APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 24
HCA/2022/000441/XC

Lord Justice Clerk
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

IA

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Jackson, KC; Forbes; Paterson Bell, Solicitors
Respondent: Keenan KC, AD; the Crown Agent

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30 June 2023

Introduction

[1] The appellant was convicted of rape. It was agreed by joint minute that in premises called "The Loft" in Glasgow the appellant penetrated the mouth of the complainer and

ejaculated on her upper clothing and chest. The jury rejected his special defence of consent, and his evidence that the complainer offered him oral sex in exchange for cocaine.

Evidence

[2] The complainer CE, her friend AC, and his girlfriend MS had gone to a rave in the premises where they obtained, and took, cocaine. They later approached the appellant asking if he had any cocaine they could buy. He said he did. The complainer went to the toilet with the appellant and MS. According to the complainer's police statement, which she adopted, the appellant said something to her as if he wanted her to stay in the bathroom first whilst MS remained outside. MS left the toilet and the appellant locked the door. Thereafter the incident occurred, the complainer's evidence being that she had not consented and that she tried to push and punch the appellant away. Afterwards he gave her cocaine, which she took. The complainer denied a suggestion that she had offered the appellant a blow job in exchange for cocaine.

[3] MS gave evidence that both the appellant and complainer asked her to leave the toilet. In essence her evidence was that CE asked her to leave, that she was outside for about 10 minutes, after which she re-entered the toilet and she and CE both took drugs with the appellant. As to what had happened when she was outside:

> "I don't know if she was doing something with him to get more off him or not, but there was something weird going on with that.
>
> All right. So, what was it you thought that she was going to do with him to get more off him? - Like, like, sexual stuff. I think that's what she was going to do, but I don't know if that actually happened or not.
>
> What was it that made you think she was going to do sexual stuff? - Just 'cause I was told to leave. It just seemed weird … there was just weird, like, like, things I heard, like, they'd spoken about, but I don't know if it was ... I can't remember any of the conversation. I just remember vaguely hearing something about it.

> What did you hear? - I, I actually cannot remember. I just know I heard something, but I don't know what it was.
> Well, did CE say anything to you about wanting to have sex for cocaine? - I do not think so.
>
> Did she say anything about becoming involved in sexual behaviour? - I don't think so. I don't think she said anything like that, but I can't remember.
>
> So, you have no idea really? - Yeah, I've no idea. I probably would have remembered closer to the time, but I do not remember now."

[4] The appellant gave evidence that the complainer said she would give him a blow job in return for the cocaine. MS, AC, the complainer and himself went into the toilet but the complainer then asked the others to wait outside. She then gave him oral sex. Afterwards they cleaned up, let the others in, and all four of them took a line of cocaine each. He agreed with his own counsel that he told lie after lie in the first police interview on 10 July 2019. He explained that he was very scared being in a police station.

[5] The corroboration came broadly from distress and evidence of injuries, all spoken to by several witnesses.

The appeal

[6] The trial judge's charge contained the following:

> "Mr Forbes opened his speech yesterday quoting from the evidence of MS to the effect 'I was asked to leave the bathroom there was something weird going on I think she was going to do sexual stuff' and it was said that this was independent evidence which was entirely consistent with the accused's evidence. …. But the reason why I draw your attention to this is to remind you that it is your recollection of MS's evidence that matters. Insofar as my own notes are concerned, and I stress that I am not a quick enough typist to record all that was said, [he then briefly summarised the evidence].
>
> I emphasise once again, it is your recollection of the evidence that matters. But, on my notes, it appears possible that MS was simply speculating that sexual stuff was on offer in return for more drugs because she was asked to leave the toilet. This is not based on anything which she heard from CE or the accused. Nor did she describe witnessing any actions consistent with agreed sexual stuff in return for drugs. Now, just as you are told not to speculate as a jury, witnesses are also

> reminded not to speculate in their evidence. It is clearly an important passage of evidence and I simply remind you to look carefully at what MS actually saw or heard take place in the toilet."

Ground two

[7] It was submitted that this was a misdirection on an important aspect of the defence. On the evidence the inference was open to the jury that the complainer had indeed given the appellant oral sex in return for cocaine. This part of the charge undermined the defence by impressing the judge's own views on the jury. Its effect was enhanced by coming late in the charge.

[8] We do not agree. The fact that the direction came towards the end of the charge is of no moment: it does not give the direction any special weight or significance compared to the rest of the charge.

[9] Importantly, the criticism of the judge's charge focuses on one aspect of it, without recognising either the context of what he said, or the remainder of the charge. The context of the passage in question was the judge seeking to correct an impression given by counsel that the evidence of MS had been more unequivocal and clear than it had in fact been. The direction neither suggested to the jury that the witness had been speculating nor that they should reject her evidence: it merely suggested that the evidence required to be assessed with care, as is the case with all evidence.

[10] The trial judge repeatedly, throughout his charge, made it plain that matters of fact were for the jury to determine, and not for him. He directed them that their verdict had to be based only on the evidence. Drawing attention to the fact that the evidence of MS bore certain hallmarks of speculation was not unfair; it was part of the need to caution the jury that their verdict required to be based on evidence. It did not detract from the direction that their verdict could also be based on the reasonable inferences which they could draw from

the evidence. His directions continued to make it clear that it was for the jury alone to determine what they made of the evidence of MS.

[11] The jury were well aware what the issue in the trial was which they had to determine, as explained to them by the judge:

> "In this case, the accused says that in relation to this charge, any sexual activity was wholly consensual as the complainer had offered oral sex in return for cocaine. The complainer says there was no such deal. There is a stark question - was their consent or not?"

The jury could have been under no illusion but that it would be open to them to conclude that there had been such a deal, or at least to have a reasonable doubt about the matter.

Ground four

[12] The Joint Minute agreed that there was bruising when the complainer was examined at 12 noon on 15 June 2019. The witness had left the locus at 0632, having arrived there sometime after 0200. The bruising referred to was on the right side of her neck and on her lower right thigh. On examination at the Archway between 1110 and 1315 the next day there was further bruising noted to both thighs and redness over the third knuckle on the right hand.

[13] In his charge the trial judge reminded the jury of witnesses who had seen bruising on CE at the material time, but did not remind them of witnesses who had not seen it. Both MS and AC saw CE when leaving the premises. MS was asked whether she had seen any injuries on the complainer and she replied that she had not. It was submitted that this was an unbalanced presentation of the evidence which amounted to a misdirection. It was vital, in the context of corroboration for lack of consent, to present this evidence in a scrupulously balanced way. In his report the trial judge recognised that it was an omission on his part not

to have made reference to MS's evidence that she did not see injuries, albeit he did not consider it material.

[14] There is no merit in this ground. In the first place, the judge's task at this point in his charge was to direct the jury where they could find corroboration of the complainer's evidence. In this context, there was no requirement to say anything about MS's evidence. The jury were well aware that they required to consider all the evidence, and to make their own assessment of it, as repeatedly directed by the judge. The judge also directed the jury that if he did not mention a piece of evidence that they thought important they should trust their own judgement. He also reminded the jury to take account of what defence counsel had said about the bruising, reminding them what that was:

> "In particular, he reminds you that it is agreed that the timing and dating of bruises in the photos cannot be done with any accuracy (JM para 11). He says that this bruising is unconnected to what happened between the accused and the complainer in the toilet that night."

He then went on to say

> "If you conclude that some or all of these bruises were the result of sexual activity between the accused and the complainer then it would be open to you to conclude that they supported or corroborated the complainer's evidence. Of course, if you are not satisfied that the bruises are linked to what took place in the toilet at the Loft, or you are not satisfied that the bruises are indicative of non-consensual sexual activity as described by the complainer, then you would simply discount this evidence."

[15] Neither ground constitutes a misdirection by the trial judge, nor do they have such a cumulative effect, and the appeal must be refused.