IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1538

No. 202200126 B4

Royal Courts of Justice

Tuesday, 1 November 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE YIP
MR JUSTICE HENSHAW

REX
V
SAJID ADALAT

REPORTING RESTRICTIONS APPLY:
Sexual Offences (Amendment) Act 1992

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MR K A METZGER appeared on behalf of the Appellant.

J U D G M E N T

MRS JUSTICE YIP:

1 This is a case in which the reporting restrictions under the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the victim of the offence with which this application is concerned should be published during her lifetime if it is likely to lead to her being identified. In this judgment we shall refer to her only as "K".

2 On 22 December 2021 in the Crown Court at Bradford, the applicant was convicted of a single count of rape. He was subsequently sentenced to seven years' imprisonment. The applicant renews his application for leave to appeal against his conviction, following refusal by the single judge.

3 The applicant was tried alongside other men, the prosecution case being that they had been involved in the sexual exploitation of K, which began in 2006 when she was about 13. She had an unhappy home life and spent much time out of the home with her friend. In that context, she met the men who offered her friendship, alcohol and cannabis. In return, she was expected to perform sexual acts with the men.

4 The single charge against the applicant concerned an incident in 2008 or 2009 when K was 15 or 16 and the applicant was 32 or 33. K and her friend were in a car which was being driven in convoy with others. There came a point where the car stopped and the girls became separated. K became aware that her friend was performing sexual acts in another vehicle. The applicant was in the same vehicle as K and he accepts that he had vaginal sexual intercourse with her.

5 K did not make any complaint to the police until she was an adult. Her evidence was obtained by multiple video interviews conducted over a lengthy period between 2017 and 2019. It was in the course of her fourth interview that the incident involving the applicant came to light. K told the police that it had been consensual.

6 When he was interviewed by the police, the applicant denied having sex with K or even knowing her. His case at trial was different. It was conceded that sexual intercourse had taken place. K was cross-examined on the basis that she had consented to it. It appears that K agreed with much of what Mr Metzger put to her on behalf of the applicant, including that the sex was "fully consensual" and that she liked the applicant. She also agreed that she had made it clear to the applicant that she liked him sufficiently to engage in sexual activity and that she was in control of her actions.

7 The applicant submitted that there was no case for him to answer. That application was refused. The applicant did not give evidence.

8 Given the concession that sexual intercourse had taken place, the real issues for the jury were whether K had generally consented to it and whether the applicant reasonably believed that she was consenting.

9 The applicant raises two grounds of appeal:

(1) The judge erred in not withdrawing the case from the jury at the conclusion of the prosecution case, and

(2) The judge ought not to have given an adverse inference direction in respect of the applicant's silence at trial.

10 In submitting that there was no case to answer, Mr Metzger contended that K's evidence was unequivocally to the effect that she had consented to sex. She was not impaired by drink or

drugs. It was submitted that there was no basis upon which it could properly be argued that her consent was not genuine. It was further contended that there was no evidence that the applicant had been involved in any prior grooming of K or that he was aware of grooming by others. In the circumstances, it was submitted that this was a clear case of consent and that the jury could not properly convict the applicant of rape.

11 In rejecting the submission of no case to answer, the judge referred to *R v Ali & Ashraf* [2015] EWCA Crim 1279 and *Usman & Ors* [2021] EWCA Crim 502, with particular reference in the latter case to the appellant Parvaze Ahmed. He identified that the authorities established that questions of capacity and consent should normally be left to the jury and that it was only in a clear case that the judge should conclude that there was no evidence upon which the jury could properly convict. He went on to say:

> "The authorities indicate that the wider context needs to be considered and so the real question in dealing with this issue of consent for me is to determine whether this is a clear case of consent that should be withdrawn from the jury or whether, looking at the wider context, it should be for the jury to determine whether or not this act was truly consensual."

12 The judge then referred to features upon which the prosecution relied within the wider background. These features included K's age, her home circumstances, her disengagement from education, her vulnerability, her having become accustomed to acquiescing in sexual activity, the reputation she had acquired, the nature of the sexual activity and its context. The judge said that there were features of the case which indicated that the applicant knew something of K. He concluded that it was for the jury to decide whether consent was genuinely given in this case.

13 Further, he concluded the question of whether the applicant reasonably believed she did consent could also be left to the jury. The judge acknowledged that there were "substantial points that the defence can make" that said that such were for the jury to determine.

14 By his grounds of appeal, the applicant argues that the judge was wrong to leave the case to the jury. Mr Metzger, on behalf of the applicant, refers to s.1 of the Sexual Offences Act 2003. As is well known, the offence requires two elements in relation to consent. Pursuant to ss.(1)(b) that the complainant does not consent to the penetration and pursuant to ss.(1)(c) that the accused does not reasonably believe that the other person consented.

15 Mr Metzger also refers to the definition in s.74, namely:

> "a person consents if they agree by choice and have the freedom and capacity to make that choice".

16 Mr Metzger has also taken us so s.75 and s.76, which set out certain circumstances in which an evidential presumption or a conclusive presumption about consent arises. He says, uncontroversially, that none of those circumstances apply to this case. We note that the prosecution did not seek to rely on such assumptions. Further, we note that in the case of Ahmed in *R v Usman*, which Mr Metzger seeks to distinguish, the decision was not predicated on the basis of any presumption under s.75 or s.76.

17 However, Mr Metzger argues that the case is significantly different from that of Parvaze Ahmed. He submits that unlike in that case there was no evidence that the applicant had been involved in the grooming of K. He maintains that is relevant not only to the question of the applicant's belief, but is also relevant to whether K gave consent. He also stresses

the point made to the judge in submissions in the court below that the evidence of K was unequivocal to the effect that she had consented. Further, it is argued that K's evidence of past interactions with the applicant differed from the situation in the case of Ahmed. It is submitted that in the absence of evidence that the applicant knew of the factors relied upon by the prosecution, there was no evidence which could establish to the requisite standard that the applicant did not reasonably believe that K was consenting.

18 In short, Mr Metzger says that for him to have had a reasonable belief that K was consenting the applicant would have had to have known all the circumstances relied upon by the prosecution.

19 Mr Metzger submitted to the judge that an adverse inference direction should not be given on the basis that the evidence called by the prosecution was not challenged by the applicant. The judge disagreed and directed the jury in accordance with s.35 of the Criminal Justice and Public Order Act 1994. The written directions were given in standard terms. The judge referred back to the written directions when summing-up the evidence and reminding the jury of all the evidence, the fact being that the applicant had not himself given evidence. When doing that, the judge did not elaborate further. He simply referred back to the written directions he had already given.

20 The applicant contends that the judge was wrong to give an adverse inference direction and said that instead he should have directed the jury not to draw an adverse inference from the fact that the applicant did not give evidence. In the written grounds of appeal, it is argued that the jury may have been pushed towards convicting the applicant on the basis of drawing an adverse inference, particularly in circumstances where there had been a lengthy retirement with much interruption and the pressure of time. A question asked by the jury shortly before returning their verdicts inquired about evidence of impairment in the applicant's memory, something which had been the subject of agreed facts.

21 It is well established that questions of consent should normally be left to the jury. As was made clear in *R v Usman*, a complainant's own assessment cannot be taken in isolation and the fact that she may say that the act was consensual is not determinative. That applies even in circumstances to which s.75 and s.76 do not apply, as indeed was the case in the case of Ahmed in *R v Usman*.

22 In a case such as this where the relevant act occurs against a background of grooming behaviour, the wider context is highly material to the question of whether the complainant freely agreed to the act by choice and whether she had the freedom and capacity to make that choice.

23 During the recorded interviews, K recounted sexual abuse by many different men, but maintained that she had "never been raped" and that she had always consented. When her understanding of consent was explored, she said "I give my consent, but I think I was too young to know what I was giving my consent to". She also said "I didn't struggle. In my eyes, if I didn't struggle, I wouldn't see it as rape" and "if I just let them get on with it, I could have said no in between. If I didn't say no, I don't see it as rape". As the prosecution argued before the judge, this demonstrates a misunderstanding of the concept of consent and does not reflect the true legal position.

24 When considering the issue of whether K truly consented, it is not appropriate to artificially isolate this occasion of sexual activity ignoring the wider context. That context included K's general vulnerability, her young age, the fact that she had been groomed by others, that she had told the police she was scared of the applicant and his associates, but that she also considered the men to be her friends and would do anything to be out of her home.

Although she also said that she felt safe with the applicant, that was in the context of protection he might offer from others and knowing that he was "a bad lad".

25 The prosecution did not allege that the applicant had been directly involved in the grooming of K, but there was evidence that K had been groomed and sexually exploited by other adult men. Of course it is not the case that consent will be vitiated in every case where there is a background of grooming. However, when considering the validity of K's consent to what had happened with the applicant, the jury were entitled to consider her prior experiences, alongside the circumstances in which sexual activity occurred with him. There was evidence that getting into cars with adult men and submitting to sexual activity had become normalised through K's past experiences.

26 The fact that the applicant had not personally groomed her and claimed not to have knowledge of any previous abuse went to the issue of his reasonable belief in consent, rather than to the issue of consent itself. It is right that the evidence did not establish that the applicant knew of all the circumstances of the grooming. However, the jury were entitled to consider the circumstances in which he had met her and spent time with her and in which he came to have sex with K.

27 The unchallenged evidence was that the applicant took no steps to check that K was consenting. There was no discussion between them prior to sexual intercourse, although K agreed that she made it clear that she liked the applicant sufficiently to engage in sex and accepted that there may have been some kissing and cuddling before penetration. Around the time of the sexual activity, although perhaps not before it occurred, the applicant told K that if she wanted to be with him she had to do as she was told, which included standing up and waving when he drove past her house so that he knew she was home. There were also occasions when he told her that she had to duck down in the back of the car so as not to be seen. Previous contact between K and the applicant has been limited to "chilling" in the company of others when K would drink and smoke cannabis. There was plainly a significant age disparity and the evidence pointed to a clear power imbalance between them.

28 Having considered all the arguments raised on behalf of the applicant and having reviewed the evidence that was before the judge at the time of the submission, we agree with the views of the trial judge and the single judge who refused leave that, taken together, there was sufficient evidence upon which the jury could properly conclude that the complainant did not truly consent to the sexual activity and, further, that the applicant could not reasonably have thought that she did.

29 In agreement with the single judge, we conclude that the trial judge was right not to withdraw the case from the jury and instead to leave them to determine these issues. As was said in *R v Usman* about the case of Ahmed, this was precisely the kind of case which requires a jury properly directed, as this one was, to consider all the evidence and to reach a conclusion.

30 This is not a case in which it can fairly be said that the facts adduced by the prosecution were unchallenged and that the only issue was whether they amounted to the offence charged. The prosecution were inviting the jury to find as a fact that there was a lack of true consent on the part of K and, further, to find a lack of any reasonable belief on the applicant's behalf that K was truly consenting. These were matters on which the applicant could reasonably be expected to give evidence. He could have dealt with the circumstances of his previous interactions with the applicant and the detail of the occasion when sexual intercourse occurred in the past. Such evidence went to the issue of whether any valid consent was in fact given. The jury could reasonably conclude that the

prosecution case called for an explanation from the applicant as to why he reasonably believed that this young girl with whom he had no existing relationship and who had got into a car at some traffic lights before being driven to a location where sex followed was truly and freely consenting, rather than simply submitting to what was expected of her.

31 In interview the applicant had denied any sexual activity with K, but the cross-examination of the complainant was conducted on the basis of a concession that sex had occurred but was consensual. That change also called for an explanation, because one view of the reason for the change in account is that the applicant adopted a different defence after K positively identified him in identification procedures.

32 The judge made it clear that the jury were not bound to hold the applicant's silence at trial against him and could not convict him wholly or mainly because of it. The standard direction which he gave made it clear that before they could draw such an adverse inference, they must find that the prosecution case was so strong that it called for an answer. In that way, it provided safeguards for the applicant. There is no reason to think that the jury did not follow the directions properly. Indeed, the questions they asked during their lengthy retirement suggest that they were working their way through the case against each defendant with reference to the directions they had received. Their final question about the evidence of the applicant's memory difficulties is a further illustration of that.

33 We have reviewed the grounds of appeal and the matters raised therein carefully. We have also listened carefully to the submissions made by Mr Metzger today. Like the single judge, we conclude that the trial judge was right to leave the issue of consent to the jury and to give an adverse inference direction in the terms that he did. In all the circumstances, we do not consider that the verdict in this case is even arguably unsafe and we agree with the single judge that leave to appeal should be refused.

CERTIFICATE

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This transcript has been approved by the Judge