IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LEWES
HHJ HUSEYIN T20220032 T20227013

CASE NO 202302966/B2-202302969/B2

NCN [2024] EWCA Crim 1639

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 26 November 2024

Before:

LORD JUSTICE DINGEMANS

MRS JUSTICE MAY

RECORDER OF BRISTOL
(HIS HONOUR JUDGE BLAIR KC)
(Sitting as a Judge of the CACD)

REX
V
ASHLEY LEWIS

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
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MR J DEIN KC appeared on behalf of the Applicant.

J U D G M E N T

MRS JUSTICE MAY:

1. This is a renewed application for the necessary extensions of time (263 days in respect of the conviction appeal and 172 days in respect of the sentence appeal) and for leave to appeal conviction and sentence following refusal by the single judge.

2. On 18 October 2022, in the Crown Court at Lewes, the applicant pleaded guilty on re-arraignment to two counts of voyeurism. On 11 November 2022, at the same court, after a trial before HHJ Huseyin and a jury, the applicant was convicted unanimously of rape (count 1), two counts of sexual assault (counts 3 and 4), theft (count 5) and assault by beating (count 7). On 10 February 2023, the applicant was sentenced to 6 months' imprisonment on count 6, with a consecutive extended determinate sentence of 16 years and 6 months for the rape on count 1, comprising a custodial term of 12 years 6 months with an extension period of 4 years. Concurrent sentences were passed on the remaining offences. The judge also made a sexual harm prevention order and a restraining order, neither of which is the subject of any appeal. A co-defendant, Dylan Holden, was convicted of rape and sexual assault. He was sentenced to a total of 6 years' imprisonment.

Reporting Restrictions

3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during the 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 the offence. This prohibition applies unless waived or lifted by this court in accordance with section 3 of the Act. In this judgment, we shall refer to the two complainants as "C1" and "C2".

The facts of the offending

4. The applicant was charged on the same indictment with two sets of offences arising from separate incidents in Brighton on 2 June 2021 ("the Brighton offences") and in London on 3 October 2021 ("the London offences").

The Brighton Offences (Voyeurism and counts 1, 3 and 5)

5. On 12 June 2021, the applicant (who was then aged 35) travelled from London to Brighton. During the afternoon he covertly recorded footage of women changing on Brighton beach, giving rise to the two counts of voyeurism, to which he pleaded guilty before trial. The footage was later discovered in evidence seized at the applicant's home following his arrest for the subsequent offences of rape and sexual assault committed against C1. The prosecution case at trial was that later on the same day, the applicant and his co-defendant, Holden, (whom he had just met) together orally raped and sexually assaulted C1 (then aged 17). It was alleged that Holden held C1 while the applicant put his penis into her mouth. The details of the offences and of the prosecution case and evidence at trial is fully set out in the Criminal Appeal Office note and in Mr Dein's helpful advice. It is unnecessary to repeat it all here.

The London Offences

6. On 3 October 2021, C2 (then aged 17) was on the Peace march in Central London with female members of her family in the Women's Only section. At some stage during the event, she and her family stopped, the applicant approached her and touched her vagina for 5 seconds, over her clothing. She described it as "a tickle" (count 6). She grabbed and held on to him. He pushed her away, causing her to stumble (count 7). Again, full details of the offences under the evidence at trial are set out in the Registrar's note and Mr Dein's advice.

Trial ruling (Bad character)

7. Following the applicant's pleas of guilty to the voyeurism offences, the prosecution applied to admit them in evidence at trial as facts of the offending, under section 98 of the Criminal Justice Act 2003 or under section 101(1) (d), as relevant to an important matter in issue, namely the applicant's propensity to commit offences involving seeking sexual gratification of women without their consent. Defence counsel argued against admitting the evidence but the judge ruled that the jury should hear about the voyeurism offences committed earlier the same day in June.

Joinder/severance and cross-admissibility

8. Prior to trial the judge had heard argument as to the propriety of trying the London offences together on the same indictment as the Brighton offences. The judge then ruled that they could be joined but left it open to defence counsel to make a renewed application to sever at trial, if so advised at that time. In the event, trial counsel did not renew his application to sever the counts alleging the London offences. At trial, the judge ruled that the London and Brighton offences were cross-admissible and he directed the jury accordingly.

Grounds of appeal

9. Fresh counsel (Jeremy Dein KC) seeks an extension of time to advance grounds of appeal against conviction and sentence. The reasons given for the delay may be summarised as follows: new counsel was only instructed to consider an appeal in May 2023, thereafter time was taken obtaining transcripts, liaising with trial counsel and obtaining further instructions from the applicant in prison.

10. In relation to the appeal against conviction Mr Dein, in his advice and grounds, advanced four matters. First, he says the judge erred in admitting, alternatively in not excluding, evidence of the applicant's convictions for two offences of voyeurism committed earlier in the day on which he was charged with rape/attempted rape of the complainant C1. Secondly, the London offences should not have been joined in or, having been joined, should have been severed from the indictment charging the Brighton offences. Thirdly, the London and Brighton offences were not cross-admissible and the judge's directions only serve to confuse the jury in their treatment of those offences. Fourth, evidence of the covert camera and ladies underwear should not have been admitted on the co-defendant's application.

11. As to the first ground, Mr Dein argues that the voyeurism offences did not properly fall to be considered as facts of the defence under section 98 and that they demonstrated no relevant propensity, enabling them properly to be admitted under section 101(1)(d).

Alternatively, even if properly admitted, the judge should have excluded them under section 101(3) and/or section 78 of the Police and Criminal Evidence Act as unfairly prejudicial to the applicant at trial.

12. Moving to Mr Dein's second ground concerning joinder and severance, he submits that the London offences should not have been joined or once joined should have been severed. He says that the sexual assault and battery offences against C2 in London cannot properly be considered as part of a series of offences of the same or a similar character within the meaning of rule 3.29(4)(a) of the Criminal Procedure Rules 2020. Mr Dein draws attention to a number of dissimilarities, including that the London offences were committed by the defendant acting alone, whilst the Brighton rape concerned a group attack. The London offences involved a momentary touching over clothing, whilst the Brighton rape was significantly more prolonged and more serious. The Brighton offences took place at night, in a secluded garden, whilst the London offences occurred in daytime, in a very public setting, at a public procession. Finally, the two sets of offences were, as he points out, many months apart. He argued that the dissimilarities manifestly outweighed the similarities identified by the judge, namely that the young women were both aged 17, both in a vulnerable situation and the offences involved non-consensual contact. Mr Dein further submitted that the weakness of the identification evidence in the London case compounded the unfairness of allowing it to bolster the much more serious rape and sexual assault offences alleged in Brighton. He says that allowing the jury to hear of one set of allegations in the context of the other generated irremediable unfairness to the applicant which was compounded by the directions which the judge gave by hearing about one in the context of the other. Grounds 2 and 3 are in this way co-extensive. Mr Dein says that nothing the judge could have said would have cured the prejudice to the applicant on the rape allegation by the jury's learning about the London offences; the position being made even worse for him by the admission of the voyeurism offences. Mr Dein no longer sought to maintain his arguments before us on ground 4, emphasising that his principal points were the errors in admitting the voyeurism offences and in relation to severance/cross-admissibility of the London offences with the Brighton offences.

13. Turning to sentence, Mr Dein submitted that the judge wrongly took into account what he referred to in his remarks as an element of abduction, by referring to attempts which the applicant had made to get C1 away to somewhere on her own, and that he had allowed the aggravating factors unduly to raise the level of sentence within the guideline range. However, his main point was that the judge had failed to allow a sufficient reduction on account of the applicant's life-long diagnosis of Autism Spectrum Disorder and its effect on his behaviour, the behaviour to which the judge referred to as "obsessiveness".

14. There is a detailed response to all grounds in relation to appeal and sentence in the Respondent's Notice which we have read.

Decision

Delay

15. The explanation advanced in the grounds for the very long periods of delay deals briefly with the considerable time (6 months from conviction on 11 November 2022 and 3 months from sentence on 10 February 2022) before new counsel was instructed in May 2022. Mr Dein told us this morning that this was attributable to the time taken in the family amassing sufficient funds. We acknowledge the presence of he applicant's sister here in Court today and the difficulties reported to us of the family being able to secure funding; we have approached the merits of the arguments accordingly.

Conviction

16. In refusing leave to appeal conviction the single judge (Sir Nigel Davis) gave reasons as follows:

> "Ground 1.
>
> 4. Given that the voyeurism offences occurred on the same day, during the outing to Brighton, they were properly assessed as to do with the facts of the alleged rape offence occurring later in the day. They also were properly admissible under s.101(1)(d): voyeurism

> of course does not involve sexual physical contact but it relates to a sexual preoccupation and targeting, involving violation of young women without their consent. The judge's ruling overall was justified for the reasons he gave. As for exclusion of that evidence, that was a matter for the judge's discretion; and, as he said, appropriate directions could in due course be given to the jury (as they thereafter were) as to the potential limitations of such evidence to the extent that the jury accepted it. In truth, [the single judge pointed out] it would to my mind have been most surprising if the jury had been deprived of knowing of the voyeurism matters."

Ground 2

17. The single judge observed that the real point was as to severance rather than joinder, pointing out that trial counsel, well familiar with the case, had not renewed any application for severance at trial:

> "6. In my view, the judge had been entitled to conclude that there was a sufficient nexus to justify joinder and non-severance. The latter offending (some four months later, while the applicant was on bail) of course had its factual differences from the former offending. But it involved the sexualised targeting of another young girl in a public place. The judge was entitled in the exercise of his discretion to order joinder and reject severance: and no sufficient basis is made out to justify an appellate court interfering with that exercise of discretion."

18. In relation to the linked ground 3, the single judge said this:

> "7. The issue of severance of course is linked with the ground

> challenging cross-admissibility. In this respect, the judge had been entitled, for the reasons given, to rule in favour of cross-admissibility. Having so decided, he of course had then to give appropriate legal directions to the jury. In my view, he did so, appropriate and fully, properly instructing the jury as to how they were to approach that task and giving the appropriate warnings, where applicable, as to the limitations arising. I do not understand trial counsel in fact to have challenged (once the decision as to cross-admissibility had been made by the judge) the accuracy or fairness of the legal direction."

19. We agree with the remarks of the single judge and add only this. As the single judge noted, trial counsel did not apply to sever the two sets of counts at trial and, having lost the argument on cross-admissibility, he made no objection to the judge's directions to the jury at the time they were given. We see no reason for the trial judge to have taken any different course than he did. In our view, the trial judge dealt admirably with a series of complex directions as to bad character arising from the voyeurism evidence and also in relation to cross-admissibility of the Brighton and London offences.

Sentence

20. We can deal with the appeal against sentence equally shortly. In refusing leave to appeal against sentence, the single judge, again Sir Nigel Davis, observed:

> "2. This was very grave offending, with (as the judge identified) aggravating factors over and above the factors causing the rape to be within category 2A (range of 9 to 13 years). There was also the accompanying sexual assault on C1 as part of the same incident. The mitigation arising from the psychological report was taken into account and the judge was entitled to give it limited weight given the planned and predatory nature of aspects of the offending. I can also see no error in the sentences imposed with regard to C2;

and there is no available argument on totality."

21. We agree. The sentence was severe but this was very serious offending. The judge plainly had regard to the psychological report, where there was no clear link identified between the diagnosis and the applicant's culpability in relation to the rapes and sexual assaults. The judge gave the diagnosis of Autism Spectrum Disorder weight as a mitigating factor but was entitled to take into account also what he had heard and seen of the applicant during trial.

Conclusion

22. It follows from the above that the applications for extensions of time and for leave to appeal conviction and sentence must all be refused.