IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202200296/B5

[2022] EWCA CRIM 1473

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 20 October 2022

Before:

LADY JUSTICE SIMLER DBE
MRS JUSTICE McGOWAN DBE
MRS JUSTICE TIPPLES DBE

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v

XY

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MR S AHMED appeared on behalf of the Applicant.
MR P CAVIN KC appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. The prohibition applies unless waived or lifted in accordance with section 3 of the Act. In order to avoid identification of the victim, we have found it necessary to anonymise other names, including that of the applicant.

2. On 20 December 2021, in the Crown Court at Wolverhampton before HHJ Campbell and a jury, the applicant was convicted of sexual activity with a child family member contrary to section 25(1) of the Sexual Offences Act 2003 (count 1). He was acquitted at the same trial of rape of another complainant (count 2). He was sentenced to seven years' imprisonment on count 1 and required to comply with the notification provisions of Part 2 of the 2003 Act on an indefinite basis. Other appropriate ancillary orders were made.

3. The applicant applies for a short extension of time of eight days for leave to appeal against conviction. The applications have been referred to the full court by the single judge with an application for leave, pursuant to section 23 of the Criminal Appeal Act 1968, to introduce fresh evidence from the victim of the count 1 offence (to whom we shall refer as "GK") relating to DNA and mobile phone image evidence.

4. The applicant's own grounds of appeal were lodged eight days out of time. Extension of time reasons were requested by the Registrar but never provided by the applicant who was then acting in person. Approximately five weeks later, grounds of appeal settled by counsel

were lodged stating that a letter from GK, to which we shall refer below had not come to the attention of the applicant's lawyers until February 2022. The letter was reviewed by the applicant's defence team. They took instructions from the applicant and that is the explanation for the delay. The delay is said to have been compounded by Covid restrictions affecting the prison estate.

The facts

5. The applicant was 51 at the time of the offence. He is the stepfather of GK who was 16 at the relevant time. In 2018 the relationship between the applicant and GK's mother, with whom he had fathered three other children, broke down and he moved to London. GK continued to live with her mother in Wolverhampton. She would visit London during school holidays and on occasion the applicant travelled to Wolverhampton. On the evening of 24 October 2020, GK reported that she had been raped by a stranger in the street in Wolverhampton. She telephoned her mother and the police were informed that evening. Police enquiries found no independent evidence of stranger rape and nobody was arrested or charged. However, her complaint led to a forensic medical examination, in the presence of her mother, her aunt and a police officer, at a sexual assault referral centre on the afternoon of 25 October. GK had not bathed or showered between the time of her reported rape and that medical examination.

6. The examination of her anogenital region was normal and showed no marks or injuries. Her vagina was internally examined and that too showed no injuries or abnormalities. Swabs were taken from her high and low vagina. They were transported securely for forensic analysis by a forensic scientist, Charlotte Hargreaves. Semen was detected on the swabs. The laboratory had been provided with accurate DNA profiles of the applicant and others and following DNA analysis, those swabs were found to be a match with the applicant's

profile. He was arrested on the evening of 30 October 2020.

7. His iPhone was seized and examined. There was an image found on the phone of GK wearing a bra with nothing on the lower half of her body, with a small image of the applicant visible in the top left-hand corner. This was a screenshot image created by the user of the phone on 25 August 2020. At the time the image was taken an outgoing FaceTime call to GK was taking place. The file, which had been deleted by the user on 30 September and marked as "trash", was located in a default gallery application folder. The image had been specifically accessed 14 times since its creation.

8. A second image showed GK naked. That image was created by the user on 28 August 2020, again by way of a screenshot. This too was stored in the same folder as the previous image but had not been deleted. That image had been accessed 15 times since creation and had been moved to a hidden album so that it could not be seen when the default gallery view was opened.

9. There was an image of a single clear blue pregnancy test kit. This was not created by the phone user but had been received as an image file from a WhatsApp application. It was created on 18 October 2020. The message containing the image could not be identified, indicating that it had been deleted. The image itself had also been deleted by the phone user on 23 October and marked as "trash" but was still accessible via the recently deleted folder. That image had been accessed once via the gallery since creation. There was another image of two clear blue pregnancy test kits in near identical circumstances to those we have just described.

10. Finally, there was a 25 second video that was an amalgam of images of GK with a song superimposed on the images and two photographs of her wearing a dress, though it is unclear to us whether that final image was before the jury.

11. In interview the applicant spoke about his good relationship with GK and how she regarded him as her father. When asked questions about the DNA findings and later, the photographs on his phone, he made no comment. He gave no explanation as to how the first two screenshots came into existence. GK did not give evidence at the applicant's trial.

12. Count 2 involved a different complainant. The jury were properly directed that evidence given by that complainant (to whom we shall refer as "MN") in respect of GK was irrelevant to the jury's consideration of count 1. In those circumstances, it is unnecessary to summarise the evidence relating to count 2 save to the limited extent that follows. MN alleged that the applicant used a sex toy on her during the course of the alleged rape on 25 April 2021. Following that allegation the police seized a vibrator that broadly fitted the description given by MN from GK's mother's home address in Wolverhampton. Police had questioned GK's mother about whether a vibrator was present in the house. GK's mother said that there was one and produced the vibrator from a chest of drawers in the bedroom.

13. Charlotte Hargreaves gave evidence at trial. She said that semen was detected on both the high and low vaginal swabs taken from GK as well as on her underwear. Sperm heads were detected. The semen found on the high swabs was sent for DNA profiling. A full and clear major profile was recovered from the high swabs that matched the corresponding components of the applicant's profile. She said it was at least 1 billion times more likely that the semen came from the applicant rather than someone other than him or unrelated to him.

14. Ms Hargreaves explained that as a general principle, when there was ejaculation into the vagina there was good or very good expectation of the recovery of semen within one to two days of that ejaculation. After three to four days there was a greater expectation of there being some drainage from the vagina and the chance of recovering semen was reduced. If

however there had been full ejaculation one would still expect to find semen in the vagina during this period. After four to seven days the expectation was much lower and after seven days very low.

15. She explained that the amount of semen detected on GK was consistent with intercourse having taken place a few days prior to the swabs having been taken. She could not be precise, but the amount of semen found was not as much as might have been seen if ejaculation had occurred one day earlier, although this could not be ruled out. It could have been up to four days previously. She said her findings provided extremely strong support for the fact that the applicant had sexual activity with GK rather than the fact that he had not when comparing those two propositions. It was, she said, incredibly unlikely that one would get the same findings if there had been no vaginal intercourse.

15. She also examined the vibrator seized in relation to count 2. Semen was found on the head of the vibrator. The DNA taken from the semen matched the applicant's profile. One sample of DNA from the head of the vibrator was a match for GK's mother. Two further minor profiles were obtained from the head but there was no evidence that they originated from either GK's mother or indeed from MN. From the control buttons DNA from at least two people was obtained. One person could have been GK's mother but there was nothing to suggest that the other DNA profile was that of either the applicant or MN. There was at that time no DNA profile sample from GK available.

17. Ms Hargreaves was asked before the trial to consider the defence case statement which set out the possibility that GK had used a sex toy used by the applicant and her mother, and that semen recovered from the swabs might have been transferred in that way. Ms Hargreaves provided a further statement in which she reiterated her view that the amount of semen matching the applicant's DNA on the high vaginal swab was "indicative of having been

deposited in the vagina within a few days prior to the recovery of the swabs on 25 October 2020". As for the vibrator she said:

> "If [GK] inserted a sex toy into her own vagina at a time when it was stained with a sufficient quantity of the defendant's semen, then as a result his semen would likely be transferred into her vagina."

18. In cross-examination at trial Ms Hargreaves was asked to consider the possibility that an object such as a vibrator with the applicant's semen on it had been inserted into GK and whether that might account for the presence of semen on the high vaginal swabs with the applicant's DNA. She said if there was a source of enough semen and a mechanism for transferring it then a transfer could theoretically occur. She could not however answer questions about the factual likelihood of that situation actually having happened. She dealt with the length of time that DNA can be found on an object and said it depended on the nature of the object and what happened to that object. In respect of a plastic object, if the bodily fluid dried out on it, then it would remain unless the object was handled, wiped or washed. If wiped or washed the bodily fluid would be likely removed. Cleaning products were likely to remove any remaining deposits of DNA.

19. The applicant's defence case was one of denial of any wrongdoing. In his defence case statement, he said that he had not penetrated the vagina of GK and was at a loss as to why there might be a match between his DNA and that which was recovered. He said that he had not at any time had a sexual relationship with her. He said that there was "a pink sex toy with a white head" within the house that was used by him and GK's mother. GK was aware of the sex toy as he would leave it lying around in the bedroom and GK would have seen it. The defence case statement continued that he believed at the time she thought it

was a karaoke microphone and not a sex toy. The case statement said that he would assert that GK must have used that sex toy. If indeed his DNA and semen had been recovered from the swabs, it was possible that it may have been transferred from him or his partner onto the sex toy and from the sex toy to GK.

20. At trial the applicant gave evidence that was consistent with his defence case. He described meeting GK when she was two or three years old. He described a normal family relationship in which he treated her as his daughter. He said that in 2020 they had a very good father/daughter relationship. They spoke a lot by telephone because she confided in him and he gave her advice. He explained that GK used his phone and made and played video clips on it. He accepted that he was responsible for taking the first image of GK wearing a bra but nothing else, but said that he had done so by accident. He knew nothing about technology and during the course of a video call was trying to find the button on the phone to black out the image of GK half-naked, which he did not want to see because he was her father. He took the screenshot instead by accident. He thought that the image had been viewed 14 times by GK while she was using his phone and while she was playing with it. He said he had never had sexual intercourse with GK. He could not understand how his semen came to be found in her vagina and therefore wondered whether GK had used the sex toy that belonged to him.

22. He explained that he answered "no comment" to some of the questions asked of him in interview on advice of his legal adviser. He had been in shock at the time because of the nature of the allegation and his adviser felt that he was angry and advised him to make no comment so as to calm down.

23. In cross-examination, he said that with the exception of that first image, all other images on his phone were created by GK. She was distributing photos on both his phone and her

mother's phone because her own phone was quite full. The naked screenshot was as a result of GK phoning him to tell him something at a time when she was about to have a bath. He asked her why she was naked but she was unable to hear him. The screenshot was not taken until 11 minutes into the call because he could not see her at first as there were connection problems. In respect of the completely naked screenshot, he was not responsible for taking that one. He did not know how to use the phone. He had never seen the image until the day he was arrested, and he thought it possible that GK had taken the picture.

24. He reiterated his theory in cross-examination about how his semen may have ended up on the vaginal swabs. He explained that the sex toy belonged to him, and that he took it with him to Wolverhampton when he went to stay there for two or three weeks. He said that it was not working anymore and so he left it behind when he left. When he finished with it, he left it in GK's mother's drawer as he had been sleeping in her bedroom although he was not having sex with her. Sometimes he cleaned it, sometimes he did not. He said he had never seen GK with the vibrator and he had never shown it to her. He did not have an explanation for who had sent him the images of the pregnancy test but thought it might have been GK's mother. He had bought test kits for someone to take to his younger sister in the Ivory Coast.

The letter of 13 January 2022

25. On 17 January 2022, prior to receipt of the application for permission to appeal against conviction, a letter dated 13 January 2022 was received in the Criminal Appeal Office. It purported to be from and signed by GK. It was addressed to Wolverhampton Crown Court. The Registrar made appropriate enquiries of the Crown Prosecution Service and following these, on 16 February a copy of the letter was sent to the applicant who was then acting in

person. He was told that if he wished to rely on the letter, he should lodge a further ground of appeal and a completed Form W by no later than 2 March, although that deadline was subsequently extended. He was advised he should seek independent legal advice before making any attempt to contact GK. A letter was also sent to GK acknowledging receipt of her letter but explaining that the Registrar could not accept letters or statements lodged by third parties.

26. On 8 March the applicant's trial representatives lodged a further ground of appeal dated 4 March founded on the letter from GK. The grounds were accompanied by a copy of the letter. The date and contents of the letter were otherwise identical to the copy that had been sent directly to the Criminal Appeal Office. The applicant's solicitors were directed to and did lodge a completed Form W in respect of GK. The form included an application for a witness order, and in due course a witness order was made on a provisional basis.

27. On 12 October a witness statement signed by GK was lodged in support of this application. The witness statement does not explain or provide any information as to how GK came to write the letter or why she did not give evidence at trial and no Gogana statement was lodged with the application.

28. The signed witness statement from GK dated 12 October 2022 explains that GK was asked repeatedly by police for an explanation of how her father's DNA could have been in her vagina. It continues:

> "I did not feel comfortable with telling the police anything as they kept saying I was lying and that I was in a relationship with my stepdad. I always thought my stepdad would be found not guilty as he could prove his innocence through the land of the law. Since learning he was being sentenced for something he hasn't done, I only feel it is fair I state how his semen could have been found in my vagina."

She continued that she regularly spent time in London with her siblings who lived with the applicant there, and:

> "The week before 24 October I was staying in London with my siblings and stepdad ... As I was bored and alone in the house I would often search my stepdad's drawers. I found a purple vibrator behind his cupboard and started to use it to pleasure myself. I remember using it last a day before I was raped. I clearly remember the last time I used it. It was dirty but I used it any way. I used it on the day we travelled back to Wolverhampton and we travelled back on 23 October 2020. I didn't think of washing it or using a wet wipe like I usually did as I knew my stepdad was due to be back from work soon and I wanted to use it before he got back. I used it and put it back where it was.
>
> I did not feel comfortable telling the police this as I was 16 years of age and sexual thoughts and desires is not encouraged in my religion."

29. In relation to the images on the iPhone, she explained that she told police that her dad did not know how to use an iPhone properly and must have taken them by mistake. She was telephoned by him as he was getting off the bus and he told her not to come on to FaceTime with him with no clothes (that concerned the first image). She explained in relation to other pictures found of her on his telephone that they were sent by a man named Brendon. Brendon was a friend of the applicant, and they shared a house. She and Brendon were not in a relationship but spoke behind her stepfather's back and she felt pressured to speak to Brendon and to send him pictures. She would speak to Brendon on her stepdad's phone. Brendon did not have a phone and that is why he called her from her stepdad's phone. She remembered him asking for pictures and her telling him that she was too scared to send him pictures as he was using her stepdad's phone. He told her that her stepdad would allow him to have the phone in his room in the evenings as he would receive calls from his own family, and he said he would delete the pictures and promised to do so. She did not like Brendon and does not know why she sent him pictures or spoke to him. She felt pressured at the

time. She did not tell her mum about this as she was afraid she would not be allowed to go to London.

The applications

30. The applicant has been represented by Mr Ahmed who was trial counsel. In writing Mr Ahmed made clear that he made no criticism of the legal directions given by the judge or of his summing-up. There is and could be no complaint about either. Rather the application is entirely predicated on what he asserted is fresh evidence in the form of the letter dated 13 January and the witness statement dated 12 October 2022. These documents provide an explanation as to how the applicant's semen came to be detected on swabs of GK's vagina and a compelling explanation for images found on the applicant's phone.

31. Mr Ahmed accepted and apologised for the absence of any explanation as to how the letter came to be written in the form it was, or as to how and why GK was not called to give the evidence now relied on at trial. Nonetheless, he explained that the applicant did not wish to expose his stepdaughter to criminal proceedings by calling her as a witness. The applicant had speculated that she may have used a sex toy left in Wolverhampton and he gave that explanation to the jury, hoping it would be accepted. Although his solicitors had originally sought to establish contact with GK following the transfer of a representation order to new solicitors before trial, contact with GK was not pursued. We note that privilege has not been waived and we have not been provided with a full and appropriate explanation in relation to all of these matters.

32. Mr Ahmed told us that the solicitors instructed at trial and who now instruct him were unaware of the 13 January letter until they were contacted by the Registrar. He was instructed subsequently to draft grounds of appeal as trial counsel and did so.

33. So far as the substance of the evidence is concerned, Mr Ahmed submitted that the evidence

satisfied the criteria in section 23 of the 1968 Act. First, the evidence is credible and capable of belief. The letter was written by GK herself and sent directly to the court and it provides an explanation as to why it was sent.

34. Secondly, the evidence gives rise to an arguable ground of appeal because it provides an actual explanation for the forensic findings upon which the prosecution relied at trial. At trial the theory advanced by the applicant to explain the presence of his semen in GK's vagina was a theory only. Moreover, it was the applicant's belief that the vibrator left in Wolverhampton may have been used. In fact, as a result of GK's letter and witness statement, it is now clear that it was a vibrator in London that was used. Mr Ahmed accepted that the quantity found on the vibrator in Wolverhampton could not have explained the semen found on the high vaginal and low vaginal swabs together with the underwear, but he submitted that the "London vibrator" has never been examined. GK's evidence is admissible and credible, and provides an explanation for the findings.

35. Finally, there is a reasonable explanation for the failure to adduce the evidence now relied on. GK is a young woman in a close familial relationship with the applicant and it is unsurprising that the applicant would not wish to expose her to the trauma of a criminal trial.

36. In the absence of an explanation from GK at trial as to how the applicant's semen was found within her vagina, the jury would inevitably have placed substantial reliance on the DNA evidence from the expert. That evidence was described as "extremely strong". The absence of any explanation from GK diminished the defence case and renders the conviction arguably unsafe.

37. Although there were further points made by the applicant in his own written grounds of appeal, including complaints about failure in disclosure and evidence not being shown to him, together with a complaint that the judge made a mistake in the summing up and was

pushing the jury to find the applicant guilty, those grounds were not pursued or developed by Mr Ahmed. A third ground included in the applicant's own grounds complained about the quality of his representation by the trial defence team. That ground was abandoned by him.

38. The prosecution oppose the applications and have lodged a Respondent's Notice and grounds of opposition. Developing those, Mr Cavin KC submitted that GK was available at trial and the evidence is simply not fresh evidence. Whatever else she said, GK could have been proofed and called at trial to say that she had never had sexual intercourse with him. GK was not viewed by the prosecution as a truthful witness. Mr Cavin drew our attention to a witness statement, albeit not before the jury, from a police officer, Rebecca Jones, dated 21 May 2021. She described a visit with GK to discuss the possibility of her being a victim of sexual abuse and grooming by her stepfather (the applicant). Rebecca Jones said this:

> "I spoke to [GK] to try to see if she would speak to me about any sexual abuse that I suspected had taken place with her stepfather. I informed [GK] that [MN] had stated that she had tried to encourage [MN] and her friend to have sex with her stepfather prior to inviting her to visit the house. I told [GK] that I was concerned her stepfather was using her and her friends for sex and sexual activity. ... [GK] was tearful and started to open up. [GK] confirmed sexual activity with [her stepfather] but provided no detail of any specific incidents. [GK] stated that she knew it was sperm that was found in her vagina and said that sperm would be there because of sex ... [GK] states that her father is a good man and she loves him. [GK] stated that she was unable to speak freely at home and would rather speak in private away from the house..."

39. Mr Cavin submitted that the failure even now to explain how the new statement has come about gives rise to considerable concern in all of those circumstances. Moreover, the evidence is itself not capable of belief. The suggestion that the applicant pleasured himself with a vibrator leaving sufficient semen on it, and it was then used by GK is not credible.

Conclusions

40. We have considered the arguments based on the asserted fresh evidence but are in no doubt that the evidence now relied on does not come close to satisfying the criteria in section 23 of the 1968 Act. It is not fresh evidence at all, and we decline to receive it.

41. First, there is no reasonable explanation for the failure to adduce the evidence from GK at trial. GK's letter says that she was never comfortable to share with police the fact that she had used the vibrator. She was 17 and she was ashamed. The letter does not explain why she did not give evidence at trial, even to deny having had sex with the applicant. The applicant himself has merely indicated that he wished not to expose GK to criminal proceedings. It is significant, in our judgment, that there is nothing to suggest that GK was unavailable to be called as a witness or was unwilling to be a witness. This is not a case where there was no avenue for the instructed solicitors to obtain a proof from her had they chosen to do so, and the applicant has not waived privilege or explained what the trial strategy was in this regard. Nor is this a case where the substance of the evidence or the witness' existence were unknown. The time for calling GK's evidence was at trial. To await conviction and then appeal on the basis of evidence that was plainly available but for whatever reason the defence team chose not to cal,l is not a permissible course to take.

42. The Form W has not been completed in accordance with the relevant guidance notes and there has been a failure to comply with the Gogana requirements. There is no supporting witness statement or affidavit from the applicant's solicitors explaining how the evidence has now been obtained and, more significantly, why the witness was or was not approached to give evidence at trial and came not to be called as a witness at the trial.

43. In any event the evidence now provided by GK was front and centre of the case run at trial by the defence. Indeed, it was the theory put forward by the applicant himself in his defence

case statement. That defence case statement was explored with Charlotte Hargreaves before the trial. Ms Hargreaves gave evidence in relation to the possibility of innocent transfer by means of a vibrator and that evidence was the subject of cross-examination. The evidence was summed up for the jury by the judge who were told about the possibility of transfer if there is a source and a mechanism for transfer.

44. The applicant's case was plainly rejected by the jury as an explanation for the presence of the applicant's semen on 25 October 2020. We find this unsurprising. A considerable quantity of semen would have to have been left on the head of the vibrator for it to account for the high vaginal semen, low vaginal semen and the semen found in GK's knickers. These were all indicative of recent ejaculation from intercourse and associated drainage. For the vibrator to explain those results, would have required a very considerable quantity of semen to have been left on it. This is fanciful. We are not satisfied that the proposed evidence is credible. It certainly does not support the proposition that the conviction is arguably even unsafe.

45. In these circumstances, we have concluded that it is neither necessary nor expedient in the interests of justice for the evidence from GK to be adduced on this application for leave to appeal.

46. We add this in relation to the approach adopted in relation to this application. In R v Kunwar Ajit Singh [2017] EWCA Crim 466, [2018] 1 WLR 1425, this court referred to the fact that applications to adduce fresh evidence were becoming increasingly prevalent and that on close analysis many were entirely unmeritorious. They were taking up a considerable amount of the limited time and resources available to this court. That position pertains today. In Singh (Kunwar) Hallett LJ made a number of recommendations. It appears to us that those recommendations may not be being followed and it is therefore

expedient to repeat them. They are as follows:

> "50. First, single judges faced with an application for leave to appeal based on fresh evidence, before making any decision, should inquire whether privilege has been waived and if not, an explanation should be provided as to why it is not necessary.
>
> 51. Second, if an application reaches the single judge without a Respondent's notice and the single judge would be assisted by one, the single judge should direct the Respondents to consider the application and submit a response.
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> 52. Third, the single judge should not simply refer an application based on fresh evidence to the full court without any consideration. Once the single judge has ascertained the position from trial representatives and the respondent, he or she may well be in a position to determine whether the application is potentially arguable. If it is not, the application can be rejected at that stage. If it is potentially arguable, the single judge should normally not grant applications for leave or an extension of time but should refer them to the full court.
>
> 53. Fourth, if the single judge decides to refer an application to the full court, he or she should follow the course adopted by the single judge in this case and refer it for directions. The parties should then seek to agree those directions and submit them to the registrar for approval by the court. Only if agreement cannot be reached should it be necessary for there to be an oral hearing in relation to them."

47. The remaining points advanced by the applicant in his own grounds are vague and unsubstantiated, and in any event, they go nowhere. The applicant was represented fully and properly. He was fully able to defend himself. Nor is there any basis on which to criticise the judge's summing up as Mr Ahmed has confirmed. In short, the prosecution case was strong and the grounds of appeal raise no arguable basis for doubting the safety of the applicant's conviction.

48. All applications are accordingly refused. We are grateful to both counsel for their assistance.

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

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