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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/02561/B5
[2024] EWCA Crim 1084



Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 27th March 2024

B e f o r e:

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE CALVER

THE RECORDER OF SHEFFIELD
(His Honour Judge Jeremy Richardson KC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

RHYS DAVENPORT

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Miss C Spedding appeared on behalf of the Applicant

Mr D Scutt appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 27th March 2024

LORD JUSTICE HOLROYDE:

1. On 13th July 2023, following a trial in the Crown Court at Bristol before His Honour Judge Picton and a jury, the applicant was convicted of offences of sexual assault (count 1) and assault by penetration (count 2).

2. The victim of those offences, to whom we shall refer as "C", is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these offences.

3. The applicant now applies for leave to appeal his convictions on the basis of something said by C after the trial had been concluded. The Registrar has referred the application to the full court. The trial judge has adjourned sentencing pending the hearing before this court.

4. The relevant circumstances can for present purposes be summarised briefly. In late May 2020, C moved into a shared house. One of the persons already living there was the applicant. C's evidence was that in about mid-June the applicant began to make suggestive remarks to her. Two days before the events giving rise to the charges, she said, he had shown her his genitals and then placed her hand on his genitals over his clothing. She had told him that his behaviour was disgusting and had left the room.

5. On 21st June 2020, the applicant's brother came to visit him at the house. Both men became drunk. C's evidence was that the applicant slapped her on the bottom (count 1). She said that she told him not to touch her and kicked him in the groin.

6. Later that night, into the early hours of 22nd June, C was in bed. She was wearing a T-shirt and underwear. She texted the applicant to complain about the noise which either he or his brother was making. The applicant then came into her room without knocking and asked to sleep in her bed. C observed that he was drunk and had an erection. She told him to go to his own room, but he began to touch her. C's evidence was that he put his hand inside her underwear and penetrated her vagina with his finger (count 2).

7. She repeatedly told him that she did not want to have sex with him. He nonetheless said that he would go to his own room to collect a condom. C took the opportunity to block her bedroom door, and when the applicant returned she told him to go away and leave her alone.

8. Later that day, C complained to other housemates about what the applicant had done. That evening the applicant sent her a text, saying he was "very sorry about last night", and referring to his state of intoxication.

9. The defence case, which was put to C during cross-examination, was consent. In the course of cross-examination there was the following exchange, comprising five questions and answers. We shall number each question and answer and hereafter refer to them by those numbers.

"Q1. You did not tell him to go to his room, did you? You responded by sitting up and then the two of you started kissing.

A1. It's not true.

Q2. And Rhys laid back on the bed and you took your top off?

A2. No.

Q3. Did you take your underwear off as well?

A3. No.

Q4. And you sat on his groin area whilst you were naked, did you not?

A4. Sorry?

Q5. You were sitting over him, astride him, naked.
A5. No."

10. The applicant, who was aged 27 at the material time and was of previous good character, gave evidence in his own defence. He said that he and C had got on well with one another and had flirted. He said that she had once put her hand on his genitals, but he had stopped her, saying that he had a girlfriend. He accepted that on 21st June he slapped C's bottom, but said that it was done "in a flirty way" and denied that she had kicked him. He said that in the early hours he had gone into C's bedroom to apologise for the noise. He had asked her for a kiss, which she gave, and they had become passionate. He said that C had take off her top and straddled him. They had masturbated one another and he had inserted a finger into her vagina. When he returned after collecting a condom, C told him to go away because they should not be doing it.

11. The applicant alleged that C's prompt complaints to housemates and his own subsequent apology were because he had been unable to achieve a full erection and C was disappointed that they had not had sexual intercourse.

12. The applicant's brother and another housemate were called as defence witnesses. Character evidence was also called.

13. The jury, as we have said, convicted the applicant of both offences. Sentencing was adjourned and arrangements were made for C to provide a Victim Personal Statement. C met the officer who was to see her for that purpose, and whilst they were together C emailed to that officer her own draft of a Victim Personal Statement. She then volunteered that there was something which she had not told the police when first interviewed and had not told the judge because, she said, she was worried they would not believe her. She told the officer that

at one point she had been straddling the applicant and had put her hands around his throat. She said that she had wanted to strangle the applicant, but was frightened because he is much bigger than her and she believed that he would kill her.

14. C was thereafter interviewed under caution by officers who had not previously been involved in the investigation. We have listened to the recording which was made of that interview. It is apparent that English is not C's first language, and she had considerable difficulty explaining her understanding of the caution. It is also apparent that she was quite severely tested as to her explanation of why she had given answer 5 at the end of the passage we have quoted. C said that she had sat on the applicant's lower tummy, not his lap. She had put his hands around his neck because she was scared, did not know what to do and thought she could kill him because he would kill her. But, she said, the applicant just laughed at her and then put his finger inside her. She said that she did not think she had lied in her evidence in court. She had not been sure what reply to give when question 4 was asked, which was why she had said, "Sorry?" She then went on to explain in the following terms, which we quote verbatim from the transcript of the interview:

"I don't think that I lied at the court, because I just wasn't sure what to reply back.

Another previous question that she asked me, like if I wasn't in a romantic way involved with him. It wasn't in my mind at all, thinking I asked him to do all those things to me. That's why when she said, 'Oh', you know, 'did you sit on his lap?' So my answer was 'No', because I didn't. I don't think I did that. Because he is very tall. That's one of those things I thought. He is very tall, and I'm short. So in way to stay on his lap, there's no way to reach his neck. So I thought obviously I sat on his tummy in the way to reach his neck. So it wasn't intentional to say 'No' to my answer because in my mind – in my mind I just thought 'I didn't sit on his lap', because I managed to reach his neck. So that's why I said, 'No'."

15. C went on to say that she had not mentioned this previously because she did not know

the law in this country and was worried that she might get into trouble for trying to strangle the applicant. She thought no one would believe her, because she was a foreigner and because her complaints had not been believed previously when she had been a victim of rape and of sexual assault before coming to this country.

16. Later in the interview, C said:

"I ask, 'Sorry'. So I wasn't sure about the question. I wasn't – I didn't really understand the question, because – that's why I asked, 'Sorry', kind of, and when she repeated the question, I said, 'No', because in my mind I wasn't sat on his genitals. I was on his tummy. This is what I remember. That's why I said, 'No', and I wasn't naked.

Q. OK. So do you think that you could have answered that in a different way?

A. Probably if I – if she asked for two different questions, instead of putting two questions together in my mind, I obviously thought I wasn't naked, but at the same time I'm not on his genitals."

17. The Crown Prosecution Service have subsequently confirmed that no charge of perjury or of perverting the course of justice is to be brought against C. The Crown Prosecution Service very properly informed the applicant's solicitors of what C had said to the officer who spoke to her in connection with the Victim Personal Statement.

18. The ground of appeal is that the conviction is unsafe because C has admitted to lying in cross-examination on the issue of whether she straddled the applicant whilst they were naked in the bedroom. Miss Spedding submits that this goes to C's credibility. Application is made to admit the evidence of the officer as fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968. It is submitted that if the jury had heard the evidence now available, they would not have felt able to be sure that C's account of events was correct. It is suggested that, when speaking to the officer in connection with the Victim Personal Statement, C was not

making a clean breast of things, but rather was deliberately mentioning matters which she believed to be relevant to the severity of sentence.

19. For the respondent, Mr Scutt accepts that answer 5 "could have been clearer", but contends that it does not cast any doubt on the safety of the conviction. He draws attention to the context of the cross-examination as a whole, to the terms in which question 4 and question 5 were asked, and to the overall strength of the prosecution case.

20. As to whether C was making a clean breast of things when she subsequently spoke to an officer, Mr Scutt points out that she had already emailed her draft Victim Personal Statement before volunteering the information she did.

21. We are grateful to both counsel for their submissions.

22. We agree with Mr Scutt that the context in which the key passage was set is important. In the cross-examination as a whole, the applicant's advocate had diligently and properly put to C the assertions made by the applicant as to the consensual nature of sexual activity on the night in question and on previous occasions. C had throughout denied all those suggestions. She denied that she had wanted sex with the applicant, or had done anything to encourage the applicant to think she did.

23. As further relevant context, it must be remembered that it was C herself who volunteered to a police officer the fact that there was a matter which she had failed to mention when first interviewed by the police and when giving evidence to the jury. We can see no foundation for the submission that this was part of an attempt to speak in aggravation of the applicant's eventual sentence.

24. Against that background it is to be noted that in answers 1, 2 and 3 in the passage of cross-examination which we have quoted, C denied consensual kissing, denied that she had taken her top off, and denied that she had taken off her underwear. She had done so in reply to clear questions which could easily be understood. We have no wish to embarrass the advocate, but it is unfortunate that the next question combined two questions in one, referring both to C sitting on the applicant's groin and to C being naked. It is apparent from C's response "Sorry?" that she found that question confusing or unclear. The next question also contained two propositions: that C was sitting astride the applicant, and that she was naked. Thus, taking the two questions together, three distinct propositions were being rolled into one: that C was astride the applicant; that she was sitting on his groin; and that she was naked.

25. In those circumstances it is, in our view, impossible to characterise the one word answer "No" to question 5 as a deliberate lie. C has not admitted lying in cross-examination on the issue of whether she straddled the applicant whilst they were naked in the bedroom, because she has always denied that she was naked. At most, C could be said to have failed to articulate her response as fully as she might have done. It is clear from what she said, when interviewed under caution, that she accepted only one of the three propositions which were put to her. She accepted that she had straddled the applicant, but she denied that in doing so she sat on his groin and denied she was naked.

26. That failure has to be seen in the context of her clear denial of the tenor of the cross-examination as a whole, and of this passage in particular, namely, the suggestions that she had been a willing participant in all such sexual activity as had occurred, and in the context also of C's insistence that the applicant's actions had been without her consent. Further, the failure must be seen in the context of the failure of Q5 to provide the clarification which C had requested in response to Q4.

27. We would add that if the three distinct propositions had correctly been formulated as three questions, C would have been required to make her overall position clear. But in that event, it is apparent from what she said when interviewed under caution that her answers would have provided no assistance whatsoever to the applicant. On the contrary, it seems to us that C's explanation for why she feared she would not be believed could very well have proved damaging to the applicant's case.

28. As we have indicated, the sole ground of appeal is dependent on the proposed fresh evidence. No ground of appeal arises out of any other aspect of the trial.

29. In those circumstances, we are not persuaded that there is any arguable basis on which it could be said that these convictions are unsafe. It cannot be said that C told a deliberate lie, and such criticism as might be made of her provides no foundation for challenging the jury's verdicts.

30. It follows that the proposed fresh evidence, though otherwise meeting the criteria in section 23, is not capable of affording a ground for allowing this appeal. We therefore decline to receive the proposed fresh evidence and we refuse the application for leave to appeal.

31. Miss Spedding, Mr Scutt, thank you both.

32. Mr Scutt, those instructing you will no doubt contact the Crown Court at Bristol so that arrangements can be made for Judge Picton to restore the matter for sentencing?

33. **MR SCUTT:** My Lord, yes.

34. **LORD JUSTICE HOLROYDE:** Thank you.

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

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