Neutral Citation Number: [2022] EWCA Crim 790

Case No: 202103841 B4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM the Crown Court at Worcester**
**His Honour Judge Lockhart Q.C.**
**T20167221**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2022

**Before:**

**LORD JUSTICE FULFORD, THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)**
**MR JUSTICE JAY**
and
**MR JUSTICE FOXTON**

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**Between:**

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| **NEIL ANTHONY JOHNSON** | **Appellant** |
| **- and -** | |
| **REGINA** | **Respondent** |

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**Mr D. Emanuel Q.C.** (instructed by **Stephensons Solicitors**) for the **Appellant**
**Miss S. Collins** (instructed by) **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 19 May 2022

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# Approved Judgment

## Lord Justice Fulford VP :

**Introduction**

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to counts 1, 3, 5 and 6 on the indictment with which this court is concerned. Under those provisions, no matter relating to the victim shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On the 5 October 2016 in the Crown Court at Worcester at the Plea and Trial Preparation Hearing ("PTPH") before Judge Lockhart Q.C., the applicant, who was then aged 42, pleaded guilty to all seven counts on the indictment he faced, as set out below.

3. However, on the 7 November 2016 before Judge Juckes Q.C., at the invitation of the prosecution, the applicant's pleas to counts 2 and 4 (both alleged rape) were vacated leaving pleas of guilty to the five remaining counts: two of rape (counts one and three), two of assault by penetration (counts five and six) and one of harassment (count seven). No evidence was offered against the applicant on counts two and four and not guilty verdicts for those offences were entered pursuant to section 17 of the Criminal Justice Act 1967. By way of explanation, the prosecution indicated that an error had been made, in that the complainant had alleged in her interviews (as opposed to her victim personal statement) one incident of digital vaginal penetration, one incident of digital anal penetration, one incident of vaginal rape and one incident of anal rape. Accordingly, counts 2 and 4 were not founded on the **evidence** of the complainant.

4. The applicant (then aged 43) was sentenced to seven years' imprisonment on count one, with concurrent terms of eight, five, six and two years' imprisonment respectively to be served concurrently on counts one, three, five, six and seven. The total custodial term, therefore, was eight years' imprisonment. A restraining order under section 5 of the Protection from Harassment Act 1997 and the statutory surcharge were also imposed.

5. The applicant was unrepresented in the Crown Court, a factor which is critical in the context of the current application.

6. Before this court, the applicant applies for an extension of time of 1859 days in which to appeal against his convictions, on referral by the single judge. He seeks leave, additionally, pursuant to section 23 of the Criminal Appeal Act 1968 to introduce fresh evidence from a psychologist, Dr Saima Latif, regarding his suggested cognitive functioning disabilities and his suggestibility (*viz*. his vulnerability and a susceptibility to manipulation by others (see Dr Latif, first report, 27 May 2020 [18.1.i])). Dr Latif saw the applicant on 12 May 2020 (by video) and 28 April 2021 (face-to-face). She determined that he is a vulnerable man. He has, most probably, a mild learning disability and an extremely low intellect. As a result, he is likely to be suggestible and susceptible to manipulation by others. In Dr Latif's view he is unlikely to question those in authority and he would tend to agree to suggestions made to him. He has poor emotional functioning which means he would have lacked confidence and have been unable to be assertive in the context of these court proceedings.

## The Facts

7. The applicant met and formed a relationship with the complainant in 2007, whilst they were in-patients on a psychiatric ward. Following his release, the applicant returned to visit the complainant and, on her discharge in December 2007, he visited her at home. By 2008 they were in a full-blown relationship and in the May of that year the victim invited the applicant to live with her. The applicant proposed to the victim in June 2008 and they married in September 2008. After suffering certain health problems, the applicant experienced a period of memory loss and was admitted to hospital in October 2008. He returned home, however, the following month.

8. The complainant has undoubted and significant vulnerabilities, such as the condition known as agoraphobia and, more generally, she requires assistance when undertaking many day-to-day tasks. Her account as regards the events founding the charges to which the applicant entered guilty pleas was principally set out in three video-recorded interviews, conducted in accordance with the Ministry of Justice and National Police Chiefs' Council guidance entitled "*Achieving Best Evidence in Criminal Proceedings*". Two of these interviews occurred on 28 June 2014 and one on 22 December 2014. The victim, in summary, alleged that following the early days of their marriage in 2008, the applicant became "*noticeably angry and agitated over small matters*". In temper, for instance, he punched the bathroom mirror, thereby scaring her; the applicant shortly afterwards, in tears, expressed his remorse and apologised, promising he would not harm her. During sexual foreplay the applicant once hurt the victim and, on being challenged, suggested she had liked what had occurred. He shrugged his shoulders when she told him that what had happened had been painful.

9. The applicant became verbally abusive towards the complainant in March 2009 after they had moved to more spacious accommodation. He pushed her in the chest and directed threats at her. On one occasion the complainant twisted her foot after leaving the kitchen hurriedly when he threw a jar of bolognaise sauce against a wall. He denied, however, that this had happened and suggested that the incident was a fiction on the part of the victim. The latter suggested that she began to walk on "*eggshells*" and ceased feeling safe. It is suggested that the applicant, who was on medication for anxiety and depression, had stopped seeing a psychologist after a few sessions. During an argument in November 2009 in which the applicant raised a fist to the complainant, he instead punched two holes in the wall. The complainant did not believe him when he said he could not remember what had happened on this occasion. The violence he demonstrated throughout the relevant period was reflected in count 7.

10. During the summer of 2011, the complainant was taking pain killers and antidepressants to treat the condition known as endometriosis. The medication made her drowsy and she took frequent "*naps*" which were deep in nature. She struggled to wake up and she was left feeling groggy. The complainant averred the applicant was aware of this, along with the fact that sexual penetration had the potential to cause her pain, meaning that it would never be appropriate for him to behave sexually towards her whilst she was asleep. Nonetheless, in June 2011 she awoke to find him touching her vagina and breasts, as well as putting his fingers in her anus and vagina. She shook him off and told him to stop, whereon he ejaculated. When the victim challenged the applicant about this incident, he denied any knowledge of it and

suggested that she had invented the allegation. These matters were reflected in counts five and six. The applicant, she suggested, was also aware that because of the sexual abuse she had suffered as a child she would not consent to anal sex but, nonetheless, during consensual vaginal sex he inserted his penis into her anus and persisted until ejaculation, ignoring her protests. This occurred in the latter half of 2011 and was reflected in count 3. It is noteworthy that the complainant told her hairdresser in early 2011 that the applicant had raped her twice.

11. In October 2011 the complainant once again awoke to find the applicant touching her breast from behind. She told him to stop but, undeterred, he penetrated her vagina until ejaculation. This incident was reflected in count one. Again, when she confronted the applicant, he told her she had imagined this event. The complainant reported the incident to her psychologist but declined to report the matter otherwise to the authorities.

12. The applicant's father died in January 2012 and the complainant suggested that from April of that year his grief turned to anger, and he frequently swore at and kicked her when passing, thereafter laughing about what he had done. He smashed objects in the kitchen. On one occasion he made a fist with his hand and went to punch her in the face, albeit he deliberately stopped before contact was made. He appeared to find this amusing. He pushed her and said that he still "*had it*". The complainant eventually asked the applicant to leave, a request which was met with a violent and threatening response. There was a pause in the physical abuse on the part of the applicant between March and May 2013, although the verbal abuse continued unabated. In May 2013 the complainant tried to leave the applicant, and from January 2014 she slept on the sofa. The arguments and abuse continued unabated. She made a series of sometimes partial disclosures to a range of people, and ultimately the police became involved.

13. The applicant was arrested and interviewed on the 28 June 2014, 5 September 2014 and 11 February 2015.

14. The applicant accepted at the outset of the first interview on 28 June 2014 that he had sometimes been verbally abusive ("*I've raised my voice and just gob off I suppose at her a little bit*"). He accepted he had a "*a bit of a short fuse*". He acknowledged he sometimes threw things, but not, he claimed, at the complainant. He denied having physically assaulted her, but he also said he could not remember one way or the other, suggesting that an assault may have happened but he was unable to recall ("*absolutely no idea at all*"). When the allegations of sexual impropriety were first put to the applicant, he said without apparent hesitation "*I don't know*", "*I wouldn't have a clue if I did or didn't, I don't know*", "*I have no idea, I have got no memory of it whatsoever, I wouldn't do that to her anyway*".

15. At the commencement of the second interview, the police observed that the applicant was seemingly maintaining that he had "*issues*" with his memory. He indicated that he did not know whether he might have assaulted the complainant whilst being unaware that he had done so. He said he had "*absolutely no recollection*" of having raped the complainant. He said he was happy for the officers to speak with his doctor, to whom he had reported short-term memory loss about two years earlier, when he had undergone tests.

16. He indicated that he did not believe he had attacked the complainant but that there was "*a little bit of element of doubt because she's got absolutely no reason to lie herself and I have no idea if I have or haven't, that's the confusing part of it, she has no reason to lie at all. I trust that woman but I don't know if I have or haven't*". He maintained this account even when the police were strongly encouraging him to admit and accept "*what he had done*". His response to this prompting was that he would do so ("*I'll be the first one to stick my hands up*"), but he was not sure that he had behaved as alleged. He had a vague recollection of an incident described the police when he sat bolt upright in bed and raised his fist, but this was qualified by his statement that he recalled this vaguely as the complainant had mentioned it. He denied having made holes in the walls or of having seen any corresponding damage.

17. The applicant had seen a counsellor between the first two interviews on 28 June 2014 and the next interview on 5 September 2014 (he attended the latter voluntarily). He said on 5 September he had been having "*flashbacks*". He accepted that he had had sexual intercourse with the complainant when she was asleep but said he had believed she was awake. In terms, he said he did not know she had been asleep. When asked about his mental state he said he was "*pretty unstable*", and that he was taking medication for depression and anxiety and morphine for a shoulder injury.

18. In the interview of 11 February 2015, following a recent report by the complainant that non-consensual anal sex had occurred, the applicant indicated that this was "*pretty much a no-go area … it is not my cup of tea*". He continued telling the officers that he was not 100% sure as to what had happened but he trusted the complainant "*1000%*" and suggested she was not going to make something up purely to get him into trouble for no reason. Since he was unable to give an explanation, he agreed that it must have happened, albeit he stated he thought she had been awake at the relevant time ("*I genuinely thought that she was awake*"). He described his memory as being vague, and he indicated that he did not recall some of the facts the officers were suggesting to him. He frequently described what in his view would have happened rather than as events which he was recalling, e.g. "*She was probably pretty upset. She would have been upset. I'm not 100%. She would have been pretty pissed off with me*." When asked how he would have reacted if told that anal sex was a "*no go*", he replied "*I would like to think I would have stopped, I wouldn't want to hurt her. I wouldn't want to have hurt her feelings*". During this interview, the applicant seemingly had greater recollection of what had occurred than during the preceding interviews, albeit we stress he continued to describe his memory as being less than 100% and vague, rendering it unclear whether he knew what he had or had not done.

19. By way of summary, the applicant's essentially unwavering insistence that he believed the victim had been awake and consented to what had occurred, considered realistically, means that he did not accept during these interviews that he had committed any of the sexual offences to which he pleaded guilty. The Crown accept that the interviews did not amount to admissions of guilt.

## The Hearing on 5 October 2016 before Judge Lockhart

20. At the outset of the hearing on 5 October 2016, the applicant told the judge emphatically that he did not want to be represented. The judge explained the consequences to the applicant of pleading guilty and not guilty, and the latter indicated he understood these would be "*large*" if he pleaded guilty. He stated that he understood that he would be unable to cross examine the complainant if there was a trial. The judge provided an explanation of the offences, which produced a mixed response in that the applicant sometimes suggested he understood what was being said and on other occasions remained silent. The judge asked the applicant if he had been "*the subject of any Mental Health Act difficulty*". The applicant said this had been the case when, for a long period commencing in about 2007, he had suffered from depression. He said he had taken medication between, *inter alia*, 2011 and 2014. The judge asked whether the medication affected him in a way that meant he did not know what he was doing or was unable to operate properly in society. The applicant responded that he had been taking "*two different styles of morphine*" and the drug Propranalol. The judge suggested that if the applicant had been severely depressed at the material time, this "*might be something a defence advocate would wish to, at least, have investigated*" and he expressed his wish that the applicant should receive legal advice before he was arraigned. The applicant immediately responded, "*I don't need it, sir, 'cos I have done wrong, so I'm fine*". The judge then asked if the applicant knew at the relevant time that what he was doing was wrong, to which the applicant responded "*I don't know sir* […] *I want to be honest. I don't know sir*". The judge then responded, "*You see, if you have legal advice* […] *you could answer that question or your advocate could answer it or you when he has had the chance to speak to you in a completely private way – do you understand? – and, in my view, it's very important that that happens*". The judge said he was not going to force the applicant to accept legal advice. The latter stated that he did not want legal advice, although he agreed to speak with a legal representative. He said he "*just want*[ed] *to get this over and done with*".

21. Mr Lister, a solicitor from the firm which had represented the applicant at the Magistrates' Court, was present at court. At the judge's invitation, the applicant spent in the region of half an hour, or probably less, with Mr Lister. The latter returned to court and said he could not assist the court further, save to say that he considered that there was no impediment to the indictment being put. This latter observation was in the context of the judge's stated concerns as to whether the applicant would have been able to form the relevant *mens rea*. This is an event to which we return later in the judgment. The applicant thereon pleaded to the seven counts on the indictment, two of which pleas, as we have already set out, were vacated on 7 November 2016.

## The Grounds of Appeal

22. There are two grounds of appeal. First, it is submitted that the applicant's pleas were equivocal. It is emphasised in this regard, as just mentioned in the preceding paragraph, that the applicant pleaded to a seven-count indictment despite the prosecution later having to apply to vacate his pleas to two counts. It is suggested, therefore, that the pleas did not involve any true acceptance of guilt on the applicant's part.

23. Second, it is argued that the admissions of guilt were manifestly unreliable given, *inter alia*, the interviews under caution should have been in the presence of an appropriate adult bearing in mind his learning difficulties. The context, as it is suggested, for his admissions of guilt is

that his immediate reaction to each of the different allegations put to him over the course of the interviews was one of denial. What then followed was the applicant persuading himself that if the complainant had made a clear allegation, something must have happened as she would not lie on such an issue. However, even when he accepted that events had happened, the applicant's description of them tended to be what "*would*" have happened rather than what "*had*" happened. When he accepted that certain instances of sexual activity had occurred, he consistently suggested he believed they had been consensual. Mr Emanuel Q.C. on behalf of the applicant submits it is apparent, therefore, that the applicant was unaware of the availability of the defence that he believed – on reasonable grounds – that the complainant had consented to what occurred.

24. As set out above at [6], the applicant sought to rely, pursuant to section 23 of the Criminal Appeal Act 1968, on fresh evidence from Dr Saima Latif regarding the applicant's cognitive functioning disabilities and his suggestibility. The introduction of her evidence, as contained in the two reports (27 May 2020 and 5 June 2021), was unopposed by the respondent and the court considered that it was necessary and expedient to receive it, bearing in mind the factors set out in section 23(2).

## The Respondent's Submissions

25. Miss Collins, for the Crown, submits that the judge was thorough in ensuring that the applicant understood the process and consequences of pleading guilty. He was not advised that he had no defence or prevented from running one, and no issues in this regard had been raised at the Magistrates' Court stage of the proceedings. He had been judged to be fit to plead. It is submitted that his pleas were not equivocal and that his approach to the allegations may have changed between the interviews and the date on which he pleaded guilty at the PTPH. Furthermore, the applicant had been informed of his rights to legal advice and the caution had been properly explained.

## The Issue on this Application

26. The central issue for our consideration is whether the applicant comes within one of the three categories identified in *R v Tredget* [2022] EWCA Crim 108 when an appellant is entitled to submit that, notwithstanding an admission of guilt, his or her conviction is unsafe (albeit we stress these were expressly described as not constituting a closed list of circumstances (see [153])).

27. Within the First Category identified in *Tredget*, a guilty plea can be vitiated if, *inter alia*, an equivocal plea was entered. The applicant submits his pleas were equivocal. At the outset, we need to stress that we commend Judge Lockhart for the evident care which he took and the concern he expressed for the position of the applicant during the hearing on 5 October 2016. He explained in some significant detail the elements of the offences to this then-unrepresented defendant, along with consequences of pleading guilty or not guilty. During the exchanges in court it was established – we stress before the applicant entered his guilty pleas – that he had been depressed when these alleged offences occurred and had been taking morphine and Propranalol. As we have rehearsed in detail above, the judge asked the applicant whether he knew at the relevant time that what he was doing was wrong, a clear reference to the defence of reasonable belief that the victim was consenting (counts one, three, five and six) and

whether he knew or ought to have known his conduct would cause fear of violence to the complainant (count seven). The applicant responded "*I don't know sir* […] *I want to be honest. I don't know sir*". The judge then correctly, in our view, identified that this was a "*very important*" issue which needed resolving, preferably once the applicant had taken legal advice. The judge, having asked Mr Lister to come into court, stated that he did not want the indictment to be put without being satisfied that the applicant "*understands that it might be that other avenues were at least to be considered*", meaning – as we understand it – that the applicant realised that he might not be guilty of these offences because he had a defence to the charges. The judge added that a short discussion with Mr Lister may alternatively reveal that the applicant wanted to make admissions and to be arraigned.

28. Mr Lister then went to see the applicant and when he returned to court stated:

> "Your Honour, I have spent some time with (the applicant). He has been kind enough to listen to what I have said. Without breaching that confidentiality, **I have no instructions and I am afraid I can assist the court no further**." (our emphasis)

29. The judge then asked whether, in the context of the issue of "*capacity*" and the applicant's ability to form the relevant mens rea, it was possible for the arraignment to take place. Mr Lister replied, "*I can see no reason why it should not*". Critically, therefore, the judge did not receive any answer to the important question of whether the applicant knew what he was doing at the relevant time was wrong. Instead, he was simply informed that in Mr Lister's view he had the capacity to form the mens rea for the offences of rape, assault by penetration and harassment. The indictment was then put to the applicant.

30. It is relevant in this context to note the clear distinction between the position where an equivocal "guilty" plea is tendered, and cases in which a defendant who has unequivocally pleaded guilty seeks to change his plea, contending that he does not or has never accepted his guilt. As O'Connor J observed in *P (Foster (Haulage) Ltd v* Roberts [1978] RTR 302, 310:

> "In my judgment, a clear distinction must be drawn between the duties of a court faced with an equivocal plea at the time it is made and the exercise of the court's jurisdiction to permit a defendant to change an unequivocal plea of guilty at a later stage in the proceedings. A court cannot accept an equivocal plea of guilty; it has no discretion in the matter; faced with an equivocal plea the court must either obtain an unequivocal plea of guilty or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged. An example of this type of qualification is found where a man charged with handling a stolen motor car pleads 'guilty to handling but I didn't know it was stolen'. It is not every qualification which makes a plea of guilty equivocal: for example, the burglar charged with stealing spoons, forks and a camera, who pleads 'guilty but I did not take the camera' is making an unequivocal plea to burglary.
>
> Once an unequivocal plea of guilty has been made, then the position is entirely different. From this stage forward until sentence has been passed the court has power

> to permit the plea of guilty to be changed to one of not guilty, but the exercise of this power is entirely a matter of discretion."

31. When a represented defendant has pleaded guilty, we suspect that it will be a rare case in which a statement by the defendant alongside those pleas that he has "done nothing wrong" or "did not know he was doing anything wrong" will be sufficient to render the plea equivocal, with the significant consequences which would follow automatically from the legal status of such a plea as a nullity. This is because, in such cases, the court can usually safely proceed on the basis that the defendant has had the ingredients of the offence properly explained to him by his lawyers, such that the plea reflects a formal acceptance by the defendant that those ingredients are made out, notwithstanding the way the defendant might wish to categorise his own behaviour. However, there are a number of features of this case which, in our view, are of particular importance when considering the position here.

32. First, as we have noted, the applicant was not, and had never been, legally represented.

33. Second, the applicant's statement came in response to a specific query from the judge which we are satisfied was intended to raise the crucial issue of the applicant's state of mind as to whether or not the complainant was consenting (see [27]).

34. Third, in this regard the applicant's statements were wholly consistent with the position he had maintained throughout his police interviews.

35. In these circumstances, the applicant's clear doubt, expressed shortly before he pleaded guilty, as to whether he knew at the time of the alleged offences that what he was doing was wrong was inconsistent with his guilty plea to rape and assault by penetration and it was equally inconsistent with his guilty plea to harassment (see *The King v Ingleson* [1915] 1 KB 512). In *Ingleson*, having pleaded guilty, the accused handed the judge a statement which was inconsistent with his guilty plea ("*I'm guilty of taking the horses not knowing them to be stolen*") which led the Court of Criminal Appeal to determine that his plea was equivocal. The court observed "*If the recorder had read that it would be his duty to explain to the prisoner that his proper course was to plead not guilty and to have that plea entered*". We consider the present circumstances are, at least, analogous with those in *Ingleson*, both because of what the appellant said prior to entering guilty pleas but also because the judge had access to the appellant's interviews on the digital case system. A cursory perusal would have revealed the applicant's clearly and consistently expressed stance. We would stress that in the case of an undefended defendant who pleads guilty, care should always be taken to see that he or she understands the elements of the offence, especially if there are indications before the judge that the accused may have a defence.

36. In the present case, we emphasise, therefore, that it is a highly relevant context when considering what the applicant said in court at the time the pleas were entered – *viz.* he could not say whether at the relevant time he knew what he was doing was wrong – that he had been steadfast in his claims in interview that he believed the complainant agreed to the relevant sexual activity.

37. With respect to the learned judge, although he correctly identified a central question that needed to be resolved, he failed to secure an answer to that question or otherwise to resolve this issue following the meeting between Mr Lister and the applicant. The applicant, therefore, had provided an account as to his mens rea which was inconsistent with his guilty pleas: by pleading to the indictment, he accepted that he did not (reasonably) believe the complainant consented to the four sexual offences and he equally accepted that he knew or ought to have known his conduct would cause fear of violence to the complainant. Given real uncertainty as regards these issues had been raised during the hearing immediately prior to the pleas being entered, they needed to be addressed and, if possible, resolved (particularly given he was an unrepresented defendant). If unresolved and if matters were left as they then stood, the judge was required to enter not guilty pleas and to adjourn the case for trial.

38. In summary, in this case (reflecting O'Connor J's language at [30] above), the applicant had added a clear "*qualification*" immediately prior to the indictment being put which, if true, may have meant that he was not guilty of the offences, namely he raised a clear doubt as to whether he had the mens rea necessary for any of these offences. Bearing in mind he was unrepresented, these were equivocal pleas which render the proceedings based on them a nullity. We grant permission and allow the appeal. The appellant's five convictions are quashed.

## Postscript

39. Given the appellant had served the entirety of his sentence, the respondent did not seek a retrial. The court agreed with this stance. The issue of a restraining order was remitted to the Crown Court under section 5A (3) of the Protection from Harassment Act 1997.