Regina v John Lee Simpson

Court of Appeal (Criminal Division)

Judgment Date
19 February 2001

No. 2000/0977/X2 Neutral Citation Number: [2001] EWCA CRIM 468

Court of Appeal Criminal Division

Before: Lord Justice Waller Mr Justice Collins and Mr Justice Jack

19 February 2001

Representation

Mr A Campbell-Tiech appeared on behalf of the Appellant.
Mr B Lever appeared on behalf of the Crown.

JUDGMENT

MR JUSTICE COLLINS:

1.. On 26th January 2000 this appellant was convicted in the Manchester Crown Court of rape. He now appeals against that conviction by leave of the full court. The essence of the appeal is that the conviction is unsafe. It is said that the issue before the jury at the end of the short trial — all told the case took some day-and-a-half before the jury retired — was whether the jury believed the complainant or the defendant. There was no direct independent evidence which assisted either side. The jury was in retirement for over seven-and-a-half hours before reaching a majority verdict of ten to two and about half-way through its retirement it asked to be reminded of "definition of reckless and belief in consent" and to be reminded of the evidence of the complainant and the appellant about what had happened in the house where the offence allegedly occurred between their arrival at the house and the appellant leaving. It is submitted that in those circumstances the jury should have been reminded of the burden and standard of proof as well as the evidence and the definitions which the jury had asked for.

2.. One very unusual, if not unique, feature of this case is that Mr Lever, experienced prosecuting counsel, wrote a letter to this court following refusal of leave to appeal by the single judge. That letter played an important part in persuading the full court to grant leave to appeal. We will come to its contents in due course after reciting the circumstances of the case.

3.. On the evening of 7th May 1999 the complainant, then a 20-year-old virgin, went out for a drink with some friends. They ended up in a club where in the early hours of the 8th she met the appellant. Conversation led to kissing inside the club and as they were waiting for a taxi outside. While they were waiting, they were approached by a very good girlfriend of the complainant who was with her boyfriend. It was suggested that all four should go to the girlfriend's home together. They decided to do so. They got a taxi and in the taxi there was more kissing between the appellant and the complainant.

4.. At the trial evidence was given by the complainant, her girlfriend and the appellant but not by the girlfriend's partner. There were discrepancies on timing but it seems that they arrived at the house well after 2 o'clock in the morning. They all had a drink initially and chatted for a while. The complainant then went upstairs to go to the lavatory. By now her friend's partner had himself gone to bed. The complainant said that on coming down she saw a light on in another room and seeing a computer in the room went to look at it. This room also had a bed in it. It is to be noted that it was put to her in cross-examination that her friend had told the police that she had invited the complainant and the appellant back to her house and then these words from her statement:

> "I thought the complainant may appreciate this as her mother and father were away on holiday. The invitation was extended to [the appellant] as well basically because he was there."

5.. The girlfriend denied that that was or was intended to be an invitation to the complainant and the appellant to have the opportunity of going to bed together.

6.. It is far from clear why the complainant should have wanted to look at the computer. She accepted in cross-examination that she had no interest in computers and indeed there may have been some evidence that not only was she not interested but she had not the knowledge to deal with them. In any event, as she was in there the appellant, she said, came in. He kissed her. She was, she said, scared. He said it would be all right. He then began to undress her. She said "no" and she kept saying "no" as he took his trousers off and made her lie down.

7.. It seems that both ended up naked on the bed. It is not suggested that any damage was done to any clothing which had been worn by the complainant. The judge in summing her evidence up to the jury when they asked for it in somewhat more detail used these words (bottom of page 27 of the transcript):

> "He started undoing his belt, I said no and pushed him away. He pushed my hand away. He dropped his trousers, he kept pushing me back. He took his trousers off and made me lie down. He started giving me oral sex between my legs. I kept saying no. He said: 'It will be all right'. He was kissing my neck. I tried to push him off and banged my head on the wall trying to push him off. He put his penis in my vagina and went up and down, it was hurting me, I told him to stop but he did not stop. He got off, I put the duvet around myself, he held the back of my head and tried to put his penis in my mouth, I did not want this. I just pushed him away. He walked round picking up clothing and went upstairs, I sat on the bed crying. The defendant returned and said: 'Are you on?' and I said no, he went out, I heard the front door open and not close."

8.. She said in her evidence that once the appellant had left she was most upset, sat with the duvet around her and then very shortly thereafter went up to her girlfriend's room and complained essentially of what had happened. Again, we will come back to that in slightly more detail in a moment.

9.. The appellant's account was that it was all consensual. She helped him undress himself and she willingly undressed herself. He gave her oral sex. There was then intercourse which was interrupted by her giving him oral sex. He agreed that once he had had his way with her — and the whole incident had taken on his evidence something in the order of 45 minutes — he left the house. He did so because he had left his partner, who was pregnant, at home and he was concerned that she might herself be worried that he was not back. As must be apparent from that recital, his conduct was, to say the least, callous and unfeeling. Further, he had apparently noticed that there was blood on him when he had gone upstairs. That was as a result of her losing her virginity. He asked her whether she was having a period and she said "No". He must therefore have appreciated that there was or may have been something wrong, although she said, when she was asked about it, that she had not told him that she was a virgin.

10.. It must be apparent from this that the defence of this appellant required careful handling. There was a straight issue of fact as to whether she had said "No" and made it clear that she was not consenting, or whether, as the appellant was saying, she had not only given no indication that she was not consenting but had given every indication that she was. As Mr Lever has put it, there were jury points to be made, almost all of which were against the complainant and in favour of the appellant. Thus the complainant had said that she went up to complain about what had happened to her girlfriend very shortly after the appellant had left the house. But the timing — and there was clear evidence that the police were called at 5.24 am — was such that that simply could not have been right. There was a missing period of at least an hour-and-a-half and

probably nearer two hours between the defendant leaving and the police being called. The complainant was in a distressed state. She said to her girlfriend: "I kept saying 'no'." The girlfriend asked: "Did he rape you?" And she said "Yes". When the police arrived at about 5.30 in the morning she was in such a state of distress that she was effectively unable to tell the police anything at that point.

11.. When she was examined there were no injuries to her at all, other than a tear to the hymen which of course was consistent with first time intercourse. Thus on the face of it she must have not told the truth about her reaction to what had happened and, as we say, there was the missing period of at least an hour and a half. Furthermore, she was in a close friend's house. She knew that that friend and that friend's partner were in an adjoining room and yet at no stage did she call out. That of course was put to her in cross-examination and she said that it was because of fear, but she accepted that she was not paralysed and she would have been able, if she had wished, to call out. She never suggested that the appellant threatened her in any way, nor did he use any violence to her over and above such as was necessary, she said, to avoid her resistance to what he was doing. There was no question but that she had been willing to kiss and to cuddle as they were coming to the house and had shown herself apparently to be attracted to the appellant. His behaviour, having taken her virginity and simply left, showing no signs of it being other than a mere satisfaction of his desires to have intercourse and then walk away, may well, as one can readily understand, have had a very unpleasant effect upon her and have distressed her considerably.

12.. Counsel for the prosecution in all the circumstances decided that he would make no final speech. It was a short case. He did not feel that it was a case in which the jury could not properly convict. On the other hand, if we correctly understand what lay behind his decision, he did not wish to state anything positive to seek to persuade them to convict. He merely left it to the jury after directions from the judge and final speech from the defence to decide whether the case had or had not been proved.

13.. He then heard defence counsel's speech and this is where the letter comes in. Defence counsel made, as one would expect, the points, to some of which we have referred already. But in the course of his speech defence counsel made observations which struck Crown counsel as so damaging to his client's case that they led him to take, as we say, the wholly exceptional course of writing a letter to this court. We shall now refer to the relevant passages in that letter:

> "This was a case where the defendant, behind the back of his pregnant partner, met the complainant at a nightclub where she was attracted to him and invited him back to her friend's home, her parents being away. He took her virginity, she was distressed and bleeding. On his own version, instead of saying goodbye to her or asking for her telephone number, he got dressed in the bathroom, and the next thing she heard was the door slamming as he

was leaving.

His conduct will not have won him many friends on the jury and I opened that this was a court of law, not morals and he was not to be convicted for his unchivalrous behaviour towards this young virgin.

The Crown's case did not live very happily with the chronology and her account was unsupported by any independent testimony. I did not think it appropriate to make a closing speech.

What the Court of Appeal when considering leave will not know is that [counsel who defended] having made all the correct points clearly to the jury, in my view (as I certainly have done myself) incorrectly pitched the valid point namely that this virgin had lost her virginity on a 'one night stand' to a man who had promptly left and therefore would be upset.

The way counsel [not counsel who has appeared before us] put it to the jury at some length was that life was not a Mills and Boon novel and many women would rather forget the occasion when they lost their virginity up against a wall in a back alley. This was an inadvertent misjudgment but I could feel the antagonism of the jury to the way this point was expressed."

14.. Mr Lever has told us that those observations, which we have just referred to, took a considerable time and counsel dwelt on them in the course of his speech.

15.. The judge, His Honour Judge Blackburn, who has since regrettably died, was a very experienced judge. If it struck Mr Lever so forcefully that the jury's reaction to what defence counsel had said was apparently negative, then we cannot believe that it had not so struck the judge. He must also have appreciated that defence counsel had made an error of judgment and of course he also appreciated, and indeed his summing-up draws attention to them, that there were considerable weaknesses in the prosecution case. The matter was approached in the summing-up, as it had been approached at the trial, on the basis that either the defendant was not telling the truth or the complainant was not telling the truth about whether there had been consent and so on the way the case had been run there was, on the face of it, little room for the possibility that the appellant had genuinely believed in consent. Either the jury accepted the complainant's evidence that she had made it plain that she did not consent, or if they thought that might not be the case the only alternative really was that they had to acquit the appellant.

16.. Nevertheless, as we have said, the jury sent the note which made it clear that on the face of

it they were concerned about belief in consent and so, having regard to all the circumstances, this was a case in which it was peculiarly important that the judge did make it as clear as he could to the jury that they had to approach this on the basis of the evidence alone and must not in any way be swayed by feelings of antagonism towards the appellant, stemming both from his callous behaviour and from anything that might have been said on his behalf.

17.. Mr Lever has made the point that the learned judge was in a difficult position because if he appeared to criticise something said by defence counsel that might in the eyes of the jury undermine what defence counsel had said in making his good points on behalf of the appellant. Undoubtedly, there were difficulties facing the judge in deciding precisely what was the correct approach.

18.. We, in this court, must never forget that the system in this country is trial by jury. This jury heard the evidence, saw the witnesses and at the end of the case had to decide whether they were sure that the offence was made out. They were properly directed on that and indeed Mr Campbell-Tiech has not sought to suggest that there is anything he can point to in the summing-up which amounted to a misdirection or to a non-direction — subject only to the submission that in the circumstances of what was said in the final speech the learned judge ought to have been careful to ensure, as best he could, that there was no lingering prejudice against the appellant resulting from those observations of counsel.

19.. Accordingly, this court is most reluctant to intervene in circumstances where there was evidence which entitled the jury to convict and it is not and cannot be suggested that there was not in the circumstances of this case such evidence. Nevertheless, we have to consider, because that is the obligation upon this court, whether a conviction that is brought before us is safe. In so doing we must look at all the circumstances. We have already pointed to an exceptional feature in this case, namely the perfectly proper activity of Mr Lever in appraising the court of his concerns about the effect of counsel's final speech. The learned judge was undoubtedly put in a difficult position. He did give the standard direction and made it clear that the jury must not be prejudiced against the appellant because of some feeling that he had behaved badly. But in the circumstances of this case, of course, it went a little further than that because it was not only the appellant's conduct which might have inflamed the jury against him, but what was said on his behalf has added to that inflammation. We also note that the learned judge adopted a form of summing-up at page 18 of the transcript, having referred to the appellant's discreditable behaviour, which involved making the prosecution points in the form "The prosecution say this", "The prosecution say that". Mr Lever had not made a final speech and had not said what the judge indicated the prosecution would say. They were perfectly valid points that could have been made on behalf of the prosecution but there is a danger where prosecuting counsel has not made points and a judge in summing-up says that the prosecution say this or that, that he might appear to be making points and siding, as it were, with the prosecution. There is obviously that danger in approaching the matter in that way and any such apparent tipping towards the prosecution in a case as difficult and sensitive as this might have had an effect which in any other case would not have arisen. If, as we accept, the effect of what counsel said was as clear as

Mr Lever indicates, then in our judgment it was necessary for the learned judge to say something. It could have been something along the lines that the jury may have been irritated by, on the one hand, Mr Lever not having helped them or said anything to them in final speech, and on the other hand they may have been irritated by what the defence counsel had said, but they must be careful, and indeed it was utterly essential, that they did not hold against the defendant anything that had been said on his behalf. They must concentrate only upon the evidence. Whilst we accept that if there had been no inflammatory remarks it might have been that they would have convicted, nevertheless there were, as we have indicated, significant weaknesses in the prosecution case.

20.. We cannot, in the circumstances, avoid the conclusion that it may be that the jury's distaste for the appellant did feature in the ultimate verdict which they reached. We bear in mind that although the evidence, and indeed the case, took no more than a day-and-a-half, this jury was in retirement for nigh on seven hours and 50 minutes and then convicted by a majority. We do not of course normally seek to draw any inferences one way or the other from length of retirement or from majority verdicts, but in the exceptional circumstances of this case it is a factor to which we inevitably have regard. We note too that there was on the timing aspect some indication that the complainant cannot have been telling the whole truth about what she felt and did in the course of the early hours of that morning.

21.. In all those circumstances, and we cannot emphasise too much the exceptional nature of this case, we are persuaded that the verdict which the jury eventually brought in was one which was unsafe and in those circumstances we must allow this appeal.