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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2022/01969/B4

[2023] EWCA Crim 1706

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 8th December 2023

B e f o r e:

LORD JUSTICE DINGEMANS

MRS JUSTICE STACEY DBE

HIS HONOUR JUDGE DREW KC

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

JANNICK JENSEN

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Non-Counsel Application

J U D G M E N T
(Approved)

Friday 8th December 2023

LORD JUSTICE DINGEMANS: I shall ask Mrs Justice Stacey to give the judgment of the court.

MRS JUSTICE STACEY:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 the offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. This is a renewed application for leave to appeal against conviction, following refusal by the single judge.

3. On 25th May 2022, following a trial in the Crown Court at Woolwich before Her Honour Judge Sarah Whitehouse KC, the applicant (then aged 54) was convicted of two counts of assault by penetration (counts 1 and 2) and one count of rape (count 3). On 27th May 2022 the applicant was sentenced by the trial judge to six years and ten months' imprisonment for the rape and to a concurrent term of five years' imprisonment for the assault by penetration.

4. The issue at trial was consent. The complainant's evidence was that she had no memory whatsoever of meeting anyone in the karaoke bar where she had been with friends on the night in question. Nor had she any memory of how she had become separated from her friends, how she came to leave the bar, or how she had arrived at the applicant's house. After arriving at the karaoke bar, her next memory was of being naked from the waist down being

sick in the bathroom of the applicant's house. She remembered him helping her into bed before sexually assaulting her by penetrating her with his fingers (count 1) and tongue (count 2). She had no memory of him penetrating her with his penis. She was unable to move her head and could not move. She left as soon as she awoke the following morning.

5. The applicant was identified by a semen stain on the complainant's clothes that had been retained when she went to the Haven Sexual Assault Referral Centre a few days later. The complainant also positively identified the applicant at an identification parade.

6. The defence was that the sexual activity was consensual at the time, but that the complainant's attitude changed in the morning after she had noticed a cot in the applicant's home and he had lied about not having a child.

7. The applicant, who was of good character, called four character witnesses to attest to his positive qualities. The jury were given a full good character direction.

8. Two proposed grounds of appeal against conviction were lodged. Firstly, it was said that the conviction was unsafe because of the failure of the prosecution properly to deal with secondary disclosure and the refusal of the trial judge to order the prosecution to allow the defence to inspect the complainant's phone download.

9. Secondly, it is said that there was a material irregularity as a result of a juror speaking to the defendant during the course of his evidence. That juror had then spoke to a second juror. The first juror was discharged. It was said that the judge erred in refusing the defence application to discharge the second juror.

10. The applicant's application for leave to appeal was refused by the single judge for the

reasons given. We agree with those grounds which we adopt:

"This was not a case in which a more extended exercise of disclosure was mandated. You and the complainant had not seen or been in contact with each other either before or after the events in issue. She named the friends with whom she had been in contact and there was no evidence that she had told anyone that your sexual contact had been consensual. It is regrettable that disclosure was late but the judge offered adequate time within which the material could be perused [at court]."

11. As to the refusal of the Judge to discharge the second juror, there were no grounds to suggest that the second juror had paid any heed to what the first juror may have said to him, or, indeed, have any recollection of it. It fell well within the parameters of the Judge's evaluative judgment to decline to discharge the second juror. At each step the judge followed the Criminal Practice Rules and Direction on dealing with jury issues.

12. The applicant is now a litigant in person and seeks leave to lodge a fresh ground of appeal by letter dated 4th July 2023:

"The conviction is unsafe because of the failure of my defence or the prosecution to examine or address during proceedings integral and significant evidence and allegations that have a fundamental bearing on the outcome of proceedings."

13. The applicant has waived legal professional privilege and his counsel and solicitors have provided a joint statement in response. They set out in some detail the history of the proceedings and the course of the trial. In light of the single judge's decision and the Respondent's Notice in response to the original two grounds of appeal, counsel's advice was that there were no longer arguable grounds of appeal.

14. Although the lack of specificity in the criticism in the additional ground made it difficult for the applicant's legal team at trial to respond, the applicant clearly had the benefit of a diligent and thorough solicitor. Defence counsel was also meticulous in her approach to the evidence and disclosure. The applicant's instructions were put to the witnesses and the applicant had frequently stated that he was happy with his representation at the time.

15. A further letter was received by the Court of Appeal Office on 31st October 2023. In it the applicant seeks transcripts of the cross-examination of the complainant, the evidence of a friend of hers who was present on the night in question, and his own cross-examination. In his letter he makes the following further points to address the concern in relation to the lack of specificity in his earlier letter. He states that the “integral and significant evidence and allegations” are firstly a reference to an underlying implicit allegation that he had spiked the complainant's drink, without any evidential basis, which he said was unfair to him as it implied to the jury that it remained a possible factor which had a key bearing on the course of the evening and the allegations.

16. Secondly, he says that he had asked his counsel in conference to challenge the complainant's evidence that she was on her period at the time of the alleged offence as he was offended that there was an underlying allegation that it would "make me a satanical blood drinker". His counsel advised him not to say that as it would not help his case and the issue was not explored before the jury.

17. Thirdly, he says that the notes from the Haven Clinic on 3rd August 2017 recorded that the complainant had said that she had "met a guy and went home with him", which the applicant considered to be good evidence of consent. He says that his counsel failed to explore this adequately at trial.

18. Fourthly, he took exception to a description of himself as a "gambler out gambling", which he said was made in a pejorative way by the prosecution in their closing speech. He said that in fact he had been a key participant in a regular social poker league or tournament that evening and that poker is a game of great skill, not to be confused or "lumped in" with no skill gambling, such as fixed odds betting terminals. It had created an unfavourable impression of him before the jury. It was also prejudicial to him to have been compared to Boris Becker in the prosecution closing speech, which his counsel failed to challenge.

19. The applicant's counsel has not been asked to comment on the contents the letter of 31st October 2023. It is not necessary to ask her to do so.

20. The issue in this case was one of consent. The issue for the jury was whether they could be sure of the complainant's evidence. Her account was compelling and consistent with the contemporaneous disclosures she made to friends, and consistent with the evidence of the friend who was also at the karaoke bar that night. The friend remembered having a rum and coke when they arrived, and, like the complainant in this case had no recollection of anything else that evening. The friend recalled waking up sometime later in a taxi with a man whom she did not know. The taxi dropped her at her house and she went straight to bed as she felt awful.

21. The prosecution also relied on the applicant's police interview in which he had declined to comment.

22. The applicant's own phone contained WhatsApp group chat messages shortly after the incident. One of the members in the group posted: "Jannik is a naughty Viking... he forced me to rape, pillage and plunder".

23. Even if the new points raised by the applicant are factually accurate, they do not demonstrate any failings by his counsel or her running of the trial so as to make the conviction unsafe. The evidence at trial was that the complainant and her friend had a total loss of memory; that they came to in unfamiliar surroundings feeling ill, separated from each other, with people they did not know. It was a relevant part of the factual matrix.

24. Counsel's advice to stay well away from whether or not the complainant was menstruating at the time was clearly wise advice.

25. The notes taken by the Haven Clinic was a matter on which the complainant could have been cross-examined, but if the applicant's counsel did not do so, it may well have been for good tactical reasons. The notes are not proof of consent to sexual intercourse or sexual activity and drawing attention to them may have been counter-productive. In any event it was just one tiny part of the evidence in the case.

26. Any objection to the prosecution closing speech would have been refused. All of the matters raised by the applicant are of no or of very limited evidential value when set against the complainant's account and that of her friend.

27. Permission to add further grounds of appeal is refused, as the further proposed grounds are not reasonably arguable.

28. The application for an extension of time in which to lodge further grounds is also refused, since it is not in the interests of justice or in accordance with the overriding objective to extend time for grounds that are not reasonably arguable and have no realistic prospect of success.

29. The application for transcripts of the applicant's evidence in court and that of the complainant and her friend is also refused. They are not necessary and add nothing.

30. Accordingly, all applications are refused.

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