



Neutral Citation Number: [2021] EWCA Crim 923

Case Nos: 202000647 B4, 202000648 B4, 202000665 B4, 202000700 B4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT BRISTOL**  
**His Honour Judge Longman**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/06/2021

**Before:**

**THE RT HON THE LORD BURNETT OF MALDON**  
**LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**THE HON MR JUSTICE SWEENEY**  
and  
**THE HON MR JUSTICE FORDHAM**

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**Between:**

**IVOR**  
**GEORGE**  
**MIKE**  
**THOMAS**  
**- and -**  
**REGINA**

**Appellants**

**Respondent**

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**Mary McCarthy** (instructed by **Hansell Drew and Co**) for the **Appellant Ivor**  
**Emily Pitts** (instructed by **Hansell Drew and Co**) for the **Appellant George**  
**Adrian Chaplin** (instructed by **Gerald Armstrong and Co**) for the **Applicant Mike**  
**Heather Hope** (instructed by **Bay Advocates**) for the **Appellant Thomas**  
**Anna Vigars QC and Stephen Dent** (instructed by **The Crown Prosecution Service**) for the  
**Respondent**

Hearing date: 19 May 2021  
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**Approved Judgment**

*This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am on 18 June 2021.*

**Lord Burnett of Maldon CJ:**

1. To preserve the lifelong anonymity of the complainants in this case we shall give all participants pseudonyms. Between 23 September 2019 and 27 January 2020, the appellants Ivor, George and Thomas and the applicant Mike (collectively “the appellants”) were tried before His Honour Judge Longman and a jury on a 37 count indictment which concerned a total of 14 defendants. The case involved a large drugs supply conspiracy in a West Country town together with various offences of violence. In addition, the indictment contained counts of rape of the partner of the leading drugs conspirator by each of the appellants. We shall call him Smith and her X. The appellants were convicted of the rape of X. Smith’s half-brother was also charged with raping X but acquitted. Mike was convicted of the rape of two other women. Smith was convicted of multiple counts relating to X including aiding and abetting the rapes by the appellants, controlling or coercive behaviour contrary to section 76 of the Serious Crime Act 2015 and various sexual offences. He was also convicted of drugs offences. He was sentenced to a total of 25 years’ imprisonment.
2. Ivor was convicted of drugs offences, assault occasioning actual bodily harm, possession of ammunition without a certificate and two counts of rape of X. He was sentenced to a total of 11 years’ imprisonment. George was convicted of four counts of rape of X and sentenced to four years’ imprisonment. Thomas was convicted of one count of rape of X and sentenced to three years and six months’ imprisonment. Mike was convicted of drugs offences, two counts of rape of X and six counts involving the rape of the two other women. He pleaded guilty to a count of controlling or coercive behaviour towards one of the other women. He was sentenced to a total of 22 years’ imprisonment.
3. This case involves unusual allegations of rape concerning X. That is apparent when looking at the relatively short sentences that George and Thomas received for those offences, also reflected in the composition of the overall sentences of Ivor and Mike where the rape of X attracted an additional two years’ custody.
4. Smith got his sexual kicks from watching X have sex with his friends. She was in her early twenties and he much older. She apparently consented to engaging in sexual activity with the appellants. The issues for the jury were whether that consent was genuine and, if not, whether the appellants nonetheless reasonably believed that it was. That arises from the definition of rape in section 1 of the Sexual Offences Act 2003 and consent in section 74:

**“1. Rape**

(1) A person (A) commits an offence if—

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

...

#### **74 Consent**

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.”

5. By their verdicts relating to the counts of rape of X on which the appellants were convicted, the jury was sure that the apparent consent was not genuine for the purposes of section 74. The jury was also satisfied to the same standard that the appellants did not have a reasonable belief that X was consenting at the material times. The judge sentenced the appellants for the rape of X on the basis that they believed that X was consenting but that the belief was not reasonable. That resulted in sentences outside the guidelines.
6. The appellants Ivor, George and Thomas appeal with leave of the single judge on the ground that the judge should have acceded to submissions of no case to answer on the counts of rape of X on the basis that there was no evidence that each did not have a reasonable belief that she was consenting. Such submissions were made at the end of the prosecution case and again at the end of the defence cases. Thomas additionally submits that the verdicts in his case (acquittal on two counts of rape but conviction on one) were inconsistent and illogical. Mike relies upon the same common ground of appeal. The single judge refused leave to appeal against conviction in his case on this ground because of the bad character evidence afforded by his conviction of the rape of the two other women. The judge also refused leave on three further grounds: (a) that the judge should not have directed the jury that if they were sure that Mike was guilty of the rapes of the other two women that could provide support for the prosecution case on the rape of X; (b) that the rapes of the two other women should not have been tried with the counts relating to X; and (c) that the counts of rape of the other two women should not have been tried on the drugs indictment.
7. At the end of the hearing of the appeals and renewed application for leave to appeal we dismissed the appeals and the renewed application. These are our reasons for doing so.
8. The prosecution case against each of the appellants was that they knew Smith well and were aware of his methods of getting his way in the drugs world. They knew that there was a disparity of power in his relationship with X and they were aware that before engaging in sexual activity with each of them she needed to drink a lot of alcohol and take drugs. It should have been apparent to them that her ostensible consent was not real. None of them made any inquiry of her. Ivor himself suggested in interview that he had been groomed by Smith and in Thomas' case he overheard a conversation between Smith and X where she made clear that she was not really consenting to what

was going on, but nonetheless had sex with her. Mike was himself well aware of the coercive control and one of his other rape victims gave evidence of the control exerted over X by Smith.

9. In a series of Achieving Best Evidence interviews X explained how she met Smith and how their relationship developed. She soon discovered that he was involved in drug dealing. She described the deterioration in Smith's behaviour towards her. He became angry over minor things and if she did not do what he wanted her to do. She soon began to acquiesce in his demands such as sending him intimate videos or photographs. Despite asking him not to, Smith had showed the photographs to his friends. X said that he repeatedly mentioned that he had engaged in swinging with his ex-partner and that he wanted her to do the same. Initially she made it clear she was not interested but she later agreed to take part. Smith started to bring his friends to the house and she would have sexual intercourse with them. X said she would drink copious amounts of alcohol and take cocaine as this would make her feel more confident. She became isolated from her friends and was prevented by Smith from socialising without him. After about a year she told him that she had had enough and wanted to leave him. He threatened her and so she said she was only joking.
10. As regards Ivor, X said that she knew he and Smith were friends and that he sold drugs for Smith. She thought he was a nice, genuine guy and knew he was married. She had initially refused to have sex with him but soon acquiesced to stop Smith from getting angry.
11. X said that she went to an hotel with Smith to meet George where it had been arranged that she would have sex with George. She was nervous and did not know him. They spent some time in the swimming pool. Smith made her touch George's penis. Smith wanted her to start having sex with George and he would join them. She and George went to the room and had sex but it was over very quickly for George before Smith arrived. Smith lost his temper and George left. X was made to have sex with George on another occasion at a different location. He then moved in with her and Smith where she had to have sex with him on numerous occasions.
12. X said that she had sexual intercourse with Mike on numerous occasions. On one occasion he came to an hotel where she was staying with Smith. He and Mike had arranged that Mike would enter the room through the window, have sex with her and then leave. He had sex with her on many other occasions.
13. Thomas lived with her and Smith for a short time. X was made to have sex with him on numerous occasions. She said that on one occasion she argued with Smith, called him a pervert and said that she felt disgusting having to have sex with his friends. She said Thomas told her that he had heard everything and felt bad for her, but he still subsequently had sex with her after that.
14. X said that she had not wanted to have sex with any of the other men and that Smith was aware of this. She had not previously reported the incidents as she had been too scared of him. X said that in September 2017 after an argument, she told Smith that she was leaving. He and his brothers tried to stop her from leaving the room and she was subjected to violence. She went to her grandmother's house and stayed there for a while. She returned to Smith's home to collect her things. He was apologetic and begged her to resume the relationship. She agreed and things went well for a while. His behaviour

soon returned to how it had been before. She tried to leave but he prevented her. He set her up in business which trapped her in the relationship. Every time she threatened to leave, he said that she would have to repay the money.

15. The other two women gave detailed evidence about Mike's conduct and his raping them.
16. Ivor explained that Smith was a regular in the restaurant where he worked. He knew Smith well and got to know X with whom he got on. He described X and Smith as a happy and affectionate couple. He knew they were swingers. It was X who suggested that they have a threesome. All sexual contact with her was consensual.
17. George had known Smith for 25 years. He met X when she started her relationship with Smith. He thought they were a loving couple. He engaged in a threesome with them at their request. X dressed in lingerie and initiated the sexual activity. She appeared to be happy and confident and there was nothing to make him think that she was uncomfortable or upset. He had spent time with them both during normal day-to-day activities and had never witnessed Smith shouting at X or being abusive towards her. He had sex with X on other occasions but there was nothing to suggest that she was not consenting to what occurred. George knew that X liked to drink alcohol but did not think she was heavily intoxicated when they were having sex. He said there were a number of times when X did not want to have sex with him. He and Smith respected her wishes.
18. Thomas explained that he thought that Smith and X had a good relationship. They suggested a threesome and although he was nervous he was keen to try it. He had sexual intercourse with X on two occasions with Smith's knowledge. He heard X argue with Smith on one occasion, but about the amount that she was drinking and not sexual activity. This was however the first occasion that he had heard them argue. He did not witness anything that would make him think that X was unhappy. He knew that X had had sex with Ivan but did not know about the other males.
19. Mike accepted in evidence that he pleaded guilty to the offence of controlling and coercive behaviour against one of the other women he was accused of raping. He maintained that all sexual contact with both of the other women was consensual. He described his visits to Smith and how he got to know X well. Smith invited him to 'swing' with the two of them. Mike agreed to do so and had sexual intercourse with X while Smith was present on three occasions for. He said that X was dressed in lingerie, looked immaculate and it was clear that she was consenting as she was actively participating in the sexual activity.

### **Mike's Discrete Grounds**

20. Initially, the counts against Mike relating to the two other women had been the subject of separate indictments. He does not object to the joining of those counts in a single indictment but submits that the judge was wrong to join the allegations concerning those women with the drugs count on which counts against X also featured. He suggested that it would be unfair to try him on an all-encompassing indictment. At the time of ordering joinder, there was a question whether one of the other women would attend to give evidence. In that event her evidence was to be adduced as hearsay. Mike relied

upon her possible non-attendance as an argument against joinder because it was said her fear arose from being a witness in the drugs case.

21. The judge correctly referred to Criminal Procedure Rule 3.21 and part 10 of the Criminal Practice Direction on joinder. He noted that it was generally undesirable for many counts to be tried at the same time but was nonetheless satisfied that joinder was appropriate. The two women had both been in a relationship with Mike and both had alleged that he had behaved in a controlling manner towards them including in the context of sexual offending. One could give evidence about the drugs offending including about the involvement of several the co-accused and of the relationship between Smith and X.
22. The judge ruled that the evidence from one of the women in relation to the drug offending was admissible in respect of the main indictment. He concluded that there was sufficient similarity between Mike's relationship with all three women to justify a joint trial. Lastly, he said there was the potential that the evidence of the two women would be cross-admissible to lend support to each other and to the evidence of X.
23. On behalf of Mike, Mr Chaplin submits that joining the counts rendered the proceedings unfair and all the rape convictions unsafe. Moreover, the convictions of rape of the two other women leant no support to the prosecution case relating to X.
24. Refusing leave to appeal, the single judge said this about joinder:

“The Judge did not err in ruling that the rape counts and the drug offences could properly be tried together. If they had been tried separately, this would have been unfair to the prosecution as only a partial picture could have been presented to the jury. Further, the jury would have been deprived of an opportunity to appreciate the full context of the evidence from three complainants in the case. It was not likely that severing the allegations involving [the woman] would have enhanced the possibility of her attending court to be cross-examined.”
25. In relation to cross admissibility, he added:

“The jury were properly directed in relation to the issue of cross admissibility. Although his relationship with each complainant differed, their evidence made it clear that [Mike] had given no regard as to whether they consented to sex with him. The jury were provided with written directions setting out how they should treat the evidence and were correctly directed that the allegation from [X] could not be used to support the allegation made in the counts [relating to the two women]... [T]he prosecution's primary submission [was] that [Mike] had a propensity to commit offences of this nature and this was a relevant issue for the jury to consider in this case.”
26. We agree with this reasoning on these points.

27. In the course of oral argument Mr Chaplin raised a new point in connection with the way in which the judge directed the jury on the propensity evidence. The judge's direction did not contain the usual explicit direction that the jury should not convict wholly or mainly on this evidence. This apparent failing was not picked up by any of the large number of experienced counsel involved in the trial, including Mr Chaplin himself, either when the directions were circulated in writing by the judge for comment nor when he delivered them. That is not surprising. The whole context of the direction given by the judge was that the two other rapes, if the jury found them proved, might add something to the prosecution case against Mike relating to X. There was no question of its being more than a make-weight in his case. The direction was tailored for the circumstances of the case and, rightly, was not formulaic.

### **No Case to Answer: Absence of Reasonable Belief in Consent**

28. At trial it was argued that there was no evidence that X did not consent and also that the prosecution could not prove the absence of reasonable belief in consent. It is only the latter which is pursued in these appeals. In his ruling at the end of the prosecution case, having dealt with the question of X's consent, the judge turned to reasonable belief.

“The issue of reasonable belief is a separate one. All of these Defendants have put forward in oral and written argument reasons why it is said they were entitled to assume, in the absence of any enquiry or steps taken to ascertain whether [X] was consenting or not, that she was consenting. Those submissions, detailed as they were, have been addressed in response in some detail by... the Prosecution and I have considered all the arguments very carefully but all of these Defendants knew [Smith] and would have been able to assess the dynamics of the relationship between him and the much younger [X], a dynamic which she herself described as one where she was subjected to his control, as reflected in the allegation in count 5 [controlling or coercive behaviour] ... Section 1(2) of the Sexual Offences Act does not place on a Defendant a positive requirement to take steps to ascertain whether the Complainant consents, and whether any steps are required beyond the immediate circumstances that present themselves will always be case specific, but in my judgment, even taking into account [X's] evidence of how she and [Smith] presented themselves to others, it is open to a jury properly to conclude on the evidence in this case that these Defendants would have had such an awareness of the dynamics of the relationship between them that any belief in consent formed in the absence of a specific enquiry of [X] as to whether she was consenting or not was not reasonable. There is no evidence that any of them did make such an enquiry. Whether the Jury do reach such a conclusion is of course, a matter for them. In those circumstances, there is, in my judgment, sufficient evidence of lack of consent and lack of reasonable belief in consent in respect of each of these Defendants for all these

counts of rape to be left to the Jury and for that reason, the submissions of no case to answer are refused.”

29. The submission was renewed at the end of the defence cases. In Ivor’s case the prosecution relied upon the dominance and control Smith exerted over him and suggested that “he was *obliged* to ensure that [X] was a free agent and was not being similarly controlled and dominated”. The judge observed that at first blush this might be thought to be reversing the burden of proof, rather than advert to a factor identified as relevant in section 1(2) of the 2003 Act, but that he had “well in mind where the burden of proof lies.” He then turned to the renewed submission of no case and said:

“In part, the renewed submissions are based on the manner in which the respective Defendants were or were not cross-examined or challenged as to their evidence and in part, they repeat or amplify particular points raised at the conclusion of the Prosecution case, but having considered the new submissions, I am not persuaded that my initial ruling was wrong in respect of each Defendant or that it now needs to be amended or that I should come to a different conclusion in light of any new evidence given the way in which Defendants were or were not cross-examined on behalf of the Prosecution. In my judgment, there is evidence which can, and should, properly be left to the Jury in respect of these Defendants and these counts and the submissions of no case [to answer] are again refused.”

The judge’s renewed conclusion on this issue was formed having heard the evidence of the appellants as well as that of X and others who spoke to the dynamics of the relationship she had with Smith.

30. The appellants submit that, taking the evidence at its highest, there was nothing capable of proving the absence of a reasonable belief in consent. The behaviour of X towards each of them was not such as to put them on inquiry. Despite the judge being alert to the burden of proof (as we have quoted) the appellants submit that his ruling effectively reversed it.
31. The last point is contradicted by the judge’s express reference to the burden of proof and more extensive treatment of the issue in his first ruling. Moreover, there is no criticism of the way in which he summed up this issue to the jury. The law does not require a defendant to make inquiries about consent even when the broad circumstances might be thought to put him on inquiry, but section 1(2) of the 2003 Act expressly refers to the “steps A has taken to ascertain whether B consents” as a relevant factor. That was the context in which the prosecution referred to the matter in its submissions and the judge considered it.
32. The prosecution submitted to the judge that “the rape counts against each defendant should ... be judged against the background of what each man knew about [Smith’s] conduct.” By that they meant, “[Smith] is demonstrably a man of violence and a man who seeks to dominate. That much was well-known to each of the defendants ...”. That was the judge’s starting point, and for good reason. Smith was a man who ran his crime



business with a rod of iron. The jury had extensive evidence from X and others that he used violence and intimidation to get his way and believed that “he ran the town”. She described Ivor, who sold drugs for Smith, as one of his “closest mates”. George had known Smith since they were children. Thomas grew up with him. Mike was one of his dealers. There was evidence that Mike and Ivor had direct knowledge of Smith’s violent and controlling ways and, as we have noted, in Ivor’s case that he was himself the subject of some coercion relating to the sexual activity. Underlying it all was the clear evidence of coercive control by Smith of X. There was evidence that the reality was, as X said, that “he was just passing me around his friends like a sex doll.” In interview she said that she did not know whether they realised she was not consenting.

33. The judge also had regard to the evidence of the relationship between Smith and X and how she presented to the appellants. The appellants point to their appearance as a normal couple and X’s evidence that she could not imagine that Smith had told them “she doesn’t want to do it”, and that “they probably thought that I was up for it anyway”. But she explained that she needed to be heavily intoxicated on alcohol and cocaine to take part in the group sex. There was the evidence of one of the other women who Mike raped of the obvious manipulation by Smith of X; and she was less exposed to the true position than any of the appellants. They ate in Ivor’s place of work once a week; he delivered take-aways to them more often; George had lived with them as did Thomas. He was in their home for a couple of weeks before first having sex with X. Mike was a regular visitor and had observed the relationship more closely than had the other woman he raped.
34. There was evidence that Ivor was himself directly interwoven into both the drug dealing and the violent coercion and control which characterised the operation. That interweaving extended to the evidence relating to the assault on another man in which Ivor was present and had made sure that the victim was at home to enable the assault to take place. The victim was beaten unconscious. There was also his own evidence of a degree of coercion by Smith in involving him in the sexual activity.
35. George lived with Smith and X and observed them on a day-to-day basis. When the first sexual encounter did not go the way that Smith had planned it, such was his anger and George’s own fear of Smith, that he ran away. George moved into the house at a time when, on the evidence, Smith was dominating and bullying X. There was the evidence of a car journey when X refused oral sex because she “could not do that unless drunk”. There was evidence of an occasion when X tried to refuse to have sex with George in the morning while no longer intoxicated. The jury had evidence of the initial sexual contact with X at the swimming pool at the hotel where she was “nervous” and where Smith was in control and giving commands.
36. Mike knew the couple well and the reality of the imbalance in their relationship. Thomas was a long-standing friend of Smith’s who had moved in to live with the couple and had observed them – including X in what would have been a sober state – over the course of at least a week in a domestic setting. In his case there was the evidence of the argument he overheard. X said that she had clearly communicated her lack of consent and that Thomas had confirmed that he had overheard the whole argument, but that he had still gone to have sex with after that. The jury would have to consider what to make of that evidence, and to consider the position both prior to and after the argument.

37. We are satisfied that the judge was right to leave the question of consent, including reasonable belief, to the jury. The evidence which went to the question of reasonable belief was made up of a mosaic of individual pieces from a wide range of witnesses. It required the jury to evaluate those pieces of evidence in the context of a broad picture to determine whether the prosecution had proved the absence of reasonable belief. It is striking that the jury acquitted Smith's half-brother, in respect of whom the evidence of awareness of the true position was different, and also acquitted Thomas of two counts of rape. In respect of the appellants (including Thomas on his single conviction for rape) the evidence was there which entitled the jury to come to the conclusions in did.
38. On behalf of George, Ms Pitts adds two further points. First, she submits that the judge did not give the jury an adequate direction on the timing of the belief in consent. Secondly, she submits that there was a lack of clarity about the basis upon which the prosecution was seeking a conviction. We are satisfied that there is nothing in these points. The Judge directed the jury that they should consider their verdict on each count and in relation to each defendant separately. The jury were directed to consider each incident separately including the complainant, the defendant and the occasion. The jury was aware of the relevant time of reasonable belief in consent, namely at the point of penetration. Moreover, the directions properly identified what it was the prosecution had to prove.
39. On behalf of Thomas Ms Hope submits (a) that the count of rape on which he was convicted (count 25) was not properly particularised by the prosecution; (b) that it is not clear upon what basis the jury reach their verdicts that he was guilty on that count but not guilty on the other two counts (count 24 and count 26); and (c) that the jury's verdicts are inconsistent. As we have already explained, a feature of the evidence in relation to Thomas was the argument he overheard and what X said she made clear. As X had said of Thomas in interview, referring to the argument he overheard: "one of them that was staying with us at one point knew I didn't like it and even he felt uncomfortable. But he just did it". It was proper for the jury to have before them the sequence of counts that they did. There was no lack of clarity. The jury considered the evidence, including the evidence of the argument Thomas overheard. An obvious explanation for the verdicts is that the jury considered that the prosecution had not proved an absence of reasonable belief before the argument but did so for what was a single instance of sexual intercourse thereafter.

## **Conclusion**

40. The judge was right to leave the counts of rape relating to X to the jury. For the reasons we have given, we dismissed the appeals and the renewed application for leave to appeal.