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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 6 August 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GOSS

MR JUSTICE KNOWLES

R E G I N A
v
ROBERT HALLIDAY

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Miss A Hamilton appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: There are before the court renewed applications for leave to appeal against conviction and leave to appeal against sentence. One of the grounds of appeal against conviction is based upon submissions as to the significance or otherwise of the circumstances in which an earlier prosecution of this applicant was brought to an end by the prosecution's offering no evidence. In the court below submissions were made in that regard by Miss Hamilton, then (as now) appearing for the applicant, in the course of which reference was made to her understanding of what had happened in a different court on the earlier occasion.

2. Yesterday afternoon there was lodged with the court a small bundle of documents, including an unsigned written statement from counsel who represented the applicant in the earlier proceedings. This morning, unexpectedly, oral application has been made for former counsel Miss Tate to give oral evidence to this court.

3. In our judgment, that can only be regarded as an application to adduce fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968. It immediately runs into insuperable obstacles. No proper application to adduce fresh evidence has been lodged, no notice has been given to the respondent, the respondent is not represented, and - as is readily conceded by Miss Hamilton - it is not possible for her to say that the evidence of Miss Tate could not have been placed before the lower court earlier in these proceedings.

4. We are bound to say that it is quite unacceptable for an application of this nature to be made without warning at the outset of a hearing of renewed applications for leave to appeal, no proper steps having been taken and no notice having been given.

5. The merits of the points which Miss Hamilton wishes to advance about the circumstances in which the previous prosecution ended will no doubt be the subject of further submissions from her and they will of course be considered by the court, but so far as the application to adduce oral evidence before this court is concerned, it is refused.

(There followed submissions on the applications for leave to appeal against both conviction and sentence)

6. LORD JUSTICE HOLROYDE: This applicant was convicted of two offences of rape. He was sentenced to an extended sentence comprising a custodial term of 13 years and an extended licence period of seven years. His applications for leave to appeal against conviction and against sentence were refused by the single judge. They are now renewed to the full court.

7. The victim of the rapes, to whom we shall refer as VA, is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. So too is a prosecution witness who also complained of being sexually assaulted by the applicant, to whom we shall refer as SP. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify either of them as a victim of any of the offences.

8. For present purposes the salient facts can be summarised briefly. On the night of 17 November 2017, VA went out with a female friend. She had a lot to drink and became separated from her friend. In the early hours of the following morning she was clearly intoxicated. Taxi drivers at a rank refused to take her as a passenger. A nearby restaurant refused her entry and CCTV footage showed her walking bare foot carrying her boots.

9. Around 1.30 am she again tried, without success, to hail a cab. CCTV showed that the appellant then drove his car, which had been stationary nearby, towards VA and pulled up beside her. VA got into the car. Her evidence at trial was that she could not remember exactly what happened, but must have thought that she was getting into a taxi.

10. An hour or more later the applicant dropped VA off at a McDonald's take-away some considerable distance away. Customers saw that VA was plainly distressed. On her lower half she was wearing only her knickers. She immediately complained that she had been forced to have sex.

11. Her evidence at trial was that in the intervening period the applicant had driven her through an area she did not recognise and had eventually come to a cemetery which she did recognise. She had said that she needed the toilet. The applicant had stopped and, she alleged, had pushed her head down towards her crotch and made her take his penis in her mouth. She in consequence wet herself, which she said made him angry. He told her to get into the back seat of the car. She did so and there he raped her vaginally.

12. The applicant was arrested later on 18 November. He said that he had given VA a lift, in the course of which he had simply followed her directions as to where she wanted to go. She had asked him to stop because she needed to relieve herself, and when she got out of the car for that purpose he said he had noticed a damp patch on the passenger seat. He had pointed this out to her on her return to the car and she had been embarrassed. As he then drove on, he said she had started kissing him and had suggested that they have sex. He denied the allegation of oral rape and said that the vaginal intercourse which admittedly occurred was consensual.

13. The witness SP gave evidence of an incident in July 2015 when in the early hours of the morning, after she had been drinking heavily, the applicant had given her a lift in his car. She alleged that in the course of doing so he had digitally penetrated her vagina without her consent. She had reported this to the police. The applicant was charged but the prosecution offered no evidence in 2016 and the applicant was accordingly acquitted of that allegation of assault by penetration.

14. The first ground of appeal against conviction, advanced in detail both in writing and in oral submissions by Miss Hamilton, who represents the applicant before this court as she did in the court below, challenges the ruling by the judge permitting the prosecution to adduce SP's evidence as evidence of the bad character of the applicant. She submits that the decision to offer no evidence in the case relating to SP was taken wholly, or at least in part, because SP was regarded by the prosecuting authority as an unreliable witness.

Miss Hamilton submits that the prejudicial effect of SP's evidence in this trial outweighed any probative value and rendered the trial unfair. She says that the prosecution were wrongly permitted to use a weak allegation by SP, which had been the subject of a prosecution which had ended in acquittal, to bolster a weak allegation now made by VA. Moreover, she submits the adducing of SP's evidence introduced undesirable satellite litigation which required the calling of a number of witnesses in addition to SP and diverted the jury from focusing on the real issues in the case relating to VA's allegations.

15. The second ground of appeal complains that prosecuting counsel, contrary to an express ruling by the judge, wrongly addressed the jury in his opening speech in terms which asserted that SP had become unable to give evidence in 2016 because she had been traumatised by what the applicant had done to her. It is submitted that there was no evidence which could support such an assertion, quite apart from the judge's ruling prohibiting the drawing of any such causative link. Miss Hamilton submits that the references made to such a causative link by prosecuting counsel severely prejudiced the applicant in the eyes of the jury. She points out that this occurred at a very early stage of the trial. The judge, she submits, should have granted the application which she made immediately after the opening speech to discharge the jury and to start afresh with a new jury.

16. The third ground of appeal challenges the refusal by the judge to grant defence applications made pursuant to section 41 of the Youth Justice and Civil Evidence Act 1999, and also put forward as a bad character application, in relation to evidence concerning SP. The defence wished to adduce evidence to the general effect that SP had on occasions in the past behaved in a sexually uninhibited way after she had been drinking, and that on the night in question in 2015 had been described by one of her companions as being "all over" a man in a bar shortly before she got into the applicant's car.

17. The fourth ground of appeal challenges a ruling by the judge refusing to exclude prosecution evidence to the effect that nine days before his encounter with VA, the applicant had been driving in the early hours of the morning in an area of Leicester known to be the location of prostitution. The prosecution's case was that this outing was in the nature of a reconnaissance mission or a dummy run for what was to follow on the night the applicant picked up VA. The defence submitted that the evidence served no legitimate purpose whatsoever and was an invitation to speculation by the jury which was prejudicial to the applicant.

18. Finally, the fifth ground of appeal against conviction contends that the cumulative effect of the various challenged rulings was to render a straightforward trial unduly complex, to add substantially to its length and to distract the jury from the real issues, all of which worked to the severe prejudice of the applicant and had the consequence that he could not and did not receive a fair trial.

19. These various grounds of appeal against conviction were all resisted in a Respondent's Notice which we have considered.

20. We have read each of the relevant rulings given by the judge, His Honour Judge Head. As to the first ground of appeal, the judge accepted the prosecution's submission that SP's evidence was capable of showing that the applicant had a propensity to commit serious sexual offences against vulnerable women and was accordingly admissible under section 101(1)(d) of the Criminal Justice Act 2003, notwithstanding that the applicant had been acquitted of the alleged offence against SP. The judge was further satisfied that the evidence did not fall to be excluded on grounds of fairness.

21. Having reflected on Miss Hamilton's submissions, we are satisfied that there is no basis on which this first ground of appeal can be argued. VA and SP were unknown to one another. Neither knew of the other's complaint and yet, as the prosecution submitted, they each gave accounts which were very similar in a number of respects. Both gave evidence of events which occurred late at night and which involved the applicant having driven significant distances from his home to cities in the East Midlands. In each case the applicant had travelled alone. In each case he had remained in his vehicle loitering for no apparent reason in busy city centre areas, frequented by persons socialising and drinking. In each case he had observed, approached and picked up a lone female. In each case that lone female was visibly intoxicated, stranded and extremely vulnerable. In each case she believed that the applicant was a taxi driver. In each case she had been driven to a secluded location and there detained against her will and subjected to a serious sexual assault, one involving digital penetration, the other involving penile penetration. Thereafter the applicant had in each case left the women far from their intended destinations. In each case he had taken items of their property, including their mobile phones, making it necessary for each of them to seek the assistance of members of the public in order to contact the police. After each of these incidents, the applicant had returned directly to his home. In each case when questioned by the police he had claimed that the woman concerned had not only consented to, but had actively instigated, the sexual activity which he agreed had taken place.

22. We do not see how the detailed submissions which have been made as to the circumstances in which the prosecution offered no evidence in 2016 can assist the applicant. Although there were differing accounts before Judge Head as to the reasons for that course being taken, it was not and is not alleged that either the CPS or prosecuting counsel had condemned SP as a witness who was deliberately giving an untruthful account of events. Given that she was plainly intoxicated and had expressed doubt about her ability to remember matters, and given also that at that stage her evidence of course fell to be considered in isolation, it is understandable that the prosecution decided that the case should not proceed. But this is not a case in which it can be said that the prosecution acted unfairly by first asserting that a witness was untruthful and then seeking to rely upon the same evidence in different proceedings. The decision in R v Z [2000] 2 AC 483 shows that a witness may give admissible evidence of the bad character of an accused even where that witness has previously given the same evidence as a complainant in a trial and even where the jury in that trial has not been sure of the guilt of the accused. Here, SP's evidence never had been considered by a jury, and the jury trying this applicant were able to assess her credibility and reliability for themselves.

23. In those circumstances, the judge was entitled and in our view correct to find that SP's evidence was admissible, because it was relevant to issues in the case as to whether the applicant had a propensity to behave in the manner alleged and whether VA's evidence was true. Miss Hamilton submitted that the judge's ruling contravened principles laid down in a familiar passage from the judgment of the court in Hanson [2005] 2 Cr.App.R (S) 21 given by Rose LJ at paragraph 9. We are not persuaded by that point. It seems to us that SP's evidence in the present case had obvious probative value in rebutting the innocent explanation which the applicant put forward for his encounter with VA. The jury were correctly permitted to consider the unlikelihood of similar accounts being given by two women who had no knowledge of one another. The applicant was not exposed to double jeopardy. In our judgment no arguable unfairness arose from the jury considering the evidence of SP, and although that evidence necessarily added to the length of the trial it did not constitute satellite litigation which adversely affected the fairness of the trial.

24. As to the second ground of appeal, the judge indicated that he had been given an express assurance by prosecuting counsel that there had been full disclosure of any material in the hands of the prosecution which could have undermined SP's credibility or reliability. He agreed that prosecuting counsel when addressing the jury had gone beyond the limits of that which the judge had permitted him to say. The judge did not however take the view that counsel's remarks to the jury could have caused such unfair prejudice as to make it appropriate to discharge the jury. The opportunity would arise during the trial, as the judge noted, for SP to be cross-examined about her reasons for not wishing to give evidence in 2016. The jury would again be able to form their own view as to her reliability.

25. Whilst the conduct of prosecuting counsel in saying something which he had expressly been told not to say is to be deprecated, the judge in considering the application to discharge the jury was not exercising a punitive jurisdiction against counsel. As the judge with conduct of the trial, he was in the best position to assess the extent, if any, to which an inappropriate remark by counsel would give rise to unfair prejudice. We see no basis for challenging the decision reached by the judge that discharge of the jury was neither necessary nor appropriate.

26. As to the third ground of appeal, the judge ruled that the evidence which the defence wished to adduce would plainly contravene the provisions of section 41. It would clearly amount to the type of cross-examination which section 41 was intended to prevent, by suggesting that because a complainant had consented to sexual activity on another occasion, she must therefore have consented to sexual activity with the accused on this occasion. We agree. The judge's ruling in relation to section 41 was plainly correct. In so far as the application was coupled with a bad character application, no separate relevant considerations arise. There is, in our judgment, no basis on which the judge's ruling could be challenged.

27. Turning to the fourth ground of appeal, there was no factual challenge to the evidence that the applicant had some nine nights earlier been driving in an area known for prostitution. The explanation he had given when asked about what he was doing was that he had gone

there to meet a woman for sex, but he refused to name the woman concerned. His explanation for visiting Leicester on the night of the alleged rapes of VA was that he had gone there to visit a friend who lived in that area. However, he admitted at trial that that explanation was untrue and that not only had he not been going to visit the friend but the friend did not live in that area at all. The jury were in those circumstances entitled to consider whether the two trips to Leicester nine nights apart were connected. The evidence was admissible and relevant to support the prosecution case that when the applicant picked up VA he was acting as a predator, not - as he claimed - as a good Samaritan. Again, we can see no ground on which the judge's ruling could be challenged.

28. We have considered these several grounds of appeal collectively as well as individually and we have reflected upon Miss Hamilton's submission that the cumulative effect was to deprive the applicant of a fair trial. We are satisfied that whether taken individually or collectively these grounds do not even arguably cast doubt on the safety of the convictions. The renewed application for leave to appeal against conviction accordingly fails.

29. We turn to the renewed application in relation to sentence. The applicant had previous convictions including for offences of soliciting and indecent assault, but those convictions had been recorded many years ago. The judge in his sentencing remarks placed these offences of rape into Category 2A of the relevant sentencing guideline, for which the starting point is 10 years' custody and the sentencing range is from nine to 13 years. The judge held that the features of the offences and the fact that there were two offences rather than one made it appropriate to uplift that starting point to the top of the relevant category range. The judge found the applicant to be dangerous, having regard to the circumstances of the case, his findings of fact, the pattern of previous behaviour and the contents of the pre-sentence report which was prepared before the sentencing hearing.

30. The grounds of appeal against sentence are, first, that the judge should have placed the offences into Category 2B, rather than Category 2A; secondly, that the judge was wrong to find that there were Category 2 harm features of severe psychological harm, abduction and prolonged detention; and thirdly, that the judge was wrong to make the finding of dangerousness.

31. The judge assessed the culpability as falling into Category A because he found there was a significant degree of planning. He said at page 3D to E of his sentencing remarks:

> "I am also sure that there was a significant degree of planning that went into this attack. It was no mere happenstance that you were in this city centre in the early hours. The jury rejected your explanation that you were just taking your comparatively new car for a spin at that time and distance. The CCTV footage shows you lying in wait in Humberstone Gate until this victim drew your attention by her state, barefooted, weaving and failing to hail a taxi.
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> That there was no long planning with regard to this victim is irrelevant. There was long planning to scout for and abduct a victim."

32. Miss Hamilton submits that there was no evidence properly capable of supporting that assessment and she contends that the applicant's conduct in picking up VA when she walked towards his car "could not have been more random."

33. We are quite unable to accept that submission. For the reasons which he gave the judge was plainly entitled to find that there was a significant degree of planning, not initially directed specifically against this victim but directed to looking out for, and when opportunity arose moving in on, a vulnerable lone woman.

34. In relation to the second ground of appeal, Miss Hamilton complains that she was given insufficient notice of a victim personal statement which was only shown to her on the day of the sentencing hearing and in which VA asserted that following the offences of rape she had made an attempt upon her own life, though had quickly regretted doing so and had formed the view that it was not she but the offender who had problems.

35. The complaint that Miss Hamilton was only shown the victim personal statement at a late stage is a legitimate one. In Chall [2019] EWCA Crim. 865 at paragraphs 34 and 35, this court emphasised the importance of compliance with the requirement in Part 7F of the Practice Direction that a victim personal statement should be served in good time so that the defence can consider whether any steps need be taken either to challenge it or to obtain contrary evidence. In the circumstances of this case, however, it appears to us that Miss Hamilton was well able to deal in her submissions with the points which she wished to make in response to the victim personal statement, and it is not a case in which the defence sought any adjournment. Chall also shows that expert evidence is not a necessary precondition of a finding of severe psychological harm. Other evidence may suffice, including the contents of a victim personal statement, although whether such evidence is sufficient will depend upon the circumstances of the particular case.

36. The judge indicated in his sentencing remarks that further reasons for placing the case into Category 2 harm were that VA had been abducted and that this was a case of "prolonged detention/sustained incident". We acknowledge that this was not perhaps a typical case of abduction, but in our view that term can properly be applied to the applicant's conduct. On the judge's findings the applicant was on the lookout for a victim and when he found one he took her into his car under the false pretence that he would take her home, whereupon he then drove in the opposite direction and continued to do so when she began protesting. Moreover, although the two acts of rape were in themselves of comparatively short duration, they were encompassed within a period of between one and one-and-a-half hours of detention. In those circumstances, we are not persuaded by Miss Hamilton's submissions that those harm factors were not present as additional reasons for placing the case into Category 2 harm, and therefore as reasons for moving upwards from the category starting point. But even if her submissions be well-founded, and even if the judge was wrong to rely on those factors as additional reasons for placing the case in Category 2 harm, they would undoubtedly be serious aggravating features. The case plainly did fall into Category 2 harm because, as Miss Hamilton realistically acknowledges, the heavily intoxicated victim VA was particularly vulnerable due to her personal circumstances.

37. The judge, as we have indicated, found this to be a case of Culpability A because of the significant degree of planning and in our judgment he was plainly entitled to reach that conclusion. In those circumstances, and looking at the case overall, the custodial term of 13 years, coming as it does at the top of but within the Category 2A range, cannot in our judgment even arguably be said to be manifestly excessive.

38. Turning to the issue of dangerousness, the judge indicated in his sentencing remarks that he was sure that the applicant had committed the offence of assault by penetration against SP and he was also sure that the incident represented the start of a pattern of planned offending which was repeated against VA. At page 5D to G he went on to say this:

> "I am wholly satisfied on all the material I have considered that you are dangerous in the statutory sense. You have an entrenched history in your twenties of soliciting prostitutes from a car and an indecent assault. In your evidence you told the jury of your engaging in casual sex while in an established sexual relationship with another partner.
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> You have twice within two-and-a-half years sexually attacked women in strikingly similar circumstances amounting to targeting drunkenly vulnerable women late at night, a long way from your home, abducting them by pretending to be a compassionate lift-giver, but taking them to a secluded spot and then penetrating them with digits or penis. So far as VA is concerned, you then went to very great lengths with your car and your clothes to suppress evidence of your encounter with her.
>
> You are clearly convinced that you are a misunderstood and compassionate man and painted a picture of yourself on each occasion of giving way to sexual advances by your victim. I am sure that your emerging from the prosecution for the SP matter unscathed gave you a feeling of invincibility."

39. Notwithstanding Miss Hamilton's submissions, the judge in our view was plainly entitled to make those findings and, for the reasons which he gave in such compelling terms, to assess the applicant as dangerous. The author of the pre-sentence report had made a similar assessment, but we reject the submission that the judge was doing no more than adopting the view of a probation officer who had himself wrongly had regard to evidence of the SP matter.

40. For those reasons, we see no arguable ground on which it could be said that the sentence imposed was either wrong in principle or manifestly excessive. Accordingly, both renewed applications fail and are refused.

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

Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk