Neutral Citation Number: [2020] EWCA Crim 327

Case No: 201901463 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CANTERBURY CROWN COURT
Her Honour Judge Norton
T20167273

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before:

LORD JUSTICE LEGGATT
MRS JUSTICE MAY DBE
and
THE RECORDER OF MANCHESTER
(His Honour Judge Stockdale QC)
(Sitting as a Judge of the Court of Appeal)

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Between:

REGINA	**Respondent**
- and -	
HAMID MOHAMADI	**Appellant**

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- -

Ms A Lewis appeared for the **Appellant**
Mr S Taylor appeared for the **Crown**

Hearing date: 21 February 2020

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Approved Judgment

Lord Justice Leggatt:

1. On 26 May 2017, following a trial in the Crown Court at Canterbury before Her Honour Judge Norton and a jury, the appellant was convicted of three offences of rape, for which he was sentenced to seven years' detention. Three co-defendants tried at the same time as the appellant were convicted of the same offences and were each sentenced to fourteen years' imprisonment.

2. The notice of appeal was lodged long out of time. When he considered the application for leave to appeal on the papers, the single judge was satisfied that there were arguable grounds of appeal, but referred the application to the full court to decide whether the necessary extension of time of 661 days should be granted. We have granted the extension of time and have proceeded to hear the appeal.

3. Reporting restrictions under the Sexual Offences (Amendment) Act 1992 apply to this case. The victim of the offences, "E", is entitled to anonymity. Nothing relating to her may 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 the offences.

4. The facts, in outline, are that in the early hours of Sunday 18 September 2016, at around 3.20am, the appellant, Hamid Mohamadi, and his three co-accused were returning to 555 Pizza Takeaway in Ramsgate, where all four were staying. One of the co-accused, Tamin Rahmani, owned the pizza shop and was driving the car in which they returned to it. The other two co-accused, Rafiullah Hamidy and Shershah Muslimyar, worked in the shop and occupied rooms above it. The appellant was a friend of Muslimyar and was visiting him for the weekend. After the shop had closed for the night at around 1am, the four of them had gone out to Ramsgate Harbour, to some public houses and a nightclub.

5. Also out on the town that night was E, who had been out drinking with friends. At the time of these events, she had only recently turned 16. At around 3am she decided to leave her friends to go to another friend's home to sleep there for the night. She had no money and so she decided to walk. At around 3.30am she was walking along the Margate Road which passes the pizza shop. She was very drunk and had become lost. She saw some men on the other side of the road and went to ask them for directions. Those men were Muslimyar, Hamidy and the appellant who were walking back to the pizza shop, Rahmani having dropped them off and gone to park the car.

6. Initially, the exchange was friendly. Indeed, there was CCTV footage which appeared to show E hugging and possibly kissing Muslimyar. But it was the prosecution case that after Rahmani had joined them, the four men carried or took E to a room above the shop, where there was just a mattress and duvet on the floor, and proceeded to rape her. E's evidence was that she could not say how many men there were – probably about five or six, but it might have been more or fewer. When they were in the room, the men pushed her from one to the other, until one pushed her onto the bed. One or two came over, rolled her onto her back and started to climb over her. They were laughing. She tried to move away, but one man held her down by her shoulders. She could not recall how, but her clothes were removed. The men then raped her vaginally and orally, swapping around and having both vaginal and oral sex at the same time. She did not know how many men were involved, or who had done

what. She thought that two had had sex with her, although it might have been all of them. She was not sure. Sex stopped and started again about ten times. At one point, one of the men raped her anally. It had hurt and she shouted in pain. Another tried to have anal sex with her, but abandoned the attempt and continued with vaginal intercourse. She was scared. She tried to stop them and pushed them away, but that had not worked.

7. When the assaults stopped, the men left the room. E recalled gathering up her clothing and said that a man, whom she described as quite small, threw her leggings and knickers to her. She did not think that he had been part of the group, but was not sure. Once dressed, she left the room. The same small man told her how to get out and gave her directions.

8. The prosecution alleged that the small man was the appellant, who fitted that description. They also relied upon evidence given by Muslimyar's girlfriend, who was in his room in the building that night, that she had heard noises of sexual activity and later had heard a door being unlocked and footsteps going down the stairs. She said that she had gone to her window and looked out. She had seen a blonde haired woman wearing trousers or leggings and a man whom she thought was the appellant going around the corner out of sight.

9. E was unable afterwards to identify where she had been taken or who was involved in raping her.

10. When the police subsequently identified the location from CCTV footage and searched the rooms above the pizza shop, they found in the room in which the rapes allegedly occurred crisp packets, cigarettes and drink cans together on the floor near the mattress.

11. Amongst other evidence on which the prosecution relied at the trial was DNA evidence. In the case of Muslimyar, DNA from his semen was found on swabs taken from E's vulva, vagina, rectum and around the anus, and also in a mouthwash, on E's clothing and on the duvet and mattress. DNA consistent with his was also found on her face and on a drink can. In the case of Hamidy, DNA from his semen was found in the mouthwash, on E's clothing and on the mattress; and DNA probably from his semen was found on the rectal and perianal swabs. His DNA was also found on E's face. In the case of Rahmani, DNA from his semen was found on the duvet and mattress, and DNA consistent with his was found on a drink can.

12. The appellant's DNA was found on a cigarette end found in the room, and his thumb print was on a drink can. The expert evidence also showed that he might well have contributed to the DNA samples taken from both sides of E's face, but there was otherwise no DNA found which specifically linked him to the offences.

13. The prosecution also relied in relation to the appellant on CCTV footage showing him with E in Margate Road before the alleged rapes. In particular, there was footage which showed him walking alongside E, with Hamidy on the other side of her, towards the pizza shop, with Muslimyar and Rahmani following behind.

14. At the trial, the defendants all gave evidence which contradicted each other and also in each case contradicted earlier accounts they had given before they were confronted

with the CCTV and DNA evidence. Only one of them (Hamidy) admitted to having sex with E, which he claimed was consensual, in the room where the rapes allegedly occurred. That admission was made for the first time during his evidence at the trial, and contradicted earlier accounts that he had given.

15. The appellant was born in Afghanistan. He came to the UK in 2015. There was doubt about his exact age and the judge told the jury to give him the benefit of any doubt in that respect. It has since been determined by a tribunal that, at the relevant time, he was aged 16. He gave his evidence through an interpreter.

16. His evidence was that he had been out with the other defendants and had had at least three or four shots of alcohol, which he was not used to drinking. He said that he was very drunk; that he could not remember encountering E in Margate Road; that his only memories were vague ones of walking to the pizza shop and then going up the stairs to a bedroom which had red walls (which was a different room from the one in which the rapes allegedly occurred), and then waking up in the same room the following morning. He said that he was nevertheless sure that he did not have sex with E, did not see anyone else having sex with her, and was not in a room with her, as he would have recalled any of those things. He said he was sure that he spent the whole night in the bedroom with the red walls.

17. His explanation for how his DNA came to be found on a cigarette stub, and his thumb print on a drink can, in the other room was that at about 3pm on the Sunday afternoon he went into that room, which he said was Hamidy's room, to fetch a speaker. He said that he had the can in his hand and must have left it there. He also said that he smoked a cigarette in the room and left part of it behind. When pressed, he said that he had smoked the cigarette in the room and left the drink can there at different times. He gave different and inconsistent accounts of exactly when he smoked the cigarette.

18. It is not in dispute that the trial judge correctly directed the jury as to the matters of which they had to be sure in relation to any defendant before convicting that defendant of rape. Those matters were:

(1) that the defendant either himself intentionally penetrated E's vagina (count 1), anus (count 2), or mouth (count 3) with his penis, or intentionally assisted, encouraged or caused another to do so;

(2) that, if so, E did not consent to that penetration; and

(3) that the defendant whose case they were considering did not reasonably believe that E was consenting.

19. In her written legal directions given to the jury, the judge also gave further instruction as to how the jury should approach the question of assistance or encouragement (if it arose) in relation to any particular defendant. She said this:

> "Assistance or encouragement may take the form of words and/or conduct, but merely being present at the scene is not enough unless he intended by his presence to assist, encourage or cause the crime to be carried out."

20. That direction was also given, and somewhat amplified, in the judge's oral summing-up to the jury. In explaining the basis on which the jury could find a defendant guilty if sure of the relevant facts, she said:

> "Or someone can be found guilty if he intentionally – and that is an important word – if he intentionally assisted, encouraged or caused another person to commit the crime, that they have done something to help and forward that crime, intending that it be carried out. Now, assistance or encouragement may take the form of words and/or conduct, but merely being present at the scene is not enough unless he intended by that presence to assist or encourage or cause the crime to be carried out …"

21. The ground of appeal which has been pursued before us by Ms Lewis in her able and helpful submissions today is that there was, nonetheless, a defect in the legal directions given by the judge which renders the appellant's conviction unsafe. That defect is said to be that the judge failed properly to direct the jury on the relevance of intoxication to the issue of intent.

22. When the proposed directions were discussed with counsel before the judge summed up the case to the jury, counsel then representing the appellant (not Ms Lewis) asked the judge to give a specific direction on the issue of intoxication. The judge, however, declined to do so in circumstances where the appellant had not put forward any case that he was merely a spectator to rape and denied that he had seen or been aware of any rape, or had been present at any time in the room where the rape was said to have occurred. It was also not accepted by the prosecution that the appellant was drunk – or at least that he was as drunk as he claimed. The judge took the view that in these circumstances any direction about the effect of intoxication on intention would be addressing an entirely hypothetical situation which no one had raised on the evidence, and that such a direction was therefore inappropriate.

23. In her submissions on the appellant's behalf, Ms Lewis argues that this was an erroneous approach. Her argument proceeds in three stages.

24. First, she submits, in reliance on the authority of *R v Bennett* [1995] Crim LR 877, that a judge is required to direct the jury not only on those issues specifically raised by a defendant, but also on issues which, though not pursued by the defendant, are on the evidence capable of serving as a defence or bearing on facts which the prosecution must prove. That there is such a general principle is not in dispute.

25. Second, Ms Lewis submits that, far from being purely hypothetical, it was an entirely realistic possibility that the jury would conclude that the appellant did not physically penetrate E, that they could not be sure that he did any specific act to assist or encourage the other defendants, but that they could be sure that he was present in the room when the rapes occurred. It was, she submitted, also an entirely realistic possibility that the jury might accept the appellant's evidence that he was very drunk at the time. She points out that the judge in fact recognised that drunkenness was an issue in the case by the direction she gave in relation to a defendant's belief that the victim was consenting.

26. Accordingly, Ms Lewis submits that the judge was wrong to regard the issue of drunkenness as entirely hypothetical and as one which, for that reason, did not require an appropriate direction to be given.

27. We accept this submission. There was little or no evidence to suggest that the appellant had himself penetrated E. Indeed, the absence of any DNA linked to him on any of the sensitive swabs or in the mouthwash or on the mattress or duvet, in contrast to the findings for the other defendants, positively suggested that the appellant had not himself raped E. There was also relatively little evidence to support a case that the appellant had done any specific act – apart from merely being present – with the intention of assisting or encouraging the other defendants to rape E.

28. On behalf of the Crown, Mr Taylor has pointed to the CCTV evidence showing that the appellant was walking alongside E when they entered the building, and also the evidence of Muslimyar's girlfriend that she had seen the appellant escorting E out of the building after the offences had been committed. But the jury might have found it difficult to be sure from that evidence that, when they entered the building, the appellant knew what was going to happen; and what happened after the offences were committed clearly could not itself have assisted the commission of those offences.

29. On the other hand, there was strong evidence indicating that the appellant had been present when the rapes occurred, not least the findings of his DNA on a cigarette end and his thumb print on a drink can left by the mattress in the room. There was also evidence which suggested that the appellant was intoxicated. Even if the jury rejected, as lies, his claims that he had been so drunk that he could not remember much that had happened that night – as they would, it seems to us, have been bound to have done if they reached the point of finding that he was present in the room – they might well have considered that they could not rule out the possibility that he was under the influence of drink, particularly given the evidence that the defendants had visited a nightclub and public houses that night, and given the appellant's young age.

30. We therefore consider that a conclusion that the appellant did not actively participate in the rapes but was present when they took place, and also that he was affected at least to some extent by drink, far from being purely hypothetical, was a relevant, if not the most relevant and likely, scenario which the jury would need to consider in his case.

31. The question then is what, if any, direction the judge should in these circumstances have given the jury on the relevance of drunkenness to the issue of intention, and whether the absence of such a direction makes the appellant's conviction unsafe. This is the third stage of the appellant's argument.

32. Ms Lewis submitted that the judge should have given a direction in the form recommended by this court in *R v Sheehan and Moore* [1975] 1 WLR 739 at 744. It was there said by the court that:

> "… in cases where drunkenness and its possible effect on the defendant's mens rea is in issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does

> not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

33. In *Sheehan and Moore* the appellants' convictions for murder were quashed and convictions for manslaughter substituted, not because of a failure to direct the jury on the relevance of drunkenness to intention, but because the trial judge had positively misdirected the jury on that question. Sheehan was charged with murder by dousing the victim in petrol and then setting fire to him. His defence was that he had no real recollection of the relevant events, that he was affected by drink, and that if he had done what was alleged, it was either an accident or, in any event, he did not intend to kill the victim or to cause him grievous bodily harm. The judge had directed the jury that the position in law was that:

> "Drunkenness is only a defence to an act which would otherwise be criminal if a person has drunk so much that he is incapable, not nearly, but incapable of forming the intention to do the particular act."

34. The Court of Appeal held that that was a plain misdirection because the correct question was not whether the appellant was capable or incapable of forming the necessary intention, but whether he did in fact form the necessary intention. There is nothing in the judgment of the Court of Appeal, however, which suggests that an omission to give a direction of the kind recommended by the court would, by itself, have been enough to render the convictions in that case unsafe.

35. Another case in which the question of intent arose, which was very similar on its facts to the present case, is *R v Clarkson* [1971] 1 WLR 1402. In that case, like this one, there was evidence to justify the inference that the appellants were present in the room where a woman was being raped, but no evidence that they had done any positive act to assist. There was also evidence that they may have been in a drunken state. Their convictions were quashed because the judge had not directed the jury that, in order to convict the appellants on the basis of their presence at the scene, the jury had to be sure that the presence of the appellants had, in fact, given encouragement and that they intended to give encouragement to those who were committing the rape. Megaw LJ, who gave the judgment of the court, said (at page 1406C):

> "It is not enough, then, that the presence of the accused has, in fact, given encouragement. It must be proved that the accused intended to give encouragement; that he *wilfully* encouraged. In a case such as the present, more than in many other cases where aiding and abetting is alleged, it was essential that that element should be stressed; for there was here at least the possibility that a drunken man with his self-discipline loosened by drink, being aware that a woman was being raped, might be attracted to the scene and might stay on the scene in the capacity of what is known as a voyeur; and, while his presence

> and the presence of others might in fact encourage the rapers or discourage the victim, he himself, enjoying the scene or at least standing by assenting, might not intend that his presence should offer encouragement to rapers and would-be rapers or discouragement to the victim; he might not realise that he was giving encouragement; so that, while encouragement there might be, it would not be a case in which … the accused person wilfully encouraged."

36. There is again, however, nothing in the judgment to suggest that the omission to give a direction of the kind recommended in *Sheehan and Moore*, or any other direction which specifically addressed the relevance of drunkenness to intention, was a matter which affected the safety of the convictions. The decision rested squarely on the basis that, as Megaw LJ said at 1408F:

> "[The jury] might have been left under the impression that it could find the two appellants guilty on the basis of their continuing, non-accidental presence, even though it was not sure that the necessary inferences to be drawn from the evidence included (i) an intention to encourage and (ii) actual encouragement."

37. In *R v Bennett*, already mentioned, the appellant's conviction of arson with intent to endanger life was quashed in circumstances where no direction of the kind suggested in *Sheehan and Moore* was given on the relevance of drunkenness to that intent. A different view was taken in *R v McKnight* (19 April 2000, unreported). These and other cases were considered in *R v Alden and Jones* [2001] EWCA Crim 3041. In that case the charge was one of causing grievous bodily harm with intent. There was also evidence that the appellants were intoxicated at the time of the assault. The judge gave the jury a direction in similar terms to the first part of the *Sheehan and Moore* direction, to the effect that a drunken intent is nevertheless an intent, but did not include the second part of that direction – that the jury should draw such inferences as they think proper from the evidence as to intent, including the evidence relating to drink. The conviction was, nevertheless, upheld by the Court of Appeal. At para 40 of the court's judgment, after a review of the authorities, the Vice-President, Rose LJ, said:

> "The consequence of these authorities, as it seems to us, is that they illustrate that the terms of a summing-up, in relation to alcohol as affecting intention, have to be addressed to the evidence in the particular case. …"

38. Accepting, as she realistically did, that there is no rule of law that a *Sheehan and Moore* direction must be given in any case where the issue of the relevance of drunkenness to intent arises, or potentially arises, Ms Lewis submitted that it was nevertheless essential for the judge to have given such a direction on the facts of this case and that the failure to do so renders the appellant's conviction unsafe. She emphasised that the position of the appellant was different from that of his co-accused because, unlike them, there was, as we have indicated, no evidence directly linking him to active participation in the rapes. She also pointed out that the question of the relevance of drunkenness to intent was not one that his counsel could be expected to

highlight, because the appellant's case was that he had not been present when the rapes occurred nor had he witnessed the rapes, and for his counsel to have focused on what the position would be if the jury were to conclude that he had in fact been present would potentially have undermined his defence. Ms Lewis argued that, in those circumstances, it was all the more important for the judge to highlight that issue. She accepted that the judge in her summing-up summarised the appellant's evidence relating to the alcohol that he had drunk, although Ms Lewis submitted that a fuller account could have been given of that evidence.

39. Ms Lewis contends that the judge ought to have given a direction in the form that was recommended by the Court of Appeal in *Sheehan and Moore*. She accepts, however, that the judge in this case, unlike in *Clarkson*, did clearly explain to the jury the need to be sure, if they concluded that an appellant was merely present at the scene, that they could only find him guilty if he intended by his presence to assist, encourage or cause the crime to be carried out. In these circumstances, it is necessary to look at what more would have been added if a direction in the terms suggested in *Sheehan and Moore* had been given, and whether it can reasonably be said that the absence of such a direction might have led the jury into error.

40. As we have indicated, the *Sheehan and Moore* direction falls into two parts. The first part is a warning to the jury that the mere fact that a defendant's mind was affected by drink does not assist him, provided the necessary intention was there, and that a drunken intent is nevertheless an intent. Any error which the jury could have made as a result of failure to give that part of the direction could only, as it seems to us, have been favourable to the defence. If the jury had supposed that the fact that the appellant's mind was affected by drink meant that he could not have had the intention necessary to be guilty of the offence, then, when following the route to verdict given to them, they would have been bound to acquit the appellant. It therefore cannot be said that the absence of such a direction casts any doubt on the safety of the appellant’s conviction.

41. Although Ms Lewis sought to submit that simply to highlight the relevance of drink would have assisted the appellant, we do not think that it can realistically be said that a failure to draw attention to a point relating to drink which could only assist the prosecution is something that undermines the safety of his conviction.

42. The second limb of the *Sheehan and Moore* direction is that "the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent". That amounts, as it seems to us, to little more than a direction to draw such inferences as to intention which the jury think proper from the evidence. The only additional content which the direction has is to remind the jury that part of the evidence is evidence relating to drink.

43. It would, in our view, have been preferable in this case if the judge had given such a direction to the jury and specifically advised them that, if in relation to the appellant they were sure that he had been present when the rapes occurred but did not think or were not sure that he had taken any active part in the offences, they should, when asking themselves whether he had, by his presence, intentionally assisted, encouraged

or caused others to rape E, have regard to all the evidence, including that relating to drink, and convict the appellant only if they were sure that he had the required intent.

44. We do not consider, however, that the omission to give such a direction gives rise to a real risk that the jury might have made an error. The jury had heard and had been reminded in both the defence closing speech and in the summing-up of the appellant's evidence that he was drunk when the offences occurred. They were very clearly directed that, before convicting him on the basis of his presence alone, they had to be sure that he intended by his presence to assist, encourage, or cause the crime to be carried out. They were properly directed in the clearest terms that it was their function to assess the evidence and to decide what factual inferences and conclusions they should draw. They were directed, too, about the difference between drawing an inference and speculation. We do not think that in these circumstances it was a material error that they were not specifically advised to take into account a particular aspect of the evidence, albeit a relevant aspect, namely, the evidence relating to drink, when deciding whether they could be sure that the appellant had the necessary intention. Put another way, the direction which the appellant contends that the judge should have given was not a direction on a matter of law, but a direction about how the jury should approach their fact-finding task. Whilst such a direction might have been helpful to them, it went beyond the essential role of the judge.

45. In conclusion, standing back and looking at the case as a whole, the judge, as it seems to us, was wrong when formulating her directions to dismiss as entirely hypothetical the possibility that the appellant was (contrary to his case) present when the rapes occurred but under the influence of drink (even if not as drunk as he claimed). Had the judge recognised the potential salience of this scenario, she no doubt would have said more about it than she did to the jury. Nevertheless, the judge directed the jury correctly as to the law, including the need to focus on the question of whether presence intentionally encouraged the crimes. She fully and fairly summed up the evidence, including the evidence relating to drink and its effect on the appellant. We have no reason to think, in these circumstances, that the jury might have been under any misunderstanding as to the questions which they had to answer. We do not consider that in the circumstances of this case the appellant's conviction was unsafe.

46. For those reasons, we dismiss the appeal.