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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 866



No. 202301994 B5

Royal Courts of Justice

Friday, 30 June 2023

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE BRYAN

HIS HONOUR JUDGE SLOAN KC

(Recorder of Newcastle)

REX

V

AFJ

**REPORTING RESTRICTIONS APPLY:
S.71 Criminal Justice Act 2003**

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MR JARVIS appeared on behalf of the Appellant.

MS C COOPER appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

- 1 In the early hours of 11 November 2022, a young woman ("HK") was walking home from a friend's house. She was alone. She had her mobile phone in her hand and a bag over her shoulder. As she entered the road in which her home was located, she saw a man ("AFJ").
- 2 HK's evidence was that AFJ said something to her. She said that it felt as if he was catcalling her. She explained "catcalling" as "Like sexual whatever. That is the undertone". She told the police that she wished she could remember more of what he said. However, she was able to say it made her feel really uncomfortable. She said it happened a lot when she was out at night time. This was another example of someone making a horrible comment, as a result of which she felt unsafe.
- 3 HK walked on towards her home. AFJ followed her. When she was almost at her home, he came up behind her, put an arm around her body and grabbed her face with his hand. He pushed her down on to the floor. This was in an alleyway rather than on the road itself. AFJ was on top of her. He said words to the effect of "I'm going to kill you, stab you. I need you to give me all your stuff". HK recalled "a big sort of fumble round on the floor where he was pushing me down." She screamed. A neighbour heard the scream and came out of his house shouting "leave her alone". AFJ got up and ran away.
- 4 At least some of the period during which AFJ was with HK in the alleyway was captured on the CCTV system of a house adjacent to the alleyway. The footage we have seen lasts for one minute. When it began, AFJ and HK were already in the alleyway. Initially, AFJ held HK round the waist with one arm and held the hand of the other arm over her mouth. He held her very close saying something into her ear. The CCTV footage has a soundtrack but what he is saying cannot be discerned. After about 45 seconds, AFJ pushed HK on to the floor. "A big sort of fumble around" is a reasonable description of what can be seen over the next few seconds. At no point did AFJ attempt to take HK's bag although it was obvious and available. For much of the footage HK was shouting out. A few seconds before the end of the footage, the voice of the neighbour was heard, which was the point at which AFJ ran away.
- 5 Subsequently, HK told the police that AFJ could have just grabbed her bag. She asked why he did not do that and then run off. She said that she thought he might try and rape her because she was in a very vulnerable position. She repeated it would not have been hard for him to take her bag and her phone.
- 6 AFJ was arrested about an hour later on the same road in which the attack had taken place. He made no comment in interview.
- 7 AFJ was charged with attempted robbery and committing an offence of assault with intent to commit a sexual offence. He was sent for trial at the Crown Court. At his first appearance at the Crown Court, he pleaded guilty to the offence of attempted robbery. The other offence was adjourned for trial. The trial was listed on 12 June 2023. Almost all of the prosecution evidence was read by agreement. HK's evidence consisted of an ABE interview appropriately edited and a recorded cross-examination pursuant to s.28 of the

- 8 On 13 January 2023, the prosecution applied to adduce evidence of AFJ's bad character. He had a number of previous convictions, but the prosecution were concerned with only one. On 31 July 2009 he had been convicted of attempted rape, sexual assault, false imprisonment and robbery. He was then aged 42. He had been sentenced to an indeterminate term of imprisonment with a minimum term of just short of four years. He was released on licence in 2015. The circumstances of that offence were that on 30 March 2009 at about 10.30 in the evening a lone female was walking home at night when she was grabbed by AFJ. He told her not to scream or he would kill her. He took her phone and put it in a bin. He pushed her up the street and made her climb onto a derelict piece of land. He told her to give him all her money, which she said did. He then told her to get on the ground and take her clothes off. He sexually assaulted her and attempted to rape her. The trial judge refused the application to adduce the evidence of bad character.
- 9 There was then a submission made on behalf of AFJ that there was no case to answer in respect of the charge of committing an offence of assault with intent to commit a sexual offence. The trial judge acceded to that submission.
- 10 The prosecution now apply for leave to appeal against both rulings made by the trial judge pursuant to s.58 of the Criminal Justice Act 2003. They have complied with the requirements of s.58 in relation to the undertakings as to acquittal. The trial judge refused to give leave and declined to expedite the appeal. He discharged the jury.
- 11 If we were to give leave to appeal, then a date for a retrial has been set in September 2023.
- 12 Although the ruling in respect of bad character came first in time, we shall begin by considering the trial judge's determination that AFJ had no case to answer. The defence submission before the judge, and indeed today, was that the evidence was consistent only with an intent to rob on the part of AFJ. The essence of the judge's ruling was as follows:
- "The highest the Crown's case can go is that the complainant who there is no doubt was set upon in the most unpleasant fashion in the early hours of the morning by the defendant, could have raped me, that the complainant said he could have raped me or done anything. Well that is exactly the point. In the first account given to Police Constable Dunn, he reported the complainant had told him there were no sexual elements had taken place. To my mind, having watched the video, the defendant does not appear to try, let alone carry out any sexual assault. There is no pulling of clothing. The complainant does not claim any of that. His hands are not in an inappropriate place. And albeit he subdued her, he subdued her just to, well to rob her."
- 13 He concluded by saying:
- "I do not consider it to be right in the circumstances of this case to leave this case to the jury. There is to my mind no evidence but guesswork that the jury could properly convict this defendant on Count 2, namely that he was assaulting her with

intent to commit a relevant sexual offence."

- 14 In our view, the judge substantially understated the effect of the evidence. When HK was first aware of AFJ he catcalled her. She defined that in her evidence as being something with a sexual connotation. That is in fact the dictionary definition of the term. While she could not recall the precise language, it was sufficient to make her feel really uncomfortable. It is a proper inference that can be drawn from that evidence that AFJ made some kind of sexual comment to her. That was the immediate prelude to what followed. What HK then described as having happened in the alleyway was confirmed by the CCTV footage. The judge concluded that this footage did not show any attempt to commit a sexual assault. As has been argued by the appellant prosecutor this morning, that is not the offence with which the defendant was charged. In any event, we consider that it was at least a reasonable inference from what can be seen on the footage that AFJ was trying to put himself in a position sexually to touch HK. Indeed, on one view, he did put his hands somewhere below her waist immediately before the neighbour intervened. Conversely, there was no sign at all of him trying to steal anything, whether HK's bag or her phone.
- 15 In our judgment, it was a matter for a jury to consider whether AFJ's assault was something that was a preliminary to sexual assault of some description. A judge can only withdraw a case from the jury if no reasonable jury could convict on the basis of the evidence adduced by the prosecution. Mr Jarvis for the prosecutor put it this way to us today: could a reasonable jury on one view of the evidence draw the appropriate inference adverse to the defendant? However one puts the test, it was not appropriate to withdraw the case from the jury. There were good reasons for a jury to decide that what was shown on the CCTV footage was an assault with an intent to commit a sexual offence. Whether that would have been the jury's conclusion is not the question. However, that conclusion was plainly open to them on the evidence. It follows that we are satisfied that the judge erred in acceding to the submission of no case to answer and we therefore give leave to appeal in respect of that aspect of the application.
- 16 The judge refused the prosecution application to adduce evidence of AFJ's convictions in 2009. He did so because he considered that the prosecution case was weak. He relied on the observation in *Hanson* [2005] EWCA Crim 824 that bad character evidence should not be introduced to bolster a weak case. He also considered *Benabbou* [2012] EWCA Crim 3088 where this court held that a single conviction for rape some eight years before the relevant events should not have been admitted in a trial in 2011. However, there the circumstances of the previous offence were significantly different to those alleged in the trial: the evidence of propensity was limited, whereas the prejudicial effect was very substantial.
- 17 We are satisfied that the judge was wrong to categorise the prosecution case as weak. It was a circumstantial case, but for all the reasons we have already given, the circumstances were quite sufficient to provide a sound inferential case. The previous offences committed by AFJ may have occurred a considerable time prior to the events in 2022. However, they bore a striking similarity to what happened in relation to HK. In 2009 a lone female was attacked at night and taken somewhere out of view before a sexual assault was committed. Had the neighbour not intervened, it appears to us there is every prospect that that is what would have happened to HK. When he was convicted in 2009, AFJ was a mature man. This is not a case where it could be suggested that the passage of time somehow in some way means that he is different now to how he was then. Clearly the admission of the bad character evidence would have been prejudicial. It would have affected the jury's view of the case as

a whole. However, we do not agree that its admission would have been unfair. The judge said that the bad character evidence would distract the jury and cloud their minds. We reject that view. It was obviously relevant evidence. It was important evidence in terms of demonstrating the propensity of this man to commit the very sort of offence with which he was charged. With a proper direction, which we would anticipate any judge would give, then that would be a matter for the jury to consider.

- 18 It follows that we have concluded that both rulings of the judge were wrong. We allow the appeal. This case must be returned to the Crown Court to be retried by a different judge. The precise identity of the judge will have to be determined by the senior presiding judge for the South Eastern Circuit.
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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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This transcript has been approved by the Judge.