Neutral Citation Number: [2021] EWCA Crim 1664

Case No: 202101927 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT LIVERPOOL
HIS HONOUR JUDGE BYRNE
T20207351

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2021

Before:

LORD JUSTICE SINGH

MR JUSTICE GARNHAM
and
HIS HONOUR JUDGE POTTER

- -

Between:

JUNIOR FITZROY COUSINS	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Christopher Moran (instructed by Harrison Bundey) for the **Appellant**
Gerald Baxter (instructed by **.**) for the **Respondent**

Hearing date: 2nd November 2021

- -

Approved Judgment

Reserved Judgment Protocol: This judgment will be handed down by the Judge remotely, by circulation to the parties' representatives by email and if appropriate, by publishing on www.judiciary.net and/or release to Bailli. The date and time for hand down will be deemed to be 09:30 on 10 November 2021.

Mr Justice Garnham:

Introduction

1. On 27 May 2021, in the Crown Court of Liverpool, before His Honour Judge Byrne and a jury, Junior Fitzroy Cousins was convicted of one count of rape and sentenced to five years imprisonment.

2. The provisions of the sexual offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as a victim of that offence. This prohibition applied unless waived or lifted in accordance with s.3 of the Act.

3. The Appellant sought to appeal against conviction on two grounds. First, it is alleged that the Learned Judge erred in allowing the Crown to adduce the "recent complaint" report of a witness we will refer to as CH; second, that the Judge erred in directing the jury that they could draw an adverse inference under s.34 of the Criminal Justice and Public Order Act 1994 from the Appellant's failure to mention facts in his police interview.

4. Permission to appeal was granted by the Single Judge on Ground 1 but refused on Ground 2. Mr Cousins renewed that application before us. At the end of the hearing, we indicated that we would reserve our judgment on Ground 1 but we would refuse permission to appeal on Ground 2 for reasons that would follow in the judgment. This is that judgment. For convenience, we will refer to Mr Cousins throughout as the Appellant.

The Facts

5. The Appellant met the Complaint, C, through an online dating app. They agreed to meet on 24 August 2018. The Appellant travelled, from his home in Leeds, to Warrington where the Complainant lived. The Appellant went to the Complaint's house and there met her daughter, L, and L's boyfriend. The group spent the evening drinking and talking.

6. At some point, during the evening, the Appellant and the Complainant went to the Complainant's bedroom where they began to kiss. The Complainant's account thereafter was that the Appellant asked her to take her clothes off. She did not really want to do so. The Appellant then removed his clothes, grabbed her and rubbed himself against her. He pushed her down onto the bed, he then pulled down her pants, kissed her back and put his penis inside her vagina. She said she was a little shocked at first, but she was "ok with it".

7. The Complainant said that, a little later, the Appellant tried to put his penis into her anus. At first, she thought the Appellant had placed his penis in the wrong area and so she used her hand to move his penis back to her vagina. She said she told him that she had never had anal intercourse and did not want it. She said the Appellant then put his

penis back into her anus. She said she raised her voice and said no but the Appellant ignored her and pushed his penis in harder, placing his whole body on top of her so that she could not move. She said she said she told the Appellant to "get it out" but the Appellant ignored her. She described being in pain but managed to free herself by grabbing hold of the Appellant's testicles.

8. She then left the bedroom, went downstairs and walked into the garden. The Appellant followed her there. Her daughter also came outside. The Appellant joined her in the garden and went to sit beside her. She did not want him sitting next to her and screamed "Do you want me to tell her". She then told her daughter that the Appellant had forced himself upon her. Her daughter confronted the Appellant and eventually a taxi was called and the Appellant left.

9. During cross-examination at trial, it was suggested to the Complainant that the Appellant was unable to get an erection, that she had offered to perform oral sex on him, and that he had said that the smell of the Complainant was "putting him off" and that she should wash. It was suggested that it was that remark that made her grab his testicles. The Complainant denied all those elements of the defence account.

10. The Prosecution also relied upon recent complaint evidence from the Complainant's daughter, L, and a friend of the Complainant, CH. L gave evidence that she heard her mother scream, saw the Appellant leave her mother's bedroom and heard him shout that her mother was crazy. Her mother and the Appellant came downstairs shortly thereafter. The Appellant kept saying his testicles were hurting and her mother said that his testicles were hurting him because he had just raped her. A taxi was called and the Appellant left. Thereafter, L said that her mother told her that whilst she had consented to sexual activity the Appellant had forced himself into her bottom and she had asked him to stop and when he did not, she grabbed his testicles.

11. CH gave evidence that she received a phone-call from the Complainant on the day of the incident. She could hear shouting in the background between L and a man and the man was moaning that he was in pain of some kind. The Complainant did not speak at the time, so CH called her back shortly thereafter. The Complainant then told her that the Appellant had attacked her in the bedroom, that they had had consensual sex at first, that the Appellant had tried to have anal sex with her, and that the Complainant had grabbed him by his testicles because she did not want to do so.

12. The prosecution case was that the Appellant penetrated the Complainant's anus with his penis and did so without her consent.

13. The defence case was that the Complainant made up the allegation to explain why she had grabbed his testicles. The Judge made clear in his summing up to the jury that it was the defence case that the complainant was fabricating her allegation of rape.

14. The Appellant gave evidence that he and the Complainant were kissing in the bedroom but that he had come to realise that he could not get an erection because of what he had had to drink and because he was nervous. He said he told the Complainant that he did not think it "was going to happen". He said the Complainant pulled down his trousers and tried to perform oral sex on him but it did not work. He told her not to bother and the two of them then stumbled and fell on the bed laughing. They continued to touch each other, and the Appellant said that whilst touching her vagina he noticed a bad smell

and he told her she needed to wash. The Complainant called him a "cheeky fucking bastard" and grabbed his testicles and squeezed them causing him to scream out. The Complainant then went downstairs, and he followed shortly after. The Complainant's daughter, L, started shouting at him, asking what he'd done to her mum. He did not know what she was talking about. L accused him of raping her mother; he told L that the Complainant had squeezed his testicles and asked the Complainant to tell the truth. A taxi was ordered, and he left.

15. At his police interview, he provided a prepared statement referring to consensual sexual activity. On the advice of his solicitor, he made no comment in respect of any other question. The issue for the jury was consent.

Rulings and Summing up

16. There are two rulings in issue.

17. First, the Prosecution sought to rely on CH's statement in which she said that on 24 August 2018 she spoke on the phone to the Complainant and the Complainant gave the account of events to which we have referred. The defence said that that account was inadmissible, pointing out that the Complainant had not referred to her speaking to CH when she gave evidence.

18. In his ruling, the Judge said:

> "As a matter of logic it seems odd to the court that such evidence would be inadmissible merely because a complainant had omitted to mention the fact that she had made the statement to the witness in the first place. Nevertheless, it is important to deal with such matters with due caution and to ensure that there is a statutory or common law gateway for the evidence.
>
> I am satisfied after considering section 120 of the Criminal Justice Act 2003 that that subsection 2 should be interpreted as being a standalone provision. It does not, on the face of it, appear to be qualified in any way by any of the other provisions and to that extent I therefore agree with Mr Baxter (for the prosecution) that the statement would be admissible…Even if I am wrong about that, I would have permitted the Crown to make an application under section 114 and admit it through that gateway as it is very clearly in the interests of justice for that statement to be admitted into evidence"

19. Second, before the summing up, the Judge heard the parties' competing submissions as to whether he should give an adverse interference direction following the defendant's failure to give his version of events to the police in interview or following charge. Counsel for the defence submitted that no adverse inference direction should be given because the defendant was not asked during cross-examination about the questions put to him during his police interview. Relying on the decision of this court in the case of *R v Argent* [1997] 2 Cr App R 27, the Defendant's counsel said that there were conditions to be met before a s.34 inference could be given. It was accepted on the defendant's behalf that he was aware what the subject matter of the interview was to be

but asserted that the prepared statement was given before any of the questions were asked. It was said that no evidence had been adduced as to whether the defendant was asked any of the specific questions identified, what those questions were, what the questions were designed to elicit, or the fact that he did not answer them.

20. Counsel for the prosecution argued that he had put to the defendant that he could have raised matters in interview what he now relied on but did not do so. He said that whilst it was correct that the defendant had not been asked about specific questions he was asked in the interview it was clear to the defendant that he was being interviewed about those matters, that he understood what the allegations were, that he had an opportunity to raise those points, but did not do so.

21. The Judge ruled that, whilst it was always desirable for the specific questions asked in interview to be adduced in evidence, the fact that the defendant was interviewed, and asked questions, was clear from the agreed facts. The question for the Court was whether the absence of specific questions being brought to the jury's attention precluded the giving of the s.34 direction. The Judge said:

> "there was an irresistible inference that the defendant would have been asked about what happened in the bedroom on 24 August and on that basis the direction would be given."

22. In summing up the case to the jury, the Judge said this:

> "The final direction regards the defendant's silence in interview. You have heard that on 13th of December that year he was interviewed by the police and he exercised his right to silence. But before he was (interviewed) he was told he does not need to say anything – that was his right – but, also, that if he failed to mention, when questioned, something that he later relied on in court that may harm his defence and that anything he said would be given in evidence.
>
> Now in this trial he gave evidence before you…and…provided quite a detailed account, you might think, of the events. He told you, amongst other things, that he had gone into the bedroom, but that he could not get an erection and that no intercourse of any description took place there. He told you about a comment he made to (the complainant) which had angered her and then she had grabbed his testicles. None of that did he mention to the police when he was interviewed.
>
> You may hold that failure against him..."

23. He then went on to give the usual direction and the usual warnings about relying such evidence.

The Grounds of Appeal

Ground 2

24. It is convenient to deal first with Ground 2 and the renewed application for permission to appeal.

25. Refusing permission, the Single Judge said:

> "Your second ground is not arguable, and permission is refused. The prosecution challenged the adequacy of the prepared statement during cross-examination. Although the specific questions asked by the police were not put to you when you gave evidence, this does not mean an adverse inference direction was unfair. It is clear from the transcript I have seen, that your trial counsel agreed that you had been tested on why you have not given the account you gave in your defence either in the prepared statement or during questions from the police. Furthermore, you agreed that you could have done so and you were acting on the advice of your solicitor in saying no comment. In those circumstances, the giving of the adverse inference direction was not objectionable."

26. We agree.

27. The argument advanced before us by Mr Moran on behalf of the Appellant turned on the terms of s.34 of the Criminal Justice and Public Order Act 1994 and the decision of this court in *R v Argent*.

28. Section 34 deals with the effect of the accused failure to mention facts when questioned or charged. It provides:

> (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact…
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies."

29. The decision of this Court in *R v Argent* was concerned with conditions that governed a failure to mention any fact relied on in a defence when being questioned under caution. As is apparent from s.34(1)(b) the same consequence may follow a failure to

mention any fact on being charged with an offence or officially informed that the person concerned might be prosecuted for it.

30. Here the Appellant produced a prepared statement, was interviewed, declined to answer any question and was charged with the offence. At no stage did he mention the case he subsequently advanced at trial, despite the opportunity to do so and despite knowing the potential consequences of not doing so. It is agreed that he could have done so but declined to do so on the advice of his solicitor.

31. In those circumstances, in our judgment, the mischief to which s.34 relates applies. We decline to grant permission to appeal on this ground.

Ground 1

32. The focus of the Appellant's case before us was Ground 1 for which he had permission to appeal. He maintains that the Judge erred in allowing the Crown to adduce the recent complaint evidence of CH pursuant to s120 of the Criminal Justice Act 2003. S120 provides as follows:

> "(1) This section applies where a person (the witness) is called to give evidence in criminal proceedings.
>
> (2) If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.
>
> (3) A statement made by the witness in a document—
>
> (a) which is used by him to refresh his memory while giving evidence,
>
> (b) on which he is cross-examined, and
>
> (c) which as a consequence is received in evidence in the proceedings,
>
> is admissible as evidence of any matter stated of which oral evidence by him would be admissible.
>
> (4) A previous statement by the witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if—
>
> (a) any of the following three conditions is satisfied, and
>
> (b) while giving evidence the witness indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth.

> (5) The first condition is that the statement identifies or describes a person, object or place.
>
> (6) The second condition is that the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.
>
> (7) The third condition is that—
>
> (a) the witness claims to be a person against whom an offence has been committed,
>
> (b) the offence is one to which the proceedings relate,
>
> (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence…
>
> (e) the complaint was not made as a result of a threat or a promise, and
>
> (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter.
>
> (8) For the purposes of subsection (7) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved."

33. Mr Moran, for the appellant, says that "the witness" to whom s.120 applies must be the Complainant and as such does not include CH. We agree that the witness referred to is the Complainant. But, in our judgment, it is clear that the evidence that the Complainant made the previous statement was here given by CH. CH was the vehicle by which the previous statement of the complaint to rebut the accusation of recent fabrication was adduced.

34. Mr Moran argues that the Judge was wrong to hold that s.120(2) of itself made the evidence of CH admissible. He says that ss.2 is not a standalone gateway to admissibility and that a previous statement by a Complainant, including one served in rebuttal of an allegation of recent fabrication, must also satisfy the conditions in ss 4-7.

35. We reject that contention.

36. S.120 applies to a number of circumstances in which a witness' previous statement may be admissible. s.120(2) applies to statements which are admitted to rebut a suggestion that the witnesses oral evidence is a fabrication; s.120(3) applies where a witness is refreshing his memory from a written document; s.120(4)-(7) provide that a previous statement will be admissible as evidence of the facts it contains provided the witness states that he made the statement and believes it to be true and the statement meets one of three conditions; the third of which is where the statement consists of a complaint by

a victim which was made as soon as could reasonably be expected and the witness gives oral evidence in relation to the matter.

37. These various statutory provisions provide different and discrete means by which previous statements are admissible as evidence of the truth of their contents.

38. In the case of ss.2 the provision does not provide a route by which a statement is admitted; it is instead admitted pursuant to the common law rule that previous consistent statements are admissible to rebut an allegation of fabrication, a rule that survives the 2003 Act. But ss.2 changes the consequences of the admission of that previous statement. At common law it was admissible in response to an allegation of recent fabrication simply to prove consistency between the earlier statement and the oral evidence of the witness; ss.2 makes it evidence of the truth of its content.

39. In *R v Trewin*, David Clarke J (with whom Sir Igor Judge P and Davis J agreed) said this:

> "18. In our judgment, section 120(2) is not itself a provision governing admissibility…What the subsection does is to regulate the use to which such evidence, once admitted, may be put. It is then admissible as evidence of the truth of its contents, not merely as evidence going to the issue of consistency…
>
> 20. It seems to us that the subsection says nothing about whether such evidence may or may not be admitted. Accordingly the admissibility of evidence to rebut fabrication must be considered by reference to the principles which have governed this question in the past. It may in some cases not be possible for a judge to make that decision until he has heard the evidence of the complainant and the nature of the challenge put in cross-examination. It may be that the outcome will be different in relation to different complainants."

40. By contrast ss. 4 and 7 makes admissible, as proof of its content, the statement of a complainant who makes a complaint about conduct which if proved would constitute the offence. There is no requirement that the statement rebuts an allegation of fabrication.

41. Because these various statutory routes are different and serve different purposes, the requirements to be met before they admitted are different. The requirements of ss 4 - 7 apply to the three categories of case set out in ss7, but do not apply to a statement that meets the requirements of ss.2.

42. That was also the construction of s.120 adopted by this Court in *R v KH* [2020] EWCA Crim 1363 (a case drawn to our attention during the course of the submissions of Mr Baxter for the prosecution). Giving the judgment of the Court, Singh LJ said this:

> "62. Strictly speaking section 120(2) is not about the admissibility of a previous statement. Such a statement was admissible at common law in order to rebut the suggestion of recent fabrication. However, the rule before the 2003 Act was

> that it was not admissible in order to prove the truth of its contents. The change which section 120(2) made was to render the statement admissible both for the purpose of rebutting the allegation of recent fabrication and for the purpose of proving the truth of its content.
>
> 63. In our judgement, Parliament has created more than one gateway in section 120. We do not accept Mr Emanuel's submission that section 120(4) and (7) would be rendered otiose if a statement could be admitted in any event through section 120(2). The two are alternatives. They cover different circumstances, although they may on certain facts overlap."

43. We see nothing unfair about the way in which these provisions were applied on the facts of this case. The judge heard the submissions of the parties as to the admissibility of this evidence and reached a reasoned conclusion. Like the judge, we think it would be surprising if such evidence were inadmissible merely because a complainant had omitted to mention that she had made the statement to the witness in the first place. In any event, the statutory scheme is clear: the complainant gave evidence in the proceedings and a previous statement by her was admitted as evidence to rebut a suggestion that her oral evidence has been fabricated. There is no requirement in the legislative scheme that the complainant gives oral evidence of the previous complaint, only that that complaint was admissible at common law. Once admitted, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible.

44. In those circumstance, we reject the submission of Mr Moran that the admissibility of a previous statement to rebut allegations of recent fabrication is governed by the whole of s.120. In our judgement, it is only s.120(2) that is in play in such circumstances. Accordingly, the judge was right to allow the Crown to adduce the recent complaint evidence of CH.

Conclusions

45. For those reasons, the renewed application for leave is refused, and the appeal is dismissed.