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2018/02603/C2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 28th June 2019

B e f o r e:

LORD JUSTICE IRWIN

MR JUSTICE GOOSE

and

HIS HONOUR JUDGE POTTER
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

J W W

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Mr D Emanuel QC appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Friday 28th June 2019

LORD JUSTICE IRWIN: I shall ask Mr Justice Goose to give the judgment of the court.

MR JUSTICE GOOSE:

1. The applicant renews applications for an extension of time (287 days) and for leave to appeal against conviction following refusal by the single judge.

2. On 7th August 2017 in the Crown Court at Leicester, before Her Honour Judge Lucking and a jury, the applicant was convicted of historical sexual offences against the sister of his former wife over a period from 1996 until 2000, when the complainant was aged between 12 and 16. On 22nd September 2017, the applicant received a special custodial sentence of nineteen years under section 236A of the Criminal Justice Act 2003, comprising eighteen years' imprisonment and one year's extended licence.

4. Given the nature of these offences, the provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as a victim of the offending. This prohibition applies until waived or lifted, in accordance with section 3 of the Act. The complainant and her sister (the former wife of the applicant) will be anonymised as respectively "AB" and "CD".

5. The facts of these offences may be shortly stated. AB was born on 10th July 1984 and was aged 12 when the applicant's offending began. She was a regular visitor to the home of her sister, CD, who lived with the applicant before they became married. The applicant was aged between

22 and 26 during the offending. He is now aged 44. From when she was aged around 11, the applicant started to make sexual comments towards AB which led to the first offence, indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960, when he asked AB to perform oral sex upon him. She complied with his request. This first occasion (count 1) was repeated in similar circumstances in count 3, a further offence of indecency with a child, when AB was aged 12. We shall return to count 3 a little later.

6. The applicant's offending progressed to sexual intercourse with AB when she was under 13 (count 2). When she was 13, AB was raped by the applicant (counts 4 and 5). Whilst count 2 did not involve sexual intercourse without consent, in counts 4 and 5 there was no consent. Counts 6 and 7 charged offences of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. They involved the applicant licking the vagina of the complainant (count 6) and penetrating her vagina with a vibrator (count 7).

8. During the period of offending, AB believed that she was in a relationship with the applicant. He told her that when she was older, they would run away together. On one occasion he took her to a nightclub. On another, after she escaped from her home where she lived with her parents, he picked her up and further sexual contact took place.

9. In 1999, CD became pregnant which caused the applicant's conduct towards AB to cease. Later, in 2013, CD separated from the applicant. In the following year, AB informed CD of the applicant's offending towards her, although AB did not feel in a position to report the applicant to the police. In 2015, AB challenged the applicant about his offending, both in a text message and also when they spoke.

11. The applicant's case at trial was that there had been no sexual contact with AB. It was

suggested that the allegations had been fabricated in order to assist CD in her divorce from the applicant. It was argued on behalf of the applicant that the offences could not have occurred in the home, as alleged by AB, because the layout of the home made it highly unlikely that anything could have occurred without CD knowing.

12. On behalf of the applicant, four grounds of appeal are advanced by Mr Emanuel QC (who was not trial counsel). Firstly, that fresh evidence should be admitted under section 23 of the Criminal Appeal Act 1968; secondly, the judge failed to give a lies direction in accordance with *R v Lucas* 73 Cr App R 159; thirdly, that the direction to the jury upon delay was inadequate; and fourthly, that character evidence should have been called in support of the applicant's good character.

13. In refusing both the application for leave to appeal and the application for an extension of time, the single judge was not persuaded that there was any merit in the appeal. The single judge did not find that there was a reasonable explanation for the failure to produce the evidence at trial; nor did it afford a ground for allowing the appeal, because it does not undermine the safety of the convictions. Further, the absence of a lies directions was after trial counsel made a sound tactical decision not to seek such a direction. The judge's direction upon delay was sufficient and not open to proper criticism. Finally, evidence from the character witnesses would not have assisted the defence case sufficiently so as to undermine the safety of the conviction.

14. We have carefully considered the extensive perfected grounds of appeal against conviction and advice in support on behalf of the applicant, as well as the oral submissions made today by Mr Emanuel. We have also considered the further grounds following the decision of the single judge. In addition, we have viewed the video recordings and photographs which comprise the fresh evidence upon which the applicant wishes to rely.

15. After careful consideration of this renewed application, we have come to the same conclusion as the single judge. The grounds of appeal individually and cumulatively, do not provide a sufficient basis for an appeal against conviction. We will deal with each of the grounds in turn.

Ground 1: Fresh Evidence

16. Although it is argued that the photographs and videos were not available at the trial, in that they had not been taken or obtained by the applicant, the layout of the property and the unlikelihood of the offending going unnoticed was at the heart of the defence case. The further evidence concentrates upon count 3, which is an allegation of indecency with a child in the form of oral sex by AB upon the applicant, when he was in the loft area of the property. AB's description of the offence involved her being partly in the loft area, standing on a banister or ledge, whilst the applicant exposed his penis as he knelt in the loft and required AB to perform oral sex upon him. It is argued on behalf of the applicant that the new evidence renders AB's account incapable of belief.

17. We do not agree. The new evidence may show that such an act would have been difficult, but it does not go as far as to render it impossible. We are not satisfied that had this evidence been placed before the jury at trial, even if there was a reasonable explanation for the failure to produce it at that stage, that it would have sufficiently undermined AB's account so as to affect her overall credibility. Given that the jury were not persuaded that the offending was inherently unlikely when they convicted the applicant, we are satisfied that this new evidence would not have undermined AB's credibility and therefore does not afford a ground for allowing the appeal.

Ground 2: Lies Direction

18. Although there was an admitted lie by the applicant, which concerned his denial of having

collected AB during the night when she escaped from home, a lies direction was not given by the judge at trial. The explanation for this by the trial advocate is that she was concerned that a formal direction, in accordance with *R v Lucas*, could have been more harmful to the defence than of assistance. Firstly, because the applicant's explanation for the admitted lie was to admit potentially reprehensible conduct of child abduction. Secondly, because during the course of his evidence at trial, the applicant had given inconsistent answers to questions about text messages that had been sent to the complainant. Those messages included possible references to sexual contact by him with her. In examination in chief he admitted that the messages were from him but disputed the sexual references. However, in cross-examination he denied sending the messages at all. For tactical reasons, therefore, the trial advocate did not wish to emphasise lies before the jury. Whether that was a correct analysis or not does not provide a ground for appeal. A lies direction given to the jury is not appropriate in every case and is plainly within the discretion of the trial judge. In this case the trial judge did not give such a direction. The absence of any open discussion between the judge and the advocates does not mean that the court failed to consider the direction. It is also of note that an adverse inference direction, pursuant to section 34 of the Criminal Justice and Public Order Act 1994, was given to the jury in this case. Given the terms of that direction, in standard form, an additional lies direction would no doubt have been undesirable for the defence. Whilst we agree that, despite these difficulties, a lies direction might well have been given, we do not find that the absence of the direction undermines the safety of the conviction.

Ground 3: Delay Direction

20. At the close of the evidence, the trial judge provided her draft directions of law for discussion with the advocates. The delay direction was discussed and agreed between the parties. The applicant's criticism, that not each part of the suggested direction within the Crown Court Compendium was used does not create a ground of appeal. The direction must be drafted to fit

the circumstances of the case being tried. It is obvious from the discussion between the advocates and the trial judge that this was achieved. The direction given by the trial judge cannot be criticised.

Ground 4: Failure to call Character Evidence

21. The trial advocate has provided her explanation for not calling character evidence on behalf of the applicant. She made a tactical decision based on the fact that the applicant had received an enhanced good character direction, and the calling of character witnesses who might be cross-examined may have damaged that direction. It does not follow that a different decision, involving calling some or all of the character witnesses, may have affected the verdicts of the jury. The decision whether to call character evidence is often finely judged by advocates on behalf of defendants. Provided there is sensible reasoning for the decision made, it cannot be a ground of appeal after conviction that character evidence should have been called. We are satisfied that there were good reasons for not calling this evidence when an enhanced good character direction was to be given. This ground has no merit.

22. Accordingly, we refuse the renewed applications for leave to appeal against conviction and to extend time.

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