Neutral Citation No. [2024] EWCA Crim 54
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT
SITTING AT HARROW
Her Honour Judge V. Francis

Case Nos. 202300756B5 and 202300758 B5

Royal Courts of Justice,
Strand,
London WC2A 2LL

Thursday 18 January 2024

Before:

LADY JUSTICE ANDREWS

MR JUSTICE JAY

HIS HONOUR JUDGE ANDREW LEES
(Sitting as a Judge of the CACD)

REX

V

DRISS SERHIR

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

NON-COUNSEL APPLICATION

J U D G M E N T
(Approved)

LADY JUSTICE ANDREWS:

1. These are renewed applications for leave to appeal against conviction and sentence following refusal by the single judge. In each case the applications are made long after the expiry of the relevant time limit. The applicant requires an extension of 280 days for leave to appeal conviction and 205 days for leave to appeal sentence.

2. On 4 May 2022, in the Crown Court at Harrow, following a trial before HHJ Francis and a jury, the applicant (then aged 21) was convicted of three counts of rape of a child under 13. On 18 July 2022, the trial judge sentenced him on each count to an extended sentence of 12 years, comprising a custodial term of 9 years and an extension period of 3 years, pursuant to section 279 of the Sentencing Act 2020. She ordered the sentences to run concurrently. The judge also made a Sexual Harm Prevention Order for a period of 15 years.

3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences and accordingly, no matter relating to the complainant 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 that Act.

4. In support of the applications for extensions of time, the applicant stated that following his conviction he suffered from mental health issues, and was placed on suicide watch by the prison authorities. After he sought professional help with his mental health and "decided to fight for his case again", he was advised by his trial solicitor that he had no grounds of appeal. He therefore spent some time trying to engage a fresh legal team on a private basis, which proved difficult. Many of the firms he approached had too much work as a result of the aftermath of the Covid Pandemic. Finally, in September 2022, he found out how to appeal in person.

5. He maintains that he has submitted three previous applications for leave to appeal since September 2022, and is unsure if they had been lost in the post or directed to the wrong department. However, the Criminal Appeals Office has conducted a search and can find no trace of any previous application submitted by this applicant.

6. Whilst the applicant's mental health difficulties provide some explanation for the early part of the delay, it is not a good reason for delay of this length that the applicant has received negative advice on appeal from his trial representatives and has spent a long time trying unsuccessfully to find other lawyers who will give different advice. There is no evidence to support the applicant's assertion that he first sought to appeal in September 2022, and it is highly unlikely that three previous applications went astray.

7. However, the ultimate test that the Court must apply is whether it is in the interests of justice to grant the extensions of time. That necessarily involves consideration of the merits of the proposed appeals. If there are genuine and sufficiently arguable grounds for doubting the fairness of the trial or the safety of the applicant's conviction, then it generally would be in the interests of justice to grant the necessary extension. We must therefore consider, as the single judge did, whether any of the grounds would have a real prospect of success.

8. The offences were said to have been committed on the night of 21 October or early morning of 22 October 2019. The complainant (to whom we will refer as "X") was at the relevant time a 12-year-old girl whose family were known to Social Services. She was said to be a child at risk of sexual exploitation. On 21 October 2019, she went missing from her home. Her mother was then working on night-shifts which started at 10.00 pm. That morning she came back from her shift and went to bed to sleep, planning to be up in time to collect her younger children from a childminder. She asked X to stay in the house until she woke up. However, when she woke up, she found that the front door was open and X had gone.

9. X's mother tried to contact her by phone. She managed to speak to X, who said that she would be back before her mother left for work that evening. However, by 9.00 pm X had still not returned and her phone was now switched off. At around 12.30 am she called her mother and said that she was safe and that everything was all right, but she would not reveal where she was. Her mother said she was whispering, and her voice sounded strange and worried.

10. The following morning X telephoned her mother and her social worker, in a tearful state, and asked to be picked up from the local railway station. The social worker picked up X and returned her to her home. She was in an extremely distressed state but she would not tell her mother what had happened. Later that day, she became even more upset and agitated after her mother explained that at a Safeguarding Meeting it had been decided that every time X went missing in future, she would be checked over for injuries and marks. She ran out of the house, shouting that she would not undergo a medical examination. Eventually X was detained and placed into care.

11. X's mother suspected that she had been hurt in some way and preserved the pair of grey tracksuit bottoms that X had been wearing in a plastic bag. The clothing was subsequently handed to the police and forensically examined. Semen with the applicant's DNA in it was found on the outside of the crotch.

12. In her Achieving Best Evidence interview, X said she knew the applicant some time before October 2019 and that they had been communicating via social media. She had met him that afternoon for a coffee in a local cafe. He appeared to her to have taken drugs. The two of them then travelled together to London by train. Initially they went to a Pizza Hut restaurant near Baker Street station. The applicant was carrying what appeared to be a handgun, and a knife, and he had a large amount of cash on him which he asked X

to hide in her bra. They then went to a hotel. The applicant went off and paid for the room telling X to wait outside. He then collected her. They went upstairs to the room together and engaged in vaginal sexual intercourse twice. Afterwards they went into Central London, spending most of the night in a shisha bar before returning to the hotel. On their return she performed oral sex on him.

13. The applicant gave a "no comment" interview following his arrest. During the course of the proceedings, he served a Defence Statement in which he denied that anything sexual had occurred between him and the complainant. He explained the presence of his semen on the complainant's tracksuit bottoms on the basis that it must have been left on the bedcover in the same hotel room, after a previous occasion when he had stayed there and had masturbated. He suggested that X must have sat down on it inadvertently.

14. Apart from the evidence of the complainant herself and expert evidence from a forensic scientist, who disputed that the semen could have got onto tracksuit bottoms in the manner described by the applicant, the prosecution relied upon diary entries that X had made describing the events of 21 and 22 October 2019, the evidence of the mother and social worker and of one of the police officers who attended the house on 22 October about those events and X's behaviour, and the evidence of an independent female witness, who described having seen X with a boy, loitering on the train station platform. She described X as having love bites on her neck and she had challenged X as to what she was doing and with whom.

15. The prosecution also relied on evidence from the hotel manager, who described having conducted a search of the hotel records to discover whether the applicant had booked the same or any other room in the hotel on another occasion - there were no other bookings that he could find. Finally, they relied on evidence from the officer in the case about the applicant's arrest and police interviews and about how he, the officer, had gathered evidence including chat logs on the applicant's phone and evidence of Internet searches undertaken by him. He also gave evidence about two relevant previous convictions of the applicant that had been ruled admissible by the trial judge as evidence of bad character following a contested application by the prosecution. One was for possession of an offensive weapon and the other for possession of a bladed article.

16. The defence case was one of denial. The applicant accepted that he was with the complainant overnight on 21 and 22 October in London and that they had stayed together at the hotel, but he maintained that there had been no sexual contact between them whilst they were together. He denied going to Pizza Hut, that he had been armed with a knife or a gun at any stage, and that he had given cash to X. He said he had booked the hotel room on the morning of 21 October, when he had travelled to London with his partner. He had left his clothes after checking in that morning and he and his partner had had sex and watched a film together before they both left the hotel. He had planned to return to London later and stay in the hotel room on his own, but he subsequently made contact with X, told her what his plans were and offered that she could come along for the day.

17. He had not expected X to stay overnight but, when she asked if she could, he agreed. He had not taken X's phone from her but had rather gone to a shop to purchase a phone charger which they had both used to charge their phones in the hotel room. Initially they were in the room for about 25 minutes, during which time all they did was eat a McDonald's which he had purchased on his way back from the shop. They then went out to Piccadilly, where they met some of his friends. They did not return to the hotel until around 9.00 or 10.00 that evening and after they arrived another friend rang him and suggested that they should go and meet up at the shisha bar. They left the hotel at around 11.00 to go to the shisha bar and stayed there until the next morning. The applicant said that whilst under the influence of what he had smoked at the shisha bar he may have masturbated at the hotel after their return but he did not recall doing so. Both he and X were fully clothed on their return, and they just went to sleep. They had travelled back to her home station together on the same train.

18. In the grounds of appeal, the applicant complains that he did not get a fair trial. He complains in particular about the admission of the evidence of his bad character. He also said that his defence team had failed to raise the fact that X had made allegations of sexual offences against her, which involved a group of other males, some 5 months before this indictment. He challenged X's reliability as a witness, based on inconsistencies and her accounts of the index offences and comments made by her mother and as reported by Social Services. He sought to challenge the DNA evidence. Finally, he said that he became aware that he knew a jury member (halfway through the trial) and that the juror concerned gave him "a weird smile" just before the verdict was returned.

19. The prosecution served grounds of opposition, but it is unnecessary to refer to them in any detail in this judgment because they are generally reflected in the single judge's reasons for refusing leave to appeal. However, as regards the point about the juror, the prosecution said that there was never any suggestion made during the trial that the defendant knew one of the jurors. If he had done so, the matter would have been investigated. Moreover, none of the jurors ever passed a note to the judge to the effect that they recognised the defendant.

20. In the light of the complaint that the defence team had failed to raise matters that the applicant alleged adversely affected the fairness of his trial, he was invited to, and did, waive privilege, although when doing so he said he was not complaining about his representation. Trial counsel has provided a response, in a note dated 30 April 2023, to which the applicant replied in a letter received on 26 May 2023. We have read both these documents.

21. Counsel rightly pointed out that X's allegations concerning sexual behaviour of other males towards her could only have been admissible if the requirements of section 41 of the Youth Justice and Criminal Evidence Act 1999 were made out. She said that the unused material suggested that X's complaints about the previous incident were likely to

be true. Had there been any basis for believing them to be otherwise, she would have made the necessary application to adduce them as bad character evidence. She also made the valid point that, even if the evidence had been admissible and was admitted, it was likely to have engendered further sympathy for X and made matters worse for the applicant.

22. Counsel is correct to state that this evidence was inadmissible by virtue of section 41. The applicant appears to accept this, but he complains that this statutory inhibition on cross-examination of the complainant meant that his trial was unfair. That argument has no prospect of success. Section 41 is not incompatible with Article 6 of the ECHR. It strikes a fair and proportionate balance between the interests of the defendant and the complainant by ensuring that only relevant evidence which has probative value is adduced at trial.

23. The bad character provisions provide a mechanism for relevant evidence of sexual conduct which goes to the complainant's credibility to be adduced, but in this case trial counsel did not have the basis for making an application under those provisions. There is no merit in this complaint. As the single judge observed, the fact that the complainant had made previous allegations of rape was not relevant to any issue in this case and there was no evidence in any event that those allegations were untrue.

24. As to the forensic evidence which the applicant seeks to criticise, defence counsel at trial said that the defence instructed a forensic expert to examine the tracksuit bottoms and that that expert's report was, if anything, more damning than that provided by the prosecution. Therefore, there was no basis for challenging the prosecution expert's evidence relating to the semen on X's tracksuit bottoms.

25. In refusing leave to appeal against conviction and the necessary extension of time, the single judge described the explanation given by the applicant for the presence of his semen on X's tracksuit trousers as "preposterous" and said that he was convicted on "overwhelming" evidence. That view was plainly shared by the trial judge, who said in sentencing that the account that he gave was rightly rejected by the jury because what he described "just didn't hang together," and that it was a sign of the applicant's immaturity that he could not see that.

26. The single judge also said that the applicant's previous convictions were plainly relevant to an important matter in issue, namely the applicant's propensity to carry weapons and the judge was entitled to rule that evidence admissible. The credibility of X was a matter for the jury to assess and it was powerfully corroborated by the DNA evidence. If the applicant had been concerned about a juror, he could and should have raised the matter at the time.

27. We agree with all those observations. The trial process was scrupulously fair. The judge's summing-up, the transcript of which we have read, was balanced and contained all the appropriate legal directions to the jury. There is nothing in any of the applicant's grounds that causes us to doubt the safety of his conviction for these offences. There being no point in granting the requested extension of time, we therefore refuse it and dismiss this renewed application for permission to appeal against conviction.

28. Turning to the appeal against sentence, the applicant says that the judge passed a sentence that was too long because she did not sufficiently take into account certain mitigating factors, specifically his father's sad death from cancer shortly after being diagnosed, his own mental health issues, and his age at the time of the offences, which was 18. He also complains about the lateness of the pre-sentence report, which he says was provided less than three days before the sentencing hearing and was "not complete". However, he does not identify what further information could or should have been in the report which might have afforded him additional mitigation.

29. The prosecution provided a Sentencing Note which suggested that the offences fell into category 2 (culpability A), with a starting point of 13 years and a range of 11 to 17. In her careful sentencing remarks, the judge explained why she had decided that the offending was at the bottom end of category 2A or the top end of category 2B, which has a starting point of 10 years and a range of 8 to 13, and why she took a starting point of 12 years. This was a sustained period of detention involving violence to a victim who was vulnerable to sexual exploitation; in terms of culpability there was grooming, including isolating X from those protecting her, and the provision of alcohol.

30. Having presided over the trial, the judge was in the best position to evaluate culpability and harm. She specifically had regard to the applicant's age and immaturity when doing so, and they were an important feature in her decision to take a starting point of 12 years rather than 13, as she could have done. The judge then turned to the aggravating features, including the presence of a weapon which caused X to be frightened, the inability of X to return home because of the offending against her, and the fact that the offences were committed whilst the applicant was under the influence of drugs, in particular cannabis. Although the judge did not expressly articulate how much these factors would have increased the 12-year starting point, an increase of up to 2 years would have been justifiable before any personal mitigation was taken into consideration.

31. We do not consider there is any substance in the criticisms in the pre-sentence report, which is 15 pages long and appears comprehensive. It was completed on 14 July 2022, following a remote interview with the applicant on 5 July. It records that the applicant expressed no genuine remorse for the harm caused to the victim, that he continued to deny the offences and that he constantly blamed X for accusing him of something that he continued to claim he did not do, accusing her of a personal vendetta against him. He also

indicated no willingness to address his cannabis consumption and said that he was still taking drugs whilst in prison.

32. The report addresses the applicant's mental health and records, his suicidal ideation and depressive episodes. The probation officer specifically refers to a clinical psychology report which suggested that he had traits of emotionally unstable personality disorder. She gives compelling reasons to support a finding of *dangerousness*. The report was produced in sufficient time for the judge to read and digest it, and the applicant's trial counsel did not need more time to consider it before addressing the judge in mitigation.

33. The judge made it clear in her sentencing remarks that she had considered the contents of the pre-sentence report, and of three separate Child Abduction Notices that had previously been served on the applicant in respect of other vulnerable young women, which the jury had not seen. She expressly took into account all the mitigating factors referred to by the applicant in his grounds of appeal, including the effect on him of his bereavement, his ongoing mental health issues and his age and immaturity. It is clear from her observation about there being no magic wand that turns an 18-year-old into a fully formed adult, and her assessment of the applicant's immaturity, both at the time of offending and at the time of sentence, that she adopted an approach to sentencing someone of his age and immaturity that fully accorded with the Guidelines on Sentencing Children and Young Persons, although he had already turned 18 at the time of the offending.

34. In our judgment, no complaint can be made about the judge's decision that the applicant met the criteria for *dangerousness*, nor with her decision in principle to pass an extended sentence. She gave clear and cogent reasons for taking that course. A 3-year extension licence period was within the reasonable range.

35. As far as the custodial element is concerned, the judge weighed all the aggravating and mitigating factors in the balance and reached a period of 9 years. That sentence, far from being obviously too long, was well within the available range of offending of this seriousness. Again, therefore, there is no purpose to be served in granting the extension of time.

36. For those reasons, this renewed application for leave to appeal against sentence is also refused.