IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2024] EWCA Crim 417
CASE NO 202202151/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 12 April 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE LAVENDER

MRS JUSTICE FOSTER

REX

V

DAVID STOKOE

Computer Aided Transcript of Epiq Europe Ltd,
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MS J SMART KC appeared on behalf of the Appellant.
MR R DOSWELL KC appeared on behalf of the Crown.

J U D G M E N T

1. LADY JUSTICE MACUR: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence or offences have been committed against a person, no matter relating to that person shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as the victim of the offence or offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. On 24 June 2017, the appellant was convicted of rape, assault by penetration and two offences of assault occasioning actual bodily harm. He was acquitted of two other offences of rape and one other offence of assault by penetration. His sentence, after successful appeal against sentence, in relation to his conviction of the assault by penetration, was a total of 13 years and 4 months' imprisonment. On 14 November 2023, he was granted limited leave to appeal against conviction by the Full Court.

The Facts

3. The complainant ("C") is the appellant's former partner. Their relationship started in September 2008 and ended in April 2012 but they continued to have contact with each other until October 2013. They had a child together. C had a son ("J") from an earlier relationship.
4. In 2011, the appellant returned from a night out in drink. C was already in bed. They engaged in consensual vaginal sexual intercourse before the appellant penetrated C's anus with his penis until he ejaculated. C said she had not consented to anal intercourse; she repeatedly told the appellant to stop and was crying because of the pain. The appellant had nevertheless continued and had mocked her distress as an exaggerated response. These facts formed the basis of the anal rape of which the appellant was convicted.

5. In May 2012, the parties separated and C moved into her own property with both children. The appellant continued to have contact with his daughter and would often stay at C's address overnight on the sofa. On 4 November 2012, arrangements were made for C to collect the appellant to take him to a firework display with their daughter. The appellant raised the subject of their relationship. C did not want to discuss the subject, which angered him. The appellant stopped the car and got out to allow C to move into the driver's seat but he removed the keys from the ignition and, as she tried to take the keys back, he pulled her hair across the car towards the passenger seat and, eventually, her out of the car by her hair. She was twice struck to the shoulder and her hair extensions were dislodged and pulled away from her head. The appellant contacted the police and told them that he had been assaulted. The police attended but no complaint was made by either party. These facts formed the basis of the first offence of assault occasioning actual bodily harm of which the appellant was convicted.
6. C was medically examined on 13 November 2012 and made complaint of assault on 4 November. She had injuries consistent with bruised ribs, possibly a cracked rib, a 2-centimetre lesion to her head and bruising consistent with pinch marks to her upper arm. On 7 November 2012, C obtained an ex-parte non-molestation order, extended on notice on 6 January 2014, which prevented the appellant using or threatening violence against her, or intimidating, pestering or harassing her or continuing to have contact with her. However, C continued to have contact with the appellant. She received messages from him on Facebook using a pseudonym. The appellant, in those messages, informed her that he was receiving treatment following a diagnosis for post-traumatic stress disorder. The appellant met with the complainant and persuaded her to apply for the injunction to be revoked. Their friendship and occasional sexual intimacy continued.

7. On 29 August 2013, the appellant was invited to C's house. His daughter apparently banged herself on her cot and the appellant and C went upstairs to comfort her. However, the appellant then refused to allow C to comfort their child. He became increasingly more aggressive towards C, striking her with his fist on her face and body. He pressed a screwdriver against her neck and placed his hands around her neck, causing her dizziness. These facts formed the basis of the second offence of assault occasioning actual bodily harm of which the appellant was convicted.
8. The appellant put his hand down her top, where she had hidden her mobile phone and then up inside a trouser leg, forcibly digitally penetrating her vagina while he restrained her, holding her around the neck with one hand and striking her in the face with a metal tape measure. These facts formed the basis of the conviction of assault by penetration.
9. C sustained bruising to her arms, neck and foot. Her mouth was bruised and cut from where he had hit with the tape measure. C phoned the police and paramedics. They attended and documented her injuries. She was medically examined on 30 August 2013 and a report and photograph of her injuries were prepared.
10. In evidence at trial, C described the appellant's physical and sexual violence towards her. She said he was aggressive towards her, causing various injuries. She described how the appellant had penetrated her anus with his penis, despite her protestations, and she had noticed bleeding to her anus afterwards and felt raw. She had attended her GP but was too embarrassed to disclose what had taken place. Following the assault on 4 November 2012, she said she sustained tenderness to her head where the appellant had pulled a patch of her hair out, causing a bald patch. She had bruising to her temple and the top of her ear and arm. Her injuries were seen by a nurse at the GP's surgery on 9 November.
11. The appellant was arrested and interviewed on a number of occasions. He denied the

assault and digital penetration on 29 August 2013. It was accepted that he had been at the address and there had been an argument, but he said that it was he who had been assaulted and he had restrained C. She had kicked him and tried to head-butt him. The injuries she had were as a result of her assaulting him. Otherwise, he exercised his right of silence in all subsequent interviews.

12. His case was one of denial. He gave evidence at trial. During cross-examination, he was asked about a transcript of various messages between himself and C, where reference had been made to sexual abuse taking place the previous week. He explained that he had not challenged the comment because he had nothing to answer and he feared that his contact with his daughter would be stopped if he argued with C. When confronted in interview with the transcript from 2013, he said he could not have been expected to remember the circumstances or comment and therefore, no adverse inference should be drawn. According to him the allegations of sexual and violent assaults were a fabrication made up by C in revenge and to prevent him having contact with their daughter.
13. The prosecution case relied on the evidence of C of recent complaint, observable injuries, documents prepared in the County Court proceedings and those disclosed to medical professionals and evidence of and indications of distress. The prosecution successfully applied to adduce the appellant's previous offences of violence as evidence of bad character, which they said demonstrated a propensity and, on one occasion, in 2006 in particular, towards a female. The prosecution did ask the jury to place reliance upon his failure to mention, when questioned by the police in interview, the evidence he gave in relation to the transcript of the telephone call recorded by C, without the applicant's knowledge, in which he had apologised for sexually assaulting her.
14. The defence, on the other hand, relied on the inconsistencies in the various accounts that

the complainant had given to the court, during the family proceedings, and also to medical staff and the police when she said nothing had happened. The defence also relied on the delay in reporting the incidents and how C continued to have a relationship with the appellant. It was said to be inconsistent to the evidence of recent complaint, which undermined the credibility of those witnesses giving such evidence. Some of those witnesses had not made statements at the time the disclosure had been made to them and were seeking to recall events that had happened many years ago.

The trial

15. At trial, the appellant was represented by Mr Ward, who had taken over the case from Mr Walsh, now unfortunately deceased. The circumstances in which he became trial counsel are relied upon in this appeal as indicating that he had insufficient time to prepare what was a complex and difficult cross-examination.

16. Just prior to the trial in July 2017, a bundle of messages, amounting to 74 pages, and a phone download of approximately 40,000 messages were disclosed to the defence. A transcript of a case management hearing on 6 July 2017 shows that Mr Walsh sought to adjourn the trial. At a further mention, on 7 July 2017, prosecution counsel informed the court that the messages were recently disclosed on 3 July 2017. At that time, it was conceded on behalf of the defendant that thousands of the messages may be meaningless, but that "the time will be [taken with] extracting the relevant messages". Prosecution counsel indicated took the view that messages did not assist the defence or undermine the prosecution and need not have been but were disclosed in an abundance of caution.

17. The judge requested the parties to look at and filter the material prior to the next hearing which was due on 10 July 2017. By an email of the same date, the judge indicated that:

> "I consider, and have ruled, with the agreement of the prosecution

> and defence counsel who appeared today, that the case may be capable of being fully and properly prepared for trial in the time available.
>
> If the defence were not prepared by the date of trial I would not allow the trial to proceed. I expect the defence to work as hard as possible to have this case ready for trial. If it cannot proceed it will not proceed. If it can proceed it will.
>
> A complainant and defendant are both eagerly anticipating this trial will proceed. Every effort must be made by all parties to ensure it proceeds if possible.
>
> I see no ground at this stage for trial counsel to return the case on the basis that he considers that it cannot be ready for trial- that it will not be trial ready is far from evident and the defence and prosecution have both been ordered to use their best respective efforts to consider whether the material which was disclosed at a late stage can be considered and irrelevant material identified to allow only relevant material to be considered by the defence for use at trial.
>
> The risk is now created that the trial does not proceed to trial next Wednesday only because the case was returned by currently instructed counsel at this very late stage.
>
> I order that Instructed solicitors are immediately to seek to instruct a new trial advocate."

18. On 10 July, the application to adjourn was refused. The judge was informed that the defence had been informed on 6 June that a disc containing the 40,000 messages existed but the prosecution had never received the necessary undertaking from them for the disc to be disclosed. In any event, the defence had received a paper copy of an item on the unused schedule containing the hundreds of pages of communications between the defendant, complainant and others on 5 June 2017. On 13 June, the prosecution identified for the defence, via a schedule, all the undermining material that was present on the disc. The undermining material had been extracted and disclosed and amounted to 74 pages.

The defence had had this material since 30 June. Mr Dodds, counsel on that date, stated:

> "And the prosecution are content that there is no further material beyond those 74 pages of communications which may undermine the prosecution case."

19. Mr Ward was duly instructed and the trial proceeded. He did not seek an adjournment but did seek to cross examine the complainant further in relation to matters that had not been put during the first cross-examination.

The appeal

20. The grounds of appeal have been settled by fresh counsel, Ms Smart KC, who represents the appellant in the appeal.

21. The grounds of appeal, for which leave was granted, are that:

    (1) Mr Ward had inadequate time to properly prepare for the case. The first defence trial counsel, Mr Walsh, did not consider that he would be ready to cross-examine the complainant following late service of a disc of messages. The appellant had not been present during the forementioned hearing concerning the adjournments and none of the discussions were based on his instructions. The cross-examination of the complainant was of a broad-brush approach and did not make use of vital material which had to be extracted from the voluminous unused material including the following:

        (a) Medical evidence of a skintag, the failure to report bleeding from the anus in 2011, the presence of haemorrhoids and absent allegations of sexual assault or observable anal tearing, also a diagnosis of alopecia in September 2011.

(b) Alibi, in relation to the alleged choking incident on 15 April 2012, since the appellant's passport showed that he was out of the country

(c) C's messages to the appellant complaining that she had been assaulted by J. Defence counsel informed the jury that it was not the defence case that J had caused any injury on the indictment despite the contents of a Defence Statement..

(d) Inconsistencies in C's complaint, and those without observable injuries

(e) C's message to the appellant, after the alleged rape, which indicated that she wanted to marry him and did not want the relationship to end.

(f) Messages suggesting vengeance.

(g) Inconsistent witness statements in County Court proceedings.

(2) trial counsel is said to have resiled from the appellant's specific instructions that J had committed the second assault charged against the appellant, which led to the injuries observed upon the complainant.

22. The appellant has waived privilege. Defence trial counsel and solicitors have responded to the McCook enquiries made, and Mr Ward has prepared a comprehensive response in relation to the criticism of his conduct of the trial in the following terms:

> " I was prepared to work long hours to prepare the case and did so. The characterisation of the cross examination as 'broad brush' and disjointed is not accepted. The defendant's case was put. The schedule of messages was available for the jury on July 18th 2017... The delay cannot have had a significant impact on the jury's assessment of those messages.

Skintag and her attendance on her GP. [See ground 1(a) above]
C's evidence was that she consulted her GP about a skintag… and that she did not disclose to the GP that [D] had forced his penis into her anus… She was asked in cross-examination why she did not tell her GP that she associated the skin tag with being anally raped… Her association of a skintag with an incident of anal sex undermines her credibility in itself. It could not credibly put that a skintag which was recorded as being present since birth was the same feature as she reported to the GP more recently. To seek to make that point risked diluting the stronger point. A presentation on her GP in 2014 which was consistent with haemorrhoids would not have assisted further in undermining her credibility.

Hair/hair extensions [alopecia]
Were she to be still suffering from the same issue in 2012 then it would have been as easy for her to pull her extensions as it would have been for [the appellant] to pull them out. This point was put to her on July 18th using a more contemporaneous source (a message sent by her to DS – see transcript for that date page 18). Her attendance on her GP in September 2011 would not have assisted in establishing that she had pulled her own hair extensions out.

…

Choking Incident [See ground 1(b) above]
Her evidence, in chief, was that this was the event that brought the relationship to an end in April 2012. She did not provide a specific date. The event could, on the evidence, have preceded the appellant's departure, ":

As to ground 1 (c) above and ground 2 and see further below].
"I would not have specifically said that [the appellant] did not hold J responsible for causing injury to C without DS's specific instructions. I did not resile from his defence statement…. C was asked (based on the disclosed messages) whether she had ever told anybody that she intended to blame [the appellant] for injuries received as a result of being hit 20 times by someone else… I pointed out that I was deliberately not naming the alleged perpetrator. This message was revisited on 18-07-17…
On this occasion the full messages were read out… The fact that I have stated in terms that I was deliberately not naming the alleged perpetrator is further evidence that DS provided specific instructions not to blame J for causing injuries attributed to him.

The point being made was that C was prepared to blame him, out of malice, for causing injuries that he had not caused. That point was made.

As to ground 1(d).
" It was put to C in cross-examination (and she agreed) that [the appellant] had called the police and that no-one was arrested. The delay in providing images of her injuries was put to her in cross examination… It was an agreed fact in relation to the assault occasioning actual bodily harm on 4 November 2012. The observation that there were no visible injuries was a matter before the jury and the complainant did not need to be cross-examined on this point.

As to ground 1(e).
" I accept that messages regarding C's desire to marry the appellant or otherwise continue the relationship were not put. It was clear from the evidence that she maintained a relationship with him despite her allegations of mistreatment by him… It was put to her that she facilitated this contact and that false names were used so prevent others from discovering that they were in contact."

As to ground 1 (f)

The messages 'I'll ruin you' and 'I will stop at nothing…"
were put to C…

As to ground 1(g)

The statement from civil proceedings in which she said that there was nothing forced sexually was put to C. Further development in cross examination would not have improved the point."

23. As to ground 2:

"It is inconceivable that I would have resiled from the position adopted by a defendant in a defence statement without their specific instructions. The comment attributed to me at paragraph 20 was made following a short discussion in the absence of the jury with the defendant present. It is clear from that sequence of events DS had provided those instructions. I did not resile from his defence statement. He would have instructed me that he no longer stood by that element of his defence statement."

24. Ms Smart, concedes that individual criticisms made, whether of the judge refusing to adjourn the proceedings or the fact that Mr Ward did not make certain points that she herself would have made during the course of the trial, when seen alone would not impact upon the safety of the convictions. However, she submits that the cumulative effect of the criticisms made in the grounds of appeal leads inexorably to that conclusion.
25. However, in short, she finds herself focusing upon the fact that, at the time of the first cross-examination of the complainant, there was no bundle of documents including text messages available to Mr Ward in order that the jury could follow the defence case which sought to unravel a complex and long relationship. The absence of such a bundle undermined the force of any cross-examination. Mr Ward should have had all of the ammunition at his fingertips from the outset but was prevented from doing so by virtue of the fact that this trial was rushed. Initial trial counsel had pulled out. Mr Ward could not have had adequate time to prepare.
26. Mr Doswell, who appears on behalf of the respondent and was prosecution trial counsel has informed us that the text messages and other documents were available to the defence during the first cross examination of C but, because of inadequate printing facilities at court, were not placed in a bundle. Mr Ward successfully applied to renew cross-examination of the complainant following the intervention of other prosecution witnesses relating primarily to recent complaint. That second cross-examination, conducted with the aid of the bundle, is transcribed. Mr Ward's response to the criticism made against him refers to the transcript and which indicates a thorough cross-examination lasting some considerable time.
27. Specifically, Mr Doswell confirms that, in the absence of the jury, a discussion took place concerning the naming of J as perpetrator of the injuries seen upon the complainant and

attributed to the appellant. Time was afforded to Mr Ward to have a conference with the appellant and a conference took place. Subsequently Mr Ward made clear that he would not, upon his client's instructions, be blaming J for injuries that were seen, however he did make the point that the complainant had accused another person other than the appellant as responsible for the injuries in a message to the appellant.

Discussion

28. With the greatest of respect to Ms Smart's endeavours, we can dispose of this appeal in very short order. We note that, despite her criticisms of Mr Ward's preparedness for trial, that the appellant was acquitted of three serious offences. There has been no written rejoinder to Mr Ward's full and robust, albeit measured response to the criticisms that are made within the grounds of appeal. Nor has there been any application to challenge his response by way of oral cross-examination. It would be difficult to do so, in many respects, having regard to the transcripts now available as Ms Smart appears to now acknowledge and concede.
29. We see no merit in her submission that the appellant's absence during the case management hearings makes the decision to proceed to trial unsafe. There was nothing that the appellant could add. His wish to retain Mr Walsh as counsel was futile in light of counsel's withdrawal from the case.
30. We see nothing that the appellant can reasonably complain about Mr Ward's representation of him. We have no reason to disregard Mr Ward's response to the criticisms raised. It provides a complete rebuttal to the charges that he had inadequate time to prepare for trial or failed in his duty to put the appellant's case or to follow his instructions. The fact that Ms Smart may have pursued the defence in a different fashion

does not begin to establish a viable ground of appeal.

31. The decisions made by trial counsel are more than adequately explained. The fact of a second cross examination does not render it substandard . We do not accept Ms Smart's submission that the fact that the bundle of documents was not available at the time of the first cross-examination of the complainant, in any sense renders these convictions unsafe
32. The appeal is dismissed.

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

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