Neutral Citation Number: [2023] EWCA Crim 1118

Case No: 202203228 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2023

Before:

LADY JUSTICE SIMLER
MRS JUSTICE MAY
and
MR JUSTICE CHAMBERLAIN

REX

- V-

RT

- -

Stephen Vullo KC appeared on behalf of the Appellant

Wayne Cleaver appeared on behalf of the Crown

JUDGMENT

The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime 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. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Lady Justice Simler:

Introduction

1. This application for permission to appeal against conviction was referred to the full court because it was out of time and an extension of time of 160 days was sought.

2. On 4 May 2022 in the Crown Court at St Albans before His Honour Judge Simon and a jury, RT (then aged 35) was convicted of four counts of a 6 count indictment. He was convicted of three specific counts of indecent assault contrary to section 15(1) of the Sexual Offences Act 1956 (counts 1, 3 and 5) and of one count of attempted indecent assault contrary to section 1(1) of the Criminal Attempts Act 1981 (count 6). Counts 2 and 4 were multiple counts reflecting the behaviours alleged in counts 1 and 3 respectively. On 29 June 2022 he was sentenced to a community order with unpaid work and activity requirements; and a compensation order was made.

3. There is a single ground of appeal advanced by newly instructed leading counsel, Stephen Vullo KC, and solicitors, Twelve Tabulae. The ground arises from section 34 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), which qualifies an accused person's right to remain silent when questioned, permitting proper inferences to be drawn by the jury in determining guilt in an appropriate case; and the holding in *R v McGarry* [1999] 1 Cr App R 377, [1999] 1 WLR 500.

4. Section 34 of the 1994 Act permits a judge to give an adverse inferences direction in relation to a defendant's failure to answer questions at police interview. Where no such direction is sought by the Crown, section 34 does not require the judge to direct the jury not to draw any adverse inference. However, in *McGarry* this court held that in that case the jury should have been given a specific direction that no adverse inference should be drawn from any failure to answer questions at the police station. The advice given in the current version of the Judicial College Crown Court Compendium at 17-8, paragraph 29 reads:

> "If the judge has decided that no adverse conclusion arises from D's failure to mention a fact/s then consideration should be given as to whether it is appropriate to direct the jury that they should not hold that failure against D. It is a direction that the judge should discuss with the advocates, the potential need for such being very much a fact specific decision".

That approach is supported by a number of cases that came after *McGarry* (see in particular, *R v Thacker* [2021] EWCA Crim 97, *R v Jama* [2008] EWCA Crim 2861, and *R v Thomas* [2002] EWCA Crim 1308), where this court made clear that the trial judge retains a discretion as to when a particular form of direction is necessary or not necessary in consequence of section 34 not applying.

5. Mr Vullo recognised the existence of a discretion as to whether or not the interests of justice will be furthered by a direction as to the consequences of section 34 not applying in any particular case. He submitted however that, on the facts of this case, where it was agreed that the requirements of section 34 were not satisfied but evidence about the "no comment" interview was heard, the jury should have received a *McGarry* direction. They were not given the benefit of such a direction, or indeed

any direction as to how they should treat RT's silence in interview, and in the particular circumstances, this failure rendered his convictions unsafe.

6. An applicant wishing to appeal to this court against conviction is required to show good reason for an extension of time for lodging a notice of application for leave to appeal outside the 28 day period. The court will always examine all the circumstances of the case, including the length of the delay, the reasons for it and the overall interests of justice including the public interest in finality, the interests of victims, the practicability of a retrial and any potential injustice to the defendant. Asserted strong merits cannot be assumed to be a trump card in securing an extension of time.

7. In this case, Mr Vullo candidly accepted that although a minor cause of the delay was the need to obtain full transcripts of the proceedings below, the major factor was the time he required to read through the transcripts. Furthermore, he did not initially appreciate that the requisite direction had not been given and his preliminary advice on appeal was negative. It was only on 14 October 2022 while drafting a detailed written advice explaining that opinion that he first identified the ground now advanced. The new legal team acted promptly from that point onwards. Mr Vullo was at pains to emphasise that on any view, the delay was in no sense RT's fault. He submitted that the appeal has merit and that, accordingly, the interests of justice required an extension of time.

8. The appeal was resisted by the Crown and the court was assisted by submissions (both written and developed orally) from Wayne Cleaver, who appeared at trial for the prosecution. In short, Mr Cleaver submitted that it was not thought appropriate that a direction be given pursuant to section 34 of the 1994 Act where RT's defence was a blanket denial of all offences and he did not depart in any significant way from what he had said in his prepared statement given to police in interview. The question of a section 34 direction was raised with counsel in advance of the summing up. Mr Cleaver told the judge that the prosecution did not seek such a direction and subsequently made no reference to the "no comment" interview in his closing submissions to the jury. Mr Cleaver submitted that there is no automatic requirement on a judge to include a *McGarry* direction in summing up, and relied particularly on *R v Jama*, where judicial discretion in this regard was re-emphasised. Here, the outcome of this trial depended upon whose evidence the jury accepted. The jury clearly considered the evidence carefully, convicting only on the specific counts, and must have preferred the evidence of the complainant on the core allegations. The omission of a *McGarry* direction did not result in a real risk of prejudice to RT, and while it would have been preferable to have ventilated the question whether such a direction should be given, there was no misdirection and the convictions were not unsafe.

9. At the conclusion of the hearing we announced that we were satisfied that the length of and reasons for the relatively short period of delay, together with considerations of the interests of justice, justified an extension of time, and we granted permission to appeal. Further, we came to the conclusion that the convictions were unsafe in the circumstances. We therefore allowed the appeal and quashed the convictions. Mr Cleaver indicated that no retrial would be sought and accordingly, we lifted the order made pursuant to section 4(2) of the Contempt of Court Act 1981 postponing publication of any report of these proceedings until the conclusion of any retrial.

10. We set out below our reasons for allowing the appeal but first it is necessary to summarise the facts and explain in further detail how the "no comment" interview was dealt with by counsel and the judge.

The facts

11. The complainant, to whom we shall refer as "AB", was 33 years old when he was interviewed by police (and videoed) on 14 January 2020. He made allegations of an historical sexual nature against RT. The allegations were said to have spanned a five year period and dated back to when RT was between 11 and 16 years old and AB was between seven and 11 years old.

12. The boys' families were known to each other. The boys attended different schools but on occasions when AB's mother was working a late shift, RT's mother would look after him after the school day ended until his mother collected him (or in later years, he would then make his own way home). There was a dispute between the parties as to how often this would happen as well as the duration of the visits, but the fact of association was accepted.

13. AB told police (and later confirmed in evidence at trial) that his first recollection of going to RT's home was of RT showing him pornographic videos on the television in the living room. AB said that whilst watching the videos RT would become aroused and touch his groin area after which they would go to RT's bedroom where RT would ask him to rub his (RT's) penis over clothing to begin with and then skin-to-skin. AB said this happened about six times. He accurately described a wall poster in RT's bedroom.

14. RT's case at trial was that he had never owned pornography and that his mother, who would always be present during the visits, would have been able to see the television screen in the living room even if she had been in the kitchen cooking. Plans of the house layout were provided to the jury and RT's mother gave evidence confirming these points. RT maintained that he had no recollection of AB ever being in his bedroom and whilst the description of a wall poster in his bedroom was accurate, he suggested this may have been because AB saw his room on an occasion when AB attended with his father, who had done some building work in the house. RT's mother also gave evidence that as far as she knew they had never gone upstairs to the bedroom together.

15. AB told police that the sexual touching progressed to RT putting his erect penis in his mouth. He said that happened on about three occasions. He also recalled one occasion when RT touched his, AB's penis. AB said this incident was bought to an end by RT's mother unexpectedly walking into the room. AB said that she had been very angry with RT and had taken him downstairs shouting at him and possibly smacking him too. RT's case at trial on this was that due to his partial deafness he would not have been able to hear his mother's approach. It was argued that would mean it would be reckless in the extreme for him to engage in the alleged conduct whilst she was in the house. Furthermore, his mother gave evidence to the effect that no such incident had ever happened. She said she never witnessed any problems with AB during any of the visits that were consistent with the allegations he was to make many years later.

16. One incident was said to have happened at AB's home, in his bedroom. RT accepted he may have been at AB's house and recalled kicking a football in the garden but he denied ever being in AB's bedroom with him. AB said RT had exposed his penis and asked AB to suck it when they were unexpectedly interrupted by AB's cousin. AB said RT quickly pulled his trousers back up when she came in. In his ABE interview, AB stated that his cousin had asked him directly whether RT had tried to do anything with him, and he replied saying no, that they were just wrestling.

17. The cousin gave evidence as a prosecution witness, but her account was inconsistent with the description of the incident given by AB. She recalled an incident when she had walked into AB's bedroom and seen RT on top of him. She said that they stopped when she entered and that one of the two of them said they had been wrestling. This plainly contradicted what RT had said in terms of being in the bedroom. However, her evidence confirmed that both boys were fully clothed and that she had not thought anything of it at the time. She said she was quite sure that she did not raise the issue with AB afterwards, as he had claimed, or have any conversation with him about it at all. When AB was asked about this in evidence, he said he had brushed off her question as he was scared and ashamed.

18. Save for the cousin placing RT in AB's room in circumstances that he denied, there was no independent corroboration for any of AB's allegations. Corroboration is of course not required. Nonetheless, we consider that it is a significant feature of this case, as Mr Vullo submitted, that the evidence from the only two people named as potential witnesses by AB in respect of the only incidents that AB suggested were witnessed, did not support the prosecution case. Ultimately, the case was presented to the jury by both sides as one involving a stark conflict of fact: one or other of the two must be lying.

RT's police interview and how it was placed before the jury

19. As part of the police investigation RT was interviewed under caution on 4 March 2020. An admitted error had been made in the letter inviting him to attend for interview, not as a suspect, but as a witness. However, once at the police station it soon became clear that he was to be questioned as a suspect. Having consulted with a solicitor present to advise him, he declined to answer any questions about the allegations. Instead he provided a prepared statement. It read:

> "I am not guilty of the offences for which I am being interviewed. I have not assaulted [AB] sexually or otherwise. I have never made him watch any kind of pornography. I have never engaged in any kind of sexual activity with him or in his presence. I fully deny these allegations and have nothing further to say at this stage".

20. The officer in the case, Jason Tinsley, gave evidence at trial. He confirmed that RT was not under arrest and attended the police station on a voluntary basis. He was asked about the interview under caution although he did not (as is customary) read out the words of the caution or explain them to the jury. At this distance from the trial, Mr Cleaver could not (perhaps understandably) explain why this was not done. It appears simply to have been overlooked.

21. In his evidence to the jury, the officer apologised for the mistakes made in the letter sent to RT, which said expressly that he was not a suspect in any offences. The officer explained that a solicitor was available to advise RT at the station, and that RT spoke to the solicitor before the interview started, and fully understood that he was in fact being questioned as a suspect (and not as a witness) before the interview started.

22. The officer said he was given a prepared statement from RT at the beginning of the interview. This was read out to the jury. He said that the interview proceeded and RT was asked a series of questions directed at the account given by AB, but answered no comment to all of them. At the end of his questioning in front of the jury, the judge asked the officer expressly if the specific details of AB's account were put to RT, including in relation to the multiple counts, and the officer confirmed that they had been.

23. When RT gave evidence he was asked questions about the interview under caution. He confirmed that he had a chance to consult a solicitor and a prepared statement was read out on his behalf at the beginning of the interview. He said he had been advised by his solicitor to make no comment to questions asked of him in interview. In cross examination he was asked further questions about the interview. Having established that he understood he was being questioned as a suspect, Mr Cleaver suggested to him that when asked about the detail of what was being said against him he could have responded and given answers to all these questions. The following exchange then took place:

> "MR CLEAVER: You knew the answers to the questions, didn't you?
>
> A. Yes, I did.
>
> Q. And you tell us that you'd taken the advice of your solicitor – as of course you're entitled to do – but you surely appreciated, didn't you, that these were serious allegations?
>
> A. That's right.
>
> Q. In fact they were false allegations?
>
> A. That's correct.
>
> Q. And you knew then that you barely knew this man – this boy, AB, you barely knew him?
>
> A. That's correct.
>
> Q. Your "paths had merely crossed" was the way you put it today, yes?
>
> A. Yes, yes, it was.
>
> Q. And that you knew that this was all about allegations that are said to have arisen at your house?

> A. Yes.
>
> Q. And you knew – if it's right – that it was very unlikely because you were hardly ever there, with all of your after school clubs?
>
> A. That's right.
>
> Q. You knew all that, didn't you?
>
> A. Yes.
>
> Q. And you say, do you, that the only thing that stopped you saying it was your solicitor' advice?
>
> A. That's correct.
>
> Q. Or is it because at that time you hadn't thought of it; you hadn't thought of ways on distancing yourself from him at that time?
>
> A. That's correct."

24. As is clear from the above, the "no comment" interview formed part of the evidence before the jury and it and RT's answers in cross examination were evidence the jury were entitled to consider and to reach common sense conclusions about.

The speeches and the summing up

25. Before the close of the evidence, on 27 April, there was a brief exchange between the judge and Mr Cleaver in which the judge asked whether he would be invited to give a section 34 direction. It is clear from the transcript that Mr Cleaver had not come to any firm view on the issue at that stage, although he indicated that he thought it was "probably not triggered" in this case.

26. On 28 April the judge made clear that he would not be doing a split summing up and that his written directions would not be available before counsel had completed their speeches. Mr Cleaver said in the course of that discussion that he was not inviting a section 34 direction. Neither counsel raised the question of a *McGarry* direction and it was not raised by the judge himself. There was no further discussion about this aspect of the case. Nor, it is now common ground, was there any apparent consideration given at all (by either counsel or the judge) to what (if anything) should be said to the jury in the absence of a section 34 direction.

27. Although Mr Cleaver made no reference to the "no comment" interview in his speech to the jury, Ms Robinson, the appellant's trial counsel, said the following in her speech to the jury:

> "So you know that he said in a very short, prepared statement that he denied it. You know that he – when he was invited for the first time – he was asked to go down to the police station on the 4 of March of 2020, you know that he thought he was

> turning up as a witness. I've made it very plain, and I hope it's been plain to you, I don't criticise the officer for that. There's no suggestion that it was some sort of trickery or deliberate. It was a mistake. But the reality is that in the letter that was sent to him it says, "Please can I stress that you're in no way suspected or under investigation".
>
> So when you look at that prepared statement and consider what it says and the fact that he then took – as he told you – took his solicitor's advice to no comment, I do invite you to look at the background, him turning up there having been told, it's stressed that he was not under investigation, not suspected or under investigation for any offence, that he turns up at the police station.
>
> So a man – now 35, so back then two years ago, 33 years of age, you know, never been in trouble with the police, no convictions, no cautions, turning up at a police station thinking he's going to assist with enquiries as a witness, that they want to speak to him about something, suddenly there's a solicitor waiting for him and he's told actually no we're investigating you and we're going to interview you.
>
> So I just invite you to remember that and consider that when you consider the situation that he was in. But in that prepared statement he made it very clear that he – I suggest – that he denied these allegations and he has denied them since and got into the witness box in front of you and denied them."

28. The judge gave his summing up after both speeches to the jury. He summed up the evidence of the interview under caution as follows:

> "The officer in the case gave evidence and you heard about the way in which the interview was arranged, and also about the communication that was the wrong communication, sent to [RT], indicating that he was being invited as a witness to come and be spoken to by police, when in fact, of course, he turned up and found that there was a solicitor ready there for him to be interviewed about these allegations. And, as you know, [RT] made a prepared statement having spoken to his solicitor – that's a document you have and you'll take that with you into your deliberations but, in essence, he [RT] fully denied all of the allegations put to him, which were put in some detail."

That was the only reference in the summing up to the interview.

The appeal

29. We have summarised Mr Vullo's arguments above.

30. For the Crown, Mr Cleaver emphasised the discretion retained by the trial judge as to whether to give a *McGarry* direction. Although in writing he suggested that the judge had correctly concluded that to give a *McGarry* direction would have been more likely to harm the position of the appellant than to assist him, he accepted in oral argument that no discretion was in fact exercised by the judge in this regard, and the point appeared simply to have been overlooked by counsel as well. Nonetheless, he submitted that the omission of a negative direction did not result in a real risk of prejudice to the appellant. This trial was dependent upon whose evidence the jury accepted. The jury clearly considered the evidence carefully, convicting only on the specific counts, and must have preferred the evidence of AB on the core allegations.

31. Despite Mr Cleaver's submissions, we concluded that this was a case where a negative direction that the jury should *not* draw any inference adverse to the appellant from his silence in interview should have been given by the judge. This is not a case where to give a negative direction would have been harmful to the appellant. To the contrary, had this question been fully and properly considered by counsel and the judge, in light of the evidence and the way the trial had proceeded, the sensible response would have been to give it. Our reasons follow.

32. The trial in this case was conducted on the basis that adverse inferences might be available to be drawn, although ultimately, no such inferences were invited by the Crown. The "no comment" interview formed part of the evidence before the jury. Mr Cleaver submitted that his focus on the interview in his questioning of RT was really directed at addressing the suggestion that RT may not have known or understood why he was being interviewed. However, the jury did not know that and his questioning might easily have suggested to them that RT was withholding information he should have given to the police. Indeed in cross examination it was squarely put to RT that he chose to make no comment, not because of the advice of his solicitor, but because "at that time you hadn't thought of it; you hadn't thought of ways of distancing yourself from him at that time." In other words, Mr Cleaver's questions suggested that this was a case of recent fabrication.

33. The judge specifically directed the jury (in the usual way) that they could draw inferences from the evidence. Since the jury were not read the words of the caution or told that RT had a right to remain silent and give no comment answers, we cannot be sure that they would have known that they should not draw any conclusions from the appellant's no comment answers in interview. Defence counsel plainly felt it necessary to address the jury on the basis that a negative inference was available for them to draw, despite agreement that section 34 was not triggered, but the judge said nothing at all about it.

34. As Mr Vullo submitted, the courts have long recognised that the issue of a defendant's silence and offering no comment in interview cannot, as a matter of course, safely be left to a jury without judicial guidance. Any defendant who has this kind of evidence led against him with the challenge of recent fabrication made on the back of it is entitled to a jury direction to protect against the obvious risk of the jury placing unfair weight on that silence. However, none of the protections normally put in place in this regard were afforded to this appellant, and the possibility of a negative direction appears not even to have been considered.

35. This was a finely balanced case and the decision for the jury was a straight credibility contest between these two men. It was all the more likely in our view accordingly, that the jury would look for support for credibility or lack of credibility in other evidence. That would include the "no comment" interview which might well have been viewed as a less than full and frank response to police questions in interview. This was plainly evidence the jury were entitled to consider and they would also have been entitled to come to common sense conclusions based on the evidence that they had heard, in accordance with the general direction the judge gave them about inferences that could properly be drawn.

36. In all the circumstances, the failure to give a negative direction in this case meant that the jury were left without any guidance as to how they should regard RT's refusal to answer specific questions asked of him. They were left in a sort of "no-man's land" between the common law principle and the statutory exception in section 34, without any guidance as to how they should treat RT's failure to answer the specific questions that were put to him by police. The danger is that without such guidance the jury might well have treated his silence as probative of guilt. On the facts of this case, this was seriously prejudicial to him, and the convictions could not therefore be regarded as safe.

37. Accordingly, we allowed the appeal and quashed the convictions.