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IN THE COURT OF APPEAL
CRIMINAL DIVISION



No. 202200905 B2

[2023] EWCA Crim 228
Royal Courts of Justice

Friday, 13 January 2023

Before:

LADY JUSTICE WHIPPLE
MR JUSTICE LAVENDER
HER HONOUR JUDGE NORTON

REX
V
PASCAL MOLLIERE

**REPORTING RESTRICTIONS APPLY:
Sexual Offences (Amendment) Act 1992**

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MS S SCHUTZER-WEISSMANN appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE WHIPPLE:

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person 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 that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Background

- 2 On 25 February 2022 the applicant, who was then aged 55, was convicted of three counts of sexual assault contrary to s.3 of the Sexual Offences Act 2003 following a trial before HHJ Bartle QC at Southwark Crown Court. He was acquitted of the fourth count, which was Count 2 on the indictment, which was a charge of assault by penetration.
- 3 On 12 April 2022 the applicant was sentenced on Count 1 to a term of three years' imprisonment. On Counts 3 and 4 he was sentenced to concurrent terms of imprisonment of three years and 12 months, respectively. The usual consequential orders were made.
- 4 Before this court, he renews his application for leave to appeal against conviction and seeks a representation order. His application was refused by the single judge on the papers.
- 5 The applicant advances two challenges by his grounds of appeal. First, that the judge was wrong to direct the jury that it was open to them to draw adverse inferences pursuant to s.34 of the Criminal Justice and Public Order Act 1994 ("CJPOA") and, secondly, that the judge was wrong to admit evidence of the applicant's bad character.

Facts

- 6 In July 2010 the complainant, who was then a 22-year-old aspiring model and actress, arranged a photo shoot with the applicant through an online platform called Starnow.com,

where the applicant advertised his services as a professional photographer. The photo shoot took place on 16 July 2010 at the applicant's studio.

7 On 17 January 2019 the complainant called 999 to report that the applicant had sexually assaulted her during that photo shoot in 2010. ABE interviews were subsequently conducted on 12 February 2019 and 1 July 2020.

8 On 8 May 2019 the applicant was interviewed by police. He made no comment to all questions asked, but he provided a prepared statement in which the allegations were denied. A total of 271 photographs of the complainant from the photo shoot were subsequently extracted from the applicant's hard drive.

The parties' cases at trial

9 The prosecution case was that during the photo shoot the applicant's behaviour became inappropriate and he sexually assaulted the complainant. In the circumstances, the applicant could not reasonably have believed that the complainant consented to sexual touching.

10 The complainant's account was that the applicant was initially polite and professional. The headshots took about 10 or 15 minutes. As the photoshoot became more informal, the applicant's behaviour became inappropriate. The applicant started to get closer and touchier. He began to brush against the complainant and touched parts of her body that were unclothed. In stages, the applicant persuaded the complainant to remove more and more of her clothing. The applicant then touched her vagina and took numerous photographs of her vagina from underneath her. He repeatedly told her that she had a beautiful vagina. He then stroked and kissed her vagina.

11 Count 1 was an allegation that the applicant intentionally touched the complainant's vagina. Count 2, on which he was acquitted, was an allegation that he had penetrated her vagina with his lips. Count 3 was an alternative to Count 2, namely that he had kissed her vagina.

- 12 At the end of the photo shoot, the applicant asked the complainant if she wanted to go to his house to have a photo shoot with the other girls. He then kissed her fully on the mouth and this was Count 4.
- 13 The complainant told her partner what had happened. He contacted the applicant and told him to delete the photographs and refund the fee. The applicant refunded the money.
- 14 Apart from the complainant's evidence of what had occurred, the prosecution relied on evidence from the complainant's then partner, the photographs taken at the shoot and the fact that the applicant had refunded the £400 fee for the shoot.
- 15 In addition, following the close of evidence, the prosecution relied on adverse inferences to be drawn from the applicant's failure to mention in his police interview facts that he had relied on at trial, as well as evidence of the applicant's bad character in the form of four previous convictions, as support for the prosecution case that he was not truthful.
- 16 It is these last two elements of the prosecution case which are the subject of this application for leave.
- 17 The defence case was that the applicant did not sexually assault the complainant in the manner she alleged. The applicant gave evidence. He denied that it was his suggestion to photograph "sexy shots" or that he locked the door during the shoot, as the complainant alleged. He said that it was the complainant who was in control and that she was very keen to do adult-style shots. She was delighted and elated by the end of the shoot. He denied ever being underneath the complainant to take shots of her vagina, as she alleged. He said that he always remained at a distance from the complainant, which distance he estimated to be at least five metres. He agreed that the complainant's boyfriend rang him after the shoot and that he gave a refund.

- 18 The defence relied on the following evidence in support: the delay in reporting as evidence in support that the allegations were not true; the prejudice caused to the applicant as a result of the nine-year delay in reporting; the photographs which showed that nothing untoward had occurred; the fact that the complainant remained at the shoot; and inconsistencies between the complainant's account given in her ABE interview and her evidence at court as evidence in support that she was willing to exaggerate what had happened.
- 19 The issue for the jury was whether the applicant sexually touched the complainant during the photo shoot.

The first ground of appeal relating to s.34

- 20 After the applicant had given evidence and before the case was summed up to the jury, the prosecution submitted that it was appropriate for the court to give a s.34 direction permitting the jury to draw an adverse inference from the fact that the applicant made no comment in relation to a number of matters during his police interview in May 2019, which matters had featured in evidence at trial. The prosecution argued that it was open to the jury to conclude that this was late fabrication and tailoring the case to fit the evidence.
- 21 The defence objected, arguing that the full facts relied on by the applicant were contained in the prepared statement and that none of the facts now particularised by the prosecution were facts which the applicant could reasonably have been expected to mention when questioned in interview. They argued that the judge had already given a direction to the jury that they should not hold it against the defendant that he had not commented in interview and to give a s.34 direction would be potentially confusing for the jury.
- 22 The judge ruled that the applicant had gone outside the prepared statement, which was a relatively generalised account, which was principally a denial. The applicant had given a very detailed account in the course of his evidence. The judge was satisfied that the prepared statement did not deal with the matters which the prosecution had identified, those

matters having been raised by the applicant as part of his evidence at trial and in his defence. The judge held that the fact of the delay did not mean that an adverse inference should not be drawn, given that the defendant was not suggesting he could not remember anything about that photo shoot. Moreover, the applicant was a mature, intelligent man and had known, when he chose not to answer questions in interview, what he was doing. The judge was satisfied that a s.34 direction was appropriate in this case where the applicant had relied on a whole series of facts which he could have mentioned in interview, but chose not to.

23 The applicant now seeks to challenge the judge's ruling on s.34.

24 In her written submissions, Ms Schutzer-Weissmann puts before this court a number of the points that she argued before the trial judge without success. She says that the judge failed to take account of the substantial delay between the events alleged and when the applicant was asked for his account, which was a period of 10 years. That delay meant that the applicant's memory would not have been good; that he was ignorant until just before the interview of the charges against him, because it was only just before interview that he was told of the nature, date and alleged victim; that the applicant had made full and early disclosure of his case by his prepared statement and his evidence was merely amplification of that statement; and that the judge placed undue weight on his assessment of the applicant as a mature and intelligent man.

25 In oral submissions, Ms Schutzer-Weissmann has focused in particular on the paucity of the information that was made available to the applicant before his interview. She suggests that this needs to be put in context that around 10 years had elapsed from the date on which these events were alleged to have occurred to the point where the applicant found himself at the police station facing an interview. Moreover, the applicant was a photographer who would have had very many clients in his studio and would have undertaken a great number of photo shoots in that intervening period. She submits that it is hardly surprising that he could not at the stage of his interview give the sort of detail that he did manage to give

subsequently, that detail being consequent on his research with a view to preparation for giving evidence at trial, which included reviewing the photographs themselves and reminding himself of the photo shoot.

26 We are very grateful to Ms Schutzer-Weissmann for her careful submissions and the focus with which she has approached this application, but we are not persuaded that there is merit in her submissions on this part of her application.

27 The prepared statement was not a full exposition of the applicant's case. It was a superficial document and it amounted, as the judge said, to little more than a bare denial of the allegations. In that document the applicant said that he did not remember the precise shoot, but he recalled enough to say that the complainant had consented to all the shots and that he had acted professionally throughout. He went far beyond that in the evidence he gave at trial, adding details which were summarised into ten points listed by the prosecution and considered by the judge.

28 Before he was interviewed, the complainant was told the central details of these allegations. He was told the name of the complainant, the date of the complaints, that she alleged that the applicant had convinced her to take her clothes off and once naked, that he had touched her clitoris with fingers and kissed her vaginal area and that this was done without her consent. He was also told that the complainant's boyfriend had called him in anger and had demanded the deletion of photographs and that the fee be returned, which he did.

29 After he had been given this information, he drafted his prepared statement, which is handwritten. The prepared statement was read at interview, after which he answered no comment to all the questions put to him, just as he said he would at the end of that prepared statement. Thus, he did not engage with the detail of the allegations as they were put to him in interview.

30 He did however answer those allegations in his evidence at trial. The new elements amounted to more than mere amplification of the prepared statement. They consisted of a detailed narrative of how the photo shoot had unfolded, putting responsibility on the complainant for the steps taken towards the taking of the photographs which were in evidence and contradicting the complainant's account.

31 The question for us is whether the judge was wrong to conclude the applicant had gone outside his prepared statement, even arguably. It was only if the applicant had gone outside his prepared statement that the judge could then consider whether in his discretion to give the s.34 direction. In our judgment, the judge was not wrong, even arguably, to decide that the applicant had gone outside his prepared statement. It is clear to this Court that he had done so.

32 The judge went on to consider whether he should give a s.34 direction. In our judgment, he was entitled to conclude on the facts and evidence before him that he was going to give that direction as the prosecution requested. We do not consider the contrary to be arguable. We are perfectly satisfied that the judge was entitled to conclude that the jury should have the opportunity to consider whether to draw an adverse inference, on being properly directed on that matter.

The second ground of appeal relating to bad character

33 The applicant gave evidence at trial. Right at the end of his examination-in-chief, he said, not in answer to any specific question put to him, but rather in answer to his counsel's enquiry about whether he wanted to say anything else, that the complainant's profile on Star Now was still live and that she had stated in her profile that she did do adult and intimate photographs with couples. He contrasted that with his own practice which he said did not include pornographic or adult shots.

34 The prosecution made a bad character application, to which the defence objected. The judge granted the application. In his ruling, the judge said that the applicant had been "mudslinging" and this was an attack on the complainant's character and that it was fair for the applicant's own bad character to be admitted in consequence. The applicant's bad character consisted of previous convictions, four of which were admitted in the form of Agreed Fact 20. In summary, these were: a police caution for theft in 2009, two convictions for theft in 2014, and a breach of a non-molestation order in relation to an ex-partner in 2015. The judge directed the jury about how the jury could use this evidence in terms which are not challenged.

35 By her second ground of appeal, Ms Schutzer-Weissmann challenges the judge's bad character ruling. She repeats the arguments which were before the judge and dismissed by him. She says that s.101(1)(g) of the Criminal Justice Act was not engaged, because the appellant did not intend to make any attack on the complainant's character, other than to suggest that the complainant was not telling the truth, which was the essence of the defence case. Further, the fact of doing adult or pornographic shots is not reprehensible behaviour for the purposes of s.106(2)(b) of the Criminal Justice Act and thus there was no attack on his character. Finally, she argues that even if the gateway was engaged, in fairness and pursuant to s.101(3) and (4) the judge should not have admitted this evidence, given that this evidence was adduced without the applicant having taken legal advice and thus in ignorance of the consequences of doing so. His language was imprecise and he had not intended any slur by the use of the word "adult", which means different things in different contexts and, in any event, the complainant did want photographs taken of her which would come within this description. As is noted in Archbold at para.13.65 and cited in the Respondent's Notice, s.106(2) catches a wide range of alleged misbehaviour. It uses the term "mudslinging", as well as noting that the gateway is opened by accusations of misbehaviour which are an

integral part of the defence case: for example, an allegation that a prosecution witness is telling lies.

36 Despite Ms Schutzer-Weissmann's careful submissions, we are satisfied that the applicant was making an attack on the complainant's character. There were two ways in which this evidence amounted to an attack. First, and most obviously, the applicant was suggesting that the complainant was involved in creating adult or pornographic material. It is clear from the context of that evidence that by using the word "adult" he meant pornographic. This is an allegation of scurrilous conduct, of behaviour which might lower the complainant in the eyes of the jury.

37 Secondly, the jury had heard the applicant's evidence that she was not happy to do a naked photo shoot and that she had given up aspirations to act since this event. What the applicant said amounted to a suggestion that she was lying to the jury. This too was an attempt to paint the complainant in a bad light in front of the jury. The gateway under s.101(1)(g) had opened and the judge was correct so to find.

38 Whether to admit the defendant's bad character in light of this attack was a matter for the discretion of the trial judge under s.101(1)(g), with s. 101(3) and (4) in view. We cannot identify any arguable error in the exercise of that discretion and we are not persuaded that the admission of the applicant's bad character had, or might have had, such an adverse impact fact on the fairness of the trial that it warranted exclusion. Indeed, in our assessment the admission of the applicant's bad character in the form of these four convictions would have had only modest significance in the context of this trial. This was a strong prosecution case, which rested substantially on the complainant's evidence, which evidence the jury plainly found to be credible.

Summary

- 39 We do not consider either ground of appeal to have merit. The judge made no arguable error in the s.34 direction or by ruling that the applicant's bad character should be adduced. We are satisfied that the applicant had a fair trial and that this conviction is safe. It is not necessary for us to deal with the other points that were raised in argument before us.
- 40 This renewed application for leave is dismissed.
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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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