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No: 200906932/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL
Friday, 10th September 2010

B e f o r e:
LORD JUSTICE ELIAS
MR JUSTICE MITTING
MR JUSTICE SUPPERSTONE
R E G I N A
v
AMANPREET SINGH GREWAL

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WordWave International Limited
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165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Miss K Kaul appeared on behalf of the **Appellant**
Mr J Dawes appeared on behalf of the **Crown**

J U D G M E N T
(As approved)

1. LORD JUSTICE ELIAS: On 12th November 2009 in the Crown Court at Southwark before His Honour Judge Robbins, the appellant, aged 20, was convicted of a single offence of sexual assault on a female. That was count 3 on the indictment. He was sentenced a month later to 12 months' imprisonment suspended for 2 years and he was ordered to carry out unpaid work for 150 hours under the supervision of the probation service. There were other minor orders also imposed. He was acquitted of count 2, which was attempted rape of the same complainant as in count 3. The jury were unable to agree on count 1, which was alleging assault by penetration on another separate complainant and the jury were discharged from giving a verdict. He now appeals against conviction by leave of the single judge.

2.Before dealing with the facts, we will indicate the way in which count 3 was introduced into the indictment. At the close of the defence case, the prosecution applied for that additional count to be added alleging sexual assault against the complainant PO. It was initially opposed by the counsel for the appellant but he then conceded to the count being added.

3.The background to the offences is this. The appellant and both complainants are students at Imperial College. So far as the complainant with respect to counts 2 and 3 is concerned, the incident related to an occasion on the night of 19th January when both were very drunk. In a nutshell, the complainant contended that the appellant had forced himself upon her, and she had made it plain at all stages that she wanted no sexual encounter. The case for the appellant was that there had been sexual activity. It was always consensual activity but there came a point when the complainant requested him stop, and he did so.

4.In a little more detail, the evidence given was this. The complainant and her friends decided to celebrate her birthday, initially at a hall of residence and then they went to a nightclub called Tiger Tiger in the West End. The applicant, who had in fact been excluded from his hall of residence because of concerns about his drinking, was invited to the party by a friend of his. He and two other students drank a bottle of Scotch before they went to Tiger Tiger. PO believed she may have drunk between 10 and 15 shots of vodka before going out that night. At that stage she was completely drunk. She was sick on the bus. She was admitted to Tiger Tiger and was sick again in the club. She was invited to leave by the staff. Her friends tried to find someone to take her home and eventually the appellant was chosen. He claimed that at that time he only reluctantly agreed to take her back to the hall of residence. They went in a taxi.

5.On arrival, they went to the appellant's room in the hall of residence. It was about 12.30 in the morning. The complainant's evidence was they sat on the bed and then the appellant leant over and tried to kiss her forcibly backwards onto the bed. She told him to stop, but he managed to pull her tights and underwear off. She said that each time she told him to stop he kept replying that she should not worry. He tried to put his hand up her skirt but did not succeed. He then removed his trouser and tried to open her legs. She felt his erect penis brush against her vagina. He was leaning over her at that time. She then managed to push the appellant off with her right leg. She had been crying. The applicant fell asleep, and she also did eventually. Then, a friend of hers, CR, knocked on the door. He asked the appellant whether he had had sex with her, and the appellant replied: "No, nothing happened". That friend, CR, then stayed and there was, as the jury were told, some sexual intimacy short of intercourse between him and the complainant.

6.The case for the appellant was that they partially removed each other's clothes or took steps towards doing that. They were kissing throughout. The complainant appeared to be consenting. She was not seeking to push him off and was not trying to do so. He did not attempt any sexual intercourse. After 10 or 15 minutes she said "Stop, I don't want to", or words to that effect. The appellant asked why but the complainant just shook her head. The appellant thought that in fact it may be because she was a friend of one of his ex-girlfriends. They then both fell asleep side by side. Then the friend knocked on the door and the appellant got dressed and left. He then in fact met his ex-girlfriend and he stayed in her bedroom until morning.

7.In addition to the evidence of the complainant and the appellant, there was plenty of evidence before the jury in the form both of evidence given to them and statements read to them from various other students and friends of the appellant and the complainant, who had been at the nightclub on the evening in question or who had communicated with the appellant or the complainant after the alleged incident. It is not necessary to rehearse their evidence.

8.One of the grounds of appeal relates to three entries made on Facebook by the complainant, after the incident had occurred. There was a following entry at 4.15 on the morning immediately following the incident: "Has anyone seen my phone or camera. I don't know where they are?" Then: "ATM remembers nothing." Then 9.20 that day: "What time you around till? Well I am here to 1.00, so if you're still around then just pop down whenever. If not then I'll come and find, you tonight LOL. . Then another said, “Filling in my memory would be very much appreciated there is very little of it ATM". Then 21.22, following evening: "A bit of a disaster, LOL. Managed to lose my camera and phone. Got chucked out of Tiger Tiger and had to be brought home... should definitely have stayed away from the Skittles vodka. Ah well had a really good time, then we had a good night."

9.None of those entries were specifically referred to by the judge in the course of his summing-up.

10. There are a number of grounds which have been advanced this morning by counsel. Initially, the appeal identified two grounds only. The first is that the judge should not have acceded to the applicant to add count 3 as an alternative to count 2; and the second was that the judge had failed adequately to deal with the case because he failed to focus on the Facebook entries which, it was suggested, were inconsistent with the complainant being able to remember in such detail the events in question. Accordingly, it is submitted that these entries cast doubt on the reliability of her evidence.

11.When granting permission the single judge added a further ground, namely whether the trial judge's direction on the effect of drunkenness on consent was satisfactory.

12.Yet further grounds have now been pursued by new counsel. They can broadly be brought under two heads. First, further examples are given of alleged inconsistencies which were not specifically identified by the judge and which cast doubt on the reliability of the complainant's evidence. Second, it is said that certain directions ought to have been given and were not. These include a direction about previous inconsistent statements and their potential relevance to the evidence adduced; that there was no direction given to the meaning of preparatory acts (although that has not been pursued before us this morning but is in the skeleton argument); and that there was no direction on the possibility of innocent contamination of the evidence as a result of conversations which occurred after the incident between the two complainants.

13.We shall deal with these in turn. The complaint that count 3 should not have been added is now barely advanced by counsel. That is not altogether surprising since the appellant's counsel at trial did not ultimately oppose it. Section 15 of the Indictments Act is of course very broad and allows for an amendment to be made at any time during the trial. Here the amendment was made late in the day. But this court will only interfere if there is clear injustice. In this case, we are satisfied that the evidence would have been no different had the count been there from the beginning,and indeed the contrary has not seriously been argued by new counsel. The alleged injustice which had originally been advanced was that had the amendment been made at an earlier stage or had it always been a count in this indictment, then it would have changed the focus of counsel's approach. It is alleged that when the only issue is attempted rape, the focus was necessarily on intent and what constituted preparatory acts, whereas the introduction of count 3, the sexual assault, placed the emphasis more centrally on the question of consent.

14.We are not at all persuaded by that submission. It was always the appellant's case that there was consensual sex and the issue of consent was plainly at the very heart of his defence from the beginning.

15.In fairness to Ms Kaul who now argues this case for the appellant, the principal submission with respect to this late amendment to the indictment is that in the circumstances it was particularly important that the judge should direct the jury very carefully with respect to this charge and her complaint is that he failed to do that.

16.The second broad ground we will consider brings together a number of the more detailed points to which we have already referred. It concerns the alleged inconsistencies in the evidence of the complainant. The contention is that these should have been specifically identified in the summing-up and brought to attention of the jury; and furthermore, it is alleged that the judge did not adequately direct the jury with respect to these inconsistencies.

17.We will first identify the three areas where it is alleged the complainant had given inconsistent evidence. The first relates to the entries in the Facebook, to which we have made reference.It is said that they vividly demonstrate in terms how hazy the complainant's memory was of the events of the previous night, and yet at trial she was apparently able to give a relatively detailed account of the way in which the incident had unfolded.

18.The second concerns her conduct immediately after the appellant had left her room. She then had some sexual intimacy with the friend, who had knocked on the door. She had apparently had some sexual intimacy with him in the past. The jury were told of that, but they were not of the nature of the sexual encounter, which apparently fell short of intercourse. It is submitted the judge again ought to have drawn attention to this on the basis that it would suggest she was not particularly distressed by the earlier incident.

19.The third alleged area of inconsistency relates to statements made by the complainant to other persons, after the incident. It is accepted that she gave statements to some persons to the effect that the appellant had sought to force himself upon her, but focus is placed on one or two other conversations where she says that she did not have a particularly clear recollection of events. It seems that the only issue put directly to her in cross examination as a matter casting doubt on the reliability of her testimony was the entry in Facebook.

20.The judge did in his summing-up at two places refer to the question of inconsistencies, at page 15 he said:

> "Members of the jury, the defence point out various inconsistencies in the complainant's accounts. They say that these inconsistencies may show that they are untruthful and unreliable witnesses. You will need to consider whether consistency in this case is necessarily an indicator of whether or not the complainants are telling the truth."

Then he came back to the point, at page 20, where he also referred to the fact that there had been communication between the two female complainants. He reminded the jury that complaints made to various people were not evidence of what actually happened. He then says this with respect to the position of the appellant:

> "On the other hand, the defence say that they [that is the complainant] fall short and in some respects vary from the accounts that they had given in detail. It is for you to decide whether the evidence of complaints to others helps you to reach any decision ..."

21.It is trite law, of course, that a judge does not need to recount each and every bit of evidence in his summing-up. The judge in this case, in the time honoured way, told the jury that they should have regard to what they considered relevant, whether or not he specifically made reference to it. But plainly there may be circumstances where there is a

real injustice if evidence which is central to the defendant's case is not fairly summarised to the jury. We do not however think that is the case here.

22. It was plain to the jury, and this was made clear from statements made not only by the complainant herself but various witnesses whose evidence was before the jury, and which was referred to expressly by the judge in his summing-up, that this complainant was extremely drunk both when she left the hall of residence to go to the nightclub and at the nightclub itself. Indeed, two witnesses commented that she had virtually passed out.

23. So it was obviously clear to the jury that they had to consider whether the reliability of her evidence might have been affected by the amount of alcohol that she had consumed. In the summing-up, the judge noted what she had to say about that. Her case was that she had sobered up by the time of the incident and that she knew what she was doing. So the issue was clearly before the jury, and in our view it was not necessary for the judge to recount the Facebook material.

24. In any event we are not satisfied that the entries in the Facebook do in fact demonstrate an inconsistency, certainly not necessarily so. They are consistent certainly with her not recalling what had happened in the nightclub and the earlier parts of the evening. But she would hardly be seeking assistance of others to help her recollect what had happened in the room itself since they were not there. Furthermore, she obviously had sobered up enough by 4.15 to put this message on Facebook itself.

25. Similarly, with the other matters. The fact that she is willing to have a sexual encounter with another person shortly after the incident does not go to the question whether she consented on the earlier occasion and is not inconsistent with her having refused to consent. Nor is the fact that she has told others that she did not have a full recollection of what went on that night, or even of the detail of the incident in question, demonstrate any inconsistency with the evidence she gave. Of course, these are all matters which the jury, could properly take into consideration and they might want to consider whether she had sobered up sufficiently at the time of the incident so as to make her evidence reliable. As we have said, that is effectively what the summing-up from the judge required them to do.

26. Accordingly, we do not think that there are clear inconsistencies here. This was not a case where there had been admitted inconsistencies, such that a stronger direction may have been required.

27. We were referred to the case of R v Doyle, where this court in a judgment given by Pitchford LJ was concerned with a case where there were specific inconsistencies and admitted clear inconsistencies. The judge summed-up to the jury in following way:

> "You may take account any inconsistencies and obviously her explanation for them in considering her reliability as a witness. It is obviously for you to judge the extent and the importance of any inconsistency. If however you are sure one of her accounts is true in whole or in part then obviously it is evidence you may consider when you are deciding your verdicts in this case."

The judge did not explicitly give any stronger direction than that. In particular, the judge did not explicitly direct the jury that they should treat the evidence of the complainant with caution. But this court did not criticise the judge for that.

28. Miss Kaul accepts that the direction given by the judge in this case was in substance similar to that given by the judge in the Doyle case, but she submits that a relevant distinction, as the Court of Appeal made clear, is that the judge made specific reference to the inconsistencies and identified them for the jury. She says that is exactly what should have happened here. That, in our view, is a misconception. There were no admitted or clear inconsistencies in this case. That was something the jury had to decide. That is what the judge told them. It was simply a matter of the jury having to assess the evidence in its context. Accordingly, we think there was nothing wrong with the direction given by the judge with respect to this matter.

29. Then, it is submitted that the judge's direction on drunkenness was inadequate. The judge dealt with this, both when considering the question of intent and considering the question of consent. In fact, it seems to us that following the decision of this court in R v Heard [2008] QB 23 intoxication cannot negative intent in relation to an assault of this nature and in so far as the judge suggested otherwise it was a direction more favourable to this appellant than was required.

30. Be that as it may, the judge summed-up, in our view, perfectly properly, in relation to the question of intoxication and consent. He was asked a question by the jury with respect to that and he returned to the issue, at the end of his summing-up and again gave a direction which, in our view, is perfectly clear, distinguishing between the appellant's honest belief, where his drunkenness may be relevant and whether that belief is reasonable, where it is not relevant and one has to look at the matter as if he were sober. Miss Kaul came close to accepting that this direction was not inadequate. Her focus shifted a little and she submitted that the judge should at least have indicated that whether the appellant reasonably believed that the complainant was consenting may have changed in the course of the 10 minutes or so encounter.

31. It was never suggested that it had and in any event the appellant's case all through was that she was consenting until she asked him to stop. He then knew she was not consenting and he no longer sought to engage in any sexual activity with her. Accordingly we see no error arising from that issue.

32. Finally, we focus on certain directions which were not given,and which it was suggested ought have been given. There

are two that have really been urged before us today. We have already dealt with one, namely the lack of any stronger direction on the issue of inconsistent statements. The other is the possibility of contamination of the complainant's evidence as a result of discussion between the two complainants. It is right to say there was discussion between them. The complainant with respect to count 1 has been the appellant's girlfriend, and it was only following the discussions between the two complainants that they went to the college authorities together and that led to proceedings leading to this trial.

33.Miss Kaul properly identifies the fact that there may be circumstances where a judge ought to give a direction on the possibility of innocent contamination, even in circumstances where it has not been specifically relied upon by counsel. She has referred us to the case of R v Lamb [2007] EWCA Crim 1766, in which there were allegations of deliberate collusion. The judge directed in respect to that, but did not focus on the more important matter as far as the defence were concerned in that case, namely the question of innocent collusion.

34.Had there been a conviction with respect to counts 1 or 2, then this submission may have had more force. We do not say it would necessarily have succeeded but the risk of innocent contamination may have had some bearing in that case. But we do not see how it could have had a bearing on count 3. The issue before the jury was simply whether there had been consent. It was not ever suggested that there had been deliberate collusion between the complainants such that this account was manufactured and false. At the highest it was suggested that there may have been some innocent contamination resulting in an unconscious reinterpretation of events. But that unconscious reinterpretation of events could not lead the complainant to allege that something had been done without her consent when in fact it was done with her consent.

35.So whether or not there was a failure by the judge, with respect to failure to provide this particular direction, we are satisfied that it had no impact whatever on the safety of the conviction.

36.We should add one further point. It was suggested that when counsel had acceded to count 3 being added to the indictment, he had not consulted properly with the appellant. Privilege was waived. We have seen counsel's response and he says there was full and careful consideration together with the appellant as to whether this was an appropriate step to take. We reject therefore this ground also.

37.In substance the nature of this complaint is that the judge could and should have said more and could and should have given a clearer route map to the jury so as to assist them in distinguishing between the various counts, and in particular counts 2 and 3. We think the judge gave a perfectly adequate summary of the key evidence and that save perhaps with respect to the question of innocent contamination, the directions were perfectly adequate and provided the jury with appropriate guidance as to how they should approach the case.

38.For these reasons therefore this appeal against conviction fails.