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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2021/03639/B2, 2021/03641/B2

[2022] EWCA CRIM 1066

Royal Courts of Justice
The Strand

WC2A 2LL

Wednesday 13 July 2022

B e f o r e:

LADY JUSTICE SIMLER DBE

MR JUSTICE GOSS

HIS HONOUR JUDGE MICHAEL CHAMBERS QC
The Recorder of Wolverhampton
Sitting as a Judge of the Court of Appeal Criminal Division

REGINA

- v -

KELSEY JONES

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Mr D Emanuel QC appeared on behalf of the Appellant

Mr S Rogers appeared on behalf of the Crown

JUDGMENT

LADY JUSTICE SIMLER:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case so that no matter relating to any person who is a victim of any sexual offence shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the sexual offence. The prohibition applies unless waived or lifted in accordance with section 3 of the 1992 Act.

2. On 17 May 2019, following a trial in the Crown Court at Mold before His Honour Judge Rees and a jury, the appellant was convicted on three counts: attempted rape (count 1), false imprisonment (count 3), and assault occasioning actual bodily harm (count 4). The indictment contained an alternative to count 1, namely sexual assault (count 2) but given the conviction on count 1, no verdict was returned on count 2. On 10 June 2019, the appellant was sentenced to ten years' imprisonment for attempted rape and to concurrent terms of three years' imprisonment for the false imprisonment and two years' imprisonment for the assault occasioning actual bodily harm.

3. He now appeals with limited leave of the full court against his convictions, and he has contingent leave to appeal against sentence. The full court granted the necessary extensions of time in which to appeal and a representation order for Mr David Emanuel QC, who appears on his behalf and to whom we are grateful. The Crown is represented by Mr Rogers, who appeared below.

4. Two grounds of appeal against conviction are pursued. First, it is said that on count 1 there was no evidence upon which a jury properly directed could have been sure that the appellant intended to penetrate the complainant vaginally with his penis. Secondly, so far as all counts are concerned, it is said that the judge failed to direct the jury as to the evidential value of the complaint evidence. Accordingly all verdicts are unsafe.

The facts

5. On 7 July 2018 the appellant entered the ladies' toilets at the Custom House public house

in Connah's Quay. Those toilets were marked for use by women. There were toilets available for men next door. He went into one of the cubicles and hid there. The complainant, who was 37 years old and a complete stranger, entered the ladies' toilets and used the cubicle next door to the one in which the appellant was hiding. When she had finished in the toilet, she exited the cubicle and was confronted by the appellant.

6. Her evidence, given on the same day in video form for Achieving Best Evidence purposes, and subsequently at trial, which the jury must have accepted, was to the following effect. She said that she unlocked the door of her cubicle and heard the door of the next cubicle unlocking at the same time. Almost immediately she was attacked by the appellant. He put his T-shirt over her head and pulled it tight so that she was unable to see anything. He pushed her back into the cubicle which she had just left and locked the door. She said that he had hold of her head and slammed her head against the wall at the back of the cubicle. She was struggling and trying to fight him off. He had hold of her arms. She said words to the effect, "What do you want? I've got a phone, I've got money. You can have my money". He replied, "No, I don't want it". She thought that was all he said. She explained that the T-shirt was tight at first but became looser in the struggle. She thought that he hit her head against the back tiled wall three times, and her glasses fell off and hit the floor behind the toilet. She described him grabbing her dress and pulling it up to her waist. He was standing close behind her. At that moment, a woman entered the ladies' toilets and the complainant started to scream, "Help me". The other woman started to bang on the door, which was locked, and said something about phoning the police. The appellant grabbed his T-shirt back, put it on, unlocked the door and ran out.

7. In cross-examination at trial, the complainant was asked about where the appellant's hands were and whether he had touched her anywhere. She said that she thought he had touched her hips after he lifted her dress. She was asked whether there was any skin to skin contact at any point and she said "Yes". She described him holding on to her right hip with his hand. She said that she was facing towards the toilet, slightly angled towards the right-hand corner.

He was right behind her, also facing the toilet, pushed up against her, using the weight of his body to pin her into the corner. She was asked whether she could feel anything against her buttocks, and she said, "Only sort of his body. He had his shorts on the whole time, I think, but I could sense his body pressed up against me and that's all really". She said that he had his top off and his shorts were very low slung under his belly so that she could feel his stomach on her lower back. She said that his shorts did not come down at any point. She was always facing away from him until the banging on the door. That was the only time that she turned around to look at him. She did not feel him moving his own clothing. Nor did she see his penis at any point. She described being very frightened. She said that she thought that she would be raped because he had pulled her dress up and had pushed her into the corner and covered her head.

8. The complainant suffered a number of injuries, including tenderness to the right side of her jaw, pain to the back of her neck, and bruising to the left of her forehead, right upper arm, left lower leg, left forearm and left elbow. There were photographs, which we have seen.

9. At trial there was evidence given by other witnesses for the prosecution. In summary, Debra Boden said that she entered the ladies' toilets after 7 pm. She heard a man's voice inside one of the cubicles and asked what was going on. She heard a woman's voice asking for help. She ran into the pub for help, returned to the toilets and began to shout, "You better get out of there". There was no reaction, but she heard the woman's voice shouting more clearly, "Help me, help me". She went back again into the bar and shouted that someone was being raped. Again, no one responded. She returned to the toilet and began to bang on the cubicle door and to shout at them to come out. At that point, she said, the man left the cubicle. She asked him what he had been doing. As he left, she grabbed him by his collar, but he broke free and ran from the toilet. Ms Boden described seeing the complainant in a cubicle in a dishevelled state. She said that her dress had been pushed right up to the top of her legs.

10. Joan Hamilton also went into the cubicle after the incident. She saw the complainant

sitting on the toilet, shaking and crying. She reported the account of what had happened given by the complainant, including the fact that the man had put a T-shirt over her head, had hit her head against the tiles and had lifted her skirt. She also reported that the complainant had said that the man had tried to rape her.

11. Grant Vaughan gave evidence. He said that he saw the complainant in the cubicle. She was crying and crouched up. He took some photographs of her, which were exhibited.

12. On 9 July 2018 the appellant attended Mold Police Station, having seen on social media that the police were investigating the incident at the Custom House public house.

13. He was later interviewed. He explained that on the afternoon of 7 July 2018 he had been at his parents' house drinking with friends and watching television. At some point he and a friend went for some more alcohol. On the way home he used the men's toilets at the Custom House pub. When he came out, he realised that he did not have his phone and went back in to retrieve it. But having done so, he inadvertently took a wrong turn and accidentally ended up in the ladies' toilets. He turned to leave, but heard someone coming in. He panicked and hid in one of the cubicles. He then went to leave, but a woman exited another cubicle at the same time. There was a confrontation between them. The woman pushed him. He pushed back and, as she fell, he stumbled into the cubicle with her. She then started to struggle with him. He heard a woman's voice and he ran off.

14. The appellant gave evidence at trial. He denied using his T-shirt as a hood. He denied pulling the complainant's dress up to her waist or thighs. He denied banging her head against the wall and he denied any sexual intentions. He explained, as he had in interview, that on encountering the complainant, she shouted at him and asked what he was doing. He was in a panic. The first thing he thought of was to push her back. She went back into the cubicle and there was then the struggle in which he stumbled forwards. He said that she said something about having his phone and money, to which he replied, "I don't want it. I want to get out". He wanted to free himself. She had a tight hold of his arm. He then heard somebody else coming in and saying, "Why is there a man in here?" He said that the door to the cubicle was

not locked, and he panicked and ran off.

15. The appellant's friend, Luke Corbett, also gave evidence at trial. He confirmed that they had been drinking on 7 July. He said that the appellant went inside the Custom House pub to use the toilets. He (Luke Corbett) waited outside and at one point sent a text to say, "Hurry up". The appellant replied that he was "just having a shit". Corbett carried on waiting, but eventually left and returned to the appellant's parents' house. When he arrived, the appellant was there. He was quiet and did not say anything about what had taken place.

16. In cross-examination Luke Corbett quoted from the statement he had given to the police in which he said:

"Kelsey was already at his house by the time I arrived back. He was in the back garden. I asked Kelsey where he had been. He said he'd been in the toilet. He heard a commotion. Someone was pointing fingers, blaming someone, and he panicked and ran. I told him a woman had run past me and told me someone had been raped. He didn't really react to it, other than to acknowledge something had gone on at the pub as he was aware of a commotion. He did not discuss it any further, or go into any more detail."

The appeal

17. As we have already indicated, there are two grounds of appeal. Mr Emanuel QC produced a detailed skeleton argument setting out the relevant facts, a clear and helpful analysis of the applicable legal principles and his submissions on each of the two grounds of appeal. We take each ground in turn.

18. The first ground contends that there was no evidence upon which a jury properly directed could have been sure that the appellant intended to rape the complainant. The offence of attempted rape requires proof of two things: first, proof of actions which were more than merely preparatory to committing the offence; and secondly, and significantly, proof of an intention to rape, rather than to do something else. Mr Emanuel submitted that the prosecution case, taken at its highest, was that the appellant had lain in wait in a cubicle in the ladies' toilets for a woman to exit the adjoining cubicle. When she came out, he forced her

into the cubicle, locked the door, grappled with her, pulled his T-shirt over her head and lifted her dress up to the waist, but he was stopped before anything further could happen. On these facts, Mr Emanuel accepted that it was open to the jury to conclude, so that they were sure, that the actions of the appellant were more than preparatory to the act of rape, notwithstanding the fact that there had been no attempt to remove her clothing or his own penis, or to penetrate the complainant's vagina. However, he submitted that there was no evidence that he intended to penetrate her vagina with his penis, as opposed to committing some lesser sexual assault. Mr Emanuel relied on the absence of any evidence that the appellant had removed or even tried to remove his shorts. There was no evidence that he attempted to take out his penis, or to remove the complainant's underwear. There was nothing said by the appellant to suggest an intention to rape. In all, Mr Emanuel submitted that a reasonable jury, properly directed, could not possibly have rejected the possibility that the appellant's only intention was to sexually assault the complainant and not to rape her.

19. Mr Emanuel relied on the leading authority, *R v G & F* [2012] EWCA Crim 1756, where, in giving the judgment of the court, Aikens LJ said:

"36. We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the 'classic' or 'traditional' test set out by Lord Lane CJ in *Galbraith*. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

20. The key point here, Mr Emanuel submitted, is that a reasonable jury could not reject all realistic possibilities consistent with innocence in terms of the attempted rape count. In particular, no reasonable jury could reject the possibility that the appellant intended some other sexual assault that fell short of rape. In those circumstances, the judge should have withdrawn the count of attempted rape and not left it to the jury. There were realistic alternatives on the facts of this case, including, as we have said, a sexual assault.

21. Mr Emanuel also referred us to three decisions of this court concerning cases of attempted rape: *R v Beaney* [2010] EWCA Crim 2551; *R v Ferriter* [2012] EWCA Crim 2211; and *R v Bryan* [2015] EWCA Crim 548. He accepts that none of these cases sets out any new principle of law and that each is dependent on its own facts. Nonetheless, he submits that these cases are illustrative of the principle established by *R v G & F*, and that, before the case can be left to the jury, it is necessary for all realistic alternatives on the facts to be capable of being rejected.

22. The principle we take from the three cases relied on by Mr Emanuel as illustrative of the principles stated in *R v G & F* is that the question to be answered in a case of attempted rape is whether there is evidence on which the jury could rely safely to infer that the defendant's intention was to commit the offence of rape – in other words, the penetration of her vagina with his penis – and could reject other realistic alternatives consistent with a lesser sexual offence. Where a perpetrator is disturbed from completing the offence of rape, there is unlikely to be a single feature of the evidence signalling his intention. Instead, as it seems to us, the evidence must be looked at as a whole to see if the totality of it is sufficient to answer this question and in doing so to reject other realistic possibilities. We emphasise that these possibilities must be considered realistic to warrant consideration.

23. Here, as it seems to us, the appellant concealed himself in the ladies' toilets and lay in wait for a female victim. That, together with his rejection of the offer of her phone and money were consistent only with a sexual motive. We consider that the nature and persistence of the appellant's subsequent actions and the force he used, taken together, were

plainly capable of sustaining a conclusion that his only intention was to rape the complainant. In particular, having covered her head with his T-shirt, he locked the cubicle door, pinned her against the back wall of the cubicle with her leg pushed against the toilet and his right hand holding her hip. He was standing close enough behind her for the skin of his stomach to make contact with her back. He was restraining her. He was forcing her forwards while lifting her dress to her waist, still holding her hip. The totality of that evidence, we conclude, was amply sufficient to enable the jury to be sure that the appellant was intent on raping the complainant and to exclude the possibility of a sexual assault which might have been made more difficult by virtue of his position and might not have required the lifting of her dress up to her waist.

24. We reach that conclusion without reference to the fact that the jury had available to them an alternative count of sexual assault. We are comforted by the fact that this is a case where the jury had that alternative count, and had they been in any doubt as to whether the appellant's intentions were something short of penile penetration, they could and would have convicted of the lesser offence on the alternative count.

25. For all these reasons, and notwithstanding the persuasive submissions made by Mr Emanuel, the appeal fails on this first ground.

26. We turn to the second ground of appeal, namely that the judge failed to direct the jury as to the evidential value of the complaint evidence. The only complaint evidence that is in issue here was that given by Joan Hamilton in a statement read to the jury. That evidence contained a mixture of first hand evidence of what she saw in the aftermath of the incident, namely the complainant shaking, crying and being physically distressed; a make-up mark on the back wall of the cubicle behind the toilet, and a lump or bruising to the complainant's forehead. So far as the complaint evidence is concerned, Ms Hamilton said this:

"The female was very upset and distressed so I have gone to her, held her hand and asked her what has happened. She then told me that the male had 'lifted [my] skirt up and tried to rape

me'. She also told me that he had hit her head on the tiles above the cistern and I could see she had a large lump appearing on the right of her forehead and a mark around her right eye. I could also see there was a make up mark on the tiles above the cistern and I assumed this was from where he had hit her head against it. The female also told me that the male had put his shirt over head."

27. No complaint direction was given by the judge to the jury about the potentially limited effect the reported complaint had in determining the truth of the allegations made by the complainant. It is well established (and not disputed here) that juries should routinely be reminded that a reported complaint cannot provide independent support for the truth of the complainant's account because it does not come from an independent source. The source is the complainant herself. Where such a direction is not given, it may render a conviction unsafe. Whether it does so or not inevitably depends on all the circumstance of the case, including the importance of the complaint evidence, and the nature of it in the context of the case as a whole.

28. Mr Emanuel submits that the failure to give a direction in this case was important for two reasons. First, the evidence of complaint included three features of the complainant's account: the pulling of the T-shirt over her head; the banging of her head on the wall; and the lifting up of her dress. Those matters were all in dispute, and he submits that in the absence of an appropriate direction there can be no confidence that the jury did not conclude that the complainant's account was more likely to be true or to give it greater weight because they heard the witness repeat the allegations of complaint. Secondly, the fact that the complaint included reference to the complainant's assertion that the appellant tried to rape her meant that it was all the more important that the jury were properly directed, and that the witness' account of the complaint was of no additional value when it came to the determination of the critical issues in the case.

29. It is regrettable that no complaint direction was given and particularly regrettable that neither counsel raised the point. It seems to have been overlooked by both counsel and the

judge. Nonetheless, having considered the summing up and the evidence, we are in no doubt that the failure to give a direction in respect of Joan Hamilton's evidence does not render the convictions unsafe.

30. First, it is right to say that there was some independent corroboration of two features of the incident reported by Joan Hamilton. There was medical evidence to corroborate the injuries she saw, together with photographs, and there was her own observation of the complainant and also the cubicle itself and the make-up on the wall. Secondly, we consider that it would have been quite clear to the jury that the complaint evidence given by Ms Hamilton came from the complainant herself and that what was reported by Joan Hamilton in this regard provided no independent support for the complainant's account. That was a matter of obvious reality and was clearly reflected by the statement that was read to the jury. Moreover, the incident occurred in a locked cubicle, in which the complainant and the appellant were the only people present. Thirdly, the central issue for the jury was to decide whose account of the incident was credible and which account should be accepted. The summing up made this clear. Thus, the importance of whether or not the jury could be sure that the complainant was telling the truth in relation to the whole of the incident, including the T-shirt covering, the banging of her head and the lifting of her dress, was properly highlighted. Even had the direction been given, we consider that it might well have emphasised the fact that the jury could have used the evidence to support their assessment of the consistency and credibility of the complainant. That would have been in contradistinction to what on any view was an account given by the appellant that was wholly rejected.

31. Finally, and in any event, in light of the clear and consistent evidence given by the complainant, and the evidence as a whole, we are sure that this was a strong prosecution case. Having regard to the totality of the evidence, the failure to give a complaint direction did not render these convictions unsafe.

32. For all those reasons, therefore, this ground of appeal also fails. Accordingly the appeal against conviction is dismissed. The convictions are not unsafe.

The sentence appeal

33. There was no dispute between defence trial counsel and the Crown that the offence of attempted rape fell within category 2A, although it was argued that the planning was borderline significant in terms of culpability. For the appellant, defence counsel emphasised his age (21 at the date of the offence and 22 at the date of sentence), his positive good character, and that the offence was an attempt and not the completed offence.

34. The judge agreed that it was category 2A, with a starting point of ten years' custody, and a range of nine to 14 years. He said that this starting point and the range was for the full, completed, penetrative offence of rape. He made clear that he bore in mind that the offence was an attempt. He was satisfied that the appellant was "well on his way to completing the full offence of rape and was only prevented by the intervention of another". He said that for the complainant the experience was little different to the full offence, and therefore any reduction to reflect the fact that this was an attempt would be modest. He also said that he would take into account the overall criminality when passing the sentence on count 1.

35. In written submissions, which were developed orally, there was no challenge to the categorisation of harm. However, Mr Emanuel submitted that the sentence of ten years' imprisonment was manifestly excessive in this case. First, he submitted that it was wrong to find that there was a significant degree of planning, and therefore wrong to categorise the case as culpability A. This was a spur of the moment offence. While there was some planning, it was certainly not a clear case of significant planning. Closer analysis of the facts should have led to the conclusion that there was simply no significant planning. This was a busy pub and there was no evidence that the appellant had been waiting for a long time or had staked out the location for the offending. It is submitted that the offence should have been categorised as B.

36. Secondly, Mr Emanuel submitted that the judge paid insufficient regard to the fact that this was an attempt, and not the completed offence. It was, he submitted, far from the completed offence. He relied on the fact that the complainant's underwear had not been

pulled down; that the appellant's own clothing had not been pulled down; and that his penis was not out. He submitted that the reduction depends on the stage at which the attempt failed, and the reasons for that. Taking account of these features, a greater reduction should have been applied.

37. Thirdly, Mr Emanuel challenged the judge's approach to both aggravating and mitigating features. So far as aggravating features are concerned, he challenged the judge's reliance on targeting, the location, the fact that the offence took place in a confined area, the fact that it took place in the ladies' toilets, and the timing. He submitted that there was double counting and, in any event, as a matter of common sense and justice, these were not matters that properly aggravated the offending.

38. So far as mitigating features are concerned, Mr Emanuel relied on the appellant's age and lack of maturity, and on his positive good character, none of which was referred to by the judge.

39. We take those points in turn. The guideline requires a significant degree of planning. Plainly, some limited planning is therefore not enough. We recognise the importance of the distinction because where present, significant planning elevates the seriousness of the offending for sentencing purposes and reflects higher culpability.

40. As this court has said previously, for example in *R v Dogra* [2019] EWCA Crim 145 and *R v Teklu* [2018] 1 Cr App R(S) 12, each case must be considered on its own particular facts. The determination of when a degree of planning reaches that higher level of culpability by a significant degree of planning is a matter of judgment. In some cases that judgment might be finely balanced. It is also right to observe – and Mr Emanuel accepted – the word "significant" in the requirement of significant planning is not an absolute concept. In the context of predatory sexual offences like rape and attempted rape that tend more often than not to be committed alone, without implements or tools, hiding in wait in a position designed to trap a lone woman might well be regarded as involving significant planning. Here, while we recognise that the planning did not go on for any length of time, and nor was it

sophisticated, the appellant chose the ladies' toilets in a busy pub. He must have known that a single woman would enter in short order. He hid in the cubicle and waited for a woman to use the cubicle next door. He would have been able to see and hear what she was doing and to know when to make his move. That is reflected in what happened here. As she emerged, he attacked her. He had taken off his T-shirt in readiness to cover her face. He also sent a text message to his friend who was waiting for him, to give him more time to commit the offence.

41. We are satisfied that the judge, who presided over this trial and heard the evidence, was fully entitled in those circumstances to conclude that the offending fell within category A and reflected significant planning in the context of this case.

42. There was severe psychological harm, as the complainant's victim impact statement makes clear and she was particularly vulnerable. Moreover, there was additional degradation and humiliation. There was also the detention of the complainant in a locked cubicle; and violence beyond that which was inherent in the offence. We are quite satisfied that all of these features justified a starting point of ten years' custody. We do not accept that the aggravating features identified by the judge were irrelevant, as Mr Emanuel submitted. We consider that the judge was fully entitled to reflect the fact that the appellant locked the complainant in the toilet, where she was entitled to privacy and to feel safe. She was confined and imprisoned in that toilet. These were features which entitled the judge to make an upward adjustment in the range from the ten year starting point. Moreover, to the extent not already reflected, the sentence on count 1 had to reflect the totality of the offending on counts 3 and 4, which included a separate assault that caused separate harm.

43. So far as mitigating features are concerned, it is correct that age is a potentially relevant feature in sentencing and that where there is evidence that a defendant's chronological, emotional or developmental age means that he bears less responsibility for an offence, that is something that should be factored into the sentence by the judge. However, there was nothing here to suggest that the appellant's chronological, emotional or developmental age

meant that he bore less responsibility for this attempted rape than an older adult would have done, and nothing to suggest that his culpability was reduced.

44. So far as good character is concerned, the definitive guideline makes clear that good character attracts little reduction in terms of mitigation for sexual offences of this kind.

45. The judge made clear in his sentencing remarks that the starting point and range identified were for the full, completed penetrative offence of rape. This was, of course, an attempt, and there was no penetration. It was a very serious attempted rape. We agree with the judge that the appellant was well on his way to completing the full offence of rape and was only prevented by the intervention of another person. We have little doubt that for the complainant the ordeal was terrifying.

46. Nonetheless, and with all due respect to the judge, we see the force in Mr Emanuel's submission that the adjustment made to reflect the fact that the appellant did not commit the full offence was insufficient in all the circumstances of this case. In our judgment having regard to the overall criminality involved and the fact that this was an attempted rape (albeit by virtue of being disturbed), the sentence should have been one of nine years' imprisonment, not ten.

47. Accordingly, we quash the sentence of ten years' imprisonment and substitute a term of nine years' imprisonment. To that extent only the appeal against sentence is allowed.

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

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