IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1657

No. 202301018 B4

Royal Courts of Justice

Friday, 3 November 2023

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE SAINI
MRS JUSTICE COLLINS RICE

REX
V
AARON HEWSON

REPORTING RESTRICTIONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992

The provision of the Sexual Offences (Amendment) Act 1992 apply to these offences. Accordingly, no matter relating to the complainant shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as victims of those offences. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

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MR C. BURTON appeared on behalf of the Appellant.
MR A. THOMPSON appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE POPPLLEWELL:

1 The appellant was convicted of three counts of sexual assault contrary to s.3 of the Sexual Offences Act 2003 and one count of assault by penetration contrary to s.2 of that Act following a trial before Mr Recorder Hardy KC, and a jury in the Crown Court at Norwich. He appeals against conviction with leave of the single judge. The grounds are essentially that the summing-up was unfairly imbalanced in favour of the prosecution because of comments on the evidence made by the Recorder adverse to the defence case; and a failure to remind the jury of material parts of the evidence relied on by the defence and of the defence case.

2 The appellant faced a nine count indictment. Count 7 involved possession of extreme pornographic images, to which the appellant pleaded guilty prior to the trial, and which has no bearing on the issues in this appeal.

3 The other counts concerned three complainants, to whom we shall refer as "HS", "KR" and "KD". They involved allegations of sexual assaults said to have taken place at HS's house in Norwich. HS, KR and KD were friends who worked together as dancers at a club. The appellant and HS had been in a relationship from about the end of 2016 until early 2018 and were living together at the house. It was during this period, in the second half of 2017, that the offences were alleged to have been committed.

4 Counts 1 to 4 concerned HS. In her ABE interview (recorded in April 2018), and which was adduced at trial as her evidence-in-chief, HS alleged that on one occasion she had woken up to find the appellant using her hand to masturbate himself and then ejaculating over her face. This was the subject matter of count 1 of which the appellant was convicted.

5 She went on to allege that the same thing had happened on three or four other occasions (count 2); and that on five occasions she had woken up to the appellant trying to penetrate her vagina (counts 3 and 4 of attempted rape). The jury acquitted the appellant on counts 2, 3 and 4.

6 She had not said anything about such behaviour to anyone until January 2018 after she had learned of the allegations made by KR and KD which formed the subject matter of the other counts.

7 Count 5, alleging sexual assault contrary to s.3 of the Act, involved the complainant KR. KR's evidence was that after work she had gone to spend the night at the house, as she had done on many previous occasions, arriving together with HS at about 4am on 26 November 2017. The appellant was awake when they arrived. Shortly afterwards, she went to bed in the spare room wearing her dress and thick black tights, under a duvet. When she awoke at about 6 am she became aware of a male in the bed behind her spooning her, and with his arm over her breast. She then felt the elasticated waist of her tights being pulled and became aware that the male was naked and that his erect penis was pressing against her. This was the appellant. At that point she sat upright and said "What the fuck, Aaron?" The appellant then got out of bed, put his finger to his lips and said "sshhh" before backing out of the room. Later she went to the appellant and HS's bedroom and told HS what had happened. The appellant brushed the incident off as a mistake on his part, which HS appeared to accept and nothing more was said about it. KR did not report it to the police at the time.

8 Count 6 (s.2 assault by penetration), and count 8 (s.3 sexual assault), concerned what was alleged to have occurred between the appellant and the third complainant KD on Saturday,

16 December 2017. KD went to stay overnight at the house. Her evidence in her ABE interview, which was her evidence-in-chief, was that she arrived at about 5 am after working the Friday night/Saturday morning shift at the club, where she had had a bottle of wine to drink at work so that she was not fit to drive home. She socialised in the living room with HS and the appellant, having some more to drink, before she fell asleep fully clothed on the sofa at, she thought, about 5am. She slept for a while but woke up, she thought at about 10 to 10.30 the next morning, and noticed the appellant on the sofa wearing shorts with his penis hanging down coming out at the side. She was not fully awake and fell back to sleep but was awoken by the appellant grabbing her breasts, her bottom and in between her legs. She was in a foetal position on the sofa facing towards him. He put his hands down the front of her high-waisted jeans, without moving them, which was easy for him because they were quite loose and put his fingers into her vagina for two or three seconds. This was all despite her telling him to stop numerous times. She said she kept her eyes closed. He did stop and she thought he had left the room but then felt something warm go over her while she was curled up; and realised that he had been stood over her masturbating and ejaculated over her face and hair. The ejaculate had also gone on to the pillow. He rubbed her hair and walked out of the room and back upstairs. She described being in shock and confused. She thought about clearing up but decided to leave and did so very shortly thereafter.

9 Afterwards she spoke to KR about what had happened. When she did so KR concluded that what had happened to her had not been a mistake on the appellant's part. Both women decided to tell HS. All three then met on 10 January 2018. It was after that meeting that all three reported allegations of sexual assault to the police.

10 On 6 April 2018 the appellant was interviewed in relation to the allegations by KR and KD. As to events involving KR in November 2017, he said that he had been asleep in his own bed fully naked when KR and HS arrived back from work. He woke up and went to the toilet. He was unaware, he said, at that stage that his partner HS was in their bed. On returning to the bedroom, he saw a figure under the bedclothes of the bed in the spare room and he assumed that it was HS because she would often sleep in the spare bedroom to avoid his snoring. He got into the bed, lay beside the person he believed to be HS, spooned her and went to sleep. He accepted that his hand would have been over her breast and that his penis may have been erect as a result of what he described as "morning glory", but he denied any sexual intent. He maintained that his actions were consistent with merely cuddling the person he believed to be his partner before going to sleep. He denied pulling at KR's waistband. As soon as KR sat up and shouted "What the fuck, Aaron?" he realised his mistake and left the room. He had not said "shush". When KR came into his and HS's room later in the morning KR appeared to acknowledge that it must have been a mistake.

11 With regard to KD, the appellant said that on a previous occasion in October 2017, when KD had stayed over at the house in similar circumstances, they had both ended up having full consensual sexual intercourse in the kitchen after HS had gone to bed. On the subsequent occasion, on 16 December 2017, he said that KD had been flirting sexually with him while all three were drinking and socialising in the lounge. After going to bed with HS, he went back downstairs and he and KD started kissing each other. He then went to pull her trousers down. He said that it was she, KD, who pulled them down and he put his fingers into her vagina before they started to have full intercourse. Then she started saying "Oh we shouldn't do this. This is getting too much." He then withdrew and as he did so he ejaculated. His account was that all the sexual activity between him and KD was consensual.

12 On 16 April 2018 the appellant was interviewed in respect of the allegations made by HS. He denied using her hand to masturbate himself whilst she was asleep or ejaculating in her

face while she was sleeping. He denied ever having engaged in sexual activity with HS while she was asleep or without her agreement.

13 All three complainants gave evidence at trial. There was also evidence of a series of messages from the appellant to KD immediately after the 16 December events, in which he appeared very anxious to talk to her, which she ignored. There were also messages to HS, sent after KD had spoken to HS and made the allegations which were the subject matter of Counts 6 and 8, in which he gave an account of what had happened with KD.

14 At trial the appellant also gave evidence which was broadly consistent with his account when interviewed under caution. He asserted that KD had lied about what happened between them because she feared that HS would find out that she had betrayed her closest friend by having sex with the appellant; and because she, KD, did not approve of HS's relationship with the appellant and wanted to bring it to an end. His explanation for seeking to meet KD urgently after 16 December, as appeared to be the effect of the messages sent to her, was that he was worried that she would tell HS of their consensual sex. The account of what happened which he subsequently gave to HS in the messages to her was not entirely consistent with his account of what had happened which he gave in his interview or in evidence. His explanation at trial for this discrepancy was that in the messages he was seeking to minimise what had happened with KD in an effort to maintain his relationship with HS.

15 Further it was the appellant's case at trial that KD had persuaded both HS and KR to believe that they were victims of sexual assault at the meeting which took place between all three of them on 10 January 2018; and that all three complainants had colluded in fabricating the allegations of sexual assault as involving sexual activity which was non-consensual. In support of that case, reliance was placed, amongst other things, on the fact that notwithstanding HS having reported allegations of serious sexual assault on her by the appellant, and learning of similar allegations made by her two closest friends, HS had subsequently resumed sexual relations with the appellant and had described their sex in messages downloaded from her phone as "amazing".

The Summing-up

16 The judge gave the jury written directions of law and a route to verdict before final speeches. No criticism is made of those directions. They included a direction at the beginning in the following terms:

> "During the course of my summing-up I shall provide you with a summary of the evidence. I may also comment on some of it. But you are the sole judges of fact, so if I appear to stress a particular point in the evidence but you think it unimportant, it is your view of it that counts, not whatever mine is or might appear to be.
>
> Equally, if I leave out in my summary - and it is - and it is just that (a summary) and no more - something which you think is important, it is your view of it that counts, not whatever mine is or might appear to be.
>
> Similarly, should I comment on any aspect of the evidence and you agree with my comment, that is all well and good, but if you disagree with any suggestion as to the facts that I make, your view is the only one that counts."

17 The written directions of law which the Recorder read to the jury prior to final speeches concluded with an emphasis of the same point in these terms:

> "After you've heard speeches from counsel I will deliver the second part of my summing-up; my summary of the evidence. As I've already told you, it is but a summary. If I've missed out something which you consider important or included something which you consider to be unimportant, it's your view and your assessment of the evidence which counts not whatever mine is or might appear to be."

18 The Recorder's summary of the evidence after speeches was a relatively full one, taking care to recount in some detail what the three complainants had said in their ABE interviews, which stood as their evidence-in-chief. It also dealt with what they had said, albeit more briefly, in cross-examination. It dealt with what the appellant had said in interview at some length and what he had said in his evidence, including what he had said about the messages after the events in question.

19 There is no criticism made about the structure of the summing-up.

20 At the conclusion of his summary of the evidence, the Recorder asked counsel whether either of them wished to address him about its content. Neither counsel did so.

The Relevant Principles

21 In a recent decision of this court in *BKY v R* [2023] EWCA Crim 1095, the Vice-President summarised the relevant principles as follows:

> "77. In *R v Hulusi* (1974) 58 CAR 378 the court, citing the earlier decision in *R v Hamilton* (1969, unreported), emphasised the long-established principle that a judge must not descend into the arena and give the impression of acting as an advocate, and continued:
>
> 'Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really threefold: those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury and that you, the members of the jury, must disregard anything that I, the judge, may have said with which you disagree. The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence; and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.'
>
> 78. Those principles, and the prohibition on a judge appearing to take sides, apply however implausible or fanciful a defence account may appear to be: see, eg, *R v Inns* [2018] EWCA Crim 1081 at [37].
>
> 79. As to the summing up, paragraph 3(a) of Part 25.14 of the Criminal Procedure Rules (as amended with effect from 4 April 2022) requires a judge to give the jurors directions about the relevant law and to 'summarise for them, to such extent as is necessary, the evidence relevant to the issues

they must decide'. By paragraph 4, the directions 'may include questions that the court invites jurors to answer in coming to a verdict'.

80. The summing up of the facts must deal with the essentials of the case and must strike a fair balance between the prosecution and defence cases. In *R v Haddon* [2020] EWCA Crim 887 the court noted that in some older cases it had been held permissible for a judge to comment on the evidence in a way which indicated his or her own view so long as the jury were told they could ignore those opinions. The court continued, at [12]:

'We find it difficult to reconcile that approach with the cardinal obligation that the judge should remain impartial, leaving the decisions on the facts to the jury. Indeed, we suggest it is difficult to envisage cases in which it will be appropriate or of assistance to the jury for the judge to reveal his or her personal views as opposed to providing an impartial analysis of the cases for and against the prosecution and the defence.'

81. That is not to say that there is a blanket ban on a judge commenting on the evidence; but it emphasises the care which must be taken to avoid giving the appearance of advocacy on behalf of one side or the other. In *R v Merchant* [2018] EWCA Crim 2606 the court said at [15]:

'The judge is perfectly entitled to comment on the evidence by pointing out matters which may tend to support or undermine either party's case on an issue, nor is there any requirement that a summing up should be balanced in the sense that a judge should seek to compensate for a weak case or downplay a strong one. What is vital is, first, that the judge should not trespass on the role of the jury by telling them what conclusions they should draw on matters which are for them to determine and, second that the judge's review of the evidence should be objective and impartial and not skewed unfairly in favour of the prosecution or the defence.'

82. That passage was cited in *R v Awil* [2020] EWCA Crim 1802, where the court went on to say, at [23]:

'… the guiding principle must always be balance and fairness. An objective marshalling and presentation of the evidence is a feature of every good summing-up. Furthermore, a balanced presentation of the cases being advanced by the prosecution and the defence may require the judge to point out matters which support or undermine the case of either or both of the parties. it Is clear that there is no blanket ban upon trial judges expressing a view based upon an analysis of the evidence which may be adverse to either the prosecution or the defence. However Careful consideration should always be given before a judge decides to express a view rather than presenting matters that support or undermine each party's case impartially for the jury's consideration and determination. What is critical is that the judge's presentation and any expression of the judge's personal view must be justifiable by reference to the twin touchstones of balance and fairness. That will involve a careful and judicious use of language.'"

22 We apply those principles in this case.

Submissions

23 Mr Burton's essential submission is that on a number of occasions in his summing-up the Recorder either commented on material parts of the evidence in a manner which gave the impression that they were the judge's own views and reflected a view which was adverse to the defence case; or failed to remind the jury of material parts of the evidence or the defendant's case. And that the individual and cumulatively effect was to render the summing-up fundamentally unfair and unbalanced.

24 The first example which he relied on relates to the appellant's evidence and case of a previous visit to the house by KD in October 2017 on which occasion, according to his evidence, full consensual intercourse had taken place. The submission was that KD gave evidence at the trial that she had not been to the house on a previous occasion, whereas HS's evidence, in contrast, was that she had done so. It was suggested that this categorical denial by KD was unlikely to have resulted from mere forgetfulness and was a deliberate lie told by that complainant to distance herself from the suggestion that she had engaged in consensual sexual activity on that previous occasion and, therefore, in consensual sexual activity on the occasion which formed the subject matter of counts 6 and 8.

25 At the outset of his summing-up the Recorder told the jury, correctly, that at the heart of the case was the credibility of the four protagonists; and he offered this advice as to how they might determine who was telling the truth and who not, where it is one person's word against another. He said:

> "You may find it helpful to apply this two-stage test to the evidence of each witness - that includes the defendant because you judge him by the fair - same fair, objective standards that you judge each witness by: is the witness trying to tell me the truth, trying to tell us the truth? That's the first question.
>
> You'll bear in mind, of course, that we're dealing with events that are over five years old. People's memories fade. There are bound to be differences of detail. To take but one example, [KD] said that this was the first occasion she'd ever been to [the house]. [HS] said that [KD] had been there before. Well, what does this mean, ladies and gentlemen? Does it mean: 'ah-ha, that's the break in their story. They've got their story wrong?' Or it is entirely innocuous; just a difference of recollection over a long period of time?
>
> If you determine that a witness is not trying to tell the truth then you will, no doubt reject his or her evidence. But if you determine that a witness is trying to tell you the truth go on and ask yourselves this: is that witness accurate and reliable?"

26 The Recorder then reminded the jury of KD's evidence in her ABE interview which was "I hadn't stayed there for a very long time" and said that the jury might think that her evidence oscillated between saying on the one hand that she had stayed at HS's house before the latter moved to the house where the offences allegedly occurred, which was something she had said in her evidence at trial, and on the other that she had not stayed at that particular address for a very long time.

27 Mr Burton submitted that at trial the evidence of KD had been a clear and categorical denial that she had ever stayed on a previous occasion at the house. His submission on the Recorder's remarks was that the Recorder was therefore unequivocally treating KD's denial as an example of an error of detail resulting from memories fading and therefore something which would not necessarily assist the jury on the issue of whether the witness

was trying to tell the truth, whereas it was the defence case that this was an example of her deliberately lying.

28 We cannot accept this interpretation of the Recorder's remarks. The summing-up of KD's evidence indicates that it may not have involved such a straightforward, unequivocal and categorical denial of a previous visit to the house, which was a matter for the jury to consider. But however that may be, the Recorder was merely using that conflict in the evidence between HS and KD about whether she had previously visited the house, if conflict it was, as an example of a matter which might involve mistaken recollection (on HS's part or KD's part) or might involve deliberate lying by KD, and emphasising that it might help the jury to try to decide which it was. It was not an invitation to them to adopt a view of his own that it was merely mistaken recollection.

29 The next passage to which Mr Burton refers comes at p.12F to H of the transcript. After recounting KD's initial narrative account from her ABE interview and before coming to her ABE evidence in which her account was drawn out more fully by questions by the officer and thereafter to her evidence when cross-examined, at this point the Recorder directed the jury that one of the things they would have to consider was the issue of concoction in respect of which he had already given written directions. He then went on to comment as follows:

> "You might think it's a very odd story. If you and two of your friends each individually decide to make up something to get somebody into trouble you might think that the nuclear option would be the best way of getting something into trouble: 'He raped me.' But none of these ladies (none of the three complainants) say: 'He actually raped me.' You'll have to take that into account in determining whether or not they're telling you the truth."

30 Mr Burton submitted that the Recorder's observations demonstrated clear favour towards the prosecution case in respect of a central issue for the jury's consideration, namely whether the complainants may have put their heads together and lied or possibly been unconsciously influenced by each other's accounts. Furthermore, he submitted, the proposition advanced lacked any rational foundation in the context of this case where each complainant was potentially drawing on an experience of actual sexual activity, which was not in issue, but falsely alleging lack of consent.

31 We think there is force in this point. The words "You might think it's an odd story" to refer to the defence case that there was collusion between the complainants carried with it the clear implication that that was what the Recorder thought. This was a point made solely by the Recorder and did not reflect any prosecution submission at the trial, whether as a matter of substance or as a matter of language. It can only therefore have been interpreted by the jury as the Recorder indicating what he thought and it was an indication that the Recorder thought that it was an unlikely suggestion for the complainants to have colluded if they had not made a more serious allegation, such as one of rape.

32 Moreover, we agree with Mr Burton that the point being made by the Recorder was a bad one in the context of this case, at least so far as KD is concerned, with whose evidence he was dealing at this point in the summing-up. The defendant's case was that KD was describing activity which had taken place but had taken place consensually and was falsely alleging a lack of consent. Whether she had deliberately falsified that account to turn it into an account which did not involve consent was not made any less likely by reason of it being of that nature, rather than an allegation of rape.

33 The Recorder's error was compounded by his telling the jury that they *will* have to take that into account in determining whether or not the complainants were telling the truth. It was not, however, a point that they had to consider valid, and if they did it was something which they could only treat as adverse to the defence.

34 Mr Burton went on to rely on a number of further passages which he submitted confirmed the impression that the judge supported the credibility of the complainants. We will not address all of them, but only those where we think there may be some substance to the submission.

35 At p.13F to 14B the Recorder had been dealing with the meeting between all three complainants before they made their reports of sexual assault and he observed:

> "The defence say: 'Concoction, conspiracy, fabrication, make up.' The prosecution: 'Why not? People don't just say: 'Something has - something horrible has happened to me of a sexual nature but I'm not going to tell my friends about it, or anyone else.' Of course it's natural for people to discuss these things and compare their experiences. That's part of human life, isn't it?"

36 Mr Burton suggested that although appearing to strike a balance between what "the defence says" and what "the prosecution say", the effect was to undermined the defence case by the use of dismissive language suggestive of caricature compared to the reality of "human life". We do not think that there is any great weight in this. Taken on its own, it would not be seen as either unbalanced or unfair. However, it has to be seen in the context of the various other passages to which we make reference.

37 The next one on which Mr Burton relied comes at p.15B to C of the transcript where the Recorder was reminding the jury of a passage in KD's account in interview in which she was explaining why immediately after the event she left everything there with the stains on the pillow and went out. The Recorder picked out for particular comment her statement that it was because HS was her best friend and "It's that guilt of like: 'Oh my God, what has happened?'" The Recorder told the jury at that point that they may think that particular expression about guilt was a pointer to whether she was telling the truth or making it up. Mr Burton submitted that the clear implication of what the Recorder was saying was that the Recorder thought that KD's sense of guilt was corroborative of the truth of her account, whereas it was equally consistent with her having had consensual sex with her best friend's partner, which was the reason given by the appellant. Again, we do not think that this is a point of any great weight taken in the abstract and on its own it would not be suggestive of imbalance. However, again, it must be seen in the context of the summing-up as a whole.

38 The next passage relied on comes at 17E to F of the transcript. This was in a part of the summing-up in which the Recorder was dealing with the evidence of HS. The Recorder reminded the jury of the passage in her ABE interview which said that when she had suffered a miscarriage he had been very supportive through it all. The Recorder then said:

> "You'll have to ask yourselves, ladies and gentlemen: if [HS] is making up these allegations about Aaron, why does she describe him as 'supportive'? A matter for you."

39 That was a one-sided comment. Although the Recorder qualified it with the expression "a matter for you", it was a comment which indicated that what HS had said supported the prosecution case. It was not balanced by the point which had been made by the defence in relation to her evidence and, in particular, the point made by the defence that her evidence

about how the relationship had continued after the allegations had been made was supportive of the defence case of collusion.

40 The next passage to which Mr Burton referred us comes at p.24G to H, where the Recorder was summarising what the appellant had said in interview about his relationship with HS having deteriorated because KD had told HS that they had had consensual sex and felt bad that she had done something behind HS's back. The Recorder commented:

> "You may think when somebody does something bad behind another's back, the last thing they would do is tell them about it."

41 Again, this was an observation adverse to the defence.

42 Next, when summarising the appellant's evidence in interview and the text messages sent by the appellant after 16 December 2017, the Recorder referred to the lack of any equivalent messages after their alleged previous sexual encounter and went on to comment at 27C to D:

> "You might wonder ... that if this is his reaction to having consensual sex with [KD] on the sofa at [the house] why he didn't feel any need to send similar messages after, as he has said to you, he first had consensual sex with [KD], this time in the kitchen of [the house]. Of course [KD's] evidence is that she never had consensual anything with him at all, nor would she wish to."

43 He then made the same point again at 28E to F when dealing with the appellant's evidence at trial, emphasising again that there was no exchange of messages between the first occasion of consensual sex, alleged consensual sex, with KD in the kitchen. He said:

> "Something of a contrast, you may think, with the virtual barrage of texts he sent after the 16th of December to KD."

44 That was a point which had been made by the prosecution and if the Recorder had simply recorded that that was a comment on the evidence made by the prosecution and had made the observation only once, it could not possibly have been a matter for criticism. However, by making the comment twice in rapid succession so as to give it emphasis and by introducing it not as something which the prosecution had said, but by the words "you may consider" or "you may think" it was something which may well have given the jury the impression that it was a reflection of his own view. It was of course adverse to the defence. That impression may have been reinforced by what immediately followed it at p.28D to F of the transcript. He also compared the barrage of texts as:

> "Markedly similar to the silence which ensued when he left the bedroom in which [KR] was sleeping saying nothing. Not 'Oh my God,' not 'sorry' not 'Good heavens, I thought you were [HS]. What a dreadful mistake.' Make of that what you will."

45 Clearly what the Recorder was asking the jury to make of it was that the prosecution case was more likely to be the correct one and the appellant's case less likely to be the correct one by reason of the fact that he had not, when he realised his mistake in the bedroom, said anything by way of specific recognition that it was a mistake and by way of apology. Again, it was an invitation to the jury to adopt a view of the evidence which was favourable to the prosecution and using the expression "make of that what you will" would not have been sufficient to remove the impression that it was a view of the Recorder himself which he was inviting them to accept.

46 Mr Burton submitted that the prejudicial effect of these passages was compounded by the Recorder's failure to remind the jury of important evidence given by KD on being cross-examined about the account which she gave when she first reported the matter to the police which was contained in a handwritten document entitled "First Account", which she signed. That was an account which had been written down by the officer reflecting her first narrative on a date which was probably a day or two before she gave her ABE interview. She had, as she accepted, signed it as being correct. That document said that the appellant had (i) pulled her trousers down to her hips, (ii) was laying on top of her and (iii) that she was "not sure if he put his cock in me". Mr Burton told us, and this was not disputed, that in cross-examination she denied having given that account and when asked why she had signed it, could not give an explanation.

47 Mr Thompson submitted that her denials were a little bit more nuanced in relation to the issue of the trousers being pulled down. However, what he said did not meet the point that in all three respects, including the allegation that he had pulled her trousers down to her hips, the first account contradicted what she had said in her ABE interview and her evidence-in-chief in each of those respects. That was (i) that he had not moved her clothing at all. She was explicit about that in the ABE interview, saying that he had been able to insert his hands into her "high-waisted jeans", as she described them, from the top because they were loose fitting; (ii) that he had not lain on top of her; and (iii) (which followed from (ii)) that he had definitely not put his penis inside her. The only reference by the Recorder in his summing-up which might have reflected some part of this came where he was recording KD's evidence in cross-examination. That includes, without any context, the words "he pulled my trousers down from my waist to my hip".

48 These inconsistencies or apparent inconsistencies in her account were potentially important ones which went to the heart of the alleged offence and KD's credibility. The judge did not remind the jury at all about the aspects of her signed statement which said that the appellant had lain on top of her and that he might have put his penis in her. That was important evidence of which, as a matter of fairness and balance, he should have reminded the jury. Although the Recorder did refer to her having said that the appellant pulled her jeans down, it appeared in the way he dealt with it in the summing-up out of the context in which it arose, namely of it having been put to her as inconsistent with her account in the evidence she gave at the trial, which it was.

49 In an otherwise balanced and fair summing-up a judge would not necessarily have been obliged to comment on these matters favourable to the defence, especially as these were submissions which Mr Burton had made in the course of his final speech which had recently been made. However, against the background of the Recorder repeatedly making comments on the evidence adverse to the defence, the failure to comment on this aspect of the defence, which was of potential importance, reinforces the impression of imbalance which might well have led the jury to think that the Recorder favoured the prosecution case. To put it bluntly, omitting this point which had recently been made as one to which the defence attached, correctly, some importance might well have led the jury to think that they could treat it as unimportant because the Recorder thought it not worth mentioning.

50 Mr Thompson, who appeared for the prosecution at trial as well as before us, submitted that the Recorder was entitled to comment on the evidence by pointing out matters which tended to support or undermine either party's case. There are two difficulties with this submission. The first is that the authorities to which we have referred show that very great care must be taken before doing this in order to achieve balance and to insure that the comments do not appear to be taken as the views of the judge. The second is that the comments in this case were almost all one way, being adverse to the defence. The only example which Mr Thompson gave to us of a comment favourable to the defence was in relation

to a submission he had made that it was significant that when KD left the house she left left behind her vape and the Recorder had indicated to the jury that that would not necessarily be of any significance, people leave those sorts of things behind all the time. But that is a small example compared with what we treat as otherwise a drip, drip, drip of comments which were adverse to the defence.

51 Moreover, in relation to the credibility of HS's evidence generally, the Recorder, as we have said, failed to remind the jury of the evidence that HS had resumed sexual relations with the appellant after she was aware of the sexual assaults on her two closest friends. Again, this was not a point of which we would have regarded a judge as obliged to remind the jury in an otherwise balanced summing-up. But the failure to do so would have reinforced the impression that the Recorder was favouring the prosecution case.

52 Mr Burton further submitted that the Recorder failed to direct the jury as to the correct approach to the appellant's evidence that KD had engaged in consensual sexual activity with him on a previous occasion and its relevance. In particular, it was something which might have had a bearing on whether the appellant might reasonably have believed that KD was consenting to sexual activity on the subsequent occasion, even if her evidence was accepted that she was not doing so. Again, this is a point which in an otherwise balanced summing-up would not in our view be a matter of criticism. By it is a point which the jury were entitled to take into account and the failure to draw it to the jury's attention is another example of the overall imbalance in the Recorder's approach.

53 Mr Burton also submitted that it was the manner in which the Recorder had made the comments adverse to the defence which also lent weight to the impression that the Recorder was giving the jury his own view of how they should treat the respective merits of the party's case. He submitted that the Recorder paused before making these points to the jury and made them in a manner which gave the appearance of acting as an advocate for the prosecution. Mr Thompson rejected this characterisation of the way in which the Recorder made his remarks. He said that was not his impression of how he behaved on this occasion or indeed of how he had behaved on other occasion when Mr Thompson had appeared before him. In those circumstances, we do not attach any weight to the submission that the alleged manner in which the comments were made helps us to decide the appeal.

Conclusion

54 Looking at the whole of the summing-up and the cumulative effect of these matters in context, we have concluded that the summing-up was unfairly unbalanced in a way which casts doubt on the safety of all the convictions. The Recorder's comments were often expressed in the language of "you may think" and "it is a matter for you", but that does not prevent them having the appearance of being views to which he attached himself. Adding the mantra "you may think" when making the comment on the value, weight or relevance a piece of evidence does not necessarily make it neutral and especially so when it does not reflect a submission made by the prosecution. In such cases it can only be an indication of what the judge thinks, unless it is very carefully balanced. It is a phrase which in our view should, if possible, be avoided. When legitimate comment is made to reflect the prosecution case about a piece of evidence, it is better to introduce it by reference to that being a prosecution submission or that being the prosecution case. Otherwise, the expression "you may think" can readily be understood by a jury to mean "I, the judge, think".

55 Moreover, we do not think that in this particular case the unfair imbalance was cured by the standard directions given by the Recorder as part of the legal directions before speeches that the jury in essence should ignore his views on the evidence unless they agreed with

them. In our view the summing-up, taken as a whole, gave rise to a real risk that the jury would think that the Recorder was favouring the prosecution case over that of the defence.

56 This undermines the safety of the convictions on all counts. Although the matters with which we have dealt relate mostly to what was said about the complaints by KD, we have borne in mind that the unsafety of a conviction in relation to any one complainant is likely to undermine the safety of the convictions in relation to the others because each complaint was relied on by the prosecution as cross admissible in support of the others on propensity grounds. The complaints by KD were the most serious and it was only when she gave her account to HS and KR that those two reported their complaints. We also bear in mind that the jury must have had some reservations about HS's evidence in order to have acquitted on counts 2 to 4, and her evidence was relevant not only to her own complaints but in what she recounted of KR's and KD's complaints when they were first made to her.

57 Finally, we should deal with a submission made by Mr Thompson that Mr Burton did not seek to have any of the deficiencies of which he now complains remedied in response to the Recorder's invitation at the conclusion of his summing-up. Whilst it is always important that counsel should fulfil their duty to assist the judge by correcting directions which they perceive to be erroneous, it is difficult to do so where the nature of the complaint is not so much to a single part of the summing-up but to the overall effect of a large number of different comments. We do not think that Mr Burton can fairly be criticised for not seeking to go redress the impression given by the summing-up as a whole, which is that which we have summarised.

58 For these reasons, we will allow the appeal and quash the convictions on all counts, save for count 7, on which the appellant pleaded guilty.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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