Neutral Citation Number: [2023] EWCA Crim 850

Case No: 202200874 B4
202201622 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
His Honour Judge Walker
T20210153 and T20207110

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2023

Before :

LADY JUSTICE THIRLWALL
MR JUSTICE TURNER
and
MR JUSTICE FORDHAM

- -

Between :

Joshua Hamilton	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Tim Moloney KC (instructed by **Edward Fail, Bradshaw and Waterson Solicitors**)
for the **Appellant**
Benjamin Douglas-Jones KC and Emma Nash (instructed by **Crown Prosecution Service**)
for the **Respondent**

Hearing dates : 14.06.2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday, 20 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

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. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Lady Justice Thirlwall :

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Where a sexual offence has been committed against a person, no matter relating to that person shall during the person's lifetime be included in any publication if it is likely to lead members of the public to identify the person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with S3 of the Act. We shall refer to the victim of the offence as B.

2. The appellant is 24. On 18 February 2022 in the Crown Court at Chelmsford he was convicted of rape. The victim was B, a young woman. The offence was count 2 on the indictment. He was acquitted of counts 1 and 3, causing sexual activity without consent contrary to section 4(1) of the Sexual Offences Act 2003 and count 4, assault by penetration, contrary to section 2 of the Sexual Offences Act 2003. These offences arose out of complaints by three other young women.

3. On 26 April 2022 he was sentenced to 4 years' imprisonment. He is subject to the provisions of Part 2 of the Sexual Offences Act 2003 indefinitely. He appeals against conviction and sentence with the leave of the single judge. There is also an application to introduce fresh evidence in the form of a magazine article. The article was before the judge at sentencing but was not available until after the jury's verdict.

4. The offence took place in the summer of 2015 when the appellant was 17 (dob 22.2.98). He and B were the same age and were pupils at the same school. They were in the sixth form and had just completed year 12. They were to start year 13 in September. B and the appellant were friends. B said they had kissed on a couple of occasions when drunk at parties in years 10 and 11.

5. It was B's account in ABE and in cross examination that on 23 August 2015 she went to a birthday party. It had been arranged that she would stay the night at the appellant's house, although he was not going to the party. He was at home with friends, drinking. B said that she had a very great deal to drink, much more than usual and she thought she was the drunkest she had ever been. She vomited in the taxi on the way to the appellant's house. She remembered getting to the appellant's house, she thought she had lost consciousness, she vomited and was put to bed although she could not remember how that happened. She remembered the appellant coming into the room. She recalled him leaning over to kiss her. She had just been sick and thought this was gross. She said, "No that's weird". She pushed him off her. He then tried to put his finger and penis inside her vagina and was saying "Come on, don't be silly, let's just do it." She was lying on her back with her legs together. The appellant then sat astride her chest. He was naked from the waist down and forced his penis into her mouth, despite her repeatedly telling him to stop. He did stop, lay down next to her and fell asleep.

6. The following morning B stayed at the appellant's home for about an hour. She accepted in cross examination that she had told one of her friends that she had "got with" the appellant the following morning even though he had raped her the previous evening. That was, she said, because she had not yet processed what had happened.

7. A few days afterwards she told a friend what had happened and at a festival shortly after that she told other friends what had happened. In summer 2019 she learned that

other young women were complaining about the appellant's behaviour towards them. They set up a Facebook group and they discussed what to do. On 9 September 2019 she told them in a Facebook message what had happened to her. In 2019, after one of the other young women reported the appellant to the police, B did the same. Two more young women also came forward. All four gave evidence at trial. The allegations ranged in time from 2011, when the appellant and the complainant were 12 and on a school ski trip to 2018 when the appellant and the complainant were both 21 and fellow students in their final year of university.

8. In her ABE interview B said that she had undergone counselling because of the rape and for other reasons. She was told she did not have to go into the other reasons. There was no mention in any of the records (GP or counsellors') of any complaint about this incident. B also said in her ABE interview that she had been prescribed Sertraline, which she described as "an anti-anxiety, anti-depressant." She began taking it in January 2019. The dose had been increased for some time and then reduced to 50mg.

9. The appellant denied all the offences against him. When giving evidence about the rape he said that B had arrived at his home very drunk. He gave her a pan to be sick in and a glass of water. She wanted to lie down so he put her into his bed. He stayed downstairs with friends for about an hour before they all went to bed.

10. The appellant said that he had looked in on B to see if she was all right, but she had been sick. He suggested they should go into the bathroom for her to clean up. In the bathroom they kissed. He said he got into bed fully clothed, and they continued kissing. He got out of bed to undress, and she instigated oral sex by putting her mouth onto his penis for 3 or 4 seconds. He did not feel comfortable with this, so he suggested they just go to bed. They shared a kiss and a cuddle and went to sleep. The following morning, they kissed again and there was further sexual touching, all of which was consensual. The appellant, B and the other friends in the house had breakfast together and B left after about an hour.

11. The appellant was of previous good character. He called two witnesses as to his character and four further witness statements were read. By the time these matters came to trial he had graduated with a 2.1 and was studying for a master's degree.

12. The appellant was convicted, and the case adjourned for sentence. Between the conclusion of the trial and sentence the appellant's mother read an article in a national women's magazine. She recognised B in a photograph accompanying the article and inferred correctly that B was the subject of the article. It set out in great detail her traumatic experience of sepsis, leading to post-sepsis-syndrome and the many consequences, psychological and physical of the syndrome. Some of the consequences were very similar to those set out in her very detailed victim personal statement in respect of the rape, which contained no reference to her experience of sepsis. The magazine article did not refer to the rape.

Sentencing hearing

13. It was the appellant's case that the article undermined the victim personal statement in that some of the effects of sepsis or post sepsis syndrome were the same as the symptoms said by B to be attributable to the rape. This cast doubt, Mr Moloney submitted, on the credibility of the complainant. Mr Moloney sought an order for

further disclosure, not least because there had been no reference to the history of sepsis in any of the documents available at trial. The judge refused to make an order but invited the prosecution to consider whether further disclosure was appropriate in the light of the magazine article. Further disclosure was made before the sentencing hearing to which we shall refer later in the judgment.

14. Mr Moloney elected not to cross examine B at the sentencing hearing. After hearing submissions, the judge imposed the sentence of 4 years imprisonment.

Grounds of Appeal
Conviction

15. The single judge gave leave to appeal on one ground, that there was material non-disclosure in respect of B. He directed that the Respondent should respond to requests for disclosure made in the Grounds of Appeal within 14 days of his determination with further directions thereafter. He referred to the full court the application to adduce fresh evidence (the magazine article) which suggested that the complainant may have misled the Court at trial and during sentencing. This is the basis of a second ground of appeal.

Material non-disclosure

16. Mr Moloney began his submissions on the basis that it was the prosecution case, as foreshadowed in its opening, that B had spoken to her counsellor/s about the offence. This, he said, was evidence of complaint upon which the prosecution relied. Ms Nash, who appeared at trial, indicated through Mr Douglas-Jones KC, that she had not opened the case on that basis. She had omitted that passage of the ABE from her draft opening. Mr Moloney accepted that and directed his submissions to the question of material non-disclosure of information in respect of B's medical and counselling records. Failings in disclosure had, he submitted, had an adverse effect on the way he had conducted the case, in particular upon the way he had cross examined B.

17. We were taken in detail through the history of the disclosure in respect of medical and counselling records. Some of the complaints fell away in the light of a closer examination of some of the documents. Our focus is on those matters which remain relevant to the appeal.

18. The process began with the Disclosure Management Document (DMD) uploaded to the DCS on 8 July 2020. At that stage the police had approached the NHS for records of counselling. B had said in her ABE interview that she had also received private counselling. The counsellor had been approached by the police. The following was disclosed in the DMD, "The complainant has received private counselling. An email received from the counsellor confirms that she shreds the sessions notes when she has finished working with a client (as is the case here). The counsellor writes a brief summary of the work carried out, but this does not contain any reference to allegation."

19. On 21 September 2020 a crime report was disclosed to the Appellant's legal team. It included an email of 3 December 2019 from the counsellor's service stating that they shred notes and make a very brief summary of work done. It stated that the counsellor was happy to share that summary with consent but, in it, there was no mention of the rape allegation.

20. On 10 January 2022 in a request dated 11 December 2021, the defence sought a number of items of disclosure. Relevant to this appeal was a request of the counselling received to which the answer was : "counselling in February 2019, Trent PTS (Psychological Therapies Service) and only attended 2 sessions. Those notes have been reviewed and do not contain any reference to the reported offence. She then attended private counselling."

21. There was a request for the details of what B had said about the offence to the counsellor she saw privately. The response was that the counsellor had confirmed that notes taken during the sessions are shredded afterwards.

22. On day 3 of the trial defence counsel asked for sight of the short summary referred to in the email to which we have referred at paragraph 18. The Officer in the Case contacted the counsellor immediately and received a reply shortly afterwards. The counsellor said that the summary read, "Presenting issues were low mood and anxiety. Talked about eating issues, family relationships and significant life events". Prosecution counsel informed defence counsel orally that she had the summary and would summarise some matters as medical matters rather than give the detail. Thus, instead of eating issues she referred to "medical matters". The change was made to protect B's confidential and irrelevant information. Mr Moloney argued that had he known that eating issues were discussed that may have affected his approach to cross examination. We make no criticism of counsel's decision to substitute medical matters for the original content. We do not accept that the change in the description could have made any difference to Mr Moloney's cross examination.

23. There were no further written requests for disclosure until shortly before the hearing of the appeal. The defence sought details of a text message from B to her counsellor, to which she had referred in a Facebook conversation with the other young women in September 2019. She had said to them that she was thinking of asking her counsellor whether she had any notes of her conversations which might support her case against the appellant.

24. A text exchange from 12 September 2019 was produced. B explained the background; several young women were discussing their complaints against the appellant. She was considering whether to report him to the police. The relevant passage reads as follows: "... as my case happened so long ago it's essentially his word against mine. I was wondering if you had any notes from our sessions that could help my case that you could possibly give me please? I also understand completely that you might not be in a position to help." The counsellor replied, "Can I get back to you a bit later today? I am so sorry to hear that the last few weeks have been difficult and to hear that so many others have had a similar experience to you and I would like to support you however possible. My notes are very succinct and basic, so I'm not sure how helpful they could be but am going to check it out with my supervisor and see what she thinks." This was followed up later the same morning as follows, "I have checked your message out with my clinical supervisor, and she agrees that my notes won't be much use to you. Counsellors tend to keep minimal notes in order to preserved confidentiality. She wasn't aware of anything else I could do to support you going forward other than offering emotional support … ."

25. On 23 May 2023 in the light of the direction of the single judge the Officer in the Case contacted the counsellor again. She sent the following email to counsel, which

was disclosed to the defence the following day "[Counsellor's name] can't recall whether [B] specifically spoke about the investigation as it was such a long time ago, but she doesn't think it was mentioned because forced oral sex would have stuck in her mind." This was the first time the counsellor had said that she did not think it was mentioned. It follows that there was non-disclosure in respect of that information. It had not previously been divulged to the police.

26. In the course of argument, in response to a question from the court about his closing speech, Mr Moloney said that he had not cross-examined B to the effect that she had said nothing to the GP/counsellors about the rape and so had not included the absence of complaint in his closing speech. It was however the case that there was no record supporting her evidence in the ABE that she had raised it. The decision not to ask the question was taken for sound tactical reasons. There is nothing in the additional disclosure which supports the contention that a different course would have been taken. We note that the counsellor now said that she thought she would have remembered the offence being mentioned, her response to the request for help in 2019 lends some support to B's position that she had raised it with her counsellor, given the counsellor's expressed sorrow that others had had a similar experience. And, as counsel no doubt appreciated, it is not easy to see why B would have contacted the counsellor unless she had indeed mentioned the offence to her.

27. Records from Trent Patient Therapy Services (NHS provision) disclosed in respect of the appeal showed that B had attended two sessions and that at one of them she had talked about a relationship with a young man (not the appellant) that had been very difficult for her. There was no requirement to disclose that detail at trial. It was irrelevant. Appropriate disclosure was given of the fact that there was in the records no reference to the offence.

Sertraline

28. At trial there was some discussion between counsel about the evidence in respect of Sertraline, an anti-depressant. Ultimately it was redacted from the ABE interview and the jury heard nothing about it. In the magazine article and in the VPS B spoke at some length and in detail about Sertraline and how it had affected her. In the VPS there was no reference to her requiring it other than because of the sexual offence. In the article she described it only in respect of the sepsis and post sepsis syndrome.

29. In the immediate aftermath of that discovery Mr Moloney sought from the prosecution disclosure of B's medical records. These confirmed that she had had sepsis on 31 August 2017 and been admitted to hospital. It follows that there was no basis upon which to attack the substance of the magazine article in respect of sepsis.

30. Mr Moloney points to the similarities in the two accounts of the effects upon her of Sertraline, suggesting that she may have used a single experience of a response to Sertraline to inform both the victim personal statement and the magazine article. This would suggest that she was not a reliable historian. He also points out that in her VPS she speaks about the deterioration in her mental health at the very time her records show an improvement in the form of a reduction in the dose of Sertraline in 2019. He submits that instead of securing the omission of Sertraline from the trial he may have used this information to good effect in cross examination. We do not accept that and, in fairness to Mr Moloney, he did not press the argument very strongly in oral argument. We are

quite sure that the absence of any reference to the prescription of anti-depressants for B did not lead to any disadvantage for the appellant. The contrary is far more likely. It is not necessary to consider further the detail of the prescription of Sertraline.

31. We accept Mr Douglas-Jones' argument that in contributing to an article in a national magazine about her experience of post sepsis syndrome there was no reason why B should mention a sexual offence. The same applies in respect of a statement setting out the effects upon her of the offence of rape: ie. there was no reason why she should mention the post sepsis syndrome. She had explained to the police in the ABE that there were reasons other than the appellant's offence that had taken her to counselling and was told there was no need to go into them.

32. The real point being made by Mr Moloney is that there is a marked similarity in her descriptions of some of the effects of two very different experiences. He points to two matters in particular. In the VPS she said "Shame was only a word that was introduced to me when I started counselling when I was 21. It was at this point I started suffering from sleep paralysis… . Shame continues to infiltrate every aspect of my life. Trauma-related guilt refers to the feeling of regret stemming from the belief that you should have done something different at the time a traumatic event occurred. I blamed myself for a long time because I really believed that if I hadn't been so drunk, this would have never happened to me."

33. In the magazine article she wrote, "the more I ignored it the more guilty I felt. It was this really weird cycle … I felt bad that I didn't die. Because so many people did. I just had this overwhelming guilt. Then I went to therapy, and that helped. I think it maybe hit me so hard because when I was in hospital, I didn't even know what it was, and then I was met with this "Woah, you're so lucky you didn't die."

34. We agree that the two passages are similar both in tone and content. They are both written by the same young woman who, on her account, has experienced two incidents of trauma. The fact that her account of her psychological reaction appears to have been so similar suggests a consistent response. It is not surprising that the way she describes them is the same. Whilst we can see that Mr Moloney would have considered cross examining on the similarities between the two documents had they both been available to him at trial there were very significant risks in doing so, not least in underlining B's vulnerabilities and underlining the effects of the rape. We note that he did not seek to cross examine on the documents at the sentencing hearing, although given the opportunity to do so in the light of the magazine material. We are wholly unpersuaded that its contents would have had the effect of undermining B's credibility in respect of the facts of the rape or more generally.

35. We are quite satisfied that, taken collectively or separately there was nothing in the material that was disclosed later in the process, whether in the records, texts, emails or the magazine article that would have affected the outcome of the trial. The conviction is safe.

36. The appeal against conviction is dismissed.

Sentence

37. The prosecution had submitted that the offence should be assessed as category 2B on the grounds that B was particularly vulnerable by reason of personal circumstances – being very drunk and in the appellant's bed. The judge, rightly, rejected that submission and, accepting the defence submission, placed the rape in category 3B with a starting point of 5 years imprisonment and a range of 4-7 years. The aggravating factors were that B was extremely drunk, was in the appellant's bed and so was vulnerable given her personal circumstances. The appellant was also drunk.

38. The mitigating factors were his lack of criminal record and the positive good character evidenced by his referees.

39. The judge referred to the guideline "Sentencing Children and Young People." The appellant was 6 months from his 18th birthday at the time of the offence and, applying the guideline, the judge reduced the sentence by one third from 6 years to 4 years imprisonment.

40. Mr Moloney submits that the judge made a mistake when sentencing; he referred to the fact that the appellant had made thrusting movements whilst his penis was inside B's mouth. The evidence was that he made thrusting movements while his penis was outside her mouth, not inside. We do not consider this makes any difference. The purpose of the thrusting movement was to get his penis into her mouth. In any event we cannot see that the judge relied on the precise timing of thrusting to aggravate the sentence.

41. Mr Moloney points to a number of matters which the judge should have considered mitigation: the absence of ejaculation, the fact that B remained in the appellant's bed till morning, the fact that there was consensual kissing in the morning, the absence of any threat.

42. We disagree. The absence of aggravating factors does not constitute mitigation.

43. We reject the submission that the judge placed too much emphasis on the Victim Personal Statement. He referred to the VPS in very brief terms and did not overstate its contents, nor does the sentence suggest that he gave it too much weight.

44. Mr Moloney further submits that the judge did not assess the appellant's level of maturity, as required by the guideline. We reject this submission. The appellant was nearly 18. He was well educated, about to take his A levels, apparently well adjusted – see the character references. There was no suggestion that he was less mature than the average 18 year old. The reduction of one third was correct.

45. We are satisfied that this sentence was not manifestly excessive. The appeal against sentence is dismissed.