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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202002702/B2

NCN: [2021] EWCA Crim 1413



Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 21 September 2021

LORD JUSTICE SINGH

MR JUSTICE HOLGATE

MR JUSTICE JULIAN KNOWLES

REGINA

V

LUKE WHITBREAD

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MR J HARVEY appeared on behalf of the Applicant.

J U D G M E N T

1. MR JUSTICE HOLGATE: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's life time, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. The prohibition applies unless waived or lifted in accordance with section 3 of the Act. We will anonymise the complainant's name as MW.
2. On 25 September 2020, in the Crown Court at Derby before Her Honour Judge Shant QC, the applicant (then aged 27) was convicted of 11 counts relating to child sex offences between late October and December 2019 against the same complainant, MW. He was acquitted of count 5.
3. Count 1 alleged engaging in sexual communication with a child contrary to section 15A(1) of the Sexual Offences Act 2003. Count 2 concerned meeting a child following sexual grooming contrary to section 15(1). Counts 3, 4, 7, 8 and 9 concern sexual activity with a child contrary to section 9(1). They involved kissing and several instances of vaginal penetration, both with the applicant's penis and digitally. Counts 6, 10 and 11 related to causing or inciting a child to engage in a sexual activity contrary to section 10(1) and involved several instances of oral sex on the applicant as well as masturbating him. Count 12 was an offence of making an indecent photograph of a child contrary to section 1(1)(a) of the Protection of Children Act 1978, an indecent category C image of MW.
4. On 30 October 2020 the applicant was sentenced to a total sentence of 6 years 6 months' imprisonment. He renews his application for leave to appeal against conviction following refusal by the single judge. He is represented by Mr Joe Harvey, who did not appear at the trial or settle the original grounds of appeal.
5. There is no dispute that between 29 October 2019 and 14 December 2019 the applicant had a sexual relationship with MW. She was then aged 14 and the applicant was aged 26. The prosecution case was that the applicant began the sexual relationship while fully aware that MW was 14 years old. The main issue at the trial was whether the applicant genuinely and reasonably believed MW to be over 16. The proposed grounds of appeal bear only upon that issue and Mr Harvey very fairly accepts that they do not arise in relation to count 12. Accordingly there is no basis upon which this Court could interfere with the conviction on that count in any event.
6. In summary the prosecution relied upon the following evidence. First, there was evidence from MW. She said that she had known the applicant while she was growing up as he was a family friend. He was aware of her age and that she was at school. They discussed her doing mock GCSE exams. In October the applicant had contacted her on Snapchat and they began messaging each other. She said the applicant made her feel special and that when they met up they kissed and he told her he loved her. The messages continued and the applicant booked a hotel where they had sex. They also had sexual intercourse in a flat. She consented to the sexual intercourse and said it had taken place more than 10 times. The applicant bought her gifts including perfume and a necklace and he bought her a sex toy. He sent her sexually explicit messages and naked pictures of himself. She returned the messages also sending naked pictures. She said the applicant told her to keep their meetings a secret as he had a fiancée.
7. Secondly, the prosecution relied upon adverse inferences from the applicant's "no

comment" interviews arising from his failure to mention facts which he relied upon in his defence at trial.

8. Thirdly, they relied upon transcripts of phone calls made by the applicant whilst he was on remand in prison.
9. Lastly, the prosecution relied upon a partial digital download of the applicant's phone, showing a hotel booking, text messages with MW and a video of MW wearing only black underwear categorised as a level C indecent image of a child.
10. The defence case, in summary, was that a sexual relationship had taken place between the applicant and MW but that the applicant reasonably believed MW to be 17 years old. He gave evidence that he knew some members of MW's family but first became aware of her in August 2019, when they were both part of a group present in a pub. He said he was told by MW and her mother that MW was 17. He accepted that they had begun messaging each other and that they had had a sexual relationship. He said he believed MW was 17 and at a Sixth Form Academy. The applicant said he had paid £3,000 to MW's mother after his arrest.
11. Before MW was cross-examined the defence applied, under section 41(3)(a) of the Youth Justice and Criminal Evidence Act 1999 to rely upon a number of photographs of MW with some associated questions to be put in cross-examination. It was submitted that the critical issue in the case was reasonable belief as to age - the applicant believing MW to be 17. An amended defence statement had stated:

"It is also a feature of the defence to be advanced that [MW], with the approval of her mother, presents as older than her age. She also posts provocative poses via social media platforms such as Snapchat, Facebook and Instagram".

12. It was submitted that it would be just and proportionate for the jury to view the photographs to assist them in their assessment of the key issue of reasonable belief as to age. The object was not to impugn the credibility of the complainant or to explore promiscuity or any previous sexual conduct.
13. The judge refused the application. She ruled that the provocative photographs did not have any relevance to the issue that the jury had to determine, which was what did the applicant reasonably believe MW's age to be at the time of the allegations? The applicant had not seen the photographs at that time. They had been obtained after his arrest. The photographs could not have any bearing on the applicant's belief as to MW's age. This was not a case where that belief was based upon his observations of MW's appearance. Rather the applicant's case was that he had been expressly told that MW was 17.
14. In the grounds of appeal drafted by trial counsel it was submitted that firstly, the judge had erred in disallowing the introduction of photographs of MW, which were capable of assisting the jury on the central issue of knowledge or reasonable belief held by the applicant. She failed to recognise the primary purpose for which they were sought to be introduced which was not to undermine or impugn the credibility of MW. Secondly, the introduction of the photographs would have afforded the jury a complete picture of the issue on belief as to age relevant in this case and thirdly, in disallowing the application, the convictions were rendered arguably unsafe.
15. The fresh grounds of appeal drafted by Mr Harvey were received by the Court on 24 May

2021. They repeated the original grounds of appeal and added three further grounds in the alternative. At the hearing before us today Mr Harvey confirmed that he does not pursue the third ground on behalf of this client. In summary, therefore, the two remaining grounds relied upon in support of this application are as follows. Firstly, trial counsel had been wrong to seek to adduce photographic evidence showing MW in a salacious light when other photographs of her had been capable of achieving the applicant's aim of showing the jury how she looked at the time of the alleged offending. This resulted in the applicant being deprived of the opportunity to adduce evidence which was important to the central issue, namely his belief that MW was 17. Secondly, evidence of messages allegedly sent by MW, appearing to support the applicant's case, that he was being blackmailed by MW and her mother was not provided by the applicant's former lawyers before the trial. He was therefore deprived of the opportunity of challenging MW on what he believes to be incriminating evidence.

16. The applicant requires permission to advance these additional grounds under the Criminal Procedure Rules 36.14(5).
17. In view of the criticisms made of trial counsel and solicitors in the second set of grounds the applicant was invited to, and did, waive his privilege in that respect. We have read the responses from counsel and from the solicitors in letters dated 25 June and 9 July 2021 respectively. The applicant's new solicitors responded by a letter received by the Court on 3 August 2021.
18. We have also considered the respondent's notices dated 14 January and 2 August 2021, dealing first with the original grounds of appeal and then the proposed additional grounds.
19. In relation to the original grounds of appeal the single judge said this:

"As the judge observed in giving her ruling on the s 41 application, the issue at trial was not one of reasonable belief as to consent but of knowledge or reasonable belief as to true age. It was the prosecution case that the applicant had known [MW] since childhood and was well aware of her age. The applicant contended, however, that he had not really known [MW] and had been told (by [MW] and her mother) that [MW] was 17. In making his application under s 41 YJCEA, the applicant was seeking to introduce what the defence described as 'provocative images' (photographs) of [MW], in which she presented as older than her real age. The applicant accepted that he had not seen these photographs at the time of the allegations: indeed, they had all been obtained after his arrest and, as the judge recorded, 'therefore it is accepted by the defence that they could not have had any bearing on the defendant's belief as to the complainant's age'. The judge also noted that this was not a case where the applicant's belief as to [MW] being 17 was said to have been based on his observations of her appearance; rather, it was his case that 'he was expressly told that she was 17 at the time of the allegations both by her and her mother'. In the circumstances, the judge permissibly concluded that the photographs did not have any relevance to the

issue the jury had to determine, i.e. what did the applicant reasonably believe at the time of the allegations? As the judge found, the photographs were irrelevant to that issue.

For completeness, I further note that the applicant's case on his belief as to [MW's] age was put to [MW] in cross-examination and she denied that either she or her mother had said she was 17. The jury was entitled to form a view as to [MW's] credibility in this regard. There was, moreover, other evidence (for example, in the form of messages between the applicant and [MW] and in recorded conversations between the applicant and others whilst he was on remand) which the jury would have been entitled to take into account as contradicting the applicant's case."

20. We entirely agree with the views of the single judge. This proposed ground of appeal is not arguable.
21. Turning to the first of the additional grounds of appeal, we have considered the applicant's evidence as summarised by the judge in her summing-up. No criticism has been made of that summary. It is plain that the defendant relied upon what he said he had been told by MW and her mother, that MW was aged 17. The applicant did not give any evidence about having relied upon the complainant's appearance or presentation, nor indeed in the manner suggested in submissions this morning, so that the so-called "non-salacious" photographs could arguably have been relevant. This is in line with the judge's understanding of the applicant's case when she gave her earlier ruling on his section 41 application. No possible criticism can be made of the applicant's counsel at trial.
22. The second additional ground relates to the alleged withholding from the applicant by his trial solicitors of unused material. Mr Harvey's advice relied upon what he had been told by the applicant about the content of the messages on MW's phone which he says may support the contention that MW deliberately deceived him about her true age. Mr Harvey says that on those instructions the messages could have supported the applicant's case "that he was set up and was being blackmailed".
23. We do not consider this ground to be arguable. The applicant claims that he received this material from his trial solicitors on 6 January 2021 but the document was unreadable and so was re-sent to him about 2 to 3 weeks later. The applicant says that he subsequently sent the material to Mr Harvey but the latter had not received it at the time he prepared his advice. That document was not produced until late May 2021.
24. The applicant's renewal notice was dated 3 March 2021 and makes it plain that by then he had already instructed Mr Harvey because of his dissatisfaction with his legal team at trial. So there certainly would have been plenty of time for the documents to be sent on before the advice was prepared. No such material has subsequently been produced to the Court. Mr Harvey told the Court this morning that he did receive it in June and he offered to provide it to the Court at the hearing. We decided that it was unnecessary for that step to be taken.
25. We say that because in any event the documents before the Court show that the applicant did not suggest at his trial that he had in fact been blackmailed by MW or her mother in relation to whether MW would proceed with her complaint. Instead he explained his

reference to "blackmail" in a recording of his conversation from prison with his partner as simply a deception by him of his partner (see page 42A of the summing-up). In his amended defence statement he had explained the payments he made to MW's mother as an attempt by him to keep his sexual relationship with MW secret from his partner. Trial counsel has stated that there were tactical reasons why it was considered better to steer clear of blackmail as an issue. Here again there is no arguable basis for the applicant to criticise any of his legal team at trial.

26. Accordingly, we have concluded that it is not arguable that any of the convictions are unsafe. Consequently the renewed application for permission to appeal and the application for permission to add additional grounds of appeal are refused.

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

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