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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 30 June 2020

LORD JUSTICE HOLROYDE
MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE MICHAEL CHAMBERS QC
(Sitting as a Judge of the CACD)
R E G I N A
v

"RT"

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Ms E Goodhall appeared on behalf of the **Applicant**
Ms T Hay appeared on behalf of the **Crown**

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 14 September 2016, after a trial before HHJ Heathcote-Williams QC and a jury in the Crown Court Woolwich, the applicant was convicted of two offences of vaginal rape, three offences of anal rape, one offence of assault by penetration and three offences of assault occasioning actual bodily harm. He was subsequently sentenced for each of the sexual offences to concurrent extended determinate sentences of 18 years, comprising a custodial term of 12 years and an extension period of 6 years. Concurrent determinate sentences of 3 years' imprisonment were imposed for each of the offences of violence. A sexual harm prevention order and a restraining order were made, to continue until further order, and the applicant was ordered to pay a surcharge of £120. His applications for lengthy extensions of time to apply for leave to appeal against conviction and sentence have been referred to the Full Court by the single judge.
2. The victim of all of the offences was the applicant's former partner (to whom we shall refer as "H"). She is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter shall be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences. In view of her relationship with the applicant it is likely to be necessary for any report of these proceedings to be anonymised accordingly.
3. For present purposes the facts of the case can be summarised very briefly. The applicant and H lived together for many years and have children. H's evidence was that from about 2006 the applicant began to threaten and use physical and sexual violence. The offences were committed between 2010 and 2012. Earlier incidents, some of them involving violence which caused significant injury to H, were admitted as evidence of bad character. Each of the rapes was accompanied by violence and/or by humiliating and degrading behaviour and/or by some other aggravating feature - one instance being the presence of a child.
4. The applicant's case was that all sexual activity had been consensual, that such incidents of violence as had occurred during the relationship were on nothing like the scale alleged by H, and that her specific allegations had been fabricated.
5. It is relevant to note that the applicant was, for a number of years, the proprietor of a tattoo parlour. He is, we understand, a man of large build with distinctive facial tattoos. In December 2015 he was convicted of an offence of violence against a woman at his tattoo parlour and sentenced to 5 months' imprisonment. The conviction was reported in the local free weekly newspaper which circulates in the area of the applicant's home and of the court at which he was tried, that report being illustrated by a photograph of him. The 2015 conviction was not in evidence at this trial. The bad character evidence to which we have referred related solely to incidents involving H.
6. The applicant was sent for trial on the present charges on 11 March 2016. His trial began on Monday 5 September 2016. There had been discussion between counsel and the judge as to what questions should be asked of the jury panel. The members of the panel were of course asked to look at the applicant and to indicate if they recognised him. No one gave such an indication. They were asked if they knew other persons who would be witnesses or certain places that would feature in the case. Again no indication was given. No question was asked making any reference to the applicant's trade as a tattooist or to his tattoo parlour. The trial then proceeded.

7. The applicant gave evidence. We are told that he began his evidence at about midday on the Thursday of the first week of the trial and was still giving evidence when the court rose at the end of that day. The court did not sit on the Friday. The applicant continued his evidence on the Monday, 12 September 2016, concluding at about 1239. Thereafter a defence witness was called and there was discussion between counsel and the judge as to the necessary and appropriate directions of law.
8. It should be noted that on Monday 12 September 2016 the jury sent a note to the judge expressing their concern that someone in the public gallery appeared to have been filming them. They referred to the fact that their names had been read out when they were empanelled.
9. Following speeches on the Tuesday morning, the judge began his summing-up at 1148 that day. The jury retired at 1537 that day. They were sent home shortly after 1630. They resumed their deliberations the following day, between 1018 and 1438, at which point they returned unanimous guilty verdicts on some counts and were given a majority direction. Trial counsel began to speak to the applicant in conference. The conference was interrupted when the jury, having deliberated for about a further half-an-hour, were brought back into court at 1510 and returned majority verdicts on the remaining counts. They were then discharged. Counsel resumed her conference with the applicant.
10. At about 1556 counsel informed the judge that the applicant had indicated that he recognised one of the female jurors. In a short hearing the judge indicated, correctly, that at that stage of the proceedings he had no jurisdiction to take any action to investigate this reported recognition. He indicated that he would report the matter to the Registrar of Criminal Appeals and subsequently did so.
11. At the later sentencing hearing the judge found the applicant to be a dangerous offender, a finding which was supported by the contents of the pre-sentence report. He imposed the sentences which we have mentioned.
12. Advices on appeal against both conviction and sentence were given by counsel. Both were in negative terms. In particular, the applicant was advised that there was no evidence to suggest that any juror had recognised him.
13. The applicant subsequently prepared his own grounds of appeal. It is to his credit that he overcame problems of his own limited literacy skills, and the practical difficulties often encountered by a serving prisoner seeking to conduct legal researches, and with the assistance of a fellow prisoner produced a clear and detailed document.
14. In relation to the convictions, the applicant's argument in essence is this. He is well known in the local area through his work as a tattooist and through his distinctive appearance. His clients communicate with him via Facebook. His 2015 conviction was reported, as we have said, in the local free newspaper, and someone posted a link to that report on his Facebook page. He says that he recognised one of the female jurors as a former client. He says that he thought he recognised her when he was giving evidence and noticed that every time he looked in her direction she looked away. He says that it was only when the jury returned their verdicts that he had a good look at them and concluded that the juror concerned was someone whom he had previously tattooed in his parlour over a period of hours. He asserts that she would certainly have recognised him, would have known of the report of his previous conviction for assault on a different woman and would probably have passed on her knowledge to other jurors. There is therefore a risk that the jury were prejudiced against him.

15. As to sentence, the applicant accepts that he was convicted of serious offences, and in his own grounds of appeal he said emphatically that he accepted that the custodial term of 12 years' imprisonment was not excessive. He did however challenge the finding of dangerousness and the length of the extension period, which he seems to have understood to be an additional term to be served in custody.
16. The single judge, when referring the applications to the Full Court, granted a representation order. We have been assisted by the submissions of Ms Goodall, to whom we are grateful. We are also grateful to Ms Hay, on behalf of the respondent, she having been prosecution counsel at trial.
17. In Ms Goodall's submissions as to conviction, she indicates that the instructions which the applicant has recently given to her in conference are to the effect that he believed he raised his concern about the juror with his counsel after the first tranche of verdicts had been returned. She invites our attention to the familiar principles in Porter v Magill [2001] UKHL 67 in relation to an appearance of bias. She also seeks to advance an additional ground of appeal, namely that the judge's direction as to the issue of consent was less complete than it should have been, given the context of sexual offences alleged to have been committed in the course of a lengthy relationship which involved consensual sexual activity over the years. In this regard, she relies on passages in the Crown Court Compendium, suggesting the terms of an appropriate direction, although Ms Goodall realistically acknowledges that the Compendium provides guidance and does not dictate precisely what is appropriate in the summing-up of any given case.
18. As to sentence, Ms Goodall submits that the judge, even if he was entitled to make the finding of dangerousness, failed properly to consider whether a determinate sentence, coupled with the sexual harm prevention order and the restraining order, would provide sufficient protection for those who might be at risk, which was a group limited to prospective partners of the applicant. She also suggests that the length of the custodial term should be viewed by this court as excessive on the basis that the judge, in reaching his decision, wrongly took into account the events described in the bad character evidence: those were not incidents in respect of which the applicant had made any admission or been convicted of any offence. Finally, Ms Goodall criticises the judge for failing to give any reasons for the length of the extension period or for the indefinite duration of the other orders made, all of which she suggests were excessive in the circumstances of this case.
19. Ms Hay has added brief oral submissions to supplement those set out in her respondent's notice.
20. We have reflected on all the submissions, written and oral. Our conclusions are as follows.
21. Criminal Practice Direction VI, Part 26M sets out a procedure to be followed when a jury irregularity, such as is suggested here, is brought to the attention of the judge during a trial. As we have already indicated, the judge correctly ruled that this issue was only raised with him after the jury had been discharged. He therefore had no jurisdiction to undertake that or any other procedure beyond referring the matter to the Registrar, as he did. He concluded his short ruling on this point by saying, again correctly, that "the rest is in the hands of the defence". In view of the negative advice given by counsel, no application for leave to appeal was made until the applicant put forward his submissions long out of time.

22. We recognise the difficulties which the applicant faced in acting in person, and we recognise the difficulties which Ms Goodall faces as a result of coming into the case at this late stage. We therefore focus first on the merits of the proposed grounds of appeal.
23. Practice Direction VI, Part 26M goes on to deal with the situation when a possible jury irregularity comes to light after the jury has been discharged. At paragraph 41, it recognises that a ground of appeal may arise. At paragraph 46, it requires the Crown Court to communicate the circumstances to the Registrar, as the judge did in this case. At paragraph 50 it requires the Registrar to inform the defence if there may be a ground of appeal. Here it was of course the applicant in person who first raised the matter and who was accordingly well aware of the possibility of an appeal.
24. Section 23A of the Criminal Appeal Act 1968 gives this Court the power to direct a review by the Criminal Cases Review Commission if it appears to the Court that a matter is relevant to the determination of an application for leave to appeal and ought, if possible, to be resolved before application is determined.
25. It is unnecessary to go into further detail about those provisions. In the circumstances of this case, we take the view that the Court would need to direct such a review if there was any arguable basis for thinking that a member of the jury knew the applicant because she was a former client of his tattoo parlour. This is because of the fact that clients generally communicated with the applicant via Facebook and might therefore have been aware, through Facebook, of information about the 2015 conviction, which could give rise to actual or perceived prejudice.
26. In our view, however, there is no arguable basis for thinking that that is the position. We have carefully considered the applicant's assertion that he recognised a juror. His position in that regard is however so lacking in logic or common sense that we are unable to accept it. The premise of his case is that he is and so distinctive, and so well known in the local area, that any former client would be bound to recognise him, and that such recognition would carry a substantial risk of prejudice arising from knowledge of the 2015 conviction. If that is so, there would be every reason for him to be concerned about the possibility of any former client being a member of the jury, trying him for these serious offences against a woman, only months after his conviction for an offence against a different woman. However, there is nothing about the circumstances of the trial or of his conduct during the trial which supports his assertion that such a concern arose.
27. First, the jury panel were invited to look at him in case they recognised him. No member of the panel suggested that she did. No reason has been suggested why any of the prospective jurors would have failed to say if she had recognised him. No reason has been suggested why any juror, who had not immediately recognised him (despite his assertions that no one could forget him), but who later recognised him, would not have informed the court later in the trial. In this regard we are unable to accept Ms Goodall's submission that the fact that the judge gave no specific warning of this possible eventuality at the start of the trial might provide an explanation. Nor has any reason been suggested why, if there were any substance in the applicant's suggestion that the juror concerned would probably have spoken to other jurors about her knowledge of the applicant, none of those other jurors ever complied with his or her duty to inform the court.
28. Secondly, it is apparent from the questions which were asked of the jury panel that no one thought at the time that any reference needed to be made to the tattoo parlour or to

the associated Facebook page. No legal knowledge or familiarity with court procedure would have been necessary for the applicant to raise his concerns with his counsel at the outset, if they were genuine. It is to be inferred, from the absence of any reference to this point in any submissions to the Crown Court, that he did not do so. No explanation has been given as to why not.

29. Thirdly, the trial continued over seven working days. There was ample opportunity for the applicant to observe the jury and every reason for him do so, if ever there came a stage when he began to think that one of their faces was familiar. The question asked by the jury about the conduct of someone in the public gallery provided an additional reason for the applicant to look at the jurors.
30. Fourthly, the applicant asserts that such recognition came to him as he gave his evidence. It is implicit in his own grounds of appeal that he must have looked at the juror concerned a number of times. We have summarised the timetable of his giving of evidence. There was ample opportunity during that timetable for him to reflect on the significance of these observations of the juror, if he had made them. Yet he said nothing to his counsel after he had completed his evidence; or at any break in proceedings during the remainder of the evidence; or at any point after the discussion between counsel and the judge as to appropriate legal directions; or at any point, during the course of speeches and summing-up; or at any point during the jury's retirement which lasted, as we have indicated, well over 5 hours.
31. Fifthly, the explanation which the applicant gives, to the effect that he did not get a good look at the juror until the verdicts were returned, contradicts his own evidence that he noticed her when giving his evidence and took sufficient interest to be able to observe that she averted her gaze whenever he looked at her.
32. Sixthly, the applicant's recent instructions to Ms Goodall, that he believes he raised the matter with counsel after the first tranche of verdicts, is contradicted by counsel's near-contemporaneous note that it was first raised during her resumed conference, after the second tranche of verdicts. As is apparent from what we have said earlier in this judgment, she then, very promptly, raised the matter with the judge. There is no obvious reason why she would not have raised the matter with the judge equally promptly if it had in fact been brought to her attention when the applicant says it was. In those circumstances, we see no reason to doubt that counsel's note is an accurate account of events. It follows that no explanation has been given as to why the applicant did not raise it at the time when he now says he did.
33. The fact that a defendant does not raise a possible jury irregularity as soon as he might have done is not, of course, necessarily fatal to a ground of appeal based on that irregularity. However, in all the circumstances of this case, the failure to raise the matter until after the jury had been discharged, leads us to conclude that there is no substance in the assertion that the applicant was known to one of the jurors. It follows that it does not appear to us that there is any matter which should be investigated by the Criminal Cases Review Commission.
34. As to the proposed further ground of appeal against conviction, we are satisfied that the judge's direction was legally correct and sufficient in the circumstances of this case. Each of the alleged rapes was said by H to have been accompanied by serious violence and/or degrading conduct of a most unpleasant kind and/or some other aggravating feature. The defence case was that incidents of those descriptions, or anything

approaching those descriptions, simply never happened. We see no merit in the suggestion that, in the circumstances of this case, the jury should have been given a further direction, assisting them in respect of an element of give and take between partners in respect of sexual activity during a relationship lasting many years. We find it difficult to understand how any such matter could have arisen on the evidence and issues in this case without improper speculation on the jury's part.

35. For those reasons we see no arguable ground of appeal against conviction.
36. As to sentence, we notice that it is accepted that the judge was entitled to decide that each of the rape offences fell within category 2A of the relevant Sentencing Guideline, with a starting point of 10 years' imprisonment and a range from 9 to 13 years. Even taking account of the personal mitigation which the judge found to be available to the applicant, a total custodial term of 12 years was, in our view, very lenient. We are unable to accept Ms Goodall's submission that the judge adopted a wrong approach and that by necessary inference he would have passed an even shorter sentence if he had not fallen into that error.
37. Further, given the circumstances of the offences, which showed the applicant to be not only violent but also highly controlling of his partner, and which further showed him to be self-centred and jealous in his relationship with her, it is, in our view, beyond argument that the judge was entitled to make a finding of dangerousness. We agree that it would have been better if he had spelt out his reasons for concluding that an extended sentence rather than a standard determinate sentence was necessary, even when taking into account the making of the other orders. It is however implicit in the sentencing remarks as a whole that the judge's conclusion was that an extended licensed period, in conjunction with the sexual harm prevention order and restraining order, was necessary to protect any woman who might become his partner in the future. There is, in our view, no arguable basis on which that conclusion could be said to be wrong.
38. The reports which we have seen show that the applicant has behaved in an exemplary fashion during his time in prison and has done much to better himself and to assist others. We commend him for that. We are however satisfied that there is no arguable ground of appeal against the concurrent extended sentences.
39. One final matter must be mentioned. Although no one noted it at the time, the judge fell into error in imposing a surcharge as some of the offending of which the applicant was convicted was committed before the surcharge provisions came into force. The imposition of the surcharge was therefore unlawful and it must be quashed. The error would have passed undetected but for the customary vigilance of the Registrar, for which the court is, as always, grateful.
40. In those circumstances, in relation to the convictions, we refuse the applications for an extension of time and for leave to appeal.
41. In relation to sentence, we grant the necessary extension of time, grant leave to appeal and allow the appeal only to the very limited extent that we quash the surcharge order. In all other respects the applicant's sentence remains as before.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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