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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 13 December 2019

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE SPENCER

HIS HONOUR JUDGE KATZ QC

(Sitting as a Judge of the CACD)

R E G I N A
v

RAJESHKUMAR MEHTA

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(Official Shorthand Writers to the Court)

Ms E Laws QC appeared on behalf of the **Appellant**

Ms M Heeley QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE SINGH: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. We shall therefore use initials where appropriate in this judgment.

2. Introduction
On 6 April 2018, in the Crown Court at Birmingham, the appellant was convicted of one offence of sexual assault which was the subject of count 2 on the indictment. He was acquitted on count 1 which alleged sexual assault in relation to another complainant.

3. On 27 April 2018 he was sentenced by Her Honour Judge Montgomery to 15 months' imprisonment.

4. He now appeals against conviction with the leave of the Full Court (comprising Singh LJ, Fraser J and Thornton J DBE) on 11 September 2019, when the court also granted the required extension of time and gave leave to call fresh evidence under section 23 of the Criminal Appeal Act 1968. Leave to appeal was granted on two grounds and not on other grounds which had been raised in the application for leave.

5. Factual Background
At the relevant time the appellant practised as a general practitioner at the Hill GP surgery in Birmingham. The two counts on the indictment related to two different complainants: count 1, on which the appellant was acquitted, concerned a patient of the surgery itself where the appellant was then working; count 2, on which he was convicted, concerned an unregistered walk-in patient who was seen at the same surgery by him.

6. On 10 May 2016 the complainant in count 2 (QU) attended the surgery as a walk-in patient. She was seen by the appellant. She said that she had a frozen shoulder and had been suffering from anxiety, shivering and sweating. She said that she left the surgery with a friend (NM) who had accompanied her and that she had collected a prescription.

7. On 16 May 2016 the complainant attended the surgery and made a complaint about the appellant. She completed a complaint form and made a statement. She also spoke to a female doctor. Her complaint was that she had attended the surgery and had seen the appellant alone. He had her lie on a couch and unbutton her shirt, he had moved her vest and bra aside and had touched her breast. He had then stroked her back in an inappropriate way. Her evidence was that she had seen that the appellant had an erection at the time. She stated that the appellant had also engaged in an inappropriate conversation with her which was sexual in nature. Her report stated that she had attended the surgery with a friend in the morning, whereas the record suggested that she had in fact attended in the evening.

8. The surgery's internal investigation concluded that the appellant had in fact undertaken a legitimate examination. The complainant had not reported the incident to the police. However, following a report from the complainant in count 1, the police contacted this complainant in December 2016. She then made a formal police statement on 8 December 2016.

9. In relation to count 1 the complainant alleged that she had attended an appointment with the appellant on 9 May 2016 concerning a back problem. She was wearing full Islamic clothing including a veil. During their appointment the appellant had examined her and placed his hands inside her clothing and squeezed her buttocks. She had not reported the incident at the time. She attended a later appointment in August, when she had complained, and she had been advised to report it to the police.

10. The prosecution called evidence from the two complainants who gave evidence from behind screens. The complainant's evidence in count 2 was in addition supplemented by evidence called from a female doctor and the medical secretary who had taken a statement at the surgery from QU. The officer in the case produced the appellant's prepared statements given in police interview.

11. So far as the defence case was concerned, the appellant gave evidence at his trial. He relied upon his good character. He was a general practitioner of 40 years' standing. He could not remember attending the complainant the subject of count 1 but he did give an account of his attendance on the complaint the subject of count 2. The appellant denied that he had touched either complainant as alleged. In respect of count 2, he remembered the appointment. He had taken QU's vitals and examined her in an appropriate way. He diagnosed anxiety and prescribed Diazepam. He had not asked QU to remove clothing nor had he moved her clothing as alleged. He did examine her chest with a stethoscope but that was entirely proper. He denied he had touched her breast, that he had an erection or that he spoke to her about sexual matters.

12. The defence case relied upon the fact that the complainant had delayed in reporting her complaint.

13. The issue for the jury at the trial was therefore whether they were sure the appellant had touched the complainant and that the touching was sexual in nature.

14. <u>Fresh Evidence</u>
The appellant has been given leave by the Full Court, as we have mentioned, to introduce fresh evidence under section 23 of the 1968 Act from first, Mr Nigel Richardson, who is a solicitor who has made a statement dated 18 November 2018. He outlines correspondence with the prosecution to obtain disclosure which has now been received. Secondly, a report dated 18 August 2018, by Mr Simon Davison, who is a private

investigator, who confirms the complainant first gave incorrect details in relation to her mother-in-law - a topic to which we shall return - and secondly, that she made a signed statement, dated 20 August 2017, in which she had said that her twins had been fathered by NM.

15. Grounds of Appeal
On behalf of the appellant the following two grounds of appeal are advanced with the leave of the Full Court by Ms Eleanor Laws QC, who did not appear at the trial. She submits that the jury did not hear about two significant matters. First, the complainant had lied on oath before the jury when denying that NM was her boyfriend and was the father of her twins. Secondly, in response to a direction from the court made in the criminal proceedings themselves, the complainant had deliberately misled the court and the parties by providing false contact details for her mother-in-law.

16. It is argued that this deprived the appellant of the opportunity to adduce and utilise in cross-examination material which was capable of damaging the complainant's credibility; it is further argued that had the defence been aware of these matters they would have requested that the judge should have given a special warning to the jury as to the need for caution in relying upon the evidence of the complainant, QU.

17. The appellant's submissions in more detail
On behalf of the appellant Ms Laws set out the way in which the prosecution case was presented before the jury, in particular, she emphasises the evidence given by QU at trial was that she had attended the surgery at approximately 10.30 to 11.00 am on the morning of 10 May 2016, after dropping her daughter at college at 9.00 am. In fact she had attended the surgery much later in the day for about 20 minutes, between 17.24 and 17.46 hours. There was an agreed fact (No 4) to this effect which reflected the surgery's own records. Ms Laws submits that QU said in evidence that she had picked up her keys from the table after her examination by the appellant and ran outside forgetting her jacket. She said that the appellant then followed her and gave her her jacket. She did not recall whether she had booked a further appointment. She said that a friend of hers (NM) was waiting for her at the surgery. He asked her what was wrong. She did not tell him at that time what had happened but did tell him later. She said that she obtained her prescription and then went home. She did not go to the police at that time. A day or two later she told her daughter who told her to report it to the surgery.

18. Ms Laws emphasises that the essential issue at the trial was whether the appellant had touched QU's breast or breasts as alleged with his hands and whether any touching was sexual. The defence case was that he had not touched her breasts as alleged or at all and that such contact as there was was part of a proper examination for diagnostic purposes. Ms Laws submits therefore that the credibility of both the complainant and the appellant was crucial at the trial.

19. Ms Laws accepts that during the trial the defence were able to and did raise various

inconsistencies in the account they said had been given by QU. However, Ms Laws submits there were two matters which were treated at the trial as inconsistencies but which in fact have turned out to be, as she puts it, "nailed on lies".

20. On behalf of the appellant Ms Laws submits there is an important difference between a mere inconsistency and an established lie. It is submitted that the two matters upon which leave has now been granted and which the jury did not hear about were clear lies. The other matters which were before the jury were inconsistencies and might therefore be capable of "honest" explanation.

21. In relation to the first ground of appeal Ms Laws points to the transcript of the cross-examination of QU, by counsel who then appeared on behalf of this appellant (page 32B of the transcript) and submits that counsel was unable to pursue the point. In that passage in the transcript for relevant purposes the transcript records the following exchange between counsel and the complainant who was giving evidence:

> "Q. And your friend - we've heard reference to his first name [NM is then referred to by name]...
> A. Yes.
> Q. Is it right Mrs [U], that he was in fact more than your friend? Wasn't he your boyfriend?
> A. No, he wasn't at the time.
> Q. I see because I think you've had children with him since?
> A. No.
> Q. You haven't?
> A. No."

22. That evidence on oath before the jury can be contrasted, submits Ms Laws, with the signed witness statement made by the complainant in a separate matter on 20 August 2017. That was a statement made under section 9 of the Criminal Justice Act 1967 and contained the usual declaration: that the maker of the statement makes it knowing that if it is tendered in evidence they shall be liable to prosecution if they have wilfully stated in it anything which they know to be false or do not believe to be true.

23. In that statement, on the second page, QU said:

> "I am currently pregnant, approximately 17 weeks, with twins. [NM] is the father and he knows that I am pregnant."

24. It is not accepted by Ms Laws that the jury had the fact of the lie of the father QU's children before them. They had what is described by her as a tangential discrepancy. This came from the fact that the officer in the case, on the day after the complainant had given evidence at the trial, was asked about what the complainant had said to him and he

said that she had said that NM was the father of her children.

25. In relation to the second ground of appeal Ms Laws submits that the trial judge clearly felt that the line of enquiry was sufficiently important that she herself directed that it should be pursued by the officer in the case when an application for disclosure was made some time before the trial on 20 March 2018. Ms Laws submits that QU's lie in giving the wrong details about her apparent mother-in-law effectively stopped those enquiries in their tracks and so created an illegitimate end to the investigation. She submits that the lie told by QU in this regard must be seen within the context of these criminal proceedings. She further submits that the complainant must have known full well why the information was required and therefore subverted the legal process in order to ensure that it was not obtained. Ms Laws submits that the respondent in closing the case before the jury was able to submit that QU had not lied (see page 42G of the transcript) and that she had no motive to lie (see page 43D of the transcript). Further, submits Ms Laws, the judge in her summing-up made no reference to the fact that QU had lied at all. She therefore submits that these two new points of fresh evidence are the only examples of incontrovertible lies which can be shown to be such told by QU. As such they are of a different order to any other inconsistencies in QU's evidence. This would, she submits, have given rise at least to the possibility of the exercise of a discretion on the part of the judge to give a direction in accordance with the judgment of Lord Taylor CJ in R v Makanjuola [1995] 3 All ER 730, at 732-733. The background to that judgment was the fact that the common law was changed by Parliament when it enacted section 32 of the Criminal Justice and Public Order Act 1994, which so far as relevant provided:

> "**32 Abolition of corroboration rules.**
>
> (1) Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is—
>
> ...
>
> (b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed
>
> is hereby abrogated ..."

26. The effect of this legislative change was considered by this court in Makanjuola. The relevant principles were summarised in particular at page 733. At page 732H Lord Taylor said:

    i. "The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a

more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."

27. Ms Laws submits that the defence in the present case were deprived of the opportunity to deploy these two lies during the course of the trial. She submits that, on any view, the fresh evidence might reasonably have affected the decision of the jury to convict and for that reason the conviction is unsafe.

28. In that context Ms Laws reminds this court of the speech of Lord Bingham in R v Pendleton [2002] 1 WLR 72. In Pendleton, at paragraph 8, Lord Bingham observed that section 2 of the 1968 Act was substituted by section 2(1) of the Criminal Appeal Act 1995 so as to read as follows:

    i. "(1) Subject to the provisions of this Act, the Court of Appeal—

        (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

        (b) shall dismiss such an appeal in any other case."

29. At paragraphs 18 to 19 Lord Bingham said the following which needs appropriate adaptation to the present case because he was there talking initially at least about the hearing of oral evidence:

    i. "Where the Court of Appeal has heard oral evidence under section 23(1)(c)... the evidence will almost always have appeared, on paper, to be capable of belief and to afford a possible ground for allowing the appeal. By the time the court comes to decide whether the appeal should be allowed or dismissed, it will have heard the evidence, including cross-examination, and any submissions made on its effect. It may then conclude, without doubt, that the evidence cannot be accepted or cannot afford a ground for allowing the appeal... The court may, on the other hand, judge the fresh evidence to be clearly conclusive in favour of allowing the appeal. Such might be the case, for example, if a witness who could not be in any way impeached testified, on oath and after all appropriate warnings, that he alone had committed the crime for which the appellant had been convicted. The more difficult cases are of course those which fall between these extreme ends of the spectrum.

    ii. 19. It is undesirable that exercise of the important judgment entrusted to the Court of Appeal by section 2(1) of the 1968 Act

> should be constrained by words not to be found in the statute and that adherence to a particular thought process should be required by judicial decision... The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

30. Ms Laws refers also to the judgment of this court in R v Burridge [2010] EWCA Crim 2847, at paragraph 99, where Leveson LJ cited earlier cases, in particular the judgment of the majority in the Privy Council in Dial v The State of Trinidad and Tobago [2005] 1 WLR 1660, at paragraph 31, in a judgment given by Lord Brown (see also paragraph 32 where Lord Brown quoted Judge LJ in R v Hakala [2002] EWCA Crim 730 at paragraph 11), where he said that the essential question and ultimately the only question for this court is whether in the light of the fresh evidence "the convictions are unsafe".

31. In summarising the case law Ms Laws submits that if this court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the appellant it will dismiss the appeal. The primary question is for this court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict.

32. The Respondent's Submissions
On behalf of the Crown Ms Michelle Heeley QC makes the following submissions. In relation to the first ground of appeal Ms Heeley submits, in essence, that this ground adds little to the lies about which the jury was already aware at the trial. The jury was directed as to where the burden of proof lay, the judge directed the jury as to how to approach the inconsistency in QU's account and the jury was specifically reminded it was for them to decide whether her evidence was true. The jury were also reminded to assess inconsistencies from QU and that they had to take that into account in assessing her truthfulness, accuracy and reliability. Ms Heeley submits that even without the signed statement of 20 August 2017, the jury had the fact of the complainant's lie about the father of her children before them, through the evidence which was elicited from the officer in the case, DC Rawlings: he gave evidence before the jury that QU had told him that NM was indeed the father of her children.

33. In relation to the second ground of appeal Ms Heeley accepts that it would appear that QU did give false details as to her mother-in-law. However, she submits given that the jury were told of numerous alleged lies and inconsistencies, adducing this additional evidence would not afford a ground of appeal. By way of example Ms Heeley submits

that the jury were made aware that the complainant (QU) had asserted that she had missed an examination but in fact had to accept that she had sat the exam but had not done as well as she had hoped because of the effects of this incident. Ms Heeley also submits that if the trial had to go into the underlying subject of whether the allegations of abuse made by QU against her husband were true or not, this would have been satellite litigation that could not have been admissible in a trial of what was a relatively straightforward issue, an allegation of sexual assault by this appellant.

34. Ms Heeley submits that the alleged lie does not go to the central issue in this case. She submits that the jury had a wealth of material with which to assess QU's credibility and that inconsistency was highlighted to them repeatedly both during the evidence and in advocates' speeches.

35. Analysis

In essence, we accept the submissions made by Ms Laws on behalf of the appellant in relation to both grounds of appeal. In relation to the first ground, this is not a fresh evidence case in the conventional sense. This ground arises from a signed statement made by QU on 20 August 2017 which did exist before the trial took place but it was not available to the defence until some time after the trial had taken place. It is not suggested that the prosecution failed in their duties of disclosure. What is submitted, with force in our view, is that if the statement had been available at the time of the trial the defence would have been able to deploy it in various ways; in fact they were not able to do so because they did not have it at that time. Ms Laws fairly accepts that the statement was not given on oath. Nevertheless, as we have mentioned, it was signed and it was made under section 9 of the 1967 Act with the usual declaration: that the person making the statement is aware of the consequences of making a false statement. The statement would have demonstrated that the evidence which QU gave to the jury about her relationship with NM, and in particular about not having had children with him, was a lie.

36. Counsel then appearing for the appellant asked two questions, as we have mentioned, about QU's evidence, but in the face of her denials had to move on (see the transcript at page 32 which we have quoted earlier). If he had had access to the signed statement made by QU on 20 August 2017, he would have had the opportunity to use it to suggest to her that she was lying in front of the jury. He might also have been able to make the submission to the jury that there was a reason why QU wished to conceal the true nature of her relationship with NM because it would have a bearing on her evidence about the events of the day on which the offence was alleged to have been committed by this appellant and also the timing of those events including the duration of her examination by this appellant.

37. In our judgment, Ms Laws is right to submit that there is an important difference between the jury being aware of inconsistencies in accounts which have been given by a complainant and being able to demonstrate that they are actual lies especially when they are made on oath in evidence to the jury.

38. It is unnecessary to speculate about what further direction the trial judge would have given to the jury, for example, in accordance with the guidance in Makanjuola. However, we see force in Ms Laws's submission that the trial judge was deprived of the possibility of exercising her discretion whether to give some warning in accordance with that judgment, even though she was not under any duty to do so.

39. In relation to the second ground of appeal, again, we accept the essence of the submissions made by Ms Laws.

40. The particular feature of this aspect of case which disturbs us is that that lie which QU told about her mother-in-law was in the context of enquiries which the trial judge had directed should be made in order to assist the defence against the background of an application for disclosure under section 8 of the Criminal Procedure and Investigations Act 1996. That was the subject of a hearing on 20 March 2018 and was returned to on the first day of the trial (3 April 2018). The context therefore was one in which there was, if perhaps not a formal order of the court, certainly a direction from the judge. As Ms Laws submits the effect of QU's lie was to stop that process of enquiry in its tracks. In our view, it matters not in this context what use might or might not have been made by the defence of the information they should have been provided with. The fact is that they were impeded in the proper preparation of their case and in a way which the trial judge had directed they should have the opportunity to do.

41. In the circumstances of this case that was not fair. In our view, this would not have entailed unnecessary satellite litigation. It would not have been necessary or appropriate to go into the truth or otherwise of the underlying allegations made by QU against her husband, or whether, for example, the First-tier Tribunal (Immigration and Asylum Chamber) had been right to find that she had been abused by her husband when it allowed her appeal against the refusal of asylum. The important feature of this case is that the complainant lied to the police when they were making enquiries at the direction of the trial judge and that fact was never brought to the attention of the jury.

42. Conclusion
Having regard, amongst other things to the speech of Lord Bingham in Pendleton, in all the circumstances of this case we have reached the conclusion that there were such significant defects in what occurred in this case both before and at the trial that the conviction cannot be regarded as safe.

43. Accordingly, the appeal will be allowed and this conviction quashed.

44. MS HEELEY: My Lord I do not seek a retrial.

45. LORD JUSTICE SINGH: Very good. Is there anything else?

46. MS LAWS: Just one thing. The appellant was, after conviction in fact, ever after privately paying. He is not, he knows, entitled to his legal costs but there are considerable expenses in relation to the instruction of the investigators who in fact unearthed one of the lies, which is one of the grounds that has been successful, and also obtaining of the transcripts which were clearly part and parcel of our submissions. I wonder if the court would be minded to find that expenses related to the transcripts and investigators would be something that the court would grant the appellant subject to –

47. LORD JUSTICE SINGH: Has this been put in writing at all?

48. MS LAWS: Not yet, no. We can do. The categorisation of this material clearly it is quite separate to legal representation.

49. LORD JUSTICE SINGH: I understand that.

50. MS LAWS: We can certainly put it in writing.

51. **(The Bench Conferred with the Registrar)**

52. LORD JUSTICE SINGH: I think you will have to make the application in writing.

53. MS LAWS: Very well.

54. LORD JUSTICE SINGH: If it is possible I will deal with it. If it is not, then we will deal with it collectively but we can deal with it without need for further hearing. Is there anything else?

55. MS LAWS: Thank you.

56. LORD JUSTICE SINGH: Can I thank both counsel and those instructing them for the assistance they have given the court.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk