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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101675/B4
[2023] EWCA Crim 496



Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 25 April 2023

Before:

LADY JUSTICE THIRLWALL DBE

MRS JUSTICE STACEY DBE

MR JUSTICE BENNATHAN

REX

V

ANDREI ROTARU

**REPORTING RESTRICTIONS APPLY:
THE SEXUAL OFFENCES (AMENDMENT) ACT 1992**

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MS P GREWAL appeared on behalf of the Applicant.

J U D G M E N T

(Approved)

WARNING: Reporting restrictions apply to this judgment -The Sexual Offences (Amendment) Act 1992

1. MRS JUSTICE STACEY: The provisions of the Sexual Offences (Amendment) Act 1992 apply. 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 to members of the public to identify that person as a victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. On 11 May 2021, in the Crown Court at Isleworth before HHJ H Duncan, the applicant (then aged 25) was convicted of ten counts of rape. He was sentenced the next day to a total of 17 years' imprisonment and ordered to pay a victim surcharge of £170.
3. There are three applications before the Court: an application for leave to appeal against conviction; an application for an extension of time of 445 days in which to renew his application for leave to appeal against conviction following the refusal by the single judge on 19 October (sent to the applicant on 21 October 2021); and leave to vary his notice of appeal from the original refused grounds, since he seeks to rely on a replacement ground and does not renew his application on the original grounds

The Facts

4. The applicant and three co-defendants were convicted of the oral, vaginal and anal rape of a complainant (who we shall refer to as "E") on 13 August 2017. They had tricked her into getting into the back of a car as she was trying to find a taxi on leaving a nightclub.

She had been talking to one of the four in the club beforehand. They took her to a house where one of them was staying, where she was stripped of her clothes, restrained and repeatedly raped by all of them, in each other's presence. She was unable to fight them off and although a neighbour heard her repeatedly shouting "no" and "stop it", the neighbour did not intervene, and the applicant and his co-defendants continued.

Eventually a taxi was called to take her home and notwithstanding her ordeal, E had the presence of mind to find out the address of the property from the taxi-driver. She disclosed the rape to her friend who was baby-sitting for her as soon as she got home at 5.00 am. The friend took her to hospital and the police were called.

5. She was found to have sustained multiple lacerations to her vagina and anus both externally and internally. She also had a split lip and bruising and tenderness to her breasts. The medical evidence of Dr Mostyn was that it was extremely rare to see such injuries in a person who had had five full-term normal deliveries and who is sexually active. The complainant suffered post-traumatic stress disorder, needed surgery for a hernia and is now doubly incontinent as a consequence of the sexual assaults.
6. The applicant returned to Romania shortly after the offences were committed but returned to the UK and was arrested on 18 September 2017. In interview he stated that the complainant was drunk, that others had engaged in sexual activity with her but that he had not joined in at all and had gone to bed. He was bailed. The forensic tests showed that the applicant's DNA with that of E was found on a condom recovered from the address concerned. He was interviewed again in January 2019 and made no comment.
7. In his Defence Case Statement before trial, he said that group sex had been discussed and that E invited him to join in when his co-defendants started group sexual activity. In his evidence before the jury, he resiled from his Defence Case Statement and said that he

accepted that there had been oral and possibly vaginal penetration, but he could not clearly remember as he had been drinking, but that any sexual activity that night was entirely consensual and took place when they were alone. The applicant and all the co-defendants were convicted of all counts by the jury in unanimous verdicts.

8. The chronology relevant to the extension of time is as follows. The time limit for applying for an oral renewal hearing expired on 5 November 2021. On 7 January 2022 the applicant instructed his current solicitors and from February to April his solicitors awaited receipt of the trial transcripts. After perusing the transcripts and considering the case papers the new solicitors sought to lodge fresh grounds with a letter to the Criminal Appeal Office on 24 August 2022. The letter was returned on 2 September 2022 since in order to renew the application on fresh grounds and comply with the Practice Direction the single judge (SJ) form had to be completed. The applicant returned the correct papers to seek leave to renew permission for leave with a new ground on 24 January 2023.

Grounds of Appeal

9. The applicant originally sought to appeal the conviction on grounds that the judge had erred in failing to discharge the jury when his original counsel had withdrawn from the case. The judge had not adequately dealt with his refusal to waive privilege so as to avoid undue prejudice. The grounds were comprehensively dismissed by the single judge and are not renewed.
10. The single fresh ground proposed is that following receipt of two jury notes expressing concerns about seeing the defendants outside the courtroom on Day 4 of the trial (22 April 2021), the learned judge failed adequately to investigate firstly, whether the author or any of the other jurors had already prejudged the case. Secondly, whether the jury had

any prejudices that were such that they would be unable fairly to try the case. Thirdly, what the author of the note meant by "a group" or "a gang" and fourthly, whether the jury felt able to continue with the trial in the circumstances. It was said that it could well have impacted directly on the verdicts that were ultimately returned, rendered the trial unfair and the convictions unsafe.

11. The first note of 22 April 2021 principally concerned the juror's request for the case to finish a little earlier at 4.00 pm but it then went on as follows:

"In addition, two other jurors have expressed their discomfort with seeing the defendants on the street when entering and exiting the court. I don't know if anything can be done about this, but I wanted to mention it. I've seen them on the street on my way home. I was initially quite surprised, however, I appreciate that as a man and given the nature of the charges, my perspective is different to that of the women on the jury."

12. The second jury note, from a different juror, stated:

"I would like to address that on Tuesday, 20 April at lunch time I was outside the court just at the door making some time before the next afternoon session when the defendants came outside at the same time. They were standing just centimetres apart from me and other jurors. I felt very intimidated as they were there, they were that close to me, and now I know that they can fully recognise me. I don't feel comfortable at all knowing that they are there to be judged by me and other jurors, that if they want, they can take revenge later. How am I going to be out on my own later if they are guilty? They were on Tuesday at lunch time laughing between them, pushing at each other very happily. To me, with the case going on, it does feel like a group (gang) against one, me. I hope other jurors speak about it because it's not only me who have mentioned this uncomfortable situation."

13. After the notes were received, they were read into the record and the contents discussed with counsel. Neither counsel for the Crown nor any of the four defence counsel

suggested there be any further inquiry, as is now proposed should have occurred. The reason for this was because none was required. All parties agreed that the jurors had quite properly raised their concern, just as they had been instructed to raise any issues of concern by the judge in her directions at the start of the trial. In the absence of the jury the judge quite rightly shared with counsel what she proposed to say to them:

"What I am going to do is reassure the jury that there is nothing to suggest, I am going to think very carefully about what to say, but effectively, nothing to suggest that they have got anything to be concerned about, but I do understand their feelings in this. Everyone is very sorry that they do feel this way and that they've been made to feel uncomfortable. I am quite satisfied that no one intended for that to happen, and that I have now made arrangements for arrival and leaving times and lunch times that means that it will not happen again in the future."

14. She went on to explain that she would not be able permit smoking breaks for the defendants as: "It is just too risky. This is to protect them as well as to enable the jury to feel comfortable."

15. When the jury returned to court, she said this:

"[Your note] ... relates to feeling uncomfortable at certain points. Can I apologise to you for that on behalf, not just me, but everyone? No one in court wants you at any point to feel uncomfortable whilst you are sitting on a jury, and by this, I mean reference to the fact that you have seen the defendants outside of this courtroom.

First of all, can I reassure you, whilst taking on board exactly how you feel and saying I understand how you feel, can I reassure you, there is no real reason for you to be concerned, first of all. Nevertheless, I understand why you feel uncomfortable and it is important that that does not happen again. We were all concerned to know that you feel like that, and [are] all very sorry, and I include the defendants in that as well, that you do feel that way. Because of that, we have all agreed that we are going to put in

place arrangements to make sure that it simply does not happen again."

16. She then set out what those arrangements were in detail so that there would be staggered arrival and departure times from court in the mornings and afternoon and assured them that the defendants would have lunch in the building and would not be outside the building during the lunch break. She made it clear that the defendants had all agreed to the arrangements and she continued:

"So, you should not, at any point, bump into them again. They do not want you to feel like that. We do not want you to feel like that either, so we have all agreed between us, those arrangements will be put in place. I hope that that reassures you, and I hope, I am confident, that that is going to work. If, for any reason, there is anything else that makes you concerned during the course of the trial, on this particular topic or indeed any other topic, do exactly what you have done this time. Write it down in a note. Give me as much detail as you would like, tell me what happened, and then I can fix it. This is a perfect example of something that is worrying you. You tell me, and I hope now I have done something sensible that will fix it, and you were right to raise it straight away, so thank you very much. I hope that this helps. I hope it works, and I hope it also reassures you."

17. The judge's direction to the jury therefore ensured that there was no further risk of contact which might lead to any jurors to feel uncomfortable and invited them to raise further notes should any more similar occurrences occur, or they have any further anxieties. No further notes were sent for the rest of the trial which continued for a further 3 weeks until the verdicts were returned on 11 May 2021.
18. The judge made clear in her direction to the jury that the defendants did not intend to cause the jurors any discomfort and everyone was sorry for what had occurred. The response was appropriate, measured and dealt effectively with the issue in a suitably low

key way and the judge was right to take a problem-solving approach. Further investigation or inquiry into the juror's notes was neither necessary nor advisable since they were self-explanatory. It is therefore not reasonably arguable that the way in which the trial judge dealt with the notes of 22 April 2021 led to unsafe convictions.

Extension of time and amendment application

19. The applicant's representatives needed to obtain the full transcript of the trial, comply with the *McCook* [2014] EWCA Crim 734 procedure, take instructions from their client in custody who does not speak English as his first language. Although his solicitors have been reasonably diligent and have an explanation for each stage of the delays, the cumulative effect means that a 445-day extension of time is required which is excessive and adds to the uncertainty and trauma for E. In any event, the proposed new ground is not arguable and there is therefore no good reason to grant an extension of time. All applications 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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