Neutral Citation Number: [2020] EWCA Crim 4

Case No: 201901945/C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Birmingham
HHJ P. Parker QC
T20187715

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2020

Before :

LORD JUSTICE GREEN
MR JUSTICE SOOLE
and
HER HONOUR JUDGE WALDEN-SMITH

- -

Between :

REGINA
- and -
Nicholas Lee THOMAS

(Transcript of the Handed Down Judgment.
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Ms Amanda O'Mara (instructed by **Charles Strachan Solicitors**) for the **Appellant**
Ms Cathlyn Orchard (instructed by **Crown Prosecution Service**) for the **Crown**

Hearing date: Tuesday 10th December 2019

Judgment
As Approved by the Court

Lord Justice Green :

A. Introduction

1. The appellant appeals against conviction on 16th April 2019 in the Crown Court at Birmingham of three counts of, respectively, kidnap, assault occasioning actual bodily harm, and, rape. On 25th April 2019 the appellant was sentenced to a term of imprisonment of 3 years for the kidnap, 3 years 6 months for the assault, and 10 years for the rape all to run concurrently, leading to a total sentence of 10 years imprisonment. The central issue arising concerns the point in time at which rebuttal evidence under Section 101(1)(g) CJA 2003 should be put before a jury.

2. The reporting restrictions contained within the Sexual Offences (Amendment) Act 1992 apply to these offences and that restriction applies until waived or lifted in accordance with Section 3 of the Act.

B. The Facts

3. The facts may be summarised as follows. In October 2012 the complainant made an allegation of rape against a person other than the appellant. Following a police investigation during which discrepancies in her account were identified, including the existence of love letters written by the complainant to the accused, the complainant admitted that she had both written the letters and lied to the police when she alleged rape. She provided a witness statement admitting that she had made a false allegation and had written the love letters. In the event she was not prosecuted due to her vulnerability connected to alcohol and drug consumption. This event forms part of the background to the present appeal.

4. The facts of the present case arose in the following way. On 16th April 2018 the complainant, who was a drug addict, had been at the appellant's home. When the appellant went out she stole his bike and sold it to fund the purchase of drugs. Later that same day, at around 5.30pm, a van containing the appellant and two co-accused pulled up alongside the complainant who was walking down a street. It was the Prosecution's case that she was kidnapped by being forced into the van by the appellant and the co-accused. They drove to the appellant's home where, the Prosecution alleged, the appellant and one of the co-accused beat the complainant. The appellant used a lump hammer and a screwdriver. He demanded that the whereabouts of the bike be revealed.

5. The co-accused later left the appellant's home. The complainant remained. Other individuals arrived and heroin was smoked and alcohol consumed. At this stage the Prosecution alleged that the appellant grabbed the complainant's head and forced her to perform oral sex upon him. The complainant managed to leave the property when she was sent out to acquire drugs.

6. The Prosecution's case was that the appellant kidnapped and assaulted the complainant as part of a joint enterprise with the co-accused. The appellant later raped the complainant.

7. A rucksack was later recovered from outside of the appellant's home. It contained a letter addressed to the complainant, a lump hammer and two screwdrivers. A separate

screwdriver was later recovered from the appellant's home. It was forensically tested and found to contain blood from the complainant and the appellant's DNA.

8. At trial the Prosecution relied upon the evidence of the complainant who recounted the matters already described.

9. The Prosecution also relied upon CCTV evidence and evidence that the appellant had read a prepared statement in the police interview. The prepared statement concluded with a paragraph which stated as follows:

> "At no time was she held against her will, she was always free to leave, I didn't rape [the complainant], nor did I force/ask her to perform oral sex on me. [The complainant] stayed in my flat, she slept on the same bed, she had a smoke the next morning, and left. She regularly comes to mine for a smoke."

10. Further circumstantial evidence was relied upon including evidence of recent complaint and evidence given by a forensic scientist.

11. She was cross-examined in relation to the complaint of rape made in 2012 and as to the fact that she had retracted the allegation. In cross-examination the complainant stated: "*I didn't lie, but I had lied, it wasn't true.*". In effect she retracted her retraction. She was also cross-examined about other lies that she was alleged to made to police involving false allegations. These included in relation to a fire in 2017 and an allegation of being strangled in January 2019. With regard to the latter she was spoken to by police and she informed them that she had not been assaulted. She agreed in cross-examination that the man had not hurt her.

12. We now address the grounds of appeal

C. The dispute concerning the appellant's bad character evidence: Section 101(1)(g) CJA 2003

13. The first ground that we turn to concerns an allegation that a ruling by the judge on previous convictions led to the trial being unfair.

14. The appellant had many previous convictions spanning a lengthy period including for kidnapping and assault. The Prosecution applied for a ruling that the evidence of previous convictions was admissible as evidence of propensity but in the alternative it was admissible under Section 101(1)(g) CJA 2003 as rebuttal evidence because of the appellant's attack upon the credibility of the complainant.

15. The Judge provided to counsel a draft, provisional, direction which reflected his view that all the previous convictions should be admitted under gateway (g) in order to provide balance to the appellant's attack upon the credibility of the complainant. In that draft direction the judge comprehensively directed the jury as to the probative value of this evidence, explaining what it was and was not relevant to. In relation to gateway (g) he said that the previous convictions: "*... produce some background evidence to provide you with material upon which you can form a judgement whether the Defendant is, any more worthy of being believed than the witness he attacks. You can judge the*

sort of person in very general terms who is making the allegation that [the complainant] *has made up the offences against him*". It was, we have been informed, common ground that the attack in cross-examination upon the complainant because of her prior inconsistencies engaged gateway (g).

16. In view of this provisional indication counsel for the Defendant adopted a new tack. It is apparent from the transcript that counsel argued that "*no issue*" could arise as to credibility if the appellant did not give evidence. The judge queried with counsel whether the agreed prepared statement to police was sufficient, indirectly, to amount to an attack upon the credibility of the complainant. Counsel argued that it was not and invited the judge to defer any decision based upon credibility until the defendant had given evidence.

17. Counsel said:

> "A final decision shouldn't be made until we make the decision whether to give evidence or not. I do submit that there isn't sufficient therefore propensity and that your Honour can rule on that now."

18. There followed a discussion about the point in time at which such evidence should be admitted into the trial. The judge pointed out that in most cases evidence of this nature was tendered at the end of the prosecution case. He observed:

> "It is not usually a halfway house or "we'll wait and see what he does*"*."

19. Counsel for the co-accused supported counsel for the appellant to the effect that the judge should, in effect, wait and see. It was said that the pre-prepared statement constituted "*rather slim pickings*" i.e. it was not a strong attack upon the credibility of the complainant.

20. Ultimately the judge agreed. He reversed his earlier view that he had expressed in the draft direction. He said as follows:

> "…contrary to my earlier view which was that (a) it should go in, (b) now, I will not accede to the prosecution application at this stage because 101(1)(g) is concerned with credibility which is something that I have to reinforce and if the defendant gives evidence then that is another thing. But on the other hand if he does not give evidence he will then have the disadvantage of a direction that he has not backed up what he said in his prepared statement by giving evidence and the jury can take an adverse inference against it. So, I think at this stage, where credibility has not loomed large, because he has not said what he maintained in his prepared statement on oath, I will not permit the Prosecution to put in his previous convictions at all."

21. In the event the appellant decided not to give evidence so his previous convictions were not placed before the jury.

22. It is now submitted that the judge erred. Various arguments were advanced in writing which we address below. In oral argument, Ms O'Mara for the appellant, somewhat refined the complaint. She argued that at base the objection was only as to the inclusion of the kidnap as part of the admitted convictions; and accepted that all the other convictions would have to be admitted if the appellant gave evidence, but not otherwise.

23. We deal below with all the written and oral arguments. We turn to our conclusions upon this ground of appeal.

24. First, it is relevant to the allegation of unfairness that counsel for the appellant achieved precisely the goal of the submission, namely that a decision on the admission of the previous convictions (with or without the kidnap conviction) be deferred to allow the defendant to decide whether to give evidence. The submission was premised upon an assumption that if the defendant did not give evidence the previous convictions would not be admitted, but if he did then they would. We do not for a moment criticise the Judge for the position he took which was designed to be scrupulously fair. We would though comment that this was generous to the appellant. On the basis of the prior cross-examination of the complaint about lies, retractions and inconsistencies gateway (g) was plainly engaged and the judge could quite reasonably have directed that the previous convictions be adduced at the end of the Prosecution case.

25. Second, we had understood part of the appellants argument to suggest that if he gave evidence this would *without more*, trigger the admissibility of the previous convictions. Our reading of the transcript does not suggest that if the appellant gave evidence this would have this effect, At the point when the judge gave his ruling, the issue of credibility had, as the judge put it, "*not loomed large*" from which we infer that the judge did not consider that the prepared statement, standing alone, was sufficient to trigger the admissibility of the previous conviction. On the logic of the reasoning of the judge, at least as set out in the transcript, if the appellant had given evidence the judge would <u>then</u> have had to decide whether, in the light of the evidence given, it amounted to an attack upon the complainant's credibility such as to engage gateway (g). The nub of the ground of appeal seemed to us to be that the judge's decision compelled the appellant not to give evidence when otherwise he would have wished to. But that does not appear to be so from the transcript. The catalyst for the admissibility of the bad character evidence would have depended upon the substance of the evidence that the appellant gave, if he chose to give evidence. It did not depend upon the mere fact of his giving evidence. Nonetheless, in oral argument Ms O'Mara submitted to us that this is not the context in which the Judge actually made his ruling. She argued that it was the common view of all counsel that the decision was in effect binary: if the appellant did not give evidence then the prior convictions would not go in but if he did give evidence then the convictions (or some of them) would go in. Ms Orchard, for the Crown, agrees that this was also her understanding. She explained that it was "*almost inevitable*" that <u>if</u> the appellant gave evidence then all his previous convictions would have been placed before the jury in accordance with the earlier draft direction. Both counsel explained that it was common ground by this stage that because of the cross-examination of the complainant, gateway (g) was well and truly engaged.

26. In these circumstances we think it fair to take Ms O'Mara's argument at face value. Though we would observe that in any case where a judge defers a decision of this sort it should always to be open to the parties and to the judge to revisit the matter afresh in the light of emerging and evolving evidence and circumstances. We do not consider

that the judge acted unfairly even upon this basis. Insofar as the appellant was unfairly placed upon the horns of a dilemma, this would merely be the consequence of the relevant gateway having been passed through by virtue of his attack upon the complainant's credibility. If this affected the decision whether to give evidence on the part of the appellant that was an inevitable consequence of the prior decision of the defence to launch that attack. The dilemma that this strategy then produced for the appellant was always on the cards and resulted from a forensic decision taken by the defence team that, on balance, this was in the appellant's best interest. There was nothing unfair in this.

27. Third, at the oral hearing Ms O'Mara focused upon the inclusion of the kidnap previous conviction in the bad character evidence that would be adduced if the appellant gave evidence. She accepted that <u>if</u> he gave evidence and the judge decided to allow bad character evidence in, there was then no basis upon which she could exclude all of his other (many) convictions. She however argued that the prejudicial effect of the kidnap conviction was highly significant because of the nature of the index offences which also included kidnap. An offence of kidnap has such "*alarming*" connotations, she argued, that it would require an explanation from the appellant as to the circumstances of that offence and why it could be argued that it was different to the current offence before the jury. A kidnap offence was so unusual that, notwithstanding the most skilful directions that could be given to a jury, it would inevitably taint the minds of the jury against the appellant. In paragraph [27] of the grounds of advice it was stated:

> "Such was the prejudice of the offence that the defendant chose not to give evidence in his own defence. By determining not to exclude the bad character of the defendant, in particular the offence of kidnap, the defendant has not had a fair trial."

28. Notwithstanding the attractive way in which the point was argued we are not convinced by it. It was open to the judge to decide that all of the previous convictions should be admitted. As was pointed out by Ms Orchard, for the Crown, given the nature of the attack upon the complainant designed to show that she was a liar about the offending, which included kidnap, it was fair that the jury, properly directed, should see the whole of the appellant's previous convictions and that to take out the most serious (the kidnap conviction) would have been misleading to the jury. In our judgment this was classically a judgment call for a judge who evidently was conscious of the need to act fairly towards the appellant. He was best placed to view all the evidence in the round and to consider what bad character evidence was appropriate. We can detect no error in his analysis. He acted, as already noted, fairly to the appellant giving him a get-out which, in our view, many other judges would not have.

<u>D. Denial of false complaints by the complainant</u>

29. The next ground of appeal amounts to a submission that the prosecution was an abuse of process. It is said that permitting the complainant to give evidence that her earlier false allegations were, or might have been, true was abusive. In written argument the appellant says:

> "There is something inherently unfair about the prosecuting authorities in circumstances where they have proof that someone has made a false complaint coupled with a written confession but

> do not prosecute that person out of sympathy to then support the witness and say what a true complaint when it is raised in a subsequent court hearing in an attempt to test the credibility of the witness. To allow such behaviour could lead to an abuse of process."

30. This argument is, in our view, unsustainable. It is not the case that the Prosecution acted improperly in re-examination of the complainant in eliciting from her that her earlier complaints were in fact true, notwithstanding that they had been withdrawn or retracted. This was the position she had taken during cross examination in response to a challenge to her veracity.

31. As the Respondent points out, the complainant was cross-examined at length about each of her previous complaints to the police and the contents of her retraction statement. The jury was aware that upon previous occasions the complainant had informed the police that she had lied when she had said that she was raped. They were also aware that there were inconsistencies in other complaints that she had made. Ultimately these were matters which were before the jury for them to form a conclusion about. Whatever view the jury took of the complainant's prior conduct, upon this occasion they believed her and disbelieved the appellant.

32. In so far as the defence objected to the manner in which the prosecution case was put in closing it was open for defence counsel to raise any objections with the judge and to submit that the prosecution was misrepresenting the evidence. If such an application had been made and substantiated any misrepresentation of the evidence by the prosecution could have been corrected there and then. No such application was made at the time. In any event we are not satisfied that any such misrepresentation of the evidence occurred. This was a straightforward case concerning two dysfunctional and flawed individuals. The jury, knowing of all these matters, simply formed the conclusion that they were sure of the complainant's evidence.

33. We reject this ground of appeal.

E. Lurking Doubt

34. Finally, it is argued that there was no supporting evidence in respect of the kidnap or rape charges and there were real questions about the complainant's credibility. The charge of rape rested solely upon her account. In written submissions it is said that even if there were no procedural or other irregularities arising out of the state of the evidence, one is left with a feeling "*that there has been injustice in this case*". We do not accept this argument; It is clear from authority that it requires exceptional circumstances before an appeal court will overturn a conviction upon the grounds of "*lurking doubt*". The appellant does not identify any exceptional circumstances. This was, as we have already stated, an unexceptional case of a jury believing one party and disbelieving another. It was common ground before the jury that the complainant had been assaulted and there was other circumstantial evidence which corroborated the complainant's account. No application was made at the close of the Prosecution case that the case was insufficiently strong and should be dismissed. There is, in our judgment, nothing in this ground.

35. For these reasons we dismiss the appeal.