IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101174/B4-202101590/B4
NCN [2022] EWCA Crim 399

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 9 March 2022

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

MR JUSTICE COTTER

REGINA
v
MUHAMMAD HUSSAIN

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MR H GRAY appeared on behalf of the Applicant.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This case concerns sexual offences against adolescent girls. The complainants are entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of these offences. We shall simply refer to the various complainants as "C1", "C2" etc.
2. On 6 April 2021 in the Crown Court at Manchester (Minshull Street) the applicant was convicted of two offences of rape, one of taking indecent photographs of children and one of sexual assault. He was subsequently sentenced by the trial judge (Mr Recorder Lasker) to a total of 6 years 2 months' detention in a young offender institution. That total term of detention comprised concurrent terms of 4 years in respect of each of the rape offences, 2 years consecutive in relation to the indecent photograph's offence and 2 months consecutive in relation to the sexual assault.
3. Applications for extensions of time to apply for leave to appeal against conviction and sentence were refused by the single judge. They are now renewed to the Full Court. Mr Gray, who represented the applicant at trial, has been good enough to act *pro bono* in preparing and presenting the renewed applications. We are grateful to him for the clarity of his written and oral submissions.
4. The applicant stood trial together with his brothers on an indictment containing 21 counts. The charges reflected what were said by the prosecution to be sexual abuse of vulnerable girls. A number of the counts against the applicant alleged offences which required proof that he did not reasonably believe the complainant to be aged 16 or over. At the conclusion of the prosecution case the recorder ruled that there was no evidence on which the jury could be sure of that fact, and so directed verdicts of not guilty on each of those counts.
5. The victim of counts 1 and 3 was C1, who was aged 14 at the relevant time in August 2016. The applicant was then aged 16. C1 drank alcohol at a party and had consensual sexual intercourse with the applicant. She complained however that he was hurting her and, when he did not slow down as she asked, she told him to stop. The applicant instead carried on despite C1 crying and trying to get him off her. That was the basis of the allegation in count 1 (rape). C1 managed to move away from him and began to dress. The applicant abused her with foul language and demanded that she "finish me off". C1 tried to avoid doing so but the applicant threatened to tell her boyfriend that they had had sex. Feeling that she had no choice, she put his penis in her mouth until he withdrew and ejaculated onto a towel. This was the subject of count 3 (rape).
6. Both C1 and another girl gave evidence that on a later occasion the applicant apologised for what he had done. The applicant's case was that all sexual activity between them had been consensual.
7. Count 9, relating to the indecent photography, was an allegation that the applicant had filmed himself being given oral sex by both C1 (then aged 15) and C3 (a girl aged 16). C1 and C3 had joined the applicant at a local park where the accused often supplied girls with alcohol before engaging in sexual activity with them. They all went back to a house. On the way to the house the applicant filmed what purported to be the girls consenting to whatever sexual activity might occur. At the house both girls acceded to the applicant's suggestion that they together give him oral sex. No relevant film has been recovered, but C1 gave evidence that she had seen the flashlight of the applicant's mobile phone as he

was filming them. The applicant admitted the sexual activity but denied that there had been any filming. His explanation for the flashlight, which he accepted was switched on, was that he had been using his phone as a torch.

8. Count 14, the sexual assault charge, related to C2, who was aged only 14 at the relevant time. She was with C1 at one of the gatherings in the park. She was anxious and uncomfortable because of the sexualised conversation around her. The applicant approached her from behind, put his hand inside the back of her leggings, pulled up her underwear and squeezed her bottom painfully. The applicant's case was that this incident had never happened and that it was a malicious fabrication by C2.
9. The applicant and one of his brothers, Hashim Hussain, were charged in counts 10 and 11 and count 16 and 17 respectively with offences of sexual activity with a child, namely C1. These charges related to what was alleged to have been an occasion when both brothers engaged in vaginal and oral sexual intercourse with C1. They were both acquitted of these charges by direction of the recorder at the conclusion of the prosecution case. The counts against the applicant were amongst those which failed for want of clear evidence that he had not believed C1 to be aged 16 or over.
10. Hashim Hussain was also charged on counts 20 and 21. The offences in those charges related to the filming of C4 (aged 17 at the material time) when she was involved in penetrative sexual activity with a group of men. Those present included, the prosecution alleged, the applicant. C4 appeared to have consented to what was happening, but the filming of it was a crime because she was under 18. The applicant was not charged with any offence in relation to this incident, but the prosecution applied to adduce the evidence relating to it as evidence of his bad character, on the basis that it was relevant to counts 10 and 11 because it showed a propensity on his part to engage in group sexual activity in which his brother was also a participant. The recorder admitted the evidence on that basis.
11. The film recorded on Hashim Hussain's phone was of short duration and indifferent quality. A transcript prepared by an expert witness indicated that in the last few seconds of the film a female voice, thought to be C4 but not clearly identified as her, said "no means no". Those words were far from clearly audible on first viewing of the video clip. Agreement was reached between counsel that when the video clip was shown to the jury, as it was agreed it would be twice in succession, it would be stopped before the last few seconds. Unfortunately that proved not to be possible, and so the clip was twice played to its conclusion. The jury were then shown a slow-motion version of the video recording, without any audio component, and a police officer explained to them who could be seen doing what at each stage.
12. Defence counsel applied to discharge the jury on the ground that the inadvertent playing of the last part of the video had caused irremediable prejudice to the applicant. The recorder refused that application.
13. A second application was made to discharge the jury at the conclusion of the prosecution case. This was on the ground that the evidence had only been admitted against the applicant in relation to charges, namely counts 10 and 11, which had subsequently been withdrawn from the jury. Again the application was refused.
14. In his written and oral submissions Mr Gray challenges each of those three rulings. He submits that the video clip should not have been admitted against this applicant because the bad character application was made out of time, one consequence of which was that

an edited copy of the video with audio was not available and the inadvertent playing occurred. He goes on to submit that the alleged identification of the applicant as one of those involved was unreliable. The recording did not show any criminal offence by the applicant. At most it showed a single incident of a different kind, and therefore had no capacity to prove a relevant propensity in relation to counts 10 and 11; and in any event any probative value was outweighed by the prejudicial effect.

15. Mr Gray submits that the recorder should have discharged the jury on the first application because the words "no means no", which should not have been played to the jury, were highly prejudicial on the other charges against the applicant. Alternatively, he submits that the recorder should have discharged the jury on the second application, because as a result of the successful submissions of no case to answer on several counts the video clip was no longer of any arguable probative value in relation to any of the charges which the applicant still faced.
16. Mr Gray also submits that the recorder should have allowed a submission of no case to answer on count 3. This was put forward on the basis that in the light of answers given by C1 in cross-examination, the jury could not be sure that she had not consented to the oral sex which was the subject of that charge.
17. We are, as we have said, grateful to Mr Gray for his submissions. Having reflected on them however, we are unable to accept them. As for the first ground, the lateness of the bad character application is rightly criticised, but we are not persuaded that the admission of the video at that stage caused any prejudice to the defence. The video recording was plainly relevant and admissible on counts 10, 11, 16 and 17 and it was properly before the jury. It was in our view capable of being regarded by the jury as recording reprehensible behaviour showing a relevant propensity on the part of the applicant in relation to counts 10 and 11, and there can be no arguable challenge to the Recorder's ruling.
18. As to the two applications to discharge the jury, we see no arguable basis on which the recorder's rulings could be challenged. Although he accepted that the words "no means no" might be audible, the recorder had himself been unable to hear them even when specifically listening out for them. It was therefore uncertain whether any member of the jury would have heard them, though the Recorder rightly proceeded on the basis that it was at least possible that one or more jurors would have heard. If any member of the jury did hear those words, it was not clear who said them. In any event, there was no allegation that the applicant, or indeed any of the men involved on that occasion, had performed any sexual act without the consent of C4. Given that the nature of the defence case included positive assertions that the applicant had engaged in sexual activity with teenage girls, the fact that the video clip showed such activity could have little prejudicial effect. That continued to be the position when the second application to discharge was made. We note moreover that no criticism is made of the directions which the recorder gave to the jury and which it must be assumed the jury obeyed. Nor is any criticism made that the recorder failed to give a direction which he ought to have given. Mr Gray's submission is that the prejudicial effect of the video was such that no direction, however worded, could suffice to overcome the damage done by it. We are unable to accept that that is arguable.
19. As to the submission of no case to answer on count 3, we can deal with this briefly. In the circumstances shown by the evidence, it was beyond argument a matter for the jury whether it may have been the case that C1 had genuinely consented to the oral sexual

activity which was the subject of the charge. Given the evidence that the applicant had blackmailed her by threatening to tell her boyfriend that he had just had sex with C1, it would, in our view, have been quite wrong for the recorder to withdraw that charge from the jury.

20. The single judge (Saini J) gave very detailed reasons for refusing the application for leave to appeal against conviction. We agree, essentially for the same reasons, that there is no arguable ground on which the convictions could be said to be unsafe.
21. Turning to sentence, the recorder indicated that he would impose concurrent sentences on counts 1 and 3, reflecting the overall criminality of the two rapes. He held that C1 was particularly vulnerable due to her personal circumstances and concluded that each offence fell within category 2B of the Sentencing Council's Rape guideline, with a starting point of 8 years' custody and a range of 7 to 10 years. He took a notional sentence of 9 years concurrent on each count. He reduced that to reflect the mitigating features that the applicant was a young man, facing a first custodial sentence and was effectively of previous good character. The recorder then followed the Children guideline by making a further reduction to 4 years to reflect the applicant's young age at the time of the offending. On count 9 the recorder took a notional adult sentence of 4½ years, which he reduced to 3 years because of the applicant's young age at the relevant time. He considered it appropriate to impose a sentence consecutive to the 4-year term on counts 1 and 3 but reduced the consecutive sentence to 2 years to take account of totality.
22. Finally in relation to count 14, which again merited a consecutive sentence because it involved a different victim on a different occasion, the recorder held that a sentence of 3 months would be appropriate but reduced it to 2 months for reasons of totality. Thus, he reached the total sentence of 6 years 2 months' detention to which we have referred. The recorder also made restraining orders. They have not been the subject of any oral submissions to us today and we think it unnecessary to say more about them.
23. Mr Gray submits that the overall sentence was simply too long for someone who was aged 16 at the time of the offences. In relation to counts 1 and 3, he challenges the recorder's assessment that C1 was particularly vulnerable due to her personal circumstances and on that basis he criticises the recorder's application of the guideline. He argues that count 9 was a form of offending which would be atypical when compared with the majority of such offences. He argues that it did not require a custodial sentence, and that even if it did the recorder's sentence was too long. The offence charged in count 14, he submits, did not cross the custody threshold.
24. We have reflected on the submissions. Young though the applicant was during the indictment period, he committed serious offences and a substantial total term of detention was inevitable. C1 was on the Social Services "At Risk" Register before the offending against her began and the recorder having heard all the evidence was entitled to find that she was particularly vulnerable. He was also entitled to find that it must have been obvious to the applicant that she was a vulnerable teenager rebelling against authority.
25. C2 was only 14 at the time of the offence against her and plainly uncomfortable about the sexualised atmosphere amongst the group in the park. The recorder was entitled to conclude that the sexual assault upon her by the applicant who, as we understand it, had never even met her before, was sufficiently serious to call for a short custodial sentence.
26. As to count 9, whilst we accept that in some respects that offence differed from many

other such offences which come before the court, it is in our view important to keep in mind that the jury were sure that this episode of oral sex was recorded. The recording not having been recovered, both girls concerned lived with the anxiety as to whether it will one day emerge in some public forum.

27. Finally, the recorder was entitled to find that the applicant had shown no real remorse for, or appreciation of, the harm he had caused. That harm was in our view very clearly and powerfully set out in the victim personal statements provided by C1 and C2.
28. We see no basis on which the recorder's approach and conclusions can be faulted. He amply reflected the applicant's young age at the time of the offences, by making a substantial reduction from what were, in our view, appropriate notional adult sentences. The imposition of consecutive sentences was not wrong in principle, and in any event the important consideration at this stage is as to the totality of the sentencing, not its structure. The recorder had presided over the trial and was in the best position to assess culpability and harm. In our judgment the total term of detention, although stiff, was not arguably manifestly excessive. Again, we agree with the detailed reasons given by the single judge.
29. We would have been willing to grant the necessary short extensions of time if there had been merit in the grounds of appeal. As it is no purpose would be served by granting either extension because an appeal against either conviction or sentence cannot succeed. It follows that, grateful though we are to Mr Gray, these renewed applications fail and are refused.