Neutral Citation Number: [2017] EWCA Crim 1556

No: 201604727/C1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 17 August 2017

B e f o r e:

LADY JUSTICE RAFFERTY DBE

MR JUSTICE SWEENEY

MR JUSTICE HOLROYDE

R E G I N A
v
ISMAIL HAJI

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Mr C Moran appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

1.1. MR JUSTICE SWEENEY: This is a renewed application for leave to appeal against conviction.

1.2. The provisions of the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the complainants shall, during their lifetimes, being included in any publication if it is likely to lead to their identification as such.

1.3. On 12 September 2016, in the Crown Court at Leeds, at the conclusion of a trial before His Honour Judge Khokhar, the Applicant, who is now aged 40, was convicted of three

offences of rape (Counts 1, 4 and 5), one offence of sexual activity with a child (Count 6), two of meeting a child following sexual grooming (Counts 10 and 11) and two of trafficking within the United Kingdom for sexual exploitation (Counts 17 and 18).

1.4. On 27 September 2016, he was sentenced by the trial judge to a total of 19 years' imprisonment.

1.5. Three co-accused were also convicted of sexual offences. It is necessary to identify only one - Mohammed Chothia, who was convicted of two Counts of meeting a child following sexual grooming and two of trafficking within the United Kingdom for sexual exploitation and was sentenced to a total of 13 years' imprisonment.

1.6. There are two Grounds of Appeal, namely that: (i) the hearsay statement of the complainant, R, dated 8th December 2014, was wrongly admitted under section 114(1)(d) of the Criminal Justice Act 2003, and (ii) the judge erred in finding that there was a case to answer against the applicant on Counts 1 and 6.

1.7. Between them the grounds relate to four of the offences namely, Count 1, the vaginal rape of J, aged 13, on 7 September 2014; Count 4, the anal rape of R, aged 15, on the night of 12 September 2014; Count 5, the vaginal rape of R on the same night; and Count 6, sexual activity with J by way of penetration of her anus with his penis also on the same night.

1.8. We therefore confine our short summary of the factual background to matters relevant to those offences. In August 2014 Chothia, who was a close friend of the Applicant, rented a flat in Dewsbury. The Applicant, a married taxi-driver with six children, had access to the flat. In late August 2014 Chothia got in touch on line with T, who was aged 22 and had considerable learning difficulties. She lived in Wakefield. T was the aunt of R and both were friendly with J, who herself had moderate to severe learning difficulties.

1.9. In the result, on Sunday 7 September 2014 there was an arranged meeting between Chothia, the applicant, T, R and J in Wakefield. The two men said, falsely in each case, that they were in their early or mid-20s. T said that J was aged 16 rather than 13. The two men took T, R and J bowling and to an arcade in Castleford, after which R went home but T and J were taken by Chothia and the Applicant to the flat in Dewsbury where vodka was provided and drunk. After about an hour the Applicant and J went to the bedroom and it was there that it was said that the rape alleged in Count 1 was committed. Chothia filmed part of the events in the bedroom through a crack in the door. The film, which lasted for some 10 minutes, was relied upon by the prosecution as demonstrating, along with other evidence, that J had not consented and that the Applicant could have had no reasonable belief that she did. Those were the issues on that Count at trial. Everyone left the flat about 20 minutes after the offence.

1.10. T, R and J went to the flat, again late at night, on Friday 12th September 2014, for a supposed 16th birthday party for J. The Applicant arrived at about 12.30 am on Saturday 13 September and stayed for almost 4 hours. Significantly J was wearing a pair of stonewashed jeans that R had loaned her, and at the flat R changed into a pair of

blue jeans. T, R and J all got drunk. There was upset between R and J, as R had said that J was 14. T said that at one point the Applicant took J into the bedroom. It was said that it was then that the anal intercourse, the subject of Count 6, took place. There was evidence that they were in the bedroom for a long time and that J was sweaty when she emerged.

1.11. T said that the Applicant next took R to the bedroom. R said that the Applicant had then raped her anally and vaginally (Counts 4 and 5). The Applicant's case was that he did not have intercourse with either girl that night.

1.12. At all events, on Sunday 14 September J returned the stonewashed jeans that she had borrowed to R, and R put them, along with the blue jeans that she had been wearing, into a bag which she took home and left there.

1.13. The police became involved after teachers at J's school became concerned about her behaviour.

1.14. The events that led to the admission of R's witness statement, dated 8 December 2014, were shortly as follows. In her ABE interviews J had denied that any sexual activity had taken place, saying only that she had got drunk and played teenage party games, and had been involved in kissing and hugging on dates. In the combination of her ABE interviews in October 2014, R described the offences in Counts 4 and 5 and also referred to the fact that she had loaned J the stonewashed jeans. She did not refer to the fact that she had changed into the blue jeans at the flat on 12 September, nor that she had put them and the returned stonewashed jeans into the bag. However, outside of the ABE process she had given the bag to the police, indicating that the clothes inside had been worn on the weekend of 12-14 September 2014. Therefore, the items were sent by the police for scientific examination.

1.15. Prior to the completion of that examination, on 15 October 2014, J wrote a letter to the police, now confessing that she had had intercourse with the Applicant and others, but giving no detail as to when and where such intercourse had taken place.

1.16. In a witness statement dated 4 December 2014 the forensic scientist, Sharon Doole, indicated that:

(i) Semen attributable to the Applicant had been found on the inside upper centre back of the blue jeans, in a position that was consistent with anal drainage and could be explained by the fact that the Applicant had had anal intercourse with R, after which she had worn the jeans.

(ii) Semen attributable to the Applicant had also been found on the inside upper centre back of the stonewashed jeans again in a position that was consistent with anal drainage, which findings could be explained by the fact that the Applicant had had anal intercourse with the wearer after the jeans had last been washed.

1.17. Four days later the police took the witness statement from R. The Respondent accepts that the police were wrong to do so. There should have been another ABE interview.

1.18. In the statement R said that the blue jeans were owned by her, that she had changed into them on the Friday night at the flat, and that they were clean prior to her putting them on that night. She had continued to wear them until the Sunday when she had put them into the bag. The stonewashed jeans, she said, had been washed prior to her lending of them to J on the Friday. At no time over the weekend had R worn those jeans. J had stayed in them and had given them back on the Sunday, after which R had put them into the bag. She had not done anything with the bag until the police had taken it from her house.

1.19. The statement was served on the defence shortly afterwards and in the event, well before the procedure, in accordance with section 28 of the Youth Justice and Criminal Evidence Act 1999, in relation to R, which was conducted on 22 April 2015. That procedure offered the Respondent the opportunity to seek to ask R questions to elicit the evidence in the witness statement. However, wrongly, as the Respondent now accepts, that opportunity was not taken. Unsurprisingly, in those circumstances, there was no cross-examination about the content of the statement either.

1.20. In December 2015, the Respondent sought to address that admission by applying to have R recalled to give the evidence at trial. However, that application was refused by His Honour Judge Clark, having regard to the welfare and well-being of R. Thus it was that, three days into the trial before His Honour Judge Khokhar, the hearsay application came to be made and was granted.

1.21. In his written submissions on the Applicant's behalf Mr Moran submits that it was extremely prejudicial to the Applicant to admit the statement; indeed that it had such an adverse effect on the fairness of the proceedings that it ought not to have been admitted. In support of that submission he variously underlines that:

(i) The judge was not asked to revisit the issue of recalling R and no steps were taken to discover whether she was available – whereas, on the face of it, she seemed to be available and willing and was in any event compellable;

(ii) The application was consequent on the Respondent's errors and was made very late;

(iii) Whilst, in accordance with authorities such as R v Z [2009] EWCA Crim 20 and R v Freeman [2010] EWCA Crim 1997, section 114(1)(d) should not be so narrowly applied as to have no effect, it must nevertheless be applied with caution;

(iv) By reference to section 114(2)(a), the evidence was of very considerable importance - indeed critical importance on Count 6, where it amounted to the foundation stone of the Respondent's case. Thus, for example, section 114(2)(g), whether oral evidence of the matter could be given, and if not, why not, should have assumed greater significance;

(v) The admission of the statement meant that the Applicant had no opportunity to cross-examine J and R about issues such as whether J had worn both pairs of jeans after the admitted intercourse with the Appellant on 7 September 2014;

(vi) Due to the clear import of the evidence and the potential for it to be undermined by

cross-examination, and the powerful effect the evidence must have had on the jury, the judge should have invited the Respondent to recall both witnesses or should have refused the application.

1.22. In its Notice, the Respondent submits that the evidence provided clarification. It was not entirely fresh. It was important, but not crucial. The jury had had the chance to assess R's general reliability and credibility via her ABE interviews and the section 28 procedure. There was, in any event, independent evidence that J was wearing the stonewashed jeans on the night of 12th September. Ultimately, the Respondent submits that, viewed overall, the judge was entitled to admit the evidence and that no unfair prejudice resulted.

1.23. We observe that it would, of course, have been far better if the Respondent had not twice failed to deal with the issues appropriately. However, it seems to us, as it did to the single judge, that it is simply not arguable that the judge fell into error in admitting the statement. He considered all the relevant factors, including those advanced on behalf of the Applicant in relation to both R and J. He had regard to the interests of the Applicant and, in his detailed ruling, carefully weighed the opposing factors.

1.24. We reject the suggestion that it is arguable that the admission of the statement had such an adverse effect on the fairness of the proceedings that it ought not to have been admitted. The Applicant was always going to have to deal with the other evidence that J had been wearing the stonewashed jeans on 12 September, and the scientific evidence in relation to both pairs of jeans.

1.25. We also observe that, in summing-up, the judge gave the jury thorough and impeccably fair directions as to their approach to this evidence.

1.26. The authorities make clear that this court will not readily interfere with decisions of this type unless the judge fell into legal error or took wrong things into account, or the situation was such that the decision could not sensibly have been made. In the particular circumstances of this case, we see no arguable basis upon which to do so.

1.27. We turn to Ground 2, with which we can deal with very shortly. It relates to Counts 1 and 6. Mr Moran submits that the judge should have acceded to the submission of no case to answer in respect of both those Counts. The Respondent, in its written reply to the submission of no case at trial, set out, in considerable detail, the evidence upon which it was submitted that there was a case to answer on both Counts. That reply was largely adopted by the judge in his detailed ruling that there was a case to answer on each.

1.28. In our view, the matters relied upon at trial by the Respondent provided a compelling basis upon which to properly conclude that there was a case to answer on both Counts. This ground is wholly without arguable merit.

1.29. In the result, and overall, this application fails and is refused.

1.30. LADY JUSTICE RAFFERTY: Mr Moran you come I think pro bono. Have you come pro bono from Leeds?

1.31. MR MORAN: Yes.

1.32. LADY JUSTICE RAFFERTY: That is very good of you and very professional.

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