IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation Number: [2020] EWCA Crim 222

CASE NO 202000708/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 17 February 2021

LORD JUSTICE HOLROYDE
MR JUSTICE LAVENDER
MRS JUSTICE ELLENBOGEN DBE

REGINA
V
ALLAHNAWAZ ISHAQZAI

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MISS F LEVETT appeared on behalf of the Appellant

MISS K BLUMGART appeared on behalf of the Crown

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: Allahnawaz Ishaqzai was convicted of an offence of sexual activity with a child, contrary to section 9 of the Sexual Offences Act 2003. He was sentenced to 18 months' imprisonment and a number of ancillary orders were made. He now appeals against his conviction by leave of the single judge.
2. The victim of the offence, to whom we shall refer as B, was 14 years old at the material time. So, too, was her best friend, a prosecution witness to whom we shall refer as M. Both are entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. 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 B as the victim of this offence, or M as a person who was alleged to have been the victim of a sexual offence.
3. For present purposes a brief summary of the relevant facts is sufficient.
4. In October 2018, both B and M were having some difficulties at their respective homes. At about 9.00 pm on 31 October 2018, after an evening of seasonal "trick or treating", they were together at Ilford Station, hanging out and not wanting to go home. They were approached by the appellant. The appellant, then aged nearly 20 and married with two young children, had met B a few weeks previously and knew of her problems at home. He began talking to the girls and offered them somewhere to stay. They went with him to a bedsit which was the home of the appellant's friend Sangar Kehdir. Kehdir later arrived. The two men were drinking alcohol and smoking cannabis.
5. In the early hours of the morning the appellant invited B to lie on the bed next to him. She alleged that as she was falling asleep, he began to touch her, grope and kiss her breasts, both over and under her clothes, and touch her vagina over clothing. Both she and M told him to stop but he persisted. B alleged that the appellant also caused her to masturbate his penis through his clothes.
6. The appellant and Kehdir were charged on an indictment containing five counts. On count 1 the appellant was charged with sexual activity with a child: that charge related to the touching of B's breasts and vagina. On count 2 he was charged with causing a child to engage in sexual activity: that related to the allegation of masturbation. Kehdir was charged with arranging or facilitating the commission of a child sexual offence (count 3) and two offences of sexual activity with a child (count 4 relating to B and count 5 relating to M). The accused stood trial in the Crown Court at Snaresbrook before Her Honour Judge Kamill and a jury in January 2020.
7. Both B and M gave evidence that they told the appellant that they were aged 14. The appellant denied this. He admitted some limited sexual activity with B, which he said was entirely consensual and indeed instigated by B. His case was that he reasonably believed both girls to be 16 or older. B had spoken about dropping out of sixth form college and he saw that she had an adult Oyster Card. He said that she seemed mature. He said that he had commented to M that she did not look 16, but she had replied that she was small because her family were of short stature and asserted that she was 16. Kehdir's evidence was that no one had said anything about age before the alleged offences were said to have been committed.
8. The judge gave initial directions of law before the closing speeches of counsel. She did so both orally and in a document provided to the jury. In relation to count 1 she identified the issue of the appellant's belief as to the age of B as being the only live issue. The terms in which she initially directed the jury about that issue were, with respect,

somewhat unsatisfactory. However, the document containing those initial terms was subsequently revised as a result of a concern raised by counsel Miss Levett, who represented the appellant at trial as she does in this court. At the time, it was thought that the revised document satisfactorily addressed the concerns which had been raised.

9. In relation to count 1 the revised document said this:

> "Are you sure that (1) He intentionally touched as she alleges; (2) Are you sure that the activity was sexual?; then (3) Are you sure that the defendant did not reasonably believe that she was over the age of 16?"

10. The judge read that revised direction to the jury on the following day, explained that she had removed from the earlier version some words which were unnecessary and misleading, and concluded:

> "So you would only find him guilty if you are sure that he intentionally touched her, that it was sexual touching, and that he did not reasonably believe that she was over the age of 16."

11. During their retirement the jury sent a note asking:

> "Can we have a legal definition of reasonably?"

12. The judge discussed the appropriate response with counsel. The discussion became somewhat side-tracked into a debate about the Crown Court Compendium's specimen direction relating to belief. The jury's question related not to the meaning of "believe" but to the meaning of "reasonably". The judge decided, notwithstanding an objection by Miss Levett, that it would be helpful to the jury for her to list some of the factors the jury should consider.
13. The jury were then brought into court. The judge at page 53 of the transcript said the following in answer to their question:

> "Well, that is a question essentially for you and you do it on the facts, but it is not quite as simple as that because, as you know, to show that a defendant believed the age, the prosecution must prove that because of the circumstances and/or what he had seen or heard, the defendant realised that the only reasonable explanation was that her age was over 16 – 16 or over, I should say. In other words, you consider all the evidence. This includes, and forgive me, I am not intruding on your conclusions about the facts, but you might be assisted by looking at such steps as the defendant took to find out her age, the length of time they were in their company, the quality of their interaction remembering particularly Mr Kehdir's language barrier although he does speak some English and he told us he spoke to them, and the fact that they were constantly on phones and indeed sharing items on phones. Take into account such items as the defendants' own age, experience, length of time

> in the UK, the fact that each one has told us he is married and has children of his own, and each one has said there were commonly teenagers at their popular hangout at Ilford Station.
>
> Now, the fact that the defendant gave evidence that he believed she, whichever girl it was, was 16 or over, is something for you to take into account as well, but the question is whether or not that was reasonable. You have to decide that question looking, as I say, at all the circumstances and they are examples essentially that I have given you."

14. The judge then explained correctly that the jury should pay no regard to any question of the defendants being intoxicated or high.
15. The jury found the appellant guilty of count 1. They acquitted him on count 2 and acquitted Kehdir on all the three charges he faced.
16. The sole ground of appeal is that the conviction is unsafe because the judge erred in answering the jury's question. Miss Levett submits that the judge reversed the test which the jury needed to consider. The judge's reference to the prosecution having to prove that "the defendant realised that the only reasonable explanation was that her age was 16 or over" would be understood by the jury to mean they would have to convict if they thought that the appellant's belief was *a* reasonable explanation but not *the only* reasonable explanation. Miss Levett further criticised the judge's selection of what was and was not included in the list of matters which the judge indicated the jury may wish to consider. She submits that overall the answer given to the jury's question gave rise to confusion as to the burden of proof. There was a risk that if the jury thought that the appellant's belief was blinkered, but was an honestly held belief, then they could still convict even though the prosecution had not proved that he did not reasonably believe that B was 16 or over. She points out that the credibility of the evidence of both B and M was very much in issue and that the jury acquitted the appellant and Kehdir of all other charges.
17. Miss Blumgart, representing the respondent in this court as she did below, resists those submissions. She notes that the judge was to a significant extent quoting from a section of the Crown Court Compendium. She submits that in the opening words of the passage which we have quoted, the judge if anything set the bar higher for the prosecution than was appropriate. She goes on to submit that the jury can have been in no doubt that the burden of proof lay on the prosecution. They had been given a document which clearly stated the legal position and they had been given what Miss Blumgart submits was a fair and balanced summary of all the relevant evidence. She accordingly submits that the conviction is not unsafe.
18. We are grateful to counsel for their written and oral submissions.
19. Section 9 of the Sexual Offences Act 2003, so far as material for present purposes, provides as follows:

> "9 Sexual activity with a child
>
> (1) A person aged 18 or over (A) commits an offence if—

(a) he intentionally touches another person (B),
(b) the touching is sexual, and
(c) either—
(i) B is under16 and A does not reasonably believe that B is 16 or over, or
(ii) B is under 13."

20. Where, as in this case, the child concerned is aged 13, 14 or 15, section 9(1)(c)(i) requires the prosecution to prove not only that the child was in fact under 16, but also that the defendant did not reasonably believe that she was 16 or over. Where there is an issue as to the latter ingredient of the offence, the prosecution may prove it in either of two ways. We suggest that judges giving directions in cases where an issue of this nature arises may find it convenient and helpful to structure their directions by reference to these two different approaches, as indeed Miss Blumgart effectively submitted in the course of argument in the present case that the judge should do. First, the prosecution may make the jury sure that the defendant did not believe the child to be 16 or over. That involves the jury making a determination as to the defendant's subjective belief. Secondly, the prosecution may prove that even if the defendant did believe the child to be 16 or over, or may have done so, his belief was not reasonable. That involves the jury making an assessment as to whether, in all the relevant circumstances of the case, any such belief was not reasonable.
21. The circumstances which are relevant in this regard will inevitably vary from case to case, and judges will no doubt wish to discuss with counsel the appropriate terms of a direction. Without attempting any exhaustive list, we suggest that the relevant circumstances are likely to include the physical size, dress and behaviour of the child; any questions asked or comments made by the defendant about the age of the child; anything said by the child or anyone else which directly or indirectly indicated the age of the child; and any previous encounter between the child and the defendant which directly or indirectly indicated the age of the child. The relevant circumstances may also include some characteristics of the defendant himself, for example his own young age and/or any mental disorder, developmental disorder or neurological impairment which impairs his ability to assess the child's age. However, no issue arises in this case as to the presence of any potentially relevant characteristic of the appellant and we therefore express no concluded view as to the extent to which any such characteristic may be relevant.
22. We note that in the current, fifth, edition of Rook and Ward on Sexual Offences, at paragraph 4.66, the learned authors express a similar analysis in these terms:

> “In considering whether the prosecution have discharged this burden, the jury's task is not to consider whether the hypothetical reasonable man would have believed B to be 16 or over, but whether A may actually have believed that and, if so, whether the belief was reasonable. If they find that A may have believed B to be 16 or over, then in determining whether the belief was reasonable the jury should have regard to all the circumstances including what B told A about herself and B's appearance at the relevant time."

23. It follows that the judge was in principle correct to assist the jury by identifying circumstances which they may think relevant to the reasonableness of any belief held by the appellant that B was 16 or over. Of course, in seeking to summarise a list of those circumstances, a judge must be careful to ensure that the list is fair to both prosecution and defence.
24. Although we therefore do not criticise the decision of the judge to provide such a list, we are troubled by the terms in which she answered the jury's question. As we have noted, earlier discussion with counsel had become somewhat side-tracked by consideration of a passage in the Crown Court Compendium which relates to an ingredient in respect of which the jury had not sought assistance. That passage is now to be found at page 8.17 in section 8.5 of the December 2020 edition of the Compendium. It relates to cases in which the prosecution have to prove an affirmative belief on the part of a defendant, for example a belief that goods were stolen. We do not believe it was intended to be used in relation to circumstances such as the present where the prosecution have to prove an absence of reasonable belief. As the opening words of the judge's answer to the jury show, it is not easily adapted to such circumstances. With all respect to the judge, we think that the jury would have struggled to understand what those opening words meant in the circumstances of this case, and against the background of the directions given orally and in writing at earlier stages of the proceedings.
25. As we have said, the judge went on to assist the jury by a list of circumstances which they may find relevant. We see some force in Miss Levett's submission that the list omitted some factors favourable to the appellant which could and should have been mentioned. That in itself would not necessarily suffice to render the judge's answer defective or unfair. The additional difficulty which Miss Blumgart faces, however, is that the list was prefaced by what was at best an unclear explanation, and at worst a potentially misleading explanation, of what was meant by "did not reasonably believe". True it is, as Miss Blumgart submits, that the jury had a document which made clear where the burden of proof lay. Unfortunately, that document too was flawed, even in its revised form; for although it corrected one of the matters which had been raised by Miss Levett, it still directed the jury to consider whether they were sure that the appellant "did not reasonably believe she was over the age of 16". That is materially different from directing the jury to consider whether they were sure he did not reasonably believe she was 16 or over. It was not the only time that the judge had fallen into that error, although in fairness to her she had also expressed the point correctly in other parts of her directions.
26. In her discussion with counsel the judge had rightly referred to the surprising lack of authority as to the meaning of "reasonably" in this context. The researches of counsel have been unable to identify any relevant case law. Miss Blumgart was able to point to a provision in section 1 of the 2003 Act which she suggested could be relied upon by analogy.
27. We sympathise with the difficulty with which the judge was confronted. We conclude however, with respect to her, that she fell into error when seeking to assist the jury, and expressed herself in terms which could not have assisted the jury and may well have led them into a misunderstanding. She did so against a background of an incorrect initial written and oral direction on the issue of the appellant's belief, followed by a written correction which was itself incorrect in a material particular.

28. We have considered anxiously whether the conviction is nonetheless safe. We bear very much in mind that there was clear evidence from both girls that the appellant was expressly told that they were only 14. There was other evidence which the jury could have accepted as proving this ingredient of the charge. However, this was the only count on which the jury convicted, and they did so after having received what we have found to have been an incorrect answer to their question. Their question concerned an ingredient of the offence which must have been troubling them, and which related to the only live issue on that count. We conclude in those circumstances that the conviction cannot be regarded as safe and must be quashed.
29. Having considered the submissions helpfully made by counsel, we are satisfied that the interests of justice require that the appellant be retried on this charge. We shall shortly give directions in that regard.
30. For those reasons, this appeal against conviction succeeds. We quash the conviction on count 1 and direct that the appellant be retried on that count.
31. Miss Levett, Miss Blumgart that concludes our judgment. We will now proceed to consider directions. We have indicated that we allow the appeal and quash the conviction. We order a retrial on the charge which was contained in count 1. We direct that a fresh indictment be served in accordance with Rule 10.8(2) of the Criminal Procedure Rules, which requires the prosecution to serve a draft indictment on the Crown Court Officer not more than 28 days after this order. We direct that the appellant be re-arraigned on the fresh indictment within two months in accordance with section 8(1) of the Criminal Appeal Act 1968, as amended. We direct that the venue for retrial should be determined by the Presiding Judge of the South Eastern Circuit. We make an order pursuant to section 4(2) of the Contempt of Court Act 1981 restricting reporting of these proceedings until after the conclusion of the retrial. We direct that the prosecution notify the Registrar within seven days of the conclusion of the retrial so that the date when that reporting restriction ends can clearly be identified.

    (The court then heard submissions about bail, and granted the appellant conditional bail.)

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