSTICE MACUR DBE**

**MR JUSTICE GARNHAM**

**MRS JUSTICE THORNTON DBE**

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**Mr P Jarvis** appeared on behalf of the Applicant

**Miss S Lawrence** appeared on behalf of the Respondent

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**J U D G M E N T**

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**NOTE - THE PROCEEDINGS IN THIS CASE ARE CONCLUDED.**  
**ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING**  
**RESTRICTIONS PURSUANT TO S.71 CRIMINAL JUSTICE ACT 2003.**  
**IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE**  
**THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN**  
**PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE**  
**IDENTIFICATION OF INDIVIDUALS.**

Thursday 27<sup>th</sup> July 2023

**LADY JUSTICE MACUR:**

1. The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. By virtue of those provisions, no publication may include a report of these proceedings, save for specified basic facts, until the conclusion of any retrial.

2. The provisions of the Sexual Offences (Amendment) Act 1992 also apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to them shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as the victim of the offence. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.

3. The respondent was tried on one count which charged him with the rape of the complainant, "C", on 23<sup>rd</sup> June 2020. The trial took place between 5<sup>th</sup> and 7<sup>th</sup> June 2023.

The facts in brief

4. The respondent and C met online and had been in contact with each other via social media platforms. On 23<sup>rd</sup> June 2020 the respondent booked an Uber taxi for the complainant to come to his house for their first meeting. Sexual intercourse took place in his bedroom. The issue in the trial was consent.

5. C's evidence as to the facts of the sexual intercourse remained consistent throughout the course of ABE interview and cross-examination. Her evidence was that before being called into the respondent's bedroom she had been to the bathroom and had messaged her ex-boyfriend and a friend, "S", indicating her discomfort at the situation in which she found herself. She was unclear when in the sequence of events in the bedroom the respondent had

removed her phone and silenced it. But while in the bedroom she said that she had taken a photograph of herself lying on the bed, which at some stage she had sent to her ex-boyfriend, saying in a text to him later that day that she had done so to emphasise her predicament. She had also answered a call from "L" (S's boyfriend) saying that she could not talk at that time.

6. Thereafter, S picked up a message from C, whether before or after L's call she could not say, indicating that she, C was in danger. S messaged C that she would come to collect her. S and L found C in the street. She was visibly distressed, and her clothing was awry. There were marks on her neck which may have been love bites.

7. Shortly after C made a 'recent' complaint to S and to S's mother and reported the matter to the police. S and L's statements to this effect were agreed and read into the evidence. C had also texted her ex-boyfriend after the incident, apparently as she was travelling in S's car towards a safe place. In that text she made a further recent complaint of rape, but she did not tell her ex-boyfriend at that time that she was being safely escorted by S to S's home.

8. It is clear from the messages that he sent to C that her ex-boyfriend did not know what to believe and he challenged her in text messages. In response, she professed to be confused about certain details. Her ex-boyfriend advised her to contact her mother or her father or the police.

9. In due course the ex-boyfriend refused to provide a witness statement, although he did disclose the relevant messaging stream. Those messages were adduced in evidence as an agreed fact.

10. C's evidence in chief was primarily in an Achieving Best Evidence interview that was played to the jury. She was fairly and reasonably cross-examined by Miss Lawrence, who

appeared on behalf of the respondent, particularly as regards the sequence and content of her communications with her ex-boyfriend and with S, and as regards the telephone conversation which she had with L. Some of the re-examination by counsel for the prosecution, Mr Wood, was rightly objected to, whilst other questions may be thought to have been thwarted unnecessarily by the judge. However, nothing turns on that point.

11. At the end of the re-examination the judge questioned C at some length in front of the jury. The transcript of that question-and-answer session extends to over four pages.

12. There can be little doubt as to the judge's motive in asking these questions, for shortly afterwards she required the prosecution, in no uncertain terms, to reconsider the prosecution of the respondent. Upon the refusal of the prosecution to do so, she subsequently went on to consider a submission of no case to answer.

13. The submission was supported by a short skeleton argument prepared by Miss Lawrence which focused on *R v Shippey* [1988] Crim LR 767 to the effect that "this is not a question of credibility but that her evidence as a whole is so undermined by the self-contradictions [that is referring to the communications, photograph and telephone call] that it is out of all reason and common sense and the case ought not be left to the jury."

14. Prosecution counsel responded that the case did not depend solely upon the evidence of C, but also the evidence of recent complaints; that the application made on behalf of the respondent was in fact based on the credibility of the complainant and the matter should be left to the jury. In addition to her detailed description in the ABE interview, there had been no self-contradiction of her evidence during cross-examination. There was evidence of the messages that she had sent and evidence of recent complaint. The accepted lies that she had told her ex-boyfriend in the text messages were not central to the allegation of rape made by

C in her evidence, but in any event, this should be a matter for the jury.

15. In discussion with counsel for the prosecution the judge speculated upon the sequence of text messages sent by C to her ex-boyfriend, S and L and, from the transcript of her exchanges with prosecution counsel was clearly of the view that C's motivation to make a false complaint was to rekindle her relationship with her ex- boyfriend. In other parts of the discussion the judge referred to the evidential dispute between C and the respondent and said, accurately:

"... the only person who knows whether that is true, is either [the respondent], well it is [the respondent] or the complainant, is it not?"

16. In the following discussions the judge indicated her cynicism of what had been said by the complainant in evidence in several respects. On other points she appeared to accept the submission of prosecuting counsel that there were matters that would have to be determined by the jury. However, immediately after the conclusion of submissions, the judge went on to give an ex-tempore ruling in which she determined that the complainant's evidence was 'out of all reason'.

The application for leave to appeal a terminating ruling.

17. Mr Jarvis, who did not appear in the court below, applies to set aside the terminating ruling. He submits that the ruling involved an error of law or principle and/or it was a ruling that it was not reasonable for the judge to have made, by reason of her reliance upon the self-serving statement of the respondent and her failure to consider the whole of the complainant's evidence. The judge's obvious view as to the veracity of the respondent's self-serving statement and that which the judge speculated was the complainant's motive, coloured her assessment of the complainant's evidence. The judge should have assessed all

the evidence for the prosecution, not just parts of it. It was impossible to read the ruling without noting the absence of the judge's analysis of the central point. The judge did not refer to the evidence of the rape in the lengthy ABE interview, from which the complainant did not resile during cross-examination. In addition to the messages, she sent to her ex-boyfriend, C sent 'distress' messages to S and L seeking help. S and L described Cs appearance when they collected her, namely, that she was in floods of tears and hysterical, and her clothing was seen to be in disarray.

18. The judge had alighted on several aspects of C's evidence which she said fatally undermined her credibility: the text messages to her ex-boyfriend; a telephone call which C answered whilst in the respondent's bedroom; and, the photograph she took whilst lying on the bed in the respondent's bedroom. Mr Jarvis submits that whilst it is not possible or realistic to underplay the significance of the texts, they were lies after the event. Although, on more than one occasion the judge made clear how unique or unusual it was in her experience for a rape victim to receive a telephone call and take a photograph in such circumstances, these were matters for the consideration of the jury in due course.

19. The judge repeatedly referred in her ruling to the duff, as she saw it to be, of the prosecution case, but there is no part of her ruling which considers the plums. He concedes that there were weaknesses in the prosecution case but stresses the constitutional primacy of the jury to assess the weight of the evidence.

20. Miss Lawrence concedes that the complainant never resiled from her allegation of rape but says that the judge was properly entitled to take into account all of the evidence that reflected upon that central allegation. The judge had reasonably focused upon the improbability of the photograph being taken and the telephone call received by C whilst in the bedroom if she was in a situation she had described. These features were beyond any

sensible interpretation in the context of a valid and genuine allegation of rape.

21. Miss Lawrence submits that the submission of no case to answer made on behalf of the respondent depended upon the inconsistent nature and inherent unreliability of the complainant's evidence when seen in the round, rather than relating to her credibility. She defends the judge's ruling, arguing that she was not distracted by matters outside the evidence, that is the judge's own experience of rape allegations, but was merely indicating the unusual nature of C's evidence of the events in the bedroom, namely the taking of the photograph and the making of the phone call, were not in accordance with the allegation of rape.

#### Discussion

22. We consider that the judge's questioning of C (see [11] above) was unnecessary in terms of clarification and amounted to cross-examination providing a vehicle to reflect the judge's view on C's motivation for making, what apparently the judge thought to be, a false complaint of rape. It was unnecessary since we regard Miss Lawrence to have skilfully laid the foundation for such remarks in her closing speech. Regrettably, this unwarranted judicial intervention sets the scene for that which followed.

23. Apparently frustrated by the rejection of her request that the prosecution reconsider the prosecution of the respondent, the way the judge went on to deal with the submission of no case to answer is concerning and revealing. The judge's discussion with prosecution counsel indicates a less than open mind. Rather than seeking assistance or clarification of the points made by the prosecution, the judge effectively countered counsel's submissions with her view as to the complainant's credibility, albeit that on occasions she conceded this was a matter for the jury.



24. It is clear from the judge's ruling that she considered that the respondent had given a 'full and frank' account of his encounter with the complainant, in a self-serving statement denying rape, that was produced at his interview and was read into the evidence. At the end of her ruling, she confirmed her opinion, that he was a 'decent young man'. Implicitly, she took this self-serving statement into consideration when dealing with the submission of no case to answer. This was an error of law; a judge cannot take into account a wholly self-serving statement in considering a submission of no case to answer. (*Pearce (1979) 69 Cr. App. R 365*)

25. We note that the judge made an error in her factual description of a photograph which she described as of the complainant and the respondent upon the bed but do not think that this is significant in the context of this application. More significant is the judge's repeated indications that she considered the photograph and telephone call to be 'out of the norm', and the like of which she had never seen before, by reference to her own experience of such cases. We agree with Mr Jarvis that the judge's own previous experience of rape allegations should not have been used as a reliable indicator that evidence was out of all reason, or inherently inconsistent with the complaint of rape. As to this latter point, whilst the judge in her ruling rejected any suggestion that she was in danger of falling into the grip of a 'rape myth', it appears to us that her expectation of what was likely or not to have occurred in certain circumstances undermines that view. Certainly, she appears to have considered that the way C met the respondent (on Tinder) and the nature of photographs exchanged were of some significance to her consideration of the evidence.

26. In contrast, the judge's approach to the evidence of 'recent' complaint in the ruling is through the prism of the necessary direction to the jury regarding the source of the complaint but makes no analysis of the objective evidence of distress and dishevelment.

27. The difficulties in the prosecution case are all too apparent to us but are, we consider, issues for the jury to consider as part of the whole of the evidence.

28. We are unable to accept Ms Lawrence's submission that the judge's ruling was based upon the inconsistency and inherent unreliability of C's own evidence untainted by the judge's reliance on extraneous matters and her consequent assessment of C's credibility. It appears to us that the judge had formed a view as to C's reliability and credibility on the erroneous basis of extraneous or irrelevant matters, that is, her previous experience and expectations of what is normal in the behaviour of rape complainants and the respondent's self-serving statement respectively.

29. We are mindful of the respect we should afford to the exercise of the judge's discretion and that we should be careful not to impose our own view of the strength or otherwise of the submission, for that of the judge. However, for the reasons above we are satisfied that the ruling involved an error of law or principle, and /or was a ruling that it was not reasonable for the judge to have made. (Criminal Justice Act 2003, s 67(b) and (c))

#### Conclusion

30. We grant leave to appeal and allow the appeal. We reverse the ruling and direct a fresh trial take place before a different judge in a Crown Court designated by the senior presiding judge of the Southeastern circuit.

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

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