Neutral Citation Number: [2025] EWCA Crim 125

Case No: 202401418 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ST ALBANS
Mr Recorder Ian Stern KC
T20230018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2025

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE MCGOWAN
and
HIS HONOUR JUDGE ALTHAM

- -

Between:

REX — **Respondent**

- and -

PAOLO BARONE — **Appellant**

- -
- -

Jessica Peck (instructed by **Wells Burcombe Solicitors**) for the **Appellant**
Harry Garside (instructed by **CPS**) for the **Crown**

Hearing date: 11 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 14 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. The prohibition has not been waived or lifted in this case

Lord Justice Stuart-Smith:

Introduction

1. On 7 March 2024 in the Crown Court at St Albans, before Mr Recorder Ian Stern KC and a jury, the applicant was convicted of one count of Voyeurism contrary to section 67A(2) of the Sexual Offences Act 2003 ["the 2003 Act"]. On 19 April 2024 the applicant was sentenced to three months imprisonment suspended for twelve months. He now applies for leave to appeal against his conviction, his case having been referred to the full court by the Single Judge. At the end of the hearing of the application on 11 February 2025 we announced that the application would be dismissed for reasons to be given in writing later. This judgment sets out our reasons for dismissing the application.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. The prohibition has not been waived or lifted in this case. We shall refer to the victim in the case as C.

Section 67A of the Act

3. Section 1 of the Voyeurism (Offences) Act 2019 ["the 2019 Act"] created two new offences in response to the practice commonly known as "upskirting". It amended the 2003 Act by inserting the provisions as section 67A of the 2003 Act. The terms of those provisions have not changed, though further amendments to section 67A have since been made that do not affect the interpretation of the original provisions. In September 2022 the provisions appeared as follows:

> "**67A Voyeurism: additional offences**
>
> (1) A person (A) commits an offence if—
>
> (a) A operates equipment beneath the clothing of another person (B),
>
> (b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe—
>
> (i) B's genitals or buttocks (whether exposed or covered with underwear), or
>
> (ii) the underwear covering B's genitals or buttocks,
>
> in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and
>
> (c) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if—

(a) A records an image beneath the clothing of another person (B),

(b) the image is of—

(i) B's genitals or buttocks (whether exposed or covered with underwear), or

(ii) the underwear covering B's genitals or buttocks,

in circumstances where the genitals, buttocks or underwear would not otherwise be visible,

(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and

(d) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents.

…

(3) The purposes referred to in subsections (1) to (2B) are—

(a) obtaining sexual gratification (whether for A or C);

(b) humiliating, alarming or distressing B.

…"

4. The particulars of the offence alleged against the applicant by the trial indictment were:

> "PAOLO BARONE on the 15th day of September 2022 *recorded images beneath the clothing of another person of the underwear covering the genitals or buttocks, of that person, in circumstances where the underwear would not otherwise be visible,* with the intention that you or a third person would look at the image for the purposes of obtaining sexual gratification, doing so without consent and without reasonably believing that those persons consented."

5. The issue in the Court below focused on the words "would not otherwise be visible"; before us the applicant's submissions also addressed the meaning of the phrase "beneath the clothing". In order to set the context for the issues that fall to be decided,

it is necessary to summarise the facts. As convenient shorthand we shall refer to what the statute calls "genitals, buttocks or underwear" collectively as "private parts".

The factual background

6. There was little or no dispute about the relevant facts. There were agreed facts that:

> "On 15 September 2022, C boarded the 23.25 Thameslink train service to Bedford at Brighton. At 00.51 hours on 16 September 2022 [the applicant] boarded the same train at London Blackfriars. C later woke up at Luton Airport Parkway Station and left the train. Because of her concerns about not being able to remember the journey, C contacted Thameslink and requested that the CCTV be reviewed. The CCTV showed a man wearing Govia Thameslink Railway uniform taking pictures of her. As a result of this discovery, there was an internal investigation at Govia Thameslink Railway to try and establish the identity of the employee. Stills from the CCTV were looked at. On 27 September 2022, Richard Clark (Area Operations Manager for Thameslink) recognised the [applicant]in the footage. On 28 September 2022, he was further recognised by his line manager, Claire Smith."

7. C's witness statement was read. In it she explained that she had been at a conference being held in Brighton. She had a number of drinks before catching the train. She intended to change at Blackfriars but had fallen asleep and missed the stop. She asked that the CCTV for the train be reviewed for her own peace of mind as she had no recollection of the journey. Her statement continued:

> "I have since viewed this CCTV and I was shocked to find out that a man had boarded the train at Blackfriars about 0051 hrs and he can be seen to take photographs of me while I slept. In the CCTV I can see that I was not sitting in the normal way but I had my feet up on the seat beside me with my back to the window and my knees bent with my head resting on them. This is not the way I would normally have sat when on a train."

8. The applicant was arrested and his mobile phone and laptop were seized. Images were found on his phone to which we will refer in more detail below. When asked in interview if there was any particular reason why he photographed C, he said "because it is not something I see every day and she has her legs up on the seat and she is wearing a very short skirt and her pants were on display." When asked why he wanted to take photographs of C he said "… it is not something I see every day … I was probably going to send it to a colleague who might appreciate it more than I did." He said it was the first time he had done anything like this and that he had shared the images with two people "who appreciate it more than I do, … ."

9. The CCTV shows that, on boarding the train, the applicant took a seat that was one row beyond C and on the other side of the central aisle. C was asleep and sitting as she described in her statement. The applicant can be seen standing up and looking in her general direction, holding his phone in his hand. Having donned his backpack he

walked to a point level with the bank of seats on which C was asleep with his phone in his hand pointing towards her. Having gone slightly past her towards the doors of the carriage, he turned around and, standing almost level with the seats on which C was still sleeping with her head on her knees, bent downwards and towards her, which gave him a different angle and closer position for his final image or images. He then went to stand by the carriage door, still looking at his phone, before leaving the train. Later, C left the train. She was wearing a skirt that covered the top of her legs and her private parts.

10. There were five images of C found on the applicant's phone. In each of them C is in the position described above. She is obviously asleep. Her arms are folded in front of her and her head is resting on her arms. Her bag has been dropped on the floor. Her feet are drawn up in front of her, resting on the seat that was the nearer to the central aisle of the two she was occupying and pointing almost directly across the carriage. In that position her feet and lower legs provide something of a physical barrier between her body and bottom and the centre aisle of the carriage, of which more later. Her bottom is close to the wall of the carriage. Her skirt is clearly visible and, though it may have ridden up to some extent when she sat down and brought her feet up onto the second seat, it is still positioned around her waist and buttocks. C can be seen to be wearing tights over her private parts.

11. Three of the five images from the applicant's phone (J3, J6, J7) are taken from a virtually identical position. There are slight differences in the position in which the applicant is holding the camera, which result in slightly different images of C. In J3 and J7, C's lower legs provide a significant barrier, but permit some limited and partial view through and past her legs to her private parts. The slight difference of camera angle in J6 provides a clearer and more extensive view between and past her lower legs towards her private parts, which may be more clearly seen. The images in J4 and J5 are more close up and, again, are directed through the gap between her lower legs to give a more extensive view of her private parts. The difference in angle and degree of close-up reflects the CCTV in demonstrating beyond any reasonable argument to the contrary that the applicant positioned himself and his camera deliberately so as to get a view through and up C's legs to her private parts. The close ups (J4 and J5) were, we were told and accept, the last images he took and were evidently taken when (as shown on the CCTV) he bent towards her and held his phone to get a fuller look and clearer view of her private parts.

The submission of no case to answer

12. At the close of the prosecution case, the applicant submitted that there was no case to answer. In writing it was submitted that there were two elements of the offence that were not made out. First, it was said that C was sitting in such a position that her underwear was visible. Second, it was submitted that the applicant did not record an image *beneath* her clothing. It is, however, apparent that in oral submissions the applicant concentrated on whether the recorded images were taken "in circumstances where the underwear would not otherwise by visible. The researches of counsel and the Recorder identified no authority on the point and no guidance in the form of an Explanatory Memorandum accompanied the 2019 Act.

13. The Recorder rejected the applicant's submission. The central section of his reasoning was:

> "What then is the meaning of 'would not otherwise be visible'? The defence suggest that if the underwear is visible, for whatever reason, then this element cannot be made out. In the course of submissions, the court posed the example that, if a female wearing a skirt was walking up stairs and as a result another was able to see her underwear and took a photo for the purposes of sexual gratification, this would not be an offence since the underwear would be visible to all people in the photographer's position. Likewise, if a person went under a table to pick something up and saw and photographed the underwear of those people whose underwear could be seen, could that person suggest that the underwear would be visible to anyone in that position? If, in this case, the complainant, instead of placing her feet up on the seat had fallen asleep across the two seats and her skirt had ridden up with her underwear visible, then would again, that element not be made out. If those examples meant what is suggested by the defence, then it would make the offence totally dependent on the actions/inactions of the complainant. It would place the responsibility on, usually the female, to ensure that no one could see beyond their outer dress at any time. It seems to me that this cannot be what Parliament intended.
>
> It would mean that whether a person would be committing the offence would be entirely arbitrary depending on what was visible to another. In this case, from where the D was sitting he would not have been able to see the complainant's underwear. At what he point he could, or anyone else could is a matter of speculation.
>
> It seems to me that the meaning of the words is more properly to be understood in this way – that, in this case, the underwear would not otherwise be visible because it is covered by tights and a skirt. *Only because the complainant has found herself in a particular position and only because D has moved himself into a position to take the photos in the position we can see, was he able to record the images. That does not detract from the fact that the complainant's underwear, being covered by other clothing (beneath her clothing), "would not otherwise be visible".* If, for example, a person removed all outer clothing and decided to swim in their underwear, and a person took a photograph, then that person would not be committing this offence since the underwear, in this instance, would be visible in all circumstances.
>
> Therefore, in this case, as can be clearly seen, the complainant's underwear would not otherwise be visible because it would be covered by other clothing. The fact that her underwear may have become visible does not negate that element of the offence."

14. In due course, the Recorder summed the case up to the Jury in accordance with his ruling. There is no separate complaint about the terms of the summing up.

The application before this court

15. Ms Peck, who has represented the applicant before us as she did at trial submits that the Recorder was wrong in his conclusion and reasons. She repeats the submission that she made to the Recorder, namely that "the photos relied upon by the Crown were not taken beneath the clothing of [C] and that, due to the positioning of her clothing and her seating position, her tights and the outline of her underwear were visible to any person walking past or sitting in the adjacent bank of seats." She submits that the Recorder's approach to the section does not properly reflect the intention of Parliament when drafting section 67A "and creating the offence of up skirting."

16. Mr Garside, who represented the Crown below and the respondent before us, submits that the intention of section 67A was to criminalise the practice of looking up skirts (in the statute either operating equipment or recording an image "beneath clothing") in circumstances where private parts would not otherwise be visible. He submits that, as shown in the CCTV when she got up to leave the train and in the images that the applicant took, C was wearing a skirt that covered her tights and her private parts.

Discussion and resolution

17. The first requirement of an offence under section 67A(2) is that A records an image "beneath the clothing" of B, the image being of that person's private parts. That is generally understood to be the essence of "upskirting": looking up someone's skirt towards their private parts. In that context, the meaning of the word "beneath" is clear. The section is concerned with people who look up a person's legs to their private parts despite the fact that the person has clothed that part of their body. It does not matter whether the skirt is short or long: the concept is the same. That this is the meaning to be attributed to "beneath" is supported by the fact that section 67A(1) uses the same approach in relation to operating equipment "beneath" the person's clothing. Here, as we have described in [11] above, what the applicant did was squarely within the meaning and purpose of section 67A(2): he looked up and through C's legs to her private parts, when she was wearing a skirt that covered that area of her body. It is not reasonably arguable that "beneath" applies only to images which are recorded from "closer to the floor". That would exclude a case where a person was, for whatever reason, horizontal (e.g. resting or otherwise lying down), which makes no sense at all.

18. The second requirement of an offence under section 67A(2) (as also under section 67A(1) is that the image is taken beneath the clothing "in circumstances where the [private parts] would not otherwise be visible". This means that the upskirting gives A a view (or image) of the victim's private parts that would not be available otherwise than by upskirting. We reject the submission that this requirement is not met in the present case. As the photographs and CCTV clearly show (and we have attempted to explain above) the applicant obtained his view and images of C's private parts by placing himself and his camera in specific positions that would enable him to see through to her private parts. His use of the phrase "on display" is as inaccurate as it is outrageous. As we have said, her lower legs and feet provided a significant barrier to intrusive and prying eyes. The most that could be said was that, if other people had shared the applicant's inclination, they too could have manoeuvred themselves to a position where they could see aspects of C's private parts. It is simply wrong to suggest that persons in other parts of the carriage, or who did not pass directly by C and adopt

the same position as the applicant, could see C's private parts, let alone to assert that they were "on display".

19. We do not find it helpful to suggest different factual circumstances which may fall either within or outside the statutory requirements. In our judgment the meaning of the section is clear and what the applicant did fell squarely within it.

20. For these reasons, we concluded that the appeal must be dismissed.