

No. 719/G/86

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice,

Tuesday, 17th June, 1986.

Before:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Lane)

MR. JUSTICE McCOWAN

and

MR. JUSTICE ROSE

R E G I N A

-v-

DAVID COX

(Transcript of the Shorthand Notes of Marten Walsh Cherer Ltd.,
Pemberton House, East Harding Street, London, EC4A 3AS.
Telephone Number: 01-583 7635. Shorthand Writers to the Court.)

MR. D. STANLEY appeared on behalf of the Appellant.

MR. C. HOTTEN appeared on behalf of the Crown.

J U D G M E N T
(As approved by Judge)

A THE LORD CHIEF JUSTICE: On 13th January this year at the Crown Court at Dudley, this appellant, David Cox, was convicted of rape and was sentenced to twenty one months' imprisonment.

He now appeals against that conviction by leave of the single Judge.

B The complainant was a young woman of 20. She lived in a flat with her boy friend Graham and their two young children. The appellant and his brother called Mark were friends of Graham.

C On 4th July last year unfortunately Graham was arrested by the police for being drunk and disorderly. He was foolish enough to decline to give his address to the police and consequently he remained in police custody. That was known to the appellant, it was known to the complainant and it was also known to the appellant's brother Mark.

D The three of them and one other man found themselves in the complainant's flat. All the others left, but the appellant stayed behind. Then, according to the complainant, the appellant made advances to her and raped her on the sofa twice. She cried and tried to push him away. She said she made it clear she did not consent. That was on the night of 4th/5th July.

E The appellant was not arrested until 6th July, in the early hours of the morning, about 4 o'clock. He had two interviews with the police. The first one contained a number of equivocal statements, which might, on one interpretation, be viewed as admissions. But eventually he made a statement under caution which contained the following passage: "She said 'No', but I grabbed her arm and pulled her on to my lap. I put my hand on her leg and moved it under her skirt. She said it wasn't right but I carried on. She tried to get off my lap. I pulled her back. I then grabbed her arm and pulled her on to the settee. I asked her for sex again but she said 'No', but it had gone too far. I was worked up. I wanted sex with her so I screwed her on the settee."

G The appellant in his turn gave evidence. He said that he had met the complainant in the past. She obviously liked him. They had kissed previously. H On the night in question the opportunity was there for them to have intercourse

A in the absence of Graham. They kissed and they cuddled. They went over on to the settee. The complainant took her own knickers off and thereby, so to speak, invited sexual intercourse.

B There was no evidence of any injury to the complainant at all and there was no evidence of any damage to her clothing. As to the statement which he had made to the police, the appellant said that it was made in oppressive circumstances and that it was merely agreeing to what was put to him by the police.

Those very briefly were the circumstances.

C The only ground of appeal put forward by Mr. Stanley on the appellant's behalf is that the Judge came to a wrong conclusion as to the admissibility of certain evidence under the provisions of section 2 of the Sexual Offences (Amendment) Act 1976, the material parts of which read as follows:

D "(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

E "(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked."

F G H The circumstances in the present case were these. First of all, recapitulating in precis form something which I have said earlier, the sexual intercourse took place between the appellant and the complainant in the early hours of 5th July, Graham having been detained in custody earlier as the appellant and the complainant knew. The appellant left

A the flat at about 8 o'clock in the morning of 5th July, having been asked,
so he said to the jury, by the complainant to say nothing to Graham about
what had gone on during the previous hours of darkness. Some time later
that morning, 5th July, the complainant was rejoined by Graham with whom
she spent the rest of the day. It seems that it was not until about
half an hour before midnight of that day that the complainant alleged to
B Graham that she had been raped. As a result of that it was not until 4 o'clock
the following morning, 6th July, that the police, as already indicated,
went to the appellant's flat in order to arrest and question him.

C The defence wished to cross-examine the complainant, and possibly also
to seek to call evidence, about an earlier occasion affecting the complainant.
The earlier occasion, it was said, involved the following facts, that she,
when Graham was away, had had sexual intercourse with another man called
D Steven. Having had sexual intercourse with her, Steven, somewhat ungallantly,
went and told Graham what had happened. Graham was enraged and had tackled
the complainant about it, whereupon she had said that she had been raped by
Steven, that the sexual intercourse with him, albeit it had happened, had
E been without her consent.

F There was a proof of evidence from Steven available to the defence
and we have a copy of it ourselves. Steven asserts that that was the case,
that he had had sexual intercourse with her consent. He asserted in his
proof that he had told Graham about it. He said that he had heard that
he was being accused of rape by the complainant. He had gone round to
see Graham and the complainant together, and in the presence of Graham the
complainant had admitted that she had accused him of rape and had admitted
G that that accusation was false. That was the evidence which the defence
wished to broach by way of cross-examination of the complainant.

H The Judge ruled against the defence, and it is desirable that I
should read the passage in his ruling which is relevant:

"Perhaps she [the complainant] would say, 'Yes', to the suggestion, but it seems to me that whatever be the fact of that, the question for me is the same, is that matter relevant to the question whether she consented or not on the occasion the subject of the indictment, the sexual intercourse with the defendant? Speaking strictly, in my judgment, it is not relevant to that question. I apply what I understand to be the ordinary tests of relevance so far as I understand them and I do not think that that matter is relevant to the question whether or not she consented to intercourse with this defendant, but I acknowledge that such cross-examination could affect her credit. Whether it affected it substantially or not might well depend on how the case developed, and so it seems to me that as it is of relevance in that sense, possible relevance to her credit, that I have to consider whether in fairness I should allow cross-examination, applying the test of whether or not it would be unfair to prevent the cross-examination. I have thought carefully about that and I acknowledge that the situation might change if the case went in a way that justified a further application and reconsideration of the matter, but at the moment, in my judgment, it is not unfair for the defendant to refuse leave to cross-examine because the girl may quite properly be asked questions without any leave from me to establish that she did not want Graham to know about what had happened and to establish that she was sure in the sense that she powerfully believed that he would leave her, or might leave her, if he did know that she had willingly had intercourse with the defendant, if that were the case, and it could be put to her that she knew that Graham perhaps, being a fair man, would not leave her if he believed that she had been raped. I suppose it could even be put to her that he had told her so, but that is not for me to decide how the questions should be put, they are in safe hands..... I rule that you cannot adduce that evidence. You can adduce evidence of her saying it should not have happened, but you must not, please, if you can possibly avoid it, ask a question which encourages

"your client to say that she made any reference to, 'Last time'."

A The way in which the matter should be approached, and one acknowledges
that it is a difficult matter for any Judge to decide in any particular case
whether it would be unfair to exclude such cross-examination, was suggested
in the judgment of this Court in Viola (1982) 75 Cr. App. R. 125, at page 130:
"The result is that generally speaking -- I use these words advisedly, of
B course there will always be exceptions -- if the proposed questions merely
seek to establish that the complainant has had sexual experience with other
men to whom she was not married, so as to suggest that for that reason
she ought not to be believed under oath, the judge will exclude the evidence.
C In the present climate of opinion a jury is unlikely to be influenced by
such considerations, nor should it be influenced. In other words questions
of this sort going simply to credit will seldom be allowed.....

D "On the other hand if the questions are relevant to an issue in the
trial in the light of the way the case is being run, for instance relevant
to the issue of consent, as opposed merely to credit, they are likely to
be admitted, because to exclude a relevant question on an issue in the trial
E as the trial is being run will usually mean that the jury are being prevented
from hearing something which, if they did hear it, might cause them to
change their minds about the evidence given by the complainant. But, I repeat,
we are very far from laying down any hard and fast rule."

F The result of that and the effect of the proposed questions and evidence
is to indicate that it was not so much the sexual intercourse with Steven in
the earlier event which was of importance, but what she said about it
afterwards, and it was really that which was the subject of the application.
G It is true that the learned Judge indicated that there was a line of
questioning which was open to the defendant falling short of the question
which he had ruled should not be put. But if the defence was to be prevented
from putting to the complainant the real nub of the Steven incident, namely
H that she had accused him of rape and had then admitted later that that

accusation was false, the effect of the cross-examination would be largely lost.

A We have come to the conclusion that to stop the questioning short of that point was unfair to the defendant. The chances are that, if that cross-examination had been allowed, the jury might very well have come to a conclusion, against the background of the case as I have illustrated, which would not have been the same as the conclusion at which they actually arrived.

B For those reasons, whilst once again acknowledging the difficulties this section presents to Judges who are faced with a submission based upon it, we have come to the conclusion that this conviction was unsafe and unsatisfactory, and accordingly the appeal is allowed and the conviction is quashed.

C MR. STANLEY: I ask you to consider the question of costs. I apply for costs out of central funds.

D THE LORD CHIEF JUSTICE: You are legally aided are you?

MR. STANLEY: Yes.

THE LORD CHIEF JUSTICE: Yes, so be it.

E MR. STANLEY: That certainly applies to this Court. I ask you to consider it so far as the proceedings in the Crown Court are concerned as well. The Court has power to make the order.

THE LORD CHIEF JUSTICE: Could you refer us to the regulation?

F MR. STANLEY: It is in Archbold, page 786/787, section 7 of the Costs in Criminal Cases Act 1973. "If the Court of Appeal is invited to exercise its discretion in respect of costs in the Court of Appeal, the Crown Court and the magistrates' court respectively, the court should consider each court in turn, for different circumstances involve different considerations and demand a separate exercise of the discretion in respect of the costs in each court."

THE LORD CHIEF JUSTICE: Yes. Costs here and below out of central funds.

G MR. STANLEY: I am obliged.

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