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Neutral Citation Number: [2006] EWCA Crim 1973
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 17 May 2006

B E F O R E:

MR JUSTICE MAURICE KAY

MR JUSTICE NEWMAN

HIS HONOUR JUDGE METTYEAY
(Sitting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

-v -

LEON BENJAMIN FORDE

- - - - - - -
Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)
- - - - - - -
MISS J WARBURTON appeared on behalf of the Prosecution
MR M CRANMER -BROWN appeared on behalf of the Defendant
- - - - - - -
J U D G M E N T
(Approved by the Court)
- - - - - - -

1. LORD JUSTICE MAURICE KAY: On 24 November 2004 at the Crown Court at Lincoln the appellant, who is now 21 years of age, was convicted of two counts of rape, two counts of indecent assault on a female, five counts of sexual intercourse with a girl under the age of 13 and one count of assault occasioning actual bodily harm. He was sentenced to 7 years' detention with 4 years' extended licence in relation to the rapes; 4 years' detention with four years extension in relation to the indecent assaults; 3 years' detention with 4 years extension in relation to the unlawful sexual intercourse offences and 12 months' detention consecutive for the offence of assault occasioning actual bodily harm. Other ancillary orders were made. He now appeals against those convictions by leave of the full court.

2. The background to the case is this. The complainant in respect of the entire indictment was a girl to whom we shall refer as N. She was born in October 1989. She was therefore 15 at the time of the trial. The appellant was aged 20 at the time of the trial and would therefore have been 17 or 18 at the time of the alleged offences, whereas she would have been 12 at the time of the earlier offences, 13 in respect of the latest.

3. It will become apparent that the success of this appeal is and has become inevitable. The prosecution do not seek to uphold the convictions, nor do they seek a retrial. In the circumstances, we shall describe the allegations with the utmost brevity. The appellant and N met in March 2002. They commenced a relationship. In May of that year he moved into a bedsit. The allegations relate to a period beginning soon after he moved. Count 1, an allegation of indecent assault, related to an allegation that he had indecently assaulted her by licking her vagina. Count 2 was an allegation of rape following immediately thereafter. That, it seems, led to a report by N to a friend that she, N, had had intercourse. The friend advised her to take the morning after pill. N visited the doctors and asked for the morning after pill. Those events remain undisputed. N's account continued that she saw the appellant again in the following week when she submitted to having sexual intercourse with him. That provided the evidence for count 5 - unlawful intercourse. She said that on 4 June the appellant had kept her at the bedsit against her will by handcuffing her to the bed and raping her. That was the second rape allegation. On 12 June she again asked a doctor for the morning after pill but at the same time asked for the full contraceptive pill as "she wanted the sex to continue". The doctor refused that prescription but advised her to go to the clinic.

4. On 26 June N said that she offered to be the appellant's slave for the day as his birthday present, however she alleged that he compelled her to give him oral sex. That is the basis for a further count of indecent assault. She alleged that sexual intercourse continued from time to time over the ensuing months. That provided the basis for the four counts of unlawful sexual intercourse.

5. In July she took an overdose, she said because she wanted to end the affair. Finally, she said that towards the end of 2002 he had twice inflicted cuts upon her, one to her back upon which occasion he sucked her blood, and one to her chest, making her hold the blade herself whilst blindfold.

6. These allegations did not come to light immediately and for that reason N was not subjected to medical examination. By the time the allegations were made to the police she had commenced another sexual relationship.

7. The account of the appellant was that there had been a relationship between himself and N over the months to which she had referred, but that it went no further than conventional relationships between people of their age and in accordance with the mores of the time. He completely denied the allegations in the indictment. He said that they were fabrications. He said that she had talked to her friend about having had sex in order to make herself look big and when the friend had told her to go to the doctor for the morning after pill that had set in train a sequence of events which she had gone along with so as to maintain her dishonest account.

8. His case was that the real reason for her overdose was for personal problems and family problems, quite unrelated to her relationship with him, and indeed there was shown to the jury a letter N had written to her mother at the time which provided some basis for that suggestion.

9. Be that as it may, the jury convicted the appellant, as we have recounted, save that, curiously, it acquitted him of the first of two allegations of assault occasioning actual bodily harm.

10. Originally, the grounds of appeal that were to be advanced on behalf of the appellant were limited to criticisms of the trial judge and, in particular, to criticisms of the summing -up. However, that has now been overtaken by events. Whilst Mr Cranmer -Brown does not resile from those criticisms, he places at the forefront of the appeal, and rightly so, subsequent developments of considerable importance. What has happened is that since the trial police officers have recovered the family computer from N's home and have examined material stored within it. In a nutshell, it contained material undoubtedly attributable to N and recorded by her which, to a substantial extent, was contemporaneous with the relationship with the appellant and which, not to put too fine a point upon it, puts her in a rather bad light. Mr Cranmer -Brown submits that it shows that N has made false allegations. She was saying at the time things inconsistent with the account that she gave in evidence. It further shows that, notwithstanding her age, she was highly sexualised and active with persons other than the appellant which it is suggested is relevant not only to an issue of consent, but also because it explains an unusual direct knowledge of the mechanics of sexual activity for a girl of her age which would have permitted her to make false allegations. Moreover, the material reflects badly on her character in general because it describes dishonesty, shoplifting, drug -taking and the consumption of alcohol to excess. At one point in the recorded material N described herself as having "made it all up". She also said that the appellant,

> "doesn't deserve to go to prison or anything ... cuz I deserved everything I got".

She said:

> "I kinda lied a bit cuz I couldn't remember what happened".

She describes giving oral sex to another man, aged 22, at a party on an occasion when she was "cheating on the appellant". She said that she was 12 or 13 at the time and that after she had left the party,

> "wearing nothing but my jeans and his jacket (fuck knows where my top went) I collapsed in the street and started crying my eyes out. (as well as being very drunk and stoned)"

- that was shortly before she took the overdose. Elsewhere she records:

> "I have come to the conclusion that I am a complete and total slut/slapper/slag/whore."

She added:

> "sex has always ruined my relationships... when I go out with people for a long time I seem to find things that bug me about them... but only over time... people who seem perfect at first slowly start to annoy the fuck out of me."

There is another description of a willingness to participate in a sordid act of sex with another young man. As we have recounted, there are extensive references to dishonesty, drunkenness and drug -taking.

11. Plainly if this material had been available to the defence at the time of the trial it would have been deployed in cross -examination. Having regard to the circumstances and the issues in the case we have little doubt that the judge would have permitted cross -examination by reference to it.

12. We do not know, and cannot know, where the truth lies in this case. That is not our role. What can be said with certainty is that if the material had been available the case would have taken a very different course from the one that it did. This brings us back to the criticism which Mr Cranmer -Brown originally made of the summing -up. We do not need to involve ourselves as to whether that criticism was well -founded within the parameters of the case as it had been contested at trial. What we can say with confidence is if this material had been before the court the judge would not have expressed himself as he did in the summing -up. Thus at the end of the summing -up, having rehearsed the evidence, the judge said this:

> "Members of the jury, that's it.
>
> On any view - and I'm going to make some comments now which you can either accept or reject - these are allegations, some of them bizarre, made by a young girl who was a twelve year old at the relevant time, and I've told you to be cautious;"

There follow some three or more pages in the transcript of unapologetic comments, admittedly with the stricture or advice that it could be either accepted or rejected. But it is clear that, contained within it, was comment favourable to the prosecution case and

based on the impression that N had given in the way in which she had given her evidence. The judge posed a number of rhetorical questions, the implication behind them being: was it at all likely that a girl of her age, having presented herself as she had, would have been able to describe these things in the way that she had if they had not in fact occurred? He said this at one point:

> "You may think someone who could invent such allegations as she's made ... would have to be someone with a very unusual imagination indeed. Is that her? You've seen her. Everyone accepts she was a mixed up twelve year old with problems at home because her parents are angry. Is she so mixed up that she did all these things? Are all these allegations of her accounts and why she went along with it simply fantasies? ... You may think that someone who could indulge in such practices at the age of ... with a twelve year old, would have to be a strange character with a very strange mind indeed. You've seen both of them. She's now fifteen; he's twenty. You've seen her again this morning. Was that a lying, conniving young woman who's invented this list of sexual allegations ... or was it a nervous, vulnerable, fifteen year old, biting her lip, getting dates and months wrong, having been very scared before she came to court about being caught out on detail, or is it all part of a plot, for some reason, to do him down? ..."

13. Notwithstanding the repeated injunctions to the effect that these were all matters for the jury and not for the judge, the rhetorical questions plainly must have given an impression that could only have been interpreted as favourable to the prosecution case. As we have said, that would not have occurred if the court had been in possession of the material which we now have. We express no view as to who was or was not telling the truth as between the appellant and N. All we have to do is to consider whether the convictions of the appellant are safe in the light of this new material. In our judgment, it is clear that they are not. The prosecution informed us in advance of the hearing that the Crown is not seeking a retrial. Mr Warburton has told us this morning that the reason behind that stance is that the material presents N in an entirely different light from that which emerged at trial. The difficult decision as to whether or not there should be a retrial has been reached after a careful consideration of the circumstances, including the views of N and her family. That family have wisely agreed that it would not be in her interest for there to be a retrial.

14. In the circumstances, we shall quash the convictions for the reasons we have already given. It is unnecessary to consider the summing -up in the light of the state of the case at trial, although we make one further observation. One of the complaints is that the judge, in refusing to give a direction in accordance with the case of R v Makanjuola [1995] 2 Crim App R 469 committed an error because there were such obvious concerns about N's reliability, and it is common ground that there was no evidence against the appellant other than that which was provided by N. Whether or not the judge was in error in refusing to give that direction at trial we take the view that if the material that we now have had been before the jury at the trial, it is almost certain that he would have taken a different view. For all these reasons, therefore, we quash the convictions and the appellant is discharged from custody.