Neutral citation number: [2019] EWCA Crim 1222

2018/04297/C3 & 2018/04600/C3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Tuesday 2nd July 2019

B e f o r e:

LADY JUSTICE RAFFERTY DBE

MR JUSTICE NICOL

and

MR JUSTICE FREEDMAN

_____

R E G I N A

- v -

MACAULAY MOODY

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Mr C L Rees appeared on behalf of the Appellant

Miss J McDonald appeared on behalf of the Crown

J U D G M E N T

(Approved)

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Tuesday 2nd July 2019

LADY JUSTICE RAFFERTY:

1. Macaulay Moody (23) on 7th September 2018 in the Crown Court at Cardiff was convicted of assault by penetration, contrary to s2 Sexual Offences Act 2003 and on 12th October sentenced to eight years' imprisonment. There were consequential orders. He appeals against conviction and sentence by leave of the Single Judge.

2. Those listening or reading should remind themselves of reporting restrictions.

3. JA (15) was friends with the Appellant's girlfriend HB and often stayed with them. The Crown's case was that in the early hours of 17th May 2018, asleep on a sofa at his home, JA woke to find him digitally penetrating her vagina. It relied upon her account, the evidence of a taxi driver and of her parents of her distress, a laceration on her labia minora and that DNA with a 1:1 billion match to the Appellant's was inside her knickers. The defence was fabrication.

4. JA told the Court she did not like the Appellant, although she had never had a problem with him. She felt him rubbing her leg and pushed him away. He put a finger into her vagina. She felt a scratch, woke and told him to go away but he asked for a kiss, saying "You liked that, didn't you?" She began to cry and told him she was afraid. He told her to forget all about it. She said she wanted to go home. He said she would get him into trouble. As she sought to send messages to her family, he asked her not to, pulled the charger from her device, told her to be quiet and not wake the children, apologised and told her to forget what had happened. Her parents sent a taxi. The Appellant followed her out as she left. She told her father what had happened and the police were called.

5. She had not mentioned sexual assaults in her texts to her father. She explained that this was concern lest he

drive to collect her, having had a drink, and she did not want to cause her mother panic.

6. Challenged in cross-examination, she explained that that night she had neither shared a cigarette with, nor shaken the hand of the Appellant, and that their sole physical contact was reflected in her allegation. That line of questioning went to try to establish an alternative explanation for the DNA inside her knickers by transference.

7. Her parents confirmed her message came to them at about 2am. When she arrived home, she was distraught, upset and shaking. She said the Appellant had touched her. Asked at initial contact with the police whether there had been penetration, she said she did not know because, she told the jury, she did not understand the term.

8. The cab driver thought her distressed and upset.

9. In interview, the Appellant denied the offences.

10. He told the jury JA was awake when he arrived home and told him HB was putting the children to bed. He went to bed at about 1.20am. JA was on her mobile telephone. He woke when the front door was slammed and ran downstairs to see her in the back of a taxi. Baffled, he asked what she was doing but she ignored him.

11. He could not recall physical contact with her, but they shared cigarettes and would have touched when she was in the house. They would not hug in greeting. He could offer no explanation as to his DNA on her clothing since they had been sitting apart.

<u>the S41 Youth Justice and Criminal Evidence Act 1999 Application</u>

13. Counsel, who also appears here, sought to ask JA whether she were biased against the Appellant or had a motive to fabricate her evidence and to explore an alternative physical explanation for the conditions upon which the Crown relied. He sought, as best he could, to present the jury with a tenable, alternative theory which explained what, according to the Appellant, was a completely fabricated allegation. He relied upon the terms of s41(3)(a) and (2). The Judge found the purpose of the questions was not to impugn JA's credibility. Three questions went to motive for fabrication. The complaint which founded the allegation came fewer than 24 hours after HB announced she would tell JA's mother of the latter's pregnancy fear. The Appellant claimed it was designed to deflect attention in a pre-emptive strike.

15. She referred herself to *R v PK [2008] EWCA Crim 434* and to *R v P [2013] EWCA Crim 2331* . Taken as a whole, the proposed questions went to sexual behaviour, though sexual behaviour and pregnancy were inextricably linked. The index case and context were very different from *R v RP*. The suggestion of a factual basis setting up a motive for JA to lie the Judge thought "extremely speculative" and completely lacking any evidential basis. It was one of a number of potential scenarios in relation to motive. S41 aimed to preclude speculative questioning about sexual behaviour. The jury would not be at risk of an unsafe conclusion as a consequence of preclusion and the application was refused.

16. The next application was to adduce evidence of JA's bad character in reliance on the terms of S100(1)(b) CJA 2003, the matter in issue JA's credibility. The reprehensible behaviour fell into three parts: first, her use of racist language; second, her aggression; and third, her willingness to manipulate and a certain skill at it.

17. The Judge accepted that her racist language was likely to affect her standing before a tribunal of fact. JA's attitude was said to show a blatant disregard for the feelings of others, relevant to the making of a false allegation. That the Appellant was of dual heritage had also been raised although it was unclear whether JA knew whether he were and in any event there was no evidence she showed him animosity.

18. The Judge considered the racist remarks, made by a schoolgirl at least two years before the allegation and in the context of misbehaviour at school had no probative value. JA had been an aggressive, disobedient pupil who frequently said hurtful things to get a reaction.

19. Aggressive, difficult behaviour demonstrated, so the argument went, lack of respect for authority and JA would not care about the consequences of a false allegation. The Judge found this episode had been some eighteen months before the index allegation again in the context of the behaviour of a 15 year old girl but there was no suggestion of untruthfulness or of dishonesty. JA had been a victim of child sex exploitation that offender had pleaded guilty and her behaviour was considered by those who would describe themselves as expert in the field a result of it. The Judge ruled this evidence lacked substantial probative value as to her credibility and was exactly what the Act was designed to exclude.

20. Finally, the Judge turned to two false complaints, both in 2015, in one of which JA was reported to have said "Don't touch me", when the truth was that she had touched the other party. The Judge found such trivial misbehaviour significantly predated the index allegation. The second, to a male teaching assistant, was said to be JA remarking "I could say you've done anything to me if we're working on our own, and you could lose your job". That, said the Judge, was not followed by any allegation. At its highest it showed that JA was aware she could make a false allegation and of the consequences. That was a long way from demonstrating her capable of making a false allegation and it lacked substantial probative value. Leave on all applications was refused.

21. Grounds of Appeal fall into two parts. First, the Judge wrongly refused the application under s41 to allow

questioning of JA about the pregnancy dialogue. The ruling prevented the defence from advancing a key issue: that is, a motive for JA to lie and the timing of the complaint which latter counsel accepts was compelling and unchallenged.

22. Second, the Judge was wrong to refuse to admit the evidence of JA's bad character. School records detailed her numerous racist comments, her exclusion for disruption and verbal abuse, her threat to fabricate complains, an arrest for common assault, her rejection of anger management counselling, and her inappropriate approaches to older men. Her ingrained racist views might have affected her credibility. The Appellant was dual heritage, a possible further motive for a false allegation. Those matters would have affected her likely standing with the jury and the Judge was wrong to conclude that none had substantial probative value.

23. In our judgment the approach taken by the Court to the application under s 41 as the Judge wisely remarked, was to identify it as precisely the sort of thing that s41 was designed to exclude. It was no more than speculation. The timing of the complaint was, as is rightly conceded, significant, not just because it was if not immediate, very close to the alleged offence, but also for its impact on JA. We are entirely confident in the Judge's ruling.

25. As to bad character, the Judge was entitled to rule that the poor behaviour of JA at school, which could be both aggressive and anti-social, was something with which the jury need not be troubled. Evidence of her ability to make a false accusation fell into the same category, not least because there had never been a follow-up false allegation.

26. We are more troubled about the suggestion that she was capable of expressing racist language (more than once) and any effect that might have had upon what the jury made of her. In 2019. racism is quite often well understood by those of school age as capable of deployment for malign motive.

27 Some judges might have taken the view that it was just something the jury should consider Even if that were so we are untroubled about the safety of the conviction. The difficulty with which the Appellant is confronted is the DNA inside JA's knickers. It protects the safety of the conviction which is in no way imperilled by any Ground advanced.

29. The appeal against conviction is dismissed.

30. As to sentence Grounds are that the case fell at the bottom of Category 2 within the Sentencing Guidelines because of the absence of a number of serious features, and that the Judge was wrong to find an abuse of trust. Consequently, as opposed to Category 2A it should have been in Category 2B, starting point six years range four to nine years. Alternatively, even it correctly found to be an abuse of trust, it should have been positioned at the bottom of the range, and substantially below the Category 2A starting point of eight years.

31. Finally, the complaint is that the Judge was wrong to decline to treat the Appellant's age, 20 at the offence, as mitigating.

32. There is something in this argument. JA's age (15) was not far short of the Appellant's. More particularly, this was not "abuse of trust".

33. The Judge may have fallen into error in positioning the matter within Category 2A. We are in any event persuaded that the age difference (15 and 20) was insufficiently reflected. The appropriate category was 2B. Consequently, loyal to the Judge's scheme of sentencing, we reduce the overall term to five years.

35. To that limited extent, the appeal against sentence succeeds.
