[2021] EWCA Crim 1691

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202003009/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 19 October 2021

LADY JUSTICE SIMLER DBE
MR JUSTICE SPENCER
THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY QC
(Sitting as a Judge of the CACD)

REGINA
V
DEANO CHURCHILL-RICHARDS

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NON-COUNSEL APPLICATION

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J U D G M E N T

1. MR JUSTICE SPENCER: This is a renewed application for an extension of time in which to apply for leave to appeal against conviction, following refusal by the single judge. The extension sought is only seven days. We have therefore concentrated on the merits of the proposed appeal.
2. This is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead members of the public to identify the victims of the offences or alleged offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
3. On 21 October 2020 in the Crown Court at Leicester, the applicant, now aged 41, was convicted by the jury of two counts of rape (counts 5 and 6) and two counts of supplying a psychoactive substance (counts 1 and 2). He was subsequently sentenced to a total of 11 years' imprisonment. There is no appeal against sentence.
4. The complainant in the two counts of rape on which he was convicted was a 13-year-old girl, BS. Count 5 alleged oral rape; count 6 alleged vaginal rape. The applicant was acquitted by the jury of two counts of rape of another 13-year-old girl, LS (count 3, oral rape; count 4, vaginal rape). He was also acquitted of counts of false imprisonment of each girl and a count of criminal damage relating to the phone of one of the girls.
5. The original grounds of appeal were settled by fresh counsel who had not represented the applicant at trial. The single ground was that the convictions of rape on counts 5 and 6 in relation to BS were inconsistent with the acquittal on the counts of rape in relation to the other complainant, LS. Those grounds of appeal were perfected on 25 January 2021.
6. The applicant subsequently wrote to the Registrar indicating that he wished to "retract" counsel's grounds of appeal and to rely on his own grounds which were set out in a document dated 1 April 2021. In substance, however, his main complaint remains the same: that the convictions for rape of one girl are inconsistent with the acquittals of rape of the other girl. He also asserts that the evidence of the complainants was contradictory, that the prosecution failed to "investigate all avenues", and that the jury were given wrong legal directions.
7. The matter is listed before us today as a non-counsel application. We have the benefit of a detailed Respondent's Notice settled by prosecuting counsel at trial, supplemented by an addendum Respondent's Notice addressing the applicant's own grounds of appeal.
8. For present purposes we need summarise the facts of the offences only briefly. The two girls, LS and BS were both 13 years old at the material time, residing at a children's home. The applicant had met one of them, LS, about a month before the offences and alleged offences took place.
9. On 20 April 2020 the applicant met the two girls in a park in Leicester. They spent some time drinking and listening to music. The applicant maintained that he thought both girls were aged 18 or 19. He admitted in his evidence, however, that he had deliberately lied about his own age, telling them he was only 24, whereas in fact he was 40 at the time.
10. When they left the park the applicant purchased more alcohol and also two boxes of nitrous oxide cannisters. The three of them went to his flat where they continued to drink and listen to music and use some of the laughing gas (the nitrous oxide). That gave rise to the charges of supplying a psychoactive substance to each of the complainants (counts 1 and 2).
11. There was no dispute at trial that sexual activity with both girls took place at the flat. The applicant's case was that all the sexual activity was consensual. He admitted

engaging in vaginal intercourse and oral intercourse with BS (counts 5 and 6, on which he was convicted of rape). He admitted engaging in oral intercourse with LS but denied vaginal intercourse with her. As we have said, he was acquitted by the jury on both counts of rape against LS.

12. At one stage during the sexual activity, he filmed BS on his phone giving him oral sex. LS also used her phone to film parts of the sexual activity in the flat.
13. The prosecution case was that when the two girls tried to leave the flat the applicant stopped them, hence the counts of false imprisonment, and that he damaged the phone belonging to LS. The jury acquitted on those counts.
14. The applicant was interviewed by the police on several occasions and provided prepared statements consistent with his case at trial. His case was that the girls initiated the sexual activity, that he had oral sex with both of them consensually, but only vaginal intercourse with BS which was also consensual. He denied knowing or believing that the girls were under the age of consent. He denied having any concern that either girl was too intoxicated to engage in sexual activity.
15. The prosecution case at trial was opened on the basis that some of what happened may have been consensual but later events were not. There were several distinct sexual encounters during the course of the evening. It was acknowledged that the evidence of the two girls was not entirely clear and that they were not consistent with each other in some of their evidence. However, they were intoxicated by the time they arrived at the flat and became even more intoxicated as the events unfolded. The jury had the advantage of seeing body-worn camera footage from the police officers who arrived. The jury could assess for themselves the state of distress and intoxication of BS (the complainant in respect of whom the jury returned guilty verdicts of rape). LS appeared less distressed and less intoxicated.
16. The evidence of BS was also supported by video evidence caught on the applicant's phone and LS's phone. Stills from the videos depicted vaginal sex where BS was clearly intoxicated, not consenting and unable to consent. At one point she told the applicant she needed to go to the toilet and returned from the bathroom some minutes later having been sick. She sat on the bed, unable to remain upright. The applicant then forced or tried to force her head onto his penis. Other footage on LS's phone showed BS in a tearful state in the flat.
17. There was evidence from a neighbour who heard the two complainants shouting in the street when they left the applicant's flat. The neighbour spoke to both girls. BS was inconsolable, saying that she had been raped.
18. The issue for the jury on the charges of rape was consent and reasonable belief. The evidence of the complainants had been pre-recorded in advance of the trial under the section 28 procedure. The applicant gave evidence and was extensively cross-examined.
19. The judge gave the conventional legal directions on the need for separate consideration of each count and of the evidence of each of the two complainants.
20. Although the applicant in his own substituted grounds complains that there were errors in the legal directions, we are quite satisfied that they were not. Nor is there anything in the applicant's complaint that the prosecution had failed to "investigate all avenues".
21. The real issue, as counsel correctly identified, is whether it is arguable that the convictions for rape in relation to BS are inconsistent with the applicant's acquittal on the counts of rape relating to LS.

22. We have considered carefully counsel's arguments in this regard in the original grounds of appeal and the applicant's own substituted grounds. For the reasons given by the single judge, we are quite satisfied that there is no arguable merit in the suggestion that the verdicts are inconsistent or that these convictions should be regarded as unsafe.
23. This was a classic case where the jury were not only entitled but required to examine carefully the reliability of the evidence of each complainant separately. All that the acquittals of rape in respect of LS established is that the jury were not sure they could rely on her evidence. This may have been either because they were not sure she was not consenting to the sexual activity, or because they were not sure they could exclude the possibility that the applicant reasonably believed she was consenting.
24. By contrast, by their unanimous verdicts of guilty the jury were sure that BS did not consent to oral and vaginal sex with the applicant and sure that he did not reasonably believe that she was consenting. That was a conclusion fully open to the jury on the evidence, despite the acquittals on the other charges of rape. It was for the jury alone to assess the reliability and credibility of BS set against the applicant's own account, in the light of such other independent evidence as there was, including the activity filmed on the applicant's phone and on LS's phone.
25. It is clear on the authorities that to succeed on the ground of inconsistent verdicts an applicant has to satisfy this court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their minds properly to the facts of the case could have arrived at the different conclusions. It is for the defendant to satisfy the court that the verdicts are not merely inconsistent, but so inconsistent that they demand interference. These principles were confirmed by this court in R v Fanning [2016] EWCA Crim 550; [2016] 2 Cr.App.R 19.
26. We agree with the single judge that this was not an "all or nothing case" where the counts of rape in relation to both complainants stood or fell together. We are quite satisfied that it is not arguable that the applicant's convictions for the rape of BS are unsafe or that his trial was in any way unfair.
27. Accordingly, we refuse leave to appeal and consequently we refuse the extension of time in which to bring such an appeal.