Case No. 201207296 B2

Neutral Citation Number: [2014] EWCA Crim 420
IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM Durham Crown Court
Mr Recorder E Duff
T20120354

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday 14th March 2014

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE HOLROYDE

and

HIS HONOUR JUDGE LAKIN

Between:

Regina

v

Hugh Raymond Frederick Holmes

Defendant

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(Official Shorthand Writers to the Court)

Mr A Petterson (instructed by Meikles Solicitors) for the **Appellant**

Mr A Dent (instructed by CPS Appeals Unit) for the **Respondent**

J U D G M E N T (Approved)

Lord Justice Fulford:

Introduction

1. On 13 December 2012 in the Crown Court at Durham, the appellant (who is 24 years old) was convicted of sexual assault (count 1) and common assault (count 2).
2. On 7 January 2013 the trial judge, Mr. Recorder Duff, sentenced him to 3 years' imprisonment on count 1 and 3 months' imprisonment concurrent on count 2.
3. The Full Court granted leave to appeal against conviction on 17 January 2014. His application for leave to appeal against sentence was adjourned to the hearing of the appeal against conviction.
4. The provisions of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to victim shall be included in any publication during her lifetime if it is likely to lead members of the public to identify her as the victim of this offending.

The Facts

5. On the evening of Friday, 25 May 2012 the victim, KS, went out drinking with friends in Durham. She drank 6-7 alcopops and a number of glasses of vodka and coke. Although in her statement she described herself as "drunk" she meant that she was tipsy or merry. During the course of the evening she fell out with her boyfriend during the course of a telephone conversation. At approximately 2.10 am she took a taxi to his house but he was not at home. She waited outside for about half an hour. She had had her last alcoholic drink about an hour and half earlier. She then started to walk down the street. It was by this time

about 3.30 am. There was no natural light and the dawn chorus was starting. The streetlights were on in the area but there were not a great number of them. A man approached her and she described the events that followed as happening fairly quickly. The man asked if she was all right. She said she was fine and was going to find her boyfriend. He said "Are you keen?" She took this to be referring to something sexual and replied she was not. The man then slid his right hand across her left breast, over her clothing, down to her stomach and across her vagina towards her left thigh before sliding it back up again. As he did so his hand caught the belt of her jeans which came loose. She told her assailant to get off but he grabbed her clothing and pulled her towards him before kneeing her in the stomach. She pushed him away and managed to run to a nearby 24 hour Asda store to find help. Her attacker fled in the opposite direction. She had only had a side view of him during the incident.

6. In her original description, KS described her attacker as being in his early 30s. In evidence she said he was 23 to 24. She explained the discrepancy by saying that when the attack took place he looked "older, a bit rough". She described her assailant as about 6' tall and of skinny build. She said he had mucky blonde hair that was shaved at the sides but longer on top. She recalled he had a "sticky out" right ear. When she attended the identification procedure and saw the image of the appellant, she was satisfied that he was her attacker although he looked "younger and quite clean shaven". She also described the attacker as smelling of a combination of alcohol and after-shave - the latter she thought she recognised as being "Lacoste", a brand used by her brother. She believed the man had been wearing a white Henley shirt, perhaps with studs. In her statement KS described his clothing as including blue stone-washed jeans and black boots similar in style to 'Timberland' boots but of a cheaper make.

7. On 9 June 2012, the police searched the appellant's home without a warrant. He was not in the house at the time but his father agreed to the search. No Lacoste aftershave, white Henley shirts, blue stone-washed jeans and or black Timberland-style boots were found.

8. The appellant was asked to attend at a police station on 20 June 2012 without any advance notice of the reason for the visit. The Full Court on the 17 January 2014 requested information as to why the appellant had been required to attend. The answer, set out in a Note from prosecuting counsel to the court, states as follows "The appellant was not arrested at this stage. He was invited to the police station on a voluntary basis. He was a suspect because he matched the description of the offender; he lived in close proximity to the offence and he has a previous conviction for a similar sexual assault". He was interviewed under caution, but without a solicitor (although he was told that he had the right to legal representation). In the main he did not answer any of the questions put to him, although at the end of the interview he said he did not use Lacoste aftershave. He indicated his aftershave was called "Joop". He denied responsibility for the attack. He said he was banned from the public houses in the Spennymoor area and he invited the police to check the CCTV film footage because he had not been in the area at the relevant time. We interpolate to note that during the trial the officer in the case gave evidence that the relevant local authority and public house cameras had been checked and the publicans and door staff had been questioned, and there was no evidence that the appellant had been in the area during the evening of the attack. The appellant agreed to participate in an identification procedure, but he said he wished first to obtain legal advice. On the appellant's account, on 27 June 2012 he told the police he had not yet sought legal advice and as a result he would not be participating in the identification procedure.

9. An identification "parade" was held on 8 August 2012 (therefore in excess of 2 months

after the attack). There had been no prior notification to the appellant that this was to take place, and the victim viewed a "line-up" of the heads of nine men on a DVD, taken face on. One of the participants was bald and otherwise they were all young men who had short hair of a variety of colours. She asked to view image No. 4 twice (this was a picture of the appellant). She said "I only seen the side (and she gestured to the side of her face) but number 4, the side of it" and she identified the appellant as her attacker. She said she was 100% sure that this man was her attacker.

10. The appellant was arrested on 23 August 2012 whilst serving a sentence for an unrelated criminal offence, and he was interviewed under caution with, on this occasion, a solicitor present. He was charged on 10 September 2012 and he provided samples for DNA analysis. There was expert evidence that a mixed DNA sample was found on the victim's neck from three people, but it was agreed the appellant was not a contributor to this cellular material.

The Bad Character Application

11. The prosecution applied to adduce evidence of the appellant's bad character. This related to his previous convictions for offences of violence and an offence of assault occasioning actual bodily harm following a sexual assault. The application was put, first, on the basis that the convictions demonstrated a propensity to violence and sexual offending. Second, it was suggested they corrected a false impression as regards comments made by him in interview when, in response to the allegation in the present case, he said he would not behave in this way and that he considered it was a horrible thing to do to another person, thereby giving the impression that offending of this kind was anathema to him. Finally, the

prosecution sought to adduce the convictions as evidence supporting the identification of the appellant, given this was the issue in the case and the appellant had convictions for similar offending.

12. The judge decided that two of the appellant's convictions, from August 2011, relating to a sexual assault and a common assault on a woman in May 2011 were admissible as being relevant to an important issue in the case, namely the correctness of the identification. Accordingly, those convictions alone were admitted and the appellant's other convictions for violence were excluded. The circumstances of these two linked offences were that the appellant had approached a woman in a public house and he had felt ("groped") her breasts over her clothing. He walked away, but when he returned a little later there was an argument during which he head butted the victim cutting her left eye. The judge's ruling on these two convictions was as follows:

> " the linked convictions of the sexual assault followed by the common assault upon a female, albeit that it took place in a public house and in somewhat different circumstances, seems to be of such a nature that it is admissible as being relevant to an important issue in the case, namely the correctness of the identification, since it does seem to me it would be an affront to common sense to say that it is not relevant that the very person that this witness picks out happens to have been guilty in the not too far distant past, in fact quite recent past in terms of offending, in May 2011, it is just about exactly a year previously pretty well, that is clearly relevant and supportive of identification and those two convictions I do permit to be given in evidence."

13. However, the judge left the bad character evidence to the jury during the summing up on two bases, as follows:

> "And you should also look to see whether there is any other evidence which supports her identification, whether there is anything which you think is capable of supporting the identification and anything which in fact does. And that latter thing that I mention, ladies and gentlemen, is part of the reason that you have heard in this case, and you have been permitted by me to hear, the fact that the Defendant was convicted in August 2011

of two linked offences of sexual assault and assault occasioning actual bodily harm. You heard some brief details of those offences from the Officer in the case, who, putting it shortly, said that the Defendant sexually assaulted by, if I may use the colloquial term, groping a female in a public house, and then shortly afterwards he head-butted her.

Now, it is matter for you to assess. You may think, and certainly the Crown would invite you to think that whilst, happily, amongst the general population, sexual offending is a rarity, that this, they would say, is a somewhat unusual combination, of a sexual assault followed shortly thereafter by a separate physical assault, not actually part of the sexual assault but a separate one afterwards. The Crown would say there is the head-butt afterwards then here after the sexual assault, very shortly after, of course, there is the kneeing in the stomach. And the Crown say that that previous behaviour provides support, or is capable, they say, to provide support - it is a matter for you whether it does provide support, certainly it is capable of providing support to the identification, on the basis that it is the most enormous coincidence, the Crown would say, that here KS identifies as her attacker a person who, just by coincidence, happens to have a pair of convictions not a very long time before, which the Crown say bear similarities. It is up to you whether you in fact think they do bear similarities and whether in that case it is stretching coincidence too far, and it does provide support.

They also say that his behaviour in that way previously shows that he has a propensity, or a tendency to behave in that sort of way, and they say that that supports the case generally. Now, just because somebody has behaved in a particular sort of way previously, does not mean to say that they would behave in a similar sort of way on any subsequent occasion. And it is question for you whether that offending does in fact satisfy you that the Defendant has a tendency to behave in that way. And even if he has a tendency, it does not say that he has behaved in that sort of way on this occasion.

As I have already said to you, what is essential is that you do not say, "Well, he's done that previously, he must have done it this time". That would be completely illogical, it would be unfair, it would be contrary to the law. That is an approach you must not take. But you are entitled, should you think it right, to look at the evidence in the way that I have described and say to yourself, "Now, is that in fact support for KS's identification? Is it really taking coincidence too far?" And you are also entitled to say to yourself, "Well, are we satisfied that it shows that he has a tendency, and if he has a tendency to behave in that way, does that in fact generally support the Crown's case on this occasion?

Of course, ultimately, ladies and gentlemen, the case relies upon the correctness of the identification, and if you are not satisfied about the correctness of that identification, then that would be end of the matter. There is no other evidence to support the guilt of the accused. But you are entitled to look at the evidence of the previous behaviour and ask yourselves, does it in fact support the identification and does it in fact demonstrate he has got a tendency to behave in that way, and see whether that supports the case generally. If you took the view that it does not support the identification and it does not show that he got a tendency, then completely put it to one side. Just ignore that

evidence, and concentrate purely upon the evidence of the identification."

The Submission of No Case to Answer

14. The application was mounted on the basis that the identifying witness was under the influence of alcohol at the time of the attack; there was no natural light; the street lighting was poor; the opportunity for identifying the attacker was short and KS may only have seen the man from the side of his head; the appellant is not in his 30s; and the image of him used for the identification procedure shows his ears as being compact and closely aligned with the side of his head. Furthermore, it was argued the other members of the line up did not bear any real resemblance to the appellant - indeed, it was suggested that in the main they were markedly dissimilar in appearance. Counsel emphasised the wholesale lack of any supporting evidence (viz. he had not been seen in the area, no relevant clothing or aftershave had been seized and his DNA had not contributed to a mixed sample taken from the victim's neck). Finally, it was suggested that the circumstances of the previous convictions admitted by way of bad character bore little resemblance to the present allegation.
15. The judge refused the half time submission of no case to answer observing this was not a "fleeting glance case" and the quality of the images used during the identification procedure was satisfactory.

The Defence

16. The appellant said in evidence that he had not gone out that Friday/Saturday night. He did not attend the identification procedure because his father was in poor health and had been

hospitalised. He did not have time to get legal advice and decided he did not want to go any further with the identification procedure without legal advice. He had felt under pressure to take part. He provided a DNA sample to the police but no traces relating to him were found on the complainant. He said he has never owned a Henley shirt and the only aftershave he possesses is "Joop".

17. In response to a question from the jury whilst they were in retirement, the DVD of the images viewed by the victim during the identification procedure was replayed.

The Grounds of Appeal against Conviction

The Appellant's Bad Character

18. It is suggested the recorder erred in allowing the prosecution to adduce evidence of the appellant's previous convictions for sexual assault and assault occasioning actual bodily harm. Mr Petterson, for the appellant, in forceful and well-constructed submissions contends that the convictions did not establish a propensity to commit offences of this kind and they did not support the identification evidence. He highlighted that the previous convictions relate to a single incident, which differs markedly in circumstances and location from the present facts. The instant case concerned an attack on a deserted street at night when the victim was by herself, whereas the previous incident occurred on the dance floor of a private party. The common assault in the present indictment was part of the sexual assault in contrast to the earlier occasion when it followed a gap in the events, after an argument. Finally, it is suggested that the prosecution impermissibly used this single previous conviction to support the identification of the appellant in a weak case.

19. The Crown argues that the appellant's previous convictions were properly admitted. It is contended that they were relevant to an important matter in issue between the defendant and the prosecution and it is argued that the evidence established a propensity to commit offences of the kind charged. It is suggested that, as in the present case, the previous convictions in May 2011 involved a sexual assault followed by a violent physical assault upon a female. Given that identification was in issue it would have been an affront to common sense to exclude them.

The Submission of No Case to Answer

20. It is submitted the recorder erred in not withdrawing the case from the jury following the close of the prosecution case, for the reasons we have extensively rehearsed above.
21. The prosecution highlights that the defendant concedes that this was not a fleeting glance case. Whilst the observation of the assailant by the complainant was made late at night and there was little or no natural light, the Crown suggests that this did not necessarily diminish its quality. Although the complainant had been drinking earlier that night, she had taken a taxi to her boyfriend's home and then walked a considerable distance without difficulty before the attack. It is pointed out by the Crown that there is no evidence that her powers of observation were impaired in any way and there was some street lighting. Further, it is contended that the complainant had her assailant in sight over some distance as he approached, and she saw him at close quarters whilst he attacked her. It is argued, finally, that the other areas of suggested weakness were matters for the jury's evaluation.

Discussion

22. By way of background, we observe that on any view this was not a particularly strong case against the appellant. It was dependent on the identification by KS at a procedure that took place over two months after the incident and her selection of the appellant was the only evidence that directly connected him to the offence. The appellant was not in his 30s and the image of him used for the identification "parade" shows his ears as being compact and closely aligned with the side of head. Therefore, it is not suggested he has a "sticky-out ear". The victim indicated she had only seen the side of her attacker's head but she was nonetheless able to identify him from a single image of his face viewed from the front. The DNA evidence, the lack of material indicating he was in the area that night and the failure to find any clothing or aftershave linking him to the man responsible are all relevant factors in this context.

The Submission of No Case to Answer

23. Although as we have just observed this was not the strongest of cases, there was sufficient evidence for the two counts to be left to the jury based on the identification by the victim. This was not a fleeting glimpse by KS - instead, she watched the perpetrator during an incident that included a number of different events - and she was certain of her identification of the appellant. Undoubtedly these were not the easiest circumstances for a witness to identify her assailant, given the time of night and the assault to which KS was subjected. However, KS provided a coherent explanation for the differences in her descriptions of the perpetrator, and the jury was well placed to analyse the points made by Mr Petterson, such as the potentially poor lighting and the absence of other supporting

evidence. KS was very close to her attacker and would have been able to see him, whether from the side or from the front. It follows that we do not accept the second ground of appeal that the case should have stopped the case at the close of the prosecution evidence. It did not come within the situation envisaged by this court in R v Turnbull [1977] 1 QB 224, at 229 and 230 when the judge is obliged to withdraw the case from the jury - notwithstanding the fact that the opportunity to view the perpetrator was a longer observation than a fleeting glimpse - because the identification was made in difficult conditions and it was unsupported by other evidence. Although there were clear points for the defence to make as to the reliability of the identification, the circumstances did not reach the level of difficulty that meant the judge was obliged to halt the case because of the real risk that the identification was inherently unsafe.

The Images used for the Identification Procedure

24. We have viewed the compilation of the images and we do not accept Mr Pettersen's complaint as to the choice of the others who were selected to form the "line up" along with the appellant. In general terms, they bore a good resemblance to him, particularly as to hair length and their facial features, and given they all had short hair, the difference in hair colour was of lesser importance. The fact that one of the men selected was apparently bald does not of itself mean it was an unfair procedure. This is, at least in part, an impressionist and subjective exercise, but in our estimation the victim was asked to make a selection from a number of individuals who "as far as possible resemble[d] the suspect in age, general appearance and position in life" (see Code D, Annex A (a) 2 of the Police and Criminal Evidence Act 1984 Codes: "Video Identification").

The Previous Convictions

25. The August 2011 previous convictions of the appellant were left to the jury on two bases, the first of which was that they potentially supported the identification of the appellant by KB: the "enormous coincidence" that the man she picked out had a pair of earlier convictions which bore similarity to the present allegation. However, what the jury did not know was that the appellant's image had been selected to be included in the identification procedure because was he was a man with these previous convictions who lived in the area (and because of his general appearance). In our judgment, if the jury had been aware of the true reason why he had become a suspect, it may well have influenced their decision as to whether this suggested coincidence had the force for which the prosecution contended. Put otherwise, if the jury had looked for support for KB's identification of the appellant - for instance, because they were concerned she may have been mistaken - the previous convictions may have had less force than otherwise would have been the case if they had been told that a central part of the reason why she viewed his image was because of his past offending. On this basis, the jury would have been entitled to conclude that it was not a powerful coincidence that the man she picked out had these convictions. We consider that, in the particular circumstances of this case, this critical additional piece of information should have been before the jury in order to enable them to reach an informed decision on this issue. Its absence gives rise to a clear risk that the jury may have attached disproportionate significance to the suggested "enormous coincidence" and thus renders these verdicts unsafe.

26. The second basis on which this evidence was left to the jury was that it potentially established a propensity on the part of the Appellant to commit this kind of offence. However, given our conclusion that the convictions are unsafe for the reason just indicated, it is unnecessary to investigate whether these two pairs of convictions shared sufficiently common or unusual features such as to endow the single earlier incident with probative force in relation to the events charged (or for other reasons potentially demonstrated propensity).

The Failure to Rehearse the Potential Weaknesses in the Identification Evidence

27. Another feature of this case which has caused the court real concern is the failure by the judge to rehearse any of the evidence that was relevant to the potential weaknesses in the identification of the appellant during the summing up. The directions by the judge on the issue of identification were as follows:

> "This is an identification case and the only evidence pointing to the guilt of the Defendant is the evidence of - the identification of the Defendant as her attacker by KS. Experience of the Courts over many years has shown that there is an especial need for caution in identification cases, and that is because mistakes can be made and have been made in identification, and miscarriages of justice have occurred in the past - Mr Petterson addressed you about a particularly famous old case. And juries have to be particularly careful when approaching identification evidence, because an entirely honest witness can still be a mistaken witness, and can be a very convincing witness, but still be wrong. Juries are extremely good at telling when witnesses are not telling the truth, are not wanting to tell the truth and are telling lies. Nobody is suggesting that KS is not telling the truth as she believes it to be, or is not being entirely honest. As far as she is concerned, she is giving wholly straightforward, honest evidence, and she genuinely believes that she has correctly identified her attacker. The question is not whether she is being truthful, but whether she is being accurate and is correct in her identification. So that is the reason for the need for caution. First of all, that mistakes can be made, and secondly, that you have got a wholly honest telling what she, in this case, believes to be the truth.

> So you should examine with care all of the evidence surrounding the identification. You should examine the circumstances of the attack itself and the opportunity that KS had to observe her attacker. How long did she have her attacker in view? What was the lighting like? Did she have any particular reason to remember the person? Was her observation impeded in any way? Was there anything that might have affected her ability to recall the person that she saw? How long elapsed between the attack and the subsequent identification? Were the circumstances of the identification satisfactory? Were there any differences between the description that she initially gave and the description of the Defendant? So you look at all of those factors and you look at them with care."

28. As Lord Widgery CJ explained in R v Turnbull at [227] the judge "should remind the jury of any specific weaknesses which had appeared in the identification evidence" and that a failure to follow this (or to follow the other guidelines established in that case) is likely to result in the court quashing the conviction. The Crown Court Bench Book reminds judges that this is a necessary ingredient of a summing up in an identification case (page 108). There were a considerable number of points to be emphasised as regards the potential unreliability of this identification evidence, as rehearsed above, and given it was the sole evidence that incriminated the appellant it was critical that the judge directed the jury as to the main matters on which they needed to focus in this context. Even allowing for the fact that this had been a short trial, on the particular facts of this case the failure by the judge to identity the specific weaknesses in the identification evidence at any stage constituted a significant defect in the summing up such as to render the verdicts unsafe.

Conclusion

29. It follows that this appeal must be allowed and the convictions, which are unsafe, are quashed.

30. The prosecution is to indicate within 14 days whether it seeks a retrial and short written reasons are to be provided within that timeframe if the Crown applies to retry the appellant. The appellant has 7 days thereafter to submit any written grounds of opposition. The case will then be listed in order to resolve the issue if the prosecution seeks a retrial.