Neutral Citation Number: [2024] EWCA Crim 1423

Case No: 2024-00105 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PORTSMOUTH
HIS HONOUR JUDGE ASHWORTH
44PC0203923

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2024

Before :

LORD JUSTICE BEAN
MR JUSTICE SAINI
and
HIS HONOUR JUDGE LEONARD KC

- -

Between :

REX	**Appellant**
- and -	
MARVIN HILL	**Respondent**

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- -

Mr O Weetch for the **Appellant**
Mr M Booth (Crown Advocate) for the **Respondent**

Hearing date : 14 November 2024

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Approved Judgment

This judgment was handed down remotely at 14.00 on 18 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Leonard:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this appeal, and no matter relating to the complainant 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 an offence to which this appeal relates, and the prohibition applies unless waived or lifted in accordance with s.3 of the Act.

2. After a trial at the Crown Court at Portsmouth before His Honour Judge Ashworth and a jury which lasted five days, the appellant was convicted of rape on 8th December 2023. He was sentenced on 21st March 2024 to an extended determinate sentence of 15 years, being a custodial term of 9 years with an extension period of 6 years.

3. This appeal centres on the restrictions on evidence of, or questions about, a complainant's sexual history by virtue of s.41 of the Youth Justice and Criminal Evidence Act 1999 and in particular the gateway to admissibility provided by s.41(5). The appellant was granted leave to appeal on the last of four grounds advanced on his behalf. He renews his application for leave to appeal to the full court on what was his third ground.

4. Mr Martyn Booth on behalf of the respondent complains that the notice of the applicant's intention to apply to renew Ground 3 after the refusal of the single judge was only done by email on 2nd July 2024. It follows that it was out of time and without an application for an extension of time and that it did not comply with the requirements of Criminal Procedure Rules 36.14. No notice was served on the respondent and the notice given to the court by email dated 2nd July 2024 where the decision of the single judge was dated 14th June was two days outside the ten business day requirement for the notice to be given.

5. Whilst this court may have been willing to extend the time allowed to give notice by two days, it is, in particular, regrettable that the informal way in which the notice was given by the applicant left the respondent unaware of the renewed application. Fortunately Mt Booth has been able to respond fully to the application, and we are grateful to him for doing so at short notice. We will not decide whether to grant leave to appeal until we have reached our conclusion as to its merits. Although he is in part an applicant and an appellant, we shall refer to him as the appellant throughout.

EVIDENCE

6. The case for the prosecution and the case put forward by the appellant were very different and irreconcilable. The prosecution led evidence that on the evening of 23rd April 2022 the appellant together with a friend, who we will refer to as F, attended a block of flats in Portsmouth to meet up with F's girlfriend, who we will refer to as FG, in Flat 115. Also present in the flat that evening was FG's father. Although F gave evidence at trial, neither FG nor FG's father did so.

7. C lived in a next door flat in the same block. It was the prosecution's case that at some point during the evening the appellant left Flat 115 and went next door to C's flat, Flat 117. She had left her door open to allow her cats to come and go. The

appellant went to her bedroom where he forced C onto the bed, slapped her in the face and engaged in vaginal sexual intercourse leading to her bleeding from her vagina.

8. C managed to free herself. She banged on the wall for help and shouted out. F gave evidence that he heard shouts from the direction of C's address followed by her appearance in Flat 115 very shortly afterwards in a distressed state and bleeding. F had gone next door to Flat 117 and seen the appellant who was confronted by FG's father whereupon the appellant denied doing anything wrong. The appellant was arrested the following day.

9. In her ABE interview C said that she was punched in the face by the appellant when he entered her bedroom. Later she said it had been a slap to her face which caused no mark or injury and that it happened when she was on her bed. She said she shouted out for him to stop as he was vaginally raping her. She managed to free herself from under him when she saw blood coming from her vagina. She banged on the wall and called for help. The appellant refused to leave. She left and went to the flat next door.

   When the police attended they found and photographed apparent blood staining on the bedding in C's room. An officer who attended on the following day, 24th April, noted that he had been told about an alleged anal rape which information appeared to have come from FG. He was permitted to give this evidence at trial.

10. The appellant was interviewed after his arrest and made no comment to the questions he was asked. He served a short prepared statement denying rape. When he returned to the Police Station on 1st March 2023 he provided a second prepared statement in which he stated that he had met C in Flat 115 and had been friendly and tactile; they had talked about his girlfriend. After a while she invited him into her flat and directed him into the bedroom. There they had consensual sex, C told him he needed to tell his girlfriend they had had sex. When FG came into C's flat he left to avoid further confrontation. No mention was made of anal intercourse in that statement.

11. He served a detailed Defence Statement which was uploaded onto the DCS on 22nd August 2023. We shall set that out in some detail because when he gave evidence he did so consistently with what he had put in his Defence Statement. He and F had travelled to the block of flats but F was quicker climbing the stairs and he did not see which flat he had gone into. The appellant knocked on the open door of the flat which he thought F had gone into but instead he saw C. She immediately came up to him, kissed him and grabbed his genitals and told him to come back in fifteen minutes.

12. When he left the flat he saw FG's father who directed him to FG's flat where he saw F and FG. They were joined by C. Throughout the evening both alcohol and drugs were consumed. When the appellant went to leave Flatt 115, C invited him into Flat 117. They kissed and cuddled and she led him into her bedroom. They each took their lower clothes off. She bent over the bed, and he inserted his penis into her anus. From the noises she made he knew she was consenting. He did not wear a condom and he thought he ejaculated. She did not tell him to stop, or to get off.

13. After they had sex he noticed a small amount of blood on his penis which he assumed had dripped from her vagina. At no point did he enter her vagina.

14. In his evidence he said that C, on seeing blood, had suddenly stopped and started shouting out apparently disgusted by the sight of the blood. He did not try to stop her from leaving and he did not think he had done anything wrong until he was frogmarched out of the flat.

15. His Defence Statement added detail about him laying on the bed almost in sleep which he believed annoyed her. He saw her picking up his clothes and his phone and she started asking about his girlfriend. She said she was going to tell her what had happened. He responded that she was not going to do that and he felt he should leave immediately.

16. He denied punching C or causing any bruises to her legs; he did not hold them in any way which could have caused the marks.

17. In addition to the accounts given of that night, on 23rd April 2023 photographs were taken of C. They appeared to show bruising to the back of her thighs and legs. There was no scientific or opinion evidence available to identify what mechanism may have caused the bruising or whether in was more consistent with the account of vaginal rape or consensual anal intercourse, or the possible age of the bruising insofar as that is possible to ascertain. The trial judge referred to them as "finger mark" bruising".

18. On 24th April C was medically examined. The vaginal examination showed fresh blood in the vagina. No injuries to the vagina were seen and, therefore, no explanation for the bleeding was found. In the opinion of the examining doctor, Dr Tillett, non-consensual penetration can occur without leaving visible genital injuries and consensual penetration can occur leaving visible genital injuries. Dr Tillett was unable to comment on the nature of the penetration with regards to consent.

19. The DNA evidence resulting from vaginal swabs from C and swabs from the shaft of the appellant's penis was reduced to the following admissions made at trial:

> "Vaginal swabs taken from [C] were analysed by a forensic scientist, Ms Matsuura. No DNA from the defendant…was found on those swabs. This does not mean vaginal intercourse could not have taken place between [the defendant] and [C] as someone may have sexual intercourse with someone without leaving a DNA trace.
>
> Swabs were taken from the shaft of [the defendant's] penis and analysed by Ms Matsuura. These suggested [C] was a low-level contributor of DNA to the result which supports the proposition that sexual activity had taken place between them. These findings were equally consistent with vaginal sexual intercourse having taken place as they were with anal intercourse having taken place."

20. In a further report, the contents of which did not go before the jury, an analyst found a complete male DNA profile in semen, in particular, on the high vaginal swabs taken from C which did not match the appellant's DNA profile and came from an unknown male. The report also provided the expert's interpretation and conclusion:

> "…in my opinion, one possible explanation for this finding is that Unknown Male 1 had recent vaginal intercourse, with internal ejaculation, with [C]. There could be other possible explanations; however, there is no alternative account to consider at this stage. …this finding does not assist in addressing whether [the appellant] had vaginal intercourse with [C], and should be deemed as inconclusive in this regard."

21. The unknown DNA was searched against the National DNA Database and identified as belonging to a named individual other than the defendant.

22. An expert concluded that the presence of semen on C's vaginal swabs:

> "…in my opinion, this finding is as I would expect had sexual activity involving the transfer of semen to these areas (which may include vaginal intercourse with internal ejaculation), occurred within the 10 days prior to the swabs being taken. I am unable to determine exactly when in this 10-day timeframe this semen may have been deposited, as the level of semen detected depends on the amount of semen initially deposited, and the rate in which semen is lost from the vagina, both of which cannot be determined from the information provided. In addition, I would have very low expectations of semen being deposited beyond 10 days".

23. This finding was inconsistent with a record made by Dr Tillett at the time of C's examination on 24th April that she had told her that she had had no other sexual activity within the last 10 days apart from that with the appellant.

APPLICATIONS AT TRIAL

24. Mr Weetch made two applications to be permitted to cross-examine C in respect of her previous sexual history. The first set out three questions he wanted to ask C:

(a) How it is that a male's DNA [not that of the defendant] came to be found on her vaginal swabs?

(b) Why it is that she told the police/medical staff that examined her she had not had sex in the ten days before this incident in light of DNA being found from a male in her vaginal swabs?

(c) Whether, the ostensible bruises to the back of her legs/thighs were caused by this defendant or if in fact these marks were caused by the male whom she had sex with in the ten days before the incident with the defendant.

25. In a succinct ruling, which may seem the more so because parts were inaudible, the trial judge concluded that the first two questions did not have any evidential relevance and, as to the third question he said:

> "…my view is that the questions are speculative and without any causative power, force so that they were, essentially there needed to be an investigation and (inaudible) evidence. I was

> also asked about the differences in one account she had given at the start and other evidence in the case whether this may be relevant to her credibility and that is one of the areas that was precluded under section 41. And therefore none of the questioning is permissible and in any event the refusal of leave is not going to render the conviction unsafe...because cross-examination can quite properly be put forward…without straying into the those impermissible areas."

26. Mr Weetch made a second application the following day based on answers C had given during her ABE interview and when cross-examined. When she was asked in interview if there was any reason why he would think she was consenting, she answered "That's impossible, I don't know this person". In cross-examination, but not in direct answer to any question put by the defence, she said "I was not looking for a new partner or sexual relationship; my partner had just died". Mr Weetch submitted that her evidence that she would not have had consensual sex with the defendant was undermined and rebutted by the DNA evidence and that s.41(5) allowed for evidence which explains or rebuts evidence adduced by the prosecution to be admitted.

27. In his ruling the judge said that the DNA evidence of the presence of someone else's semen does not undermine what she said in the ABE interview and as to her answer in cross-examination:

> "…that's how she was feeling on the day is her evidence, and the fact that someone has had sex in the recent past is frankly neither here nor there and is not evidence which would contradict those statements… The defendant's case...has to be looked at analytically in this type of application. He is suggesting that there was consent to sex given in very unusual circumstances and such that the complainant's previous history is simply irrelevant and certainly wouldn't undermine the safety of the conviction.... You quite properly made an application but I am not going to accede to it."

THE LEGISLATIVE FRAMEWORK

28. S.41 of the Youth Justice and Criminal Evidence Act 1999 sets out the restriction on evidence or questions about a complainant's sexual history. Insofar as it is relevant to this appeal its terms are as follows:

> 41.(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,
>
> by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

(a) that subsection (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

That the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

29. 30. S.42 provides interpretation and guidance to the application of s,41:

42(1) In section 41—

(a) "relevant issue in the case" means any issue falling to be proved by the prosecution or defence in the trial of the accused;

GROUNDS OF APPEAL

30. Of Mr Weech's original grounds of appeal, we need only consider two, both of which rely on s.41(5) as the gateway to admissibility:

(a) Ground 30(c), for which he seeks leave, he submitted that the DNA evidence of semen from someone else within the last ten days undermined C's assertions in evidence that she would not have had consensual sexual relations with anyone at the time of the offence and that because of the recent death of her partner she did not want to engage in any sexual contact. This evidence rebutted or explained the evidence she had given on this subject and would have put what she told the jury in its proper context for the jury's assessment. He submitted that it was not just relevant to her feelings on the day but had a much wider and broader implication. This was heavily relied on by the prosecution both in cross-examining the appellant and in his speech. He relied on s.41(5) in circumstances where it was accepted by the trial judge that her answer had not been deliberately elicited by the defence.

(b) Ground 30(d), on which the appellant has leave, he submitted that, albeit there was no expert called as to the bruising and C had not reported them when she was examined by Dr Tillett, it was the defence case that the bruising may have been caused by someone else. Without the evidence of the previous sexual intercourse with another man within ten days of her examination, and allowing C to be cross-examined as to who caused the bruising. an evidential path was denied to the defence as a result of the judge's ruling.

RESPONDENT'S SUBMISSIONS

31. In response Mr Booth on behalf of the respondent accepts that whether the penetration was vaginal or anal is "a relevant issue" as defined by s.42(1).

32. The respondent does not accept that the presence of semen from somebody other than the appellant can assist in any manner whatsoever as to whether he penetrated C's vagina or anus The jury had as an agreed fact that no DNA attributable to him had been recovered from the complainant.

33. They rely on the inconsistent nature of the appellant's position as to the mechanics of the sex has between them. When interviewed on arrest he denied raping C but made no reference to the act itself, and in his prepared statement made on 1st March 2023 he maintained that the sexual contact between them was consensual. By that time he was fully aware that the allegation being made was of vaginal rape. Nevertheless it was not until he served his Defence Statement on 22nd August 2023 that stated that there had been no vaginal rape but they had partaken in consensual anal intercourse. He set out in his Defence Statement that he 'thought' he had ejaculated but in evidence said that he did not ejaculate.

34. As to the appellant's Ground 30(c), the respondent accepts, that on the face of it, there is a discrepancy between what C said about having no sex during the 10 days prior to the rape and the medical and scientific findings in relation to the presence of semen.

35. The respondent submitted that evidence she gave at trial about her personal circumstances was of little consequence in this case and its impact on a jury would have been marginal at the very most where the issues between C and the appellant was in respect of non-consensual vaginal intercourse and consensual anal intercourse. The very essence of her evidence was that she would not have had consensual sex with a person she had never seen before that evening, in whose company she had been for a very short time. The respondent submitted that prior sexual activity was peripheral to the overwhelming and powerful reasons given by her for not consenting to sex with the appellant.

36. As to Ground 30(d), the respondent submitted that C identified the bruises she had been caused during the incident when she gave her ABE interview; she stood up to show the officer where the bruises were. She maintained this during her evidence. The bruises are entirely consistent with the allegation she has made and any assertion that they may have been caused by another person during consensual intercourse in the past is entirely speculative. Ther is no material on which the appellant can assert that sexual intercourse with another man was sufficiently "rough" to result in bruising to C. It is submitted that the absence of any expert evidence as to the bruises is neither here nor there given the strength of the evidence in this case.

DISCUSSION

37. Our starting point is to determine whether the answers given by C during cross-examination amounts to evidence, in the language of s.41(5), "…adduced by the prosecution about any sexual behaviour of the complainant". This was considered in R. v. Hamadi 2007 EWCA Crim 3048.

38. The complainant in that case said in cross-examination that she was faithful to her boyfriend and would not have sexual intercourse. It was argued that any evidence given by a prosecution witness, whether in chief or in cross-examination, fell within the scope of the subsection and to construe it otherwise might adversely effect the fairness of the trial. The court considered that:

> "20. The starting point for the discussion is the natural meaning of the words used in subsection (5). In our view the expression "evidence adduced by the prosecution" naturally refers in this context to evidence placed before the jury by prosecution witnesses in the course of their evidence in chief and by other witnesses in the course of cross-examination by prosecuting counsel. It does not naturally extend to evidence obtained from prosecution witnesses by the defence in the course of cross-examination... We are unable to accept the submission that it extends to all evidence given by the prosecution witnesses, however it comes to be given. However, whether, as Mr. Fitzgerald argued, it should be given a more liberal interpretation in this context is another matter."

> 21. …accordingly we think that in order to ensure a fair trial there may be cases in which the accused ought to be allowed to call evidence to explain or rebut something said by a prosecution witness in cross-examination about the complainant's sexual behaviour which was not deliberately elicited by defence counsel and is potentially damaging to the accused's case. For that reason we would accept that subsection (5) has to be read in the somewhat broader sense that its language might otherwise suggest in order to accommodate such cases."

39. In *Hamadi* even on that more liberal interpretation of s.41(5) the court did not accept that the answers in cross-examination were adduced by the prosecution. That was because defence counsel asked further questions which led the complainant to agree an answer which caused the defence to apply to rebut her evidence under s.41(5). It is accepted that, in this case, Mr Weetch had the sense to leave C's answer alone and moved on. We agree that a liberal interpretation of the words "adduced by the prosecution" is required in circumstances such as these and that her unsolicited answer does allow for an application under s.41(5).

40. We next have to consider s.41(2)(b). Where the defence apply to call evidence or ask questions pursuant to s.41(5) the court may not give leave unless it is satisfied that a refusal of leave might have the result of rendering unsafe a conclusion of the jury on any relevant issue in the case.

41. Evidence of marginal relevance even if technically capable of passing through this gateway will not be admitted. The evidence must be so significant that its exclusion would render the jury's verdict unsafe. There have been a number of decisions of this court identifying how the court should approach its decision, see by way of example R. v. DB [2012] EWCA Crim 1235 in which there is a similarity in part to the facts of this case. Evidence of semen from an identified man known as X, which would have been deposited three or four days before her examination was not admitted despite the complainant's denial that she had sexual intercourse with him. However the purpose of seeking to adduce the evidence was very different in that case.

    We have considered the arguments put forward on behalf of the appellant and the respondent as to whether we are satisfied that a refusal of leave by the trial judge might have the result of rendering unsafe a conclusion of the jury on any relevant issue in the case.

42. We have considered what the evidence which Mr Weetch submitted should have been admitted would have gone to in the circumstances of this trial. As Mr Booth observed, the evidence in this case was stark and involved the jury believing that C had or may have responded in a sexual manner almost immediately on meeting him and a very short time later had agreed to anal intercourse with him. This was how he put the case and Mr Weetch agreed that Mr Booth had not necessarily relied on C's answer that she that she would not have had consensual sexual relations with anyone at the time of the offence and that because of the recent death of her partner.

43. The jury had two starkly contrasting cases to consider but neither the prosecution nor the defence were alleging that consensual vaginal intercourse took place. The jury

would not have been assisted as to whether C would have consented to anal intercourse within a very short time of meeting the appellant and during what he alleges was their first sexual experience by knowing that she has had sexual relations with another man within the last ten days. It would not rebut or explain her evidence that she would not have sexual relations with anyone at that time or because of her partner's recent death.

44. Nothing was known about the circumstances in which she had had a previous sexual experience and, in any event, her agreement to have sexual relations with someone other than the appellant cannot be adduced to support that C was consenting to intercourse with the appellant, which is the real issue that the jury had to decide. And which is prohibited by s.41(1) and the exception provided by would not be admissible pursuant to s.41(3).

45. As to adducing the evidence to show that the bruising may have been caused by someone else, we agree with the trial judge's assessment of that evidence. There was no medical evidence to support how they were caused or when, approximately, they had been caused. There was no evidence of when, within a ten day period, she had had sexual relations with another man. There was no evidence as to how they could be caused during an act of consensual intercourse.

46. Mr Weetch with characteristic frankness told us that he addressed the jury in his speech on the fact that there was no medical evidence as to how the bruises were sustained. Whilst we acknowledge that, at some stage, the trial judge referred to the bruises as "finger marks", Mr Weetch was unable to say whether it was before the summing up or during the summing up. Because of recording difficulties, we do not have the advantage of a transcript of the summing up.

47. Mr Booth, for whose assistance we are also grateful, submitted that, if the applicant's argument was right, then in almost any case where there was evidence of bruising, a complainant could be asked whether that was a consequence or previous recent sexual activity with someone other than the defendant. We agree that if such evidence was permitted, it would undermine the whole purpose of s.41 which is to limit a complainant's exposure to being cross-examine on their previous sexual history. Mr Weetch's submission that he only sought leave to cross-examine on one identifiable previous incident does not assist him; s.41 can apply to one incident just as much as to a series of sexual acts.

48. We conclude that the admission of this evidence would have been, to use the words of the trial judge, "speculative and without any causative power". In the terms of s.41(2)(b) it may be appropriately put as falling far short of circumstances where the refusal of leave by the trial judge might have the result of rendering unsafe a conclusion of the jury on the issue of how the bruising was caused.

49. These are the reasons which led us to announce our decision, after hearing oral argument on 14 November, that we did not find the appellant's conviction to be unsafe. We refused leave to apply to renew his appeal on Ground 30(c) and dismissed his appeal on Ground 30(d).