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No: 201702114/B3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 9 July 2018

B e f o r e:

LORD JUSTICE DAVIS

MS JUSTICE RUSSELL DBE

MRS JUSTICE McGOWAN

R E G I N A

v

ADITYA JOSHI

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Ms N Wong & Mr B O'Toole appeared on behalf of the **Applicant**
Mr J Hayne appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MRS JUSTICE McGOWAN: This is a renewed application for leave to appeal against conviction.
2. Reporting restrictions apply in this case and nothing must be published that would lead to the identification of the complainant throughout her lifetime.
3. On 12 April 2017, in the Crown Court sitting at St Albans, before His Honour Judge Carroll, this applicant was convicted of three counts of sexual assault against a young complainant known in these proceedings as "M". Count 1 was assault by penetration; count 2, causing a person to engage in sexual activity without consent and count 3, another incident of assault by penetration.
4. The applicant was sentenced on 11 September 2017 to 4 years' detention in a young offender institution on counts 1 and 3, that to run concurrently on those two counts and to 3 years in a young offender institution on count 2, that term also to run concurrently. He is subject to the usual notification proceedings.

The Facts

5. The applicant and the complainant attended the same school and were in one A-Level class together. They got on well together but there was no personal or intimate relationship between them. From April 2014 the complainant in fact was going out with another pupil whose initials are JC.
6. On 31 December 2014 they both attended a New Year's Eve party at the home of a fellow pupil, MC. The complainant's then boyfriend was not at the party.
7. Very large quantities of alcohol were consumed by some or all of the young people there. The complainant was extremely drunk, vomited on many occasions and had to be looked after by another person at the party.
8. At about 12.30 am the parents of the pupil at whose home the party had taken place returned home and brought the party to an end.
9. Another pupil, JG, offered overnight accommodation at his parents' home to several of the people including the complainant and the applicant. They were driven by a pupil's father to that home arriving there at about 1.00 in the morning. The complainant was put to bed in a bedroom on the first floor of the property where she went to sleep, still wearing her party dress, lying under a duvet on a double bed. The bedroom door to that room was left open and the light was left on in a bathroom which was en suite to that room. The other guests, the boys who had been invited to stay at the same property, were all shown to a bedroom which they were to share on the second floor of the house.
10. The prosecution case was that the complainant woke up at some time during the night to find the applicant in bed with her, kissing her. Sexual activity between them occurred, without her consent, and consisted of digital penetration by the applicant of her vagina, the placing of her hand on the applicant's penis and oral penetration of her vagina.

11. In her interview and in evidence to the court the complainant stated that she had asked the applicant to stop and pointed out that he was hurting her. She did not want to tell anyone what had happened and they agreed that they would not tell anyone. In due course they fell asleep.
12. The applicant's case was that at about 2.30 in the morning he woke up and needed to go to the lavatory. He said that he decided to use the bathroom en suite to the complainant's bedroom because it was the only bathroom about which he was sure of the location. He went and used the bathroom and as he left the complainant called out asking who was there. He responded and a conversation began. The applicant was cold and he asked her if he could get under the duvet alongside her. She agreed. According to him, they discussed school and her relationship with other boys including her then boyfriend. After about 15 minutes they began to cuddle and to kiss. This was, according to him, entirely with her consent. The applicant said he asked her if she was sure that she wanted to continue with this sexual activity because he understood that she already had a boyfriend. According to him, she said it was okay because she was about to break up with the boyfriend and had already cheated on him with several other boys. Sexual activity followed. It lasted about half-an-hour. It was entirely consensual. The defence case was that her embarrassment about her loss of reputation at school led her to lie about what had in fact been consensual sexual activity.
13. The issue for the jury, as was accepted between the parties, was consent and the applicant's belief in the consent. The judge left the case to the jury on the basis that the complainant did not have the capacity to consent, through her intoxication and/or that she did not consent and the applicant forced himself on her, against her will, knowing that she was not consenting.
14. The defence made an application under section 41 of the Youth Justice and Criminal Evidence Act 1996 which was dealt with according to protocol at a pre-trial hearing on 6 February 2017. It was renewed immediately before the complainant was to be cross-examined during the course of the trial in April 2017.
15. In answer to the application the learned judge ruled firstly, that the complainant could not be questioned about all parts of the alleged conversation which the applicant had said had occurred immediately before sexual activity between them. That included those parts of the conversation in which she was alleged to have confided to him various incidents of her previous sexual behaviour. Secondly, the learned judge ruled that while she could be cross-examined on her concern about her reputation at school, because of it becoming public knowledge that she had indulged in sexual activity with this applicant on this occasion, cross-examination would not be permitted on her concern about her more general reputation because it was said that she was already the subject of negative gossip at school, as a result of what people knew or believed to be previous sexual relationships with others.
16. The grounds of appeal have now been distilled and helpfully presented to us today by Ms Wong QC. Two grounds are effectively pursued. The first, that the learned judge was in error in his ruling under section 41 and should have permitted cross-examination in much broader terms about the conversation between the parties before any sexual

activity took place and ground 2, that the summing-up was defective in respect of his direction on consent and capacity to consent.

17. There were earlier hearings before this court in which a number of disclosure requests were made and in part answered. Those disclosure issues have now been determined and we are grateful to Ms Wong QC for the clarification of the position that there are no outstanding requests and no further submissions to be made.
18. Turning to the grounds: ground 1, that the complainant should have been cross-examined about all the detail of an alleged conversation between her and the applicant before any sexual activity as it went to the applicant's belief in her consent, and further, that it went to her motivation in making what is said to be a false complaint about the applicant's sexual conduct towards her in the absence of consent on her part. That distils down, in our view, to a request that she should be cross-examined about her conduct, which included cheating on her boyfriend and being the subject of gossip at school about other sexual activity.
19. Section 41 specifically prohibits this sort of cross-examination. Parties are not allowed to cross-examine about previous sexual activity, about a reputation for indulging in previous sexual activity and matters of that sort. The restrictions are strict and the courts must abide by them. Exceptions are set out but in terms. Section 41(2) says:

"(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 ...

(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 ..."
20. The only exemption to section 41 that would have allowed the applicant in this case to adduce such material or to put such material in cross-examination was if it went to his belief in her consent.
21. The judge allowed some limited cross-examination on the basis of that application. He permitted questions to be put to the applicant about her lying about what had occurred on this incident because she feared that this would cause her to be the subject of gossip and rumour at school and amongst her friends. He considered further that preventing further cross-examination would not risk the jury reaching an unsafe conclusion on the evidence.
22. That is a view with which this court agrees. Section 41 is stringent in its application. Cross-examination about previous sexual conduct is rarely, if ever, to be permitted.

Cross-examination about a reputation or gossip, or what an applicant might understand to be a complainant's previous sexual experience is further prohibited and in general terms any matter "impugning the credibility of the complainant as a witness" is to be prohibited.

23. The material that was sought to be put to the complainant on the applicant's behalf in this case falls full square within the provisions of section 41 and should not have been permitted.
24. Ground 2 deals with the question of the judge's direction to the jury on the issue of consent and lack of capacity to give consent. The judge dealt with this question at page 22 and subsequent pages of his summing-up. He told the jury: "Consent you will realise is a state of mind". He spoke about consent being along a spectrum and at 23D said in terms:

"Being overpowered or simply giving in and allowing something to happen in the belief that she cannot stop it from happening is not consent. Such a person in reality has had the freedom to make a choice removed from her."

A little further on he dealt with the question of alcohol which was at the core of the issue of capacity to consent in this case and said at 23G:

"A person who is so drunk that in effect she cannot willingly make a choice one way or the other, at that stage lacks the capacity to make a choice and so cannot in law consent. Of course, drunkenness itself is a sliding scale."

He went on to remind the jury that a drunken consent can still be consent, so was not directing them in any sense that simply being affected by alcohol prevented a complainant from giving informed consent. He went on to quote from her evidence when she told the jury that she was in no fit state to consent because of what she had drunk earlier in the evening and did not in fact consent.

25. There is nothing in the complaint made about the direction on consent or the capacity to consent and the learned judge was right to direct the jury in the way in which he did.
26. In the section 31 proceedings the single judge said that the factual disputes were clear in this case. He directed that the learned judge observed that the true issue for the jury to determine was consent: and went on to say, "the judge was clear that if the jury thought the complainant may have consented they should acquit. The summing-up was not defective as we claim".
27. There is nothing arguable in either of the grounds put before us today and accordingly, the application for leave to appeal conviction on both grounds is refused.
28. MS WONG: My Lord, may I just thank the court for allowing the applicant to attend this hearing.

29. LORD JUSTICE DAVIS: We do understand the importance of the case to him and to his family, as indeed to the complainant and her family.
30. Ms Wong, you put your case very persuasively, if I may say so, even though you did not succeed in persuading us. Thank you for your submissions.

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