Judgment Approved by the court for handing down.

Neutral Citation Number: [2021] EWCA Crim 201

Case No: 2020/02425/B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NORWICH CROWN COURT
HHJ MOORE
T.20190082

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2021

Before :

LADY JUSTICE MACUR
MR JUSTICE LAVENDER
and
SIR ALAN WILKIE

- -

Between :

REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION UNDER S.9 OF THE CRIMINAL APPEAL ACT

AHMED MOHAMMED	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Mr Dominic Thomas (instructed by Brett Wilson Solicitors) for the **Appellant**
Mr Dominic Connolly for the **Crown**

Hearing date: 12 February 2021

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Approved Judgment

Lady Justice Macur:

1. This appellant's two convictions of indecent assault on 19 February 2004 are referred by the Criminal Cases Review Commission (CCRC) pursuant to section 9 of the Criminal Appeal Act 1995 on the basis that 'fresh' DNA evidence undermines the reliability of the identification evidence upon which the prosecution case rested entirely. The appellant is represented by Mr Thomas. The prosecution, who resist the appeal, are represented by Mr Connolly.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences and to the other alleged offences to which we will refer. No matter relating to either victim of the assaults shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify them as a victim of the offences or alleged offences. This prohibition will continue unless waived or lifted in accordance with section 3 of the Act.

3. The appellant is a Somalian who, then aged nearly 18, entered the United Kingdom on 2 July 2001 to join his parents, who were refugees and then living in the Tooting area of London. He had significant mental health problems and was subsequently to be diagnosed with early onset schizophrenia.

4. The appellant first came to the attention of the police in the early hours of 24 August 2001, when his family reported him missing from the family home. On 5 September 2001 he was arrested in respect of an indecent assault on JJ, who had been attacked shortly before midnight on 23 August 2001. The appellant was suspected of being responsible for that assault because it was thought that his appearance was similar to the description that JJ had given of her assailant, although details of that description are not now available. He was released without interview and bailed to return to the police station a week later. When the appellant answered his bail on 12 September 2001, he was arrested for five further indecent assaults committed in similar circumstances and within a similar location and at similar times of night between 5 July 2001 and 30 August 2001. The complainants were KF, AD, EM, JJ, ZH and MJ.

5. He was interviewed with the aid of a Somalian interpreter. His father was present as an appropriate adult. His solicitor indicated at the outset that the appellant would remain silent. The appellant's responses were predominantly "no comment", but he denied ownership or possession of a bicycle or mobile phone and explicitly denied the assault upon KF, details of which complaint were read out to him. His father said the appellant had been in the country since 2 July 2001 and confirmed that he did not own a bicycle or mobile phone and that he did not speak English.

6. The first descriptions of the assailant provided by five of the six victims had obvious similarities. That is:

   KF: 5'10 ft, 20-25, thin build, dark wavy hair, dark eyes, dark olive skin, foreign accent, no facial hair.

   AD: 5'10 ft / 6 ft tall, 20-30 medium build, black hair sun bleached at the top, top longer than the sides, afro style, small, neat features, brown eyes, pale tanned skin, short "tash", foreign accent.

EM: 20, medium build, short wavy black 1 ½' hair, round face, Mediterranean complexion, Spanish / Italian / Olive skinned, clean shaven, broken English, Italian lilt.

ZH: 6ft, 25, medium build, short black hair, dark skinned or Arabic.

MJ: 5'9" / 5'10", early to mid-twenties, thickish build, short hair dark, thick wiry hair, pock marked skin olive colour, unshaven [stubble], eastern European country.

7. The first of the indecent assaults of which he was convicted occurred on 5 July 2001 (in relation to KF) and the second on 8 August 2001 (in relation to EM). The convictions were based solely upon identification evidence; that is, the appellant was picked out by the complainants KF and EM on an identification parade held on 31 October 2001, of which procedure there has been no complaint. Of the other complainants, the three who attended at the identification parade made no positive identifications and the appellant was not prosecuted in respect of their allegations.

8. On 5 November 2001, the appellant was interviewed again. Apparently, he had been assessed by a police surgeon to be fit to be interviewed, although, as later and more focused psychiatric examinations were to reveal, and as some of the incongruent answers he did give in the interview demonstrate, this is at least doubtful. As it was, a prepared statement was read on his behalf in these terms:

> "I suffer from a mental illness and do not feel able to cope with a police interview. I therefore make this statement as an alternative to answering questions in interview. I deny any involvement in an indecent assault on either 5 July 2001, outside Dewar Close, Tooting, or on 8 August 2001, in Church Lane, Mitcham, or on any other occasion. I agree to provide a sample of DNA and deny ever owning a mobile phone or a bicycle. I entered the UK on 2 July 2001 and could not speak any English on my arrival. On both 5 July and 8 August 2001, I was at home with my family. I would not normally leave the house without a family member. I was very confused during the first interview and would therefore like to submit this written statement in order to deny the offences that I am suspected of committing."

9. On 16 October 2002, the appellant was found unfit to plead. In a subsequent hearing in which the appellant played no part, the jury heard from his father that the appellant spoke Somali and some Arabic, had arrived in the UK on 2 July 2001 and had not gone out of the family home until 9 July 2001. There was a family get together on 8 August, from 6pm to 6am, at which the appellant was present the whole time. On 23 August, the appellant had gone out to buy cigarettes and had got lost; he had returned home at 5am. It appears that two statements were also read to the jury evidencing, amongst other things, the appellant's lack of English and inability to communicate.

10. The appellant was nevertheless found to have carried out the two indecent assaults. He was sentenced to a Hospital Order with Restrictions under section 41 of the Mental Health Act 1983.

11. An application for leave to appeal against the finding-of-fact verdict, on the basis that the identification evidence had not been strong enough for the judge to leave the case to the jury, was refused by the single judge and it was not renewed.

12. The appellant's health recovered sufficiently for him to stand trial in June 2004. He was convicted. Again, he was sentenced to a Hospital Order with Restrictions under section 41 of the Mental Health Act 1983 and required to comply with the notification requirements of Part 1 of the Sex Offenders Act 1997 for an indefinite period.

13. Regrettably, there are no transcripts available from the June 2004 trial. However, we agree that reliance can reasonably be placed upon the transcripts that are available from the October 2002 finding-of-fact hearing and the summing up that was delivered on that occasion, taken together with the contents of the manuscript court log that is available from 2004.

14. The transcripts of the earlier finding-of-fact hearing indicate that the defence advanced was mistaken identification. There is no reason to think that the complainants' evidence at the full trial would have differed in any material respect from their evidence at the finding-of-fact hearing or from their statements. Neither is it likely that defence counsel at the 2004 trial would have adopted a different strategy from before. It is probable, although not certain, that the appellant himself gave evidence at trial.

15. It is not known for certain whether the jury at the 2004 trial were told about the four additional allegations and, if so, that only two of the five victims who attended the identification parade identified the appellant as their assailant. The jury at the 2002 finding-of-fact hearing was not told about them and they were not mentioned in the application for permission and draft grounds of appeal. We consider it unlikely that the jury were told of these matters. Both Mr Thomas and Mr Connolly refer to this possible defence strategy in terms of it being a 'double edged sword'. We agree that on the state of the evidence in 2002 and 2004 it may reasonably have been thought to be a high-risk strategy to engage upon.

16. The appellant did not apply for permission to appeal his conviction and applied to the CCRC in June 2017 in respect only of the finding-of-fact verdict. It was not until August 2019 that it became clear to the CCRC that, after the finding-of-fact hearing, the appellant had been convicted at a full trial, but had not sought permission to appeal. However, the CCRC is permitted to refer 'no appeal' cases to the Court of Appeal in exceptional circumstances pursuant to section 13 of the Criminal Appeal Act 1995 and submits that it is justified in doing so in this case. That is, the CCRC has determined that it is highly unlikely that it would have been possible for the appellant or his representatives to readily obtain all the information on which the reference is founded, namely the information obtained from the Police National Computer and Database relating to another man, whose DNA profile is a good match for that found on a potentially incriminating article found at the scene.

17. We agree with the CCRC that, for the reasons it gives, this is an exceptional case and that it is in the interests of justice for this Court to entertain the appeal despite the fact that the appellant has not previously applied for permission to appeal conviction.

Relevant details of the indecent assaults

18. At about 12.15am on 5 July 2001 KF was walking home. A male rode past her on a mountain bike and said, "Hello darling". After attempts to evade him she had no choice but to walk past him. She "glanced" at him and said he appeared very calm. The male grabbed her around the neck with his right arm from behind and had his left arm around her waist. She feared she was going to be raped. She said the male was holding something against her throat. He started to touch her breast and bottom. He tried to kiss her and continued to grope her. She lost her shoes. The male pulled her away from a fence that she had hold of, dragged her to some nearby bushes and forced her to the ground, face first, and continued to touch her body, breast, bottom, and leg area. She shouted for help, but the male continued to hold her tightly and tried to pin her arms to the ground. She screamed and the male then pushed her back to the ground and ran off.

19. In the immediate aftermath of the attack KF's brother, TF, found a mobile phone in bushes near the place where the attack had taken place. He had gone looking for her shoes and a few feet off the path into the bushes saw a mobile phone lying face down in the dirt. He pointed it out to the police when they arrived. It was found to be charged. The text it showed transpired to be Turkish.

20. In her witness statement KF referred to her attacker having a mobile phone and said, "I then realised that it must have been the male's mobile phone held against my neck, because the object felt flat and hard." It is apparent that the police believed that the mobile phone found by TF might be associated with KF's attacker, as they questioned the appellant about the ownership of a mobile phone and put KF's complaint to him in interview that she believed that a mobile phone was held against her neck.

21. When cross-examined at the finding-of-fact hearing in 2002, KF said, "I don't know if it was the mobile phone. All I know is he had something flat and hard pressed against my throat." When reminded of her statement she said, "I assumed it was the phone when they showed it to me, and it was found at the scene. I assume that's what he held against my throat." When told by defence counsel that the phone contained Turkish text, KF accepted, in terms of, "I guess", that this was consistent with the appearance of the man who attacked her.

22. EM was walking home just before midnight on Wednesday 8 August 2001 when she became aware of a person on a bike directly behind her. The male rode alongside her and started saying, "Hello, how are you?" She ignored him, but the male continued to follow her. She said, "I'm fine thank you" and he then started saying, "Lovely lady". She felt a hand brush her bottom and began to walk faster, but the male kept riding along side. He then touched her bottom again and then swerved his bike across in front of her and trapped her against a hedge. The male grabbed her bottom again. She managed to get away, but the male followed her and grabbed her bottom again. She eventually managed to get away. She described the bike as a bright yellow adult mountain bike.

CCRC Investigation

23. The CCRC obtained the relevant file and the only evidential material retained by the Forensic Archive, a sample swabbed from the mobile phone that was found at the scene of the assault on KF on 5 July 2001. The sample had been DNA-tested as part of the police's initial investigation, which showed only that the DNA sample did not

come from the appellant, but it did not show whose DNA it was, or could have been. The CCRC arranged for further DNA testing of the sample. A profile was obtained which, though partial, was sufficient for submission to the National DNA Database (NDNAD). 34 potentially matching DNA profiles were identified. All but one of these were SGM profiles (focussing on six areas of DNA), but the other one had been generated using the more discriminating SGM+ system (focussing on eleven areas of DNA). In the opinion of the reporting scientist, that profile "appeared to be a good match" for the partial profile obtained from the mobile phone swab and related to a male, S.

24. The CCRC investigation into S's background reveals him to be Turkish. He entered the UK in 2000. Significantly, as we indicate below, he was cautioned by the police in January 2003 for committing an act outraging public decency by behaving in an indecent manner, a consensual sexual offence with a sex worker, committed on Tooting Common at 10:30pm at night. Police records show that S had a mountain bike with him at the time of his arrest. There was also information that showed he had come to the attention of the police in respect of other matters, although he was never questioned regarding these two offences or the other four offences for which the appellant was initially arrested. Since our determination of this appeal has not relied upon those other matters, we consider it is unnecessary and inappropriate to refer to details of them in a public judgment.

25. However, by virtue of the caution and a non-related conviction shortly thereafter there is a verbal description and photograph of S which is sufficiently contemporaneous with the 2001 offences to be of interest and from which a comparison between the appellant and S can be made.

26. S is described as of white southern European "ethnic appearance", he is two or three years older than the appellant, of the same height, same colour eyes and same colour hair, with an "other foreign" accent. A black and white photograph taken in custody confirms most of the physical description and, most particularly, we consider, the fact of his appearing to be of Turkish ethnic origin.

27. The appellant's photograph was circulated in 2008 when he was missing from hospital. The photograph confirms his ethnic appearance as "black". We do not consider that he could reasonably be described as having either "dark olive skin" or a "Mediterranean appearance" or as being "Spanish/Italian/olive skinned" or "olive skinned".

28. In the draft grounds of appeal against the verdict at the finding-of-fact hearing, counsel listed several features which suggested mistaken identification, including the description by both women of a Mediterranean male; the fact that no bicycle was found at the appellant's home address; and the fact that, while there were only a few words uttered by the attacker in both cases, there was a sufficient exchange, in particular in KF's case, to suggest that the attacker could not have been the appellant. The police had obviously taken the view that the six offences were sufficiently similar in location, date, manner of commission and description of offender to give rise to the suspicion that one man was responsible for all of them. This was unsurprising and we note that the descriptions of complexion and likely ethnic origin of their assailant given by the three other complainants have obvious parallels to the descriptions provided by KF and EM.

The significance of the mobile phone

29. We do know that Counsel deployed the fact of the mobile phone in the finding-of-fact hearing. As indicated above, KF's brother, TF, had found it in bushes near to where the attack had taken place. His witness statement was read at the finding-of-fact hearing, but the 2004 Crown Court case log records that he gave evidence at trial. What cross examination took place in 2004 is unknown, but it would have been impossible for Counsel for the appellant to put a positive case as to ownership. At the finding-of-fact hearing, KF "assumed" it was a mobile phone that was held to her throat. Taken at its highest, it was not connected to the appellant by DNA evidence or by the language it displayed.

30. In the summing up in 2002 the phone was given little prominence. The judge reminded the jury that KF "was shown a mobile phone, she said it was not hers and we know that the enquiries that [the OIC] made led him to kebab shops, Turkish is the language on it." Subsequently, the judge reminded the jury that the appellant had denied having a mobile phone and denied losing one recently. There is no reference in the summing up to the DNA evidence available at the time, which showed that the DNA found on the phone was not that of the appellant. Significantly, in terms of fresh evidence, it would have been impossible to match S to the phone in 2001, for his DNA would not appear on the NDNAD data base until 2003.

Submissions

31. The mobile phone was clearly of considerable interest to the police investigation, and understandably so. Mr Thomas summarises its significance to the assault against KF in general terms as: (1) location – at the scene of the offence: (2) situation – an item not usually to be deliberately discarded and apparently discarded at or near the time of the offence by virtue of: (3) condition – in working order and charged. He argues that, since the available DNA evidence at the time did not associate the appellant to the phone, and supposing this to have been utilised by the defence, it would suggest that the jury did not regard the mobile phone as associated with the assault.

32. Mr Thomas suggests that the situation now is entirely different. The 'fresh' evidence relating to DNA comparisons and the background detail of the 'good match', S, have transformed the landscape. S's ethnic origin matches the language used on the mobile telephone and corroborates the DNA match. His physical characteristics match the initial descriptions given by all five of the complainants far better than do those of the appellant. He is known to have had use of a mountain bike at the time of the incident on Tooting Common that led to his police caution in 2003. His use of English, albeit with a 'foreign' accent was likely to be better than that of the appellant, and the language used prior to the assaults was idiomatic.

33. There was an obvious similarity in respect of all six complaints. The police suspected them to have been committed by the same individual. They were 'clustered' by location, timing and description of assailant. What had been an understandable forensic decision by defence counsel not to highlight the fact of four other complaints and the apparent association between them would now almost certainly be different considering the significant ammunition that the 'fresh' evidence provides.

34. Mr Thomas argues that these factors alone undermine the safety of the convictions without the need to consider whether the evidence relating to S's character, including, but not limited to, the caution in 2003, would be admissible at trial. Noting that the prosecution in the Respondent's Notice place reliance upon *R v Braithwaite* [2010] EWCA 1082 in support of the principle that "mere allegations" are unlikely to bear "substantial probative value", he relies upon *R v Erwood* [2016] EWCA Crim 896 and *R v Dizaei* [2013] EWCA Crim 88 for the proposition that this would be a matter for the "careful, fact sensitive assessment" of the trial judge as to whether the information relating to S which did not result in police action would nevertheless be admissible. In this case the overall circumstances might result in a favourable outcome to an application to admit such evidence.

35. Mr Connolly does not seek to challenge the admissibility of the fresh evidence but argues that it provides no basis for appeal. He makes realistic concessions that the evidence now available links S to the mobile phone found at the scene and that S's description resembles that of the initial descriptions of the assailant. However, he submits that generic descriptions are by their very nature generalised and the more significant identification evidence in this case is that arising from the positive identifications made by KF and EM on the identification parades. S and the appellant are "totally different in appearance" but two complainants had independently identified the appellant on the parade. The jury had been appropriately directed in accordance with *Turnbull* in 2002 and, in the absence of any appeal in 2004, may be taken to have received a similar warning in 2004. Nevertheless, both juries had convicted the appellant.

36. Mr Connolly submits that the 'cluster' of six offences was known to defence counsel in 2002/2004. There were wider considerations in play. Two of the offences took place on "either side of midnight" 23/24 August during a time when it was clear that the appellant was at large in the vicinity and alone.

37. Mr Connolly argues that S's caution in 2003 would not be admissible as evidence of his propensity to commit sexual offences in 2001, or at all. The nature of the offence he committed in 2003 was completely dissimilar to the facts of the assaults before the jury. The other information that the police held concerned "mere allegations" and carried no substantial probative value, which was necessary to render them admissible pursuant to Criminal Justice Act 2003, section 100(1)(b) (non-defendant's bad character).

38. In short, Mr Connolly submits that the mobile phone does not take the matter any further forward. The defence had made use of the fact that the mobile phone was not connected to the appellant in 2002/2004 to no avail. There was no conclusive factor with which to associate it to the offence.

Analysis

39. We have been struck by the great disparity between all the initial descriptions and details of the assailant in 2001 and the actual appearance of the appellant. Nevertheless, we acknowledge Mr Connolly's argument that a verbal articulation of an offender's appearance may well fall short of a subsequent certain recognition on an identification parade and two complainants did independently identify the appellant and convinced two juries of the reliability of their identification. Against this, and

what we find to be certainly established, is the fact of the greater similarity of S's physical appearance to all the initial descriptions provided in 2001, which would not have been known to either the complainants or the juries. Undermining Mr Connolly's 'wider considerations' point, this includes one of the complainants assaulted around midnight on 23/24 August, during which time the appellant was 'lost', and who attended at the identification parade and did not identify him as her assailant.

40. This factor certainly would not be sufficient to upset the safety of the conviction and we understand the reason why the single judge considering the application for permission to appeal in 2002 would reject it as a basis for doing so in the context of what was to all intents and purposes a textbook *Turnbull* direction. Nor do we regard it as conclusive proof that S was responsible for the assaults. However, we find it implausible to regard the question of identification as distinct from the mobile phone.

41. We agree with Mr Thomas's submission that its location, situation and condition rendered the mobile phone significant in the investigation, which is obviously how the police regarded it contemporaneously to the assault upon KF. The physical description and other known details of its likely recent handler/user make it the more so. In 2002/2004 it is understandable why the jury could dismiss the presence and potential import of the mobile phone that had been found; the gender, age and ethnic origin of its owner were unknown. However, the DNA evidence matching it to S now provides that information and makes it a crucial part of the identification process. If the present information had been accessed by the police in 2003, at a time when S's profile became available for comparison, we would be astonished if he had not been interviewed and relevant further inquiries made.

42. The information regarding the character of S is further grist to the mill of this appeal. We make clear that we do not consider that it is, of itself, determinative of S's likely involvement in the assaults or propensity to commit assaults such as those complained of by KF and EM. What is more, whilst we agree with Mr Thomas that *Braithwaite* does not establish that non-proven allegations will inevitably be regarded as without the necessary substantial probative value, this, and the issue of 'satellite litigation', would need to be argued at trial in relation to certain aspects of the information that has come to light and, as Mr Thomas frankly concedes, would not necessarily be determined in the appellant's favour.

43. However, we have come to the certain conclusion that the details of the police caution which S received in 2003 would be admissible. As Mr Thomas adopted the point, and Mr Connolly reasonably conceded it when Lavender J posited the issue, this evidence goes not to propensity, but to rebuttal of a coincidence. That is, the coincidence that another man matching the description of the assailant, who in 2003 was known to have ridden a bicycle late at night in the same area of the 2001 assaults and engaged in unlawful (in that it had the tendency to offend public morality), albeit consensual, sexual activity out of doors, just happened to drop his mobile phone, at the scene of, and proximate to the time of, the assault upon KF, who accepted that the mobile phone might have been used in the assault. This 'bad character' evidence does have substantial probative value. Moreover, S must have admitted the offence to receive a caution. The gateway for admissibility is pursuant to section 100 (1)(1)(b) of the Criminal Justice Act 2003.

44. For the purposes of this appeal, we consider it necessary in the interests of justice to admit the evidence relating to the further DNA analysis of the mobile phone and its match to S pursuant to Criminal Appeal Act 1968, section 23(1). The evidence was not available to be produced before the intervention of the CCRC and affords a ground for allowing the appeal. It would have been admissible in the proceedings. It does completely transform the landscape. The evidence that was available is given an entirely different and 'fresh' perspective.

45. We are satisfied that the uncertainty created by the fresh evidence related to the mobile phone and its probable user significantly weakens the reliability of KF's identification of the appellant and taints the reliability of EM's identification. That is, the similarities in the nature, timing and location of the assaults are overwhelming, and were relied on as such by the prosecution. The likelihood of different assailants being responsible for the two attacks is remote.

46. This important evidence was not in front of the jury. Consequently, we are not satisfied of the safety of either conviction; both will be quashed.

47. We have considered the question of retrial. We are told by Mr Connolly that no further investigation of any of the assaults is likely to occur in the interim but, nevertheless, there is said to be a public interest in trying the appellant for the offences again. We do not agree, when seen in the light of the circumstances we describe above, the age of the offences, and the fact that, although the appellant was released from the restrictions of the Hospital Order made in the criminal proceedings in 2015, there are continuing welfare issues arising from his medical condition. We refuse the application.