

Neutral Citation Number: [2019] EWCA Crim 729

No: 201801172/B2

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 10 April 2019

**B e f o r e:**

**LORD JUSTICE FULFORD**

**MR JUSTICE SWEENEY**

**MR JUSTICE DINGEMANS**

**R E G I N A**

**v**

**REZART LAME**

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

*This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

*WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

**Mr I Hope** appeared on behalf of the **Applicant**

**J U D G M E N T**

(Approved)

1. MR JUSTICE DINGEMANS: This is the hearing of applications for an extension of time of 2 days to renew an application for extension of time of 620 days, to seek permission to appeal against conviction. The applications for an extension of time and for permission to appeal were refused by the single judge.
2. The applicant was convicted on 6 June 2016, following a trial before His Honour Judge Williams QC and a jury, of three counts of rape, unanimously as to two counts but by a majority of 11 to 1 in respect of the first count, one assault by penetration and one attempted rape. The complainant has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992. The applicant was sentenced to a total of 9 years and made subject to a sexual harm prevention order.
3. The complainant was aged 19 and the applicant was 21 when they met on the dating app "Badoo". They arranged to meet on 13 February 2014. They drank and went back to the applicant's flat. They watched television and joked together and kissed. The complainant said that she was a virgin. All of this was common ground between the prosecution and the defence so far as the facts of the early evening were concerned.
4. Thereafter the respective cases diverge. The prosecution case was that the applicant forced the complainant to have sex, inserting his penis into her vagina, telling her to get onto all fours and then anally raping her, forcing his penis into her mouth and attempting to rape her in the morning.
5. The applicant's account was that they had had consensual sex; he had accidentally inserted his penis into her anus (of which she had made no complaint) and they had had further consensual sexual activity the next morning.
6. The prosecution relied on evidence from the neighbour that there were sounds of sexual activity and then pain and then "stop" and from the complainant's carer about distress. But there were other points about timings of texts and these were obviously matters for the jury to consider.
7. There are two proposed grounds of appeal. First, that the applicant's then legal representatives failed to obtain and call good character evidence on behalf of the applicant, and secondly that the judge failed to give a sufficient direction on inferences relating to section 34 of the Criminal Justice Act and Public Order Act 1994.

#### Character witnesses

8. The complaint is made that the former legal representatives failed to obtain character witnesses on behalf of the applicant for the trial when they were there to be called as is evidenced by the fact that they were called for the sentencing hearing. It was said that this was an important failure given the disputed fact between the applicant and

complainant. The judge did give a good character direction (at page 14H of the summing-up). The legal representatives had asked the applicant for the names of character witnesses but none were given. The applicant said he understood that the legal representatives would themselves get the witnesses. Whether that is right or not, there is no reason to doubt the response from the legal representatives and it is part evidenced by the attendance notes and correspondence, very fairly summarised in the advice on appeal prepared by Mr Hope, to whom we are very grateful for his submissions. We accept that different legal representatives might have reacted differently to the applicant's failure but that is not a justiciable ground of appeal.

9. In any event even where a good character direction has not been given a conviction may be safe - see Jagdeo Singh v The States [2005] UKPC 35; [2006] 1 WLR 1464, at paragraph 25. There is nothing to suggest that the failure to call a specific character witness in this case where a good character direction had been given could render the conviction unsafe.

#### The section 34 direction

10. Section 34 of the Criminal Justice and Public Order Act permits an inference to be drawn if the defendant, when questioned under caution, fails to mention a fact later relied on in his defence at trial which, in the circumstances then prevailing, he could reasonably have been expected to mention. The jury are permitted to draw inferences as may appear proper to them from the failure.
11. Section 38(3) of the 1994 Act prevents a conviction based solely on the adverse inference. This accords with the law which protects a right to silence and therefore prevents a conviction based on someone's silence but the law permits the drawing of an inference so long as the conviction is not based solely on that inference Murray v United Kingdom [1996] 22 EHRR 29. For this reason, a standard part of the section 34 direction has been to tell the jury that "if you do draw the conclusion that the matters have been invented by him to support his defence, you must not convict him wholly or mainly on the strength of the conclusion". In this case the Crown relied on the fact that the applicant had said in evidence to the jury that it seemed to him that the complainant asked to go with him to the car wash. He explained that she could not in the morning and she seemed upset about that, which might explain why she had made the false complaint. He did not say this in interview and the Crown's case was that this was a later fabrication to attempt to explain the complaint.
12. The judge directed the jury (at pages 14D to G of the summing-up) that the failure to mention this might harm his defence if the Crown's case called for an answer and he could reasonably have been expected to mention the matters now relied on and the only reasonable reason was that he had not yet thought of them. The judge went on:

"[The defence] argue that he could not mention everything in interview. If that is, or may be right, then his failure to mention what... he said that she could not go to the car wash ... would have an innocent explanation and, in those circumstances, it would not provide any support for the Crown's case."

13. In this case there was, in our judgment, no possibility of the applicant being convicted wholly or mainly on the strength of the adverse inference. The applicant was convicted on the strength of the complainant's evidence and the judge's directions made it clear that the jury needed to be sure of that evidence. In those circumstances, this ground of appeal is not arguable.
14. We can therefore discern no arguable grounds of appeal. We grant the extension of time to renew the applications before us but we refuse the original extension of time and refuse permission to appeal because there are no arguable grounds of appeal.

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

Lower Ground, 18-22 Fumival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk