Neutral Citation Number: [2021] EWCA Crim 1720

Case No: 202002937 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEICESTER
HIS HONOUR JUDGE T. J. SPENCER QC
T20187376

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19.11.2021

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE ANDREW BAKER
and
MRS JUSTICE THORNTON

- -

Between:

AAM	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Matthew Scott appearing on behalf of the **Applicant/Appellant**
Phil M Gibbs appearing on behalf of the **Respondent**

Hearing dates: 27.05.2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday, 19 November 2021 at 10:30am.

LADY JUSTICE THIRLWALL DBE:

1. This is the judgment of the court to which we have all contributed. The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences in this case. Nothing relating to the victim of the offences shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as the victim of any of the offences. This prohibition applies unless waived or lifted in accordance with s.3 of the Act. To protect the victim's identity the appellant's name has been anonymised.

2. On 12th March 2020 in the Crown Court at Leicester the appellant was convicted after a trial of two counts of rape. This is his appeal against conviction which he brings with the leave of the single judge.

3. The victim of both offences was his wife. They separated in December 2014 and are now divorced. The offences took place during the latter stages of the marriage, between February 2010 and December 2014 when the appellant left the family home. The two children of the marriage remained with their mother.

4. Count 2 was a single rape. For that offence the appellant was sentenced to 7 years imprisonment. Count 3 concerned 20 occasions of rape during the period on the indictment. The sentence was 8 years imprisonment to run concurrently with the sentence on count 2.

5. The ground of appeal on which leave was given is that the judge omitted to give a bad character direction in respect of evidence of reprehensible behaviour that was placed before the jury by agreement. Leave was refused on other grounds and Mr Scott, who did not appear at trial, made no application to renew.

6. Mr Gibbs, who prosecuted at trial and on the appeal, accepts that the judge did not give any particular direction about the evidence of reprehensible behaviour and now says he should have done so. He did not make that submission at trial nor did counsel for the defence. He submits that the convictions are nonetheless safe.

Background

7. The appellant originally faced an indictment of three counts covering conduct between February 2010 when the complainant was diagnosed with Multiple Sclerosis and December 2014 when the appellant left the family home for good. Count 1 was an offence of controlling and coercive behaviour over the same period contrary to section 76 of the Serous Crime Act 2015. A jury was sworn in and the case opened before it was appreciated that the Act was not in force at the time of the conduct complained of. The jury was discharged and count 1 was removed from the indictment. A fresh jury was sworn, and the trial took place on counts 2 and 3 only. All the evidence that was to have been called in support of count 1 was, by agreement, called in the trial of counts 2 and 3. We shall refer to this as evidence of reprehensible behaviour.

Evidence at trial

8. At the heart of the case was detailed evidence from the complainant on counts 2 and 3. Whilst there had been a number of incidents earlier in the marriage where the appellant had overborne her will during sexual intercourse, she had felt able to and had objected. Whilst the appellant did not accept that he had acted against her will in those early days he did apologise at the time for the way he had behaved. After the diagnosis of multiple sclerosis, the complainant had minimal feeling below the waist for a prolonged period. It was her account that the appellant repeatedly raped her as she was unable to push him off. He was aggressive and on occasions caused injuries to her. In addition, he had a number of sexual preferences which she found abhorrent.

9. There was evidence of recent complaint from a long standing friend of the complainant who gave evidence of a number of occasions when the complainant told her she had been raped in the days before their conversation. It was put to the friend that most complaints were made after the marriage was over. The friend stood by her evidence that the complainant told her at the time. The complainant's sister also gave some evidence of recent complaint.

10. Much of the sexual conduct alleged was admitted by the appellant. He was adamant that the complainant had been a willing participant in all of it. As to the allegations of rape, he said all sexual intercourse had been consensual. Save for two occasions before the children were born when they had vigorous intercourse, the complainant had never sustained injury, he said.

11. The central issue on both counts was consent and reasonable belief in consent.

12. The appellant called his current partner to say that he had never sought to have sexual intercourse without her consent, even though she had recently had major surgery and a prolonged period of abstinence.

Evidence of reprehensible behaviour

13. The evidence of reprehensible behaviour fell into several broad categories including:

    i) Financial control and meanness

    ii) undermining and humiliating the complainant in front of others

    iii) trying to prevent her from seeing her friends

    iv) uncontrolled bad temper/anger with the threat of violence and some occasions of violence

    v) lack of care for, bullying and hostility towards her when she was suffering from multiple sclerosis.

14. Evidence about the behaviour came from the complainant, her mother, sister, father and the friend to whom we referred above, known as H. The complainant said that his behaviour was so aggressive that she and the two children of the marriage would be in a constant state of fear. They kept their heads down whenever the appellant was in the

house. He kept her short of money so that she felt trapped in the relationship. Her evidence was robustly challenged in cross examination.

15. It was the appellant's case in evidence that the allegations were either untrue or exaggerated. He accepted he could get "shouty" but did not accept that he was aggressive. He had on one occasion hit the complainant in the face by accident when, in the middle of an argument he had turned to face her, she was closer than he thought, and he struck her in the face. He denied all other violence and threats of violence.

16. As to financial meanness, it was agreed that when the complainant was diagnosed with multiple sclerosis the appellant's immediate thought was to obtain a pay-out on critical illness insurance. The complainant wanted the money to be protected for the children. It was her account that the appellant did not agree with that. He wanted to use the money to pay off the mortgage, he said. In the event, arrangements were made for the children to benefit from the money in due course.

17. The appellant did not accept that he was in any way controlling of his wife and family.

18. Considerable emphasis was placed by the Crown upon an incident which marked the end of the marriage in December 2014. There had been an argument. The appellant lost his temper with their daughter, F, who was then aged 7. He dragged her upstairs and threw her into her bedroom. The complainant and the daughter were very frightened by this. The complainant told the appellant to leave the family home, which he did. He did not return. He said at trial that the complainant had asked him to be more involved in disciplining F and that he had been heavy handed. He did not accept that he had deliberately hit F.

19. It was the appellant's case that the allegations of other reprehensible behaviour had been fabricated or exaggerated so that the complainant could explain why she did not complain about the rapes until a court order had been made in the divorce proceedings finalising arrangements for his contact with the children in 2017. It was his case that it was the court order that prompted the complainant to make the allegations of rape, which, he said, were also fabricated.

Diaries

20. The complainant kept a paper diary for years. The appellant read it on occasion during the marriage. When cross examined about the absence of any reference to sexual misconduct by the appellant she said, "I made a diary all the way through the abusive things that happened and who witnessed it, of the physical abuse". She said that she had "left the sexual bit out because it was so dirty. The things he did were really degrading".

21. The appellant told the jury that he too had kept a paper diary for many years. He had recorded all the details of his sex life with his wife, in case it should ever prove necessary to refer to it. He had, he told them, mislaid the paper diary before the breakdown of the marriage, in 2014, and had reconstructed it electronically in 2017, having previously summarised it before losing it. It was not easy to follow his reasoning in respect of this and he did not produce a diary to the jury. It was the Crown's case that in keeping the diary he was preparing for the day when his wife would eventually complain of rape.

Admissibility of evidence of reprehensible behaviour

22. Subject to certain safeguards under the provisions of the Criminal Justice Act 2003 (CJA) and section 76 of the Police and Criminal Evidence Act 1984 (PACE), evidence of reprehensible behaviour/bad character is admissible if it is probative of the offence charged.

23. Mr Scott accepts that the evidence of reprehensible behaviour was all admissible as having to do with the facts of the offences, as described in section 98(a) of the CJA (i.e. not evidence of bad character). It would also have been admissible, he submits, pursuant to section 101(1)(a), evidence of bad character admitted as a result of an agreement between the parties. Mr Gibbs agrees with both of these submissions.

24. Evidence of controlling and/or coercive behaviour, if accepted, can support allegations of rape, particularly on the issue of consent and reasonable belief in consent. It can be good evidence of a tendency to override the wishes and feelings of the controlled person. It is also well understood that rape can be part of a pattern of control and coercion.

25. We are satisfied that the evidence was admissible under section 98(a) as having to do with the facts of the offences. The fact that all agreed that the evidence should go before the jury shows that it was understood by all that it was all relevant and probative of the issues before the jury. Whether, if that were wrong, it might have been admissible under the bad character provisions in the CJA matters not.

26. The issues to which all the evidence of reprehensible behaviour went were consent and whether the appellant reasonably believed the complainant was consenting.

The Appeal

27. Mr Scott referred us to the judgment of this court given by Simon LJ in **R v RJ [2017]** EWCA Crim 1943 at para 44 in which he referred to a passage in Blackstone Criminal Practice 2018 which reads;

> " As the editors of Blackstone Criminal Practice 2018 at F13.11 note the dividing line between cases involving bad character evidence and cases falling within S98 is fine: and this is a reason: "…for the Court to have in mind the safeguards attached to the former when considering the latter, and to consider appropriate directions to the jury on the use to which it should be put and, if appropriate, the weight they should attach to that evidence.""

28. Mr Scott also relied on the decision of this court in **R v MA [2019]** EWCA Crim 178 a case where some evidence of violent and controlling behaviour was held properly to have been admissible under section 98 and other evidence was properly admissible under section 101 (in various subcategories). The trial judge gave a specific direction in respect of incidents of violence alleged by the complainant against the appellant in that case. He explained to them that they had heard about the violence as it was the prosecution's case that the appellant controlled the complainant and used physical violence as part of that control. He reminded them that the case was about allegations of rape, not of physical violence, and that if they were sure the acts of violence

occurred but were unsure of any of the allegations of rape they must acquit the defendant of the counts of rape.

29. This court accepted the submission that the direction was not sufficient. Irwin LJ said what was required was "a carefully crafted direction that dealt with the problems arising from the evidence, the risk of prejudice, and assisted the jury as to how to apply this evidence in reaching their conclusions."

30. The court considered that this would be so of the case before them even were all the evidence properly to have been admitted under section 98. The suggested approach was [47] "something like the following:

> "[48] First that the judge should identify to the jury in a simple fashion, but clearly, what evidence they were to consider in the way he was about to indicate.
> [49] Secondly, to repeat the obvious point that, unless they were sure of this evidence, they should discard it. If they were unsure of part of it, they should disregard it and discard it.
> [50] Thirdly, to tell them that this category of evidence, however admitted, could not amount to direct proof of the guilt of the applicant.
> [51] Fourthly, if they were sure of the evidence, or the extent to which they were sure of it, what could it show? Here a simple direction that it bore on W's relationship to her husband and his attitude to her would have sufficed.

31. At [52] the court dealt with specific details in that case and at [53] said that:

> "They then should have been told in straightforward terms, that if they accepted all this evidence, it could show it was more likely that the husband would override the lack of consent of the wife."

32. Mr Scott, who appeared for the appellant in **MA**, submits that the judge in this case should have taken the approach set out in **MA** and failed to do so.

Summing Up

33. There was no discussion before the summing up about whether specific directions over and above those conventionally given in respect of evidence of fact were necessary in respect of the evidence of reprehensible behaviour.

34. The judge gave the jury summary written directions on the law which he developed in the course of his summing up. When dealing with the respective roles of judge and jury he said "It means that you decide who said what; you decide who did what; you decide who consented to what; you decide who knew what…It means that you decide what was going on here; in specific terms, what went on in this marriage and the sexual relationship between [the appellant and the complainant], in particular during the period February 2010 to December 2014" This was followed by a direction on the burden and standard of proof and the conventional directions about setting aside emotion when considering the evidence. He reminded the jury that they did not need to decide every

issue that had arisen in the case. He said, "You must determine those issues which enable you to return verdicts which are true to your oaths or affirmations."

35. He gave impeccable guidance in respect of the behaviour of complainants in sexual offence cases.

36. He reminded the jury that they were not called on to make a moral judgment on sexual preferences. What was needed was a cool assessment of the evidence and application of the law.

37. He set out clearly and accurately the ingredients of the offence of rape. He identified that the issues were whether the complainant had consented and, if not, whether the appellant reasonably believed that she had. He set out what the prosecution needed to prove in respect of reasonable belief.

38. In the context of a very detailed and helpful direction on reasonable belief the judge told the jury to take into account "all the circumstances of this case…. … that includes but isn't necessarily limited to, the history of their sexual relations, her illness and its effect on both her and him... There may be other things as well that you want to take into account; and if you do, do. Ultimately you decide whether there was, or may have been, a genuine belief and whether that belief was reasonable." He said that he would point out the areas of evidence which "illustrate issues which seem to me to be either important or fundamental." He reminded the jury that it was for them to decide what was important, not him.

39. He reviewed in detail the complainant's evidence on the allegations of rape which had been given in chief via an edited ABE interview. She said that she had put up with the appellant's desires because if she hadn't there would be repercussions – financial or humiliation in front of friends. The cross examination was reviewed in detail.

40. The judge dealt with the dispute about the critical illness pay out and having summarised it he said "there is an issue for you.. That's an issue that's not going to decide the case for you, ladies and gentlemen, but it may affect your view of the credibility of one or the other of them, or even both. So, you'll want to think about this aspect of the case."

41. The judge reminded the jury that the complainant had said she felt trapped in her marriage, but she had accepted when cross examined that she had asked the appellant to leave several times, and he had done so. She also pointed out that he always came back, until December 2014, after which, despite his wish to return, she refused, and he did not return.

42. The judge dealt in detail with the incident with F. He made it plain that this would not help the jury to decide whether or not the appellant had committed rape. He said that it was a part of the background and that their views of it would help them decide on the relative credibility of the appellant and complainant.

43. The judge also dealt with the evidence of the other witnesses, including of H and the complainant's sister in respect of recent complaint. We do not need to rehearse this nor the evidence of the appellant which the judge reviewed in detail. We have already referred to the key parts of his evidence.

44. The judge gave both limbs of the good character direction.

Discussion

45. It is not disputed that the judge did not follow the approach set out in **R v MA.** Mr Scott submits that the failure to follow the approach in **MA** renders the conviction unsafe. Mr Gibbs conceded at the hearing of the appeal that particular directions about the evidence of reprehensible behaviour such as described in **MA** should have been given but submitted that the absence of the directions does not undermine the safety of the conviction because all the evidence of reprehensible behaviour was before the jury by agreement, it was the appellant's case that the allegations of reprehensible behaviour were fabricated by the complainant, all the evidence was very robustly tested during a fair trial and was fairly summarised by the judge in summing up. The jury heard all the evidence and were best placed to decide.

46. Mr Scott submits that the directions were necessary not least because the prosecution case relied heavily on the evidence of reprehensible behaviour. He refers to a number of passages in prosecuting counsel's closing speech. It is sufficient to refer to prosecuting counsel's description of the appellant: "an egotistical, self-interested and selfish person, and he was cruel; he humiliated [his wife]". Later in his speech when referring to the appellant's attitude to money he described it as evidence of his selfishness. Rape being the ultimate act of selfishness, he said, "taking what you want and feeling entitled". Leaving aside counsel's forensic flourishes, which were unnecessary, all this came to was prosecuting counsel pointing out that on one view of the evidence the appellant routinely overrode his wife's wishes. That was the reason he had sought to put it before the jury. Whether they accepted the evidence and considered whether it helped on the issues in the case was a matter for them as the judge made clear.

47. The evidence was before the court by agreement. It is not nor could it be suggested that this was an error of judgment by counsel for the defence. It is plain that both prosecution and defence saw the evidence as all of a piece, as did the judge. They were right to do so. It all went to the issues in the case.

48. That the parties agreed that the evidence should go before the jury does not remove from the judge the responsibility for giving appropriate directions and to sum up the case fairly, but it does not follow that a trial judge must give directions that are unnecessary. The purpose of the directions suggested in **MA** was to ensure that the jury did not use the particular evidence in an improper way, which would mean either (a) using disputed evidence of reprehensible behaviour without first accepting that evidence, i.e. being sure of it, (b) treating evidence of reprehensible behaviour as supporting a disputed part of the prosecution case it could not reasonably be said to support, or (c) convicting the defendant on a charge the jury were considering wholly or mainly on the basis of the evidence of reprehensible behaviour.

49. In the light of the decision in **MA** it would have been better had the judge given a short specific direction warning against any improper approach to the evidence of reprehensible behaviour, but we are satisfied that there was no risk of this happening here. The judge's conventional directions were sufficient, taken together with the general direction as to the evidence to be considered in respect of reasonable belief in consent to which we refer above, and his review of the evidence, to ensure that the jury

would not rely against the appellant on reprehensible behaviour that they were not sure about on the evidence, and the evidence in question was all capable, if accepted, of supporting the prosecution case on the only real issues, namely consent and reasonable belief in consent. It was also clear enough, on the judge's summing up as a whole, that the allegations of reprehensible behaviour outside the incidents of alleged rape themselves were one element only of the prosecution case and not something upon the basis of which, or primarily on the basis of which, it could be proper to convict.

50. The judge's common sense observations in respect of the ill health pay out and the incident with F were helpful to the defendant. Plainly a decision about either of those issues could not, of itself, help them decide the rape charges and the judge directed them only that it could assist with assessing their respective credibility. In fact, had the jury found that in either case the appellant had done what was alleged against him, they would have been entitled to put that into the balance of evidence supporting the prosecution case that he routinely overrode his wife's wishes. Its probative value went beyond general credibility.

51. We acknowledge that there are cases where detailed directions are necessary about the use to which particular evidence of reprehensible behaviour may be put. This is not such a case. The evidence was all directed to the main issues in the case. There was no more need to identify each incident of alleged reprehensible behaviour and give a direction about the use to which it could or could not be put than there was, for example, to give such a direction about each individual allegation of rape within count 3. It was not necessary to tell the jury in respect of each allegation "this is not direct proof of rape". They did not need to be told repeatedly that it went to the issue of consent or reasonable belief in consent. This was clear from the summing up. We are satisfied that there was no risk that the jury might have been unsure of or disbelieved the complainant on the facts of the rape counts and yet convicted because they believed her and other witnesses on the facts of some or all of the reprehensible behaviour. Such an analysis is unreal.

Conclusion

52. The issues to be determined were clear. The evidence against the appellant was very strong. It was tested appropriately in the course of an eight day trial in which the appellant gave evidence. The summing up was fair. We are satisfied that the convictions are safe. The appeal is dismissed.