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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Tuesday 6 November 2012

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Judge)

MR JUSTICE MITTING

and

MR JUSTICE GRIFFITH WILLIAMS

R E G I N A

- v -

CHEDWYN EVANS

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Mr T Fish QC and Miss L Judge appeared on behalf of the Applicant

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J U D G M E N T

THE LORD CHIEF JUSTICE:

1. This is a renewed application for leave to appeal against both conviction and sentence following refusal by the single judge.

2. On 20 April 2012 in the Crown Court at Caernarfon before His Honour Judge Merfyn-Hughes QC and a jury the applicant was convicted of rape (count 2). He was sentenced to five years' imprisonment. Appropriate orders following his conviction for a sexual crime were made.

3. A co-defendant, McDonald, was charged on count 1 of the indictment with rape on the same girl. He was acquitted by the jury.

4. The facts are these. The complainant, who was 19 years old, worked as a waitress in a restaurant attached to a hotel in Ruddlan, North Wales. The applicant and McDonald were close friends. There is no doubt that McDonald had sexual intercourse with the girl on the night of 29/30 May 2011. Equally, there is no doubt that the applicant also had sexual intercourse with her. The issues for the jury were: whether she may have consented, although she had consumed a large quantity of alcohol; and if she did not consent, whether the applicant (and McDonald in his case) may reasonably have believed that she had consented to the sexual activity which took place between her and McDonald and between her and the applicant. The complainant stated that she had no memory of any sexual activity with either of the two men.

5. On 29 May 2011 the complainant finished work shortly before midnight. She drank some alcohol, went home, showered and then went to a bar in Rhyl, where she arrived at just after 1.30am. She drank vodka and left at about 3am. She said that she could not recall leaving the bar. She had a vague recollection of being in a kebab shop and of a large pizza box. CCTV footage, which was recovered, showed her outside the bar in Rhyl, inside and outside a kebab shop in Queen Street, and eventually her arrival at the Premier Inn where the offence with which the court is concerned took place. The owner of the kebab shop described her as being drunk and unbalanced. The CCTV footage, which we have not seen because it is accepted that this was accurately summarised by the judge in his summing-up, showed that while she was inside the kebab shop she was unsteady on her feet. At one point she fell over and landed on the floor. On the other hand, outside the kebab shop she could be seen eating pizza from a large box, although she was also seen to stumble, squat, lose her balance, and walk unsteadily. Indeed, she left her handbag in the shop. Based on this evidence, the prosecution case was that she was very drunk.

6. The applicant and McDonald had spent the evening in Rhyl with friends. They, too, visited various licensed premises. At some time shortly before 4am McDonald became separated from the group of friends. The complainant seems to have wandered into his path in Queen Street. They had a conversation. They got into a taxi. The taxi driver thought that her upper clothing was somewhat dishevelled. The taxi driver took them to the Premier Inn, where the applicant had booked and paid for a room in McDonald's name. During the taxi journey McDonald sent a text message to the applicant telling him that he had "got a bird" or words to that effect.

7. The prosecution case was that the applicant had booked the room at the Premier Inn with the main or sole purpose of procuring a girl or girls later that night. According to the Crown's case, both men were on the look-out for any girl who was a suitable target. The complainant had

literally stumbled across McDonald's path.

8. The complainant had no recollection of anything which took place after 3am. That extended to the fact that she and McDonald entered the hotel at 4.15am. The night porter (Mr Burrough) described her as "extremely drunk". That reinforced the Crown's case based on the evidence of witnesses and the CCTV footage before she had arrived at the hotel. While en route to the room Mr Burrough heard her say to McDonald "You're not going to leave me, are you?" They entered a bedroom in which various sexual acts took place and eventually they had sexual intercourse.

9. In the meantime, no doubt in answer to the message that he had received from McDonald, the applicant arrived at the same hotel with two other male friends. He persuaded the night porter to give him a key card to the room occupied by McDonald and the complainant. He said that he had booked the room for a friend who no longer needed it. The applicant entered the room. Sexual intercourse between McDonald and the complainant ceased. The applicant performed oral sex on the complainant and then had vaginal sex with her. While it was taking place Mr Burrough went to check what was happening. He waited outside the room for a while and concluded from the noises that he could hear within the room that a couple were having sexual intercourse. No other concerns were raised in his mind.

10. The applicant's two companions remained outside the hotel. They looked through the bedroom window and filmed what was taking place with a mobile telephone until the curtains to the bedroom were closed.

11. After about half an hour McDonald left the hotel via the reception. He had a brief word with the night porter, telling him that he should look out for the girl in room 14 (the room in question) because she was sick. The applicant did not leave by the front door; he went out by an emergency exit. McDonald and the applicant met up outside and they returned to the applicant's home.

12. The complainant said that her next memory was waking up in the hotel room at about 11.30am. She realised that she was alone. She was naked and had urinated in the bed. She had a headache and was confused. She reported the matter to the police.

13. She was examined by a doctor and various samples were taken. As a result of an examination of the samples, at that stage, notwithstanding the direct evidence that she had had a good deal to drink the evening before, no alcohol was detected. That may have been the consequence of its elimination over the course of time. Expert evidence sought to reconstruct the amount of alcohol she had consumed at an earlier stage. The doctor found no injuries to the complainant. The tests also revealed traces of cocaine and cannabis. The evidence was consistent with cocaine and cannabis having been ingested some days earlier.

14. The applicant was interviewed. He agreed that he had had both oral and vaginal sex with the complainant. His case was that she had consented. This was the case he advanced at trial.

15. McDonald, who was also on trial, gave evidence that the complainant approached him in Queen Street. He asked her where she was going. She replied by asking where he was going.

He said that he was going to his hotel and she said that she would go with him. He then sent the text message in case the applicant was worried about where he had gone. According to McDonald's evidence, in the hotel room sexual activity was initiated by the complainant. She gave every indication that she was enthusiastic and enjoying herself. He did not force her to do anything she did not wish.

16. The applicant accepted that he had booked the hotel room which was later used by McDonald. That was the point. It was for McDonald and another friend to stay -- not a place for them to take girls. He intended to have a night out with his male friends; he was not looking for girls. He admitted that he had lied to the night porter to obtain a key card. He did so because he was aware of the policy in the hotel about multiple occupation of rooms and thought he might be denied entry. When he arrived at the room it was immediately apparent to him that McDonald and the complainant were engaged in enthusiastic consensual sex. When she was asked if the applicant could join in, the complainant clearly replied "Yes". McDonald stopped. The complainant asked the applicant to perform oral sex on her. He did so and then they had sexual intercourse. Throughout all the activities with him she was enthusiastic, wide awake and she consented to everything that happened. He agreed that he had left the hotel using the fire exit.

17. The expert called by the defence calculated that the complainant's likely blood-alcohol level at about 4am would have approximated to something like 2½ times the legal driving limit. He gave evidence that she would have suffered from slurred speech and unsteadiness of gait, but he would not have expected any memory loss. It was an essential part of his expert evidence that there were significant doubts about the claim made by the complainant that she had suffered a memory loss. In effect, it was suggested that her assertion was false.

18. This was a classic case for decision by the jury. Having deliberated following the judge's directions on the law and his summing up of the evidence, they reached the verdicts we have indicated: not guilty in the case of McDonald; guilty in the case of the applicant.

19. In grounds of appeal the first issue is the suggestion that the verdicts reached by the jury were inconsistent. Mr Fish QC, on the applicant's behalf, submitted that if the jury acquitted McDonald, there could be no sensible basis on which they could convict the applicant. We noted in argument that it was not alleged that McDonald was a party to the rape of the complainant by the applicant. The verdict was not related to that count; he was acquitted of raping her himself. We also note that in his sentencing remarks the judge was satisfied that the complainant lacked the capacity to consent to sexual activity. That was simply his view; he would not know how the jury had reached its own decision, but we must respect his analysis. But however it is examined, and assuming that he was wrong about the basis on which the jury reached its conclusion, we find nothing illogical or inconsistent about the verdicts. The jury was directed in unequivocal, clear terms as follows:

> "When you come back .... you will be asked to return separate verdicts in respect of each of the two defendants. Accordingly, when you retire you must consider the case, that is to say the evidence for and against each of the two defendants separately. Whilst there is a considerable overlap in that evidence, the

> evidence is not identical, and whilst your verdicts may very well be the same in the case, they might be different. The important thing for you to remember is your approach to the case for and against the defendants must be considered separately."

20. Given that direction, it was open to the jury to convict both defendants, to acquit both defendants, or to convict one and not the other defendant. That was the point of a joint trial in which separate verdicts were to be returned. It was open to the jury to consider, as it seems to us, that even if the complainant did not, in fact, consent to sexual intercourse with either of the two men, that in the light of his part in what happened -- the meeting in the street and so on -- McDonald may reasonably have believed that the complainant had consented to sexual activity with him, and at the same time concluded that the applicant knew perfectly well that she had not consented to sexual activity with him (the applicant). The circumstances in which each of the two men came to be involved in the sexual activity was quite different; so indeed were the circumstances in which they left her. These seem to us to be matters entirely open to the jury. There is no inconsistency.

21. We turn to a criticism of the summing-up. It involves an analysis of the directions given to the jury about the issue of consent in the context of the consumption of alcohol and/or drugs. The written submissions also criticise selected passages in the summing-up and draw our attention to perceived problems to which they give rise. Let us examine the directions. There are two broad complaints. One is (and we summarise the more detailed submission) that nowhere in the summing-up is it made clear to the jury that, even if the complainant was drunk, it did not necessarily mean that she had not consented. Mr Fish reminded us that "a drunken consent is still a consent".

22. The second matter that he suggested required attention was a direction to the jury that if they found (contrary to the evidence given by the expert called for the applicant) that the complainant had no memory of events in the bedroom, that did not mean that she did not consent. The judge addressed this issue in clear terms. He began by directing the jury in the precise words of the relevant statutory provision:

> "A complainant consents if, and only if, she has the freedom and capacity to make a choice, and she exercised that choice to agree to sexual intercourse."

He then addressed the implications and consequences of the evidence that the complainant had been drinking and had possibly taken cocaine. He said:

> "There are two ways in which drink and/or drugs can affect an individual who is intoxicated. First, it can remove inhibitions. A person may do things when intoxicated which she would not do, or be less likely to do if sober. Secondly, she may consume so

> much alcohol and/or drugs that it affects her state of awareness. So you need to reach a conclusion upon what was the complainant's state of intoxication, such as you may find it to be. Was she just disinhibited, or had what she had taken removed her capacity to exercise a choice?"

He went on to explain:

> "A woman clearly does not have the capacity to make a choice if she is completely unconscious through the effects of drink and drugs, but there are various stages of consciousness, from being wide awake to dim awareness of reality. In a state of dim and drunken awareness you may, or may not, be in a condition to make choices. So you will need to consider the evidence of the complainant's state and decide these two questions: was she in a condition in which she was capable of making any choice one way or another? If you are sure that she was not, then she did not consent. If, on the other hand, you conclude that she chose to agree to sexual intercourse, or may have done, then you must find the defendants not guilty."

He went on to direct the jury about the requirement relating to the individual defendant's belief about whether or not the complainant was consenting. He gave clear directions to the jury about how they should approach that issue in the context of the alcohol which had been consumed by the complainant.

23. As it seems to us, those directions to the jury amply encapsulated the concept of the drunken consent amounting to consent. The judge did not use those express words; there was no obligation on him to do so. On occasions when those words are used or the issue is put in that way, it causes umbrage and indeed distress. But that he covered the concept of capacity and choice in his directions to the jury seems to us to be clear. The contrary is not arguable.

24. It is true that the judge did not direct the jury that the complainant had no memory of these events and that they should not take that into account in deciding whether or not she consented to what was happening. But that did not need to be said. That was not the issue in the case. If the judge had indeed suggested that the absence of memory was of possible relevance to the question, he would have had something to say about it. The issue of memory, it will be remembered, was addressed in the course of the trial on the basis that it went to the credibility of the complainant. The defence expert said, in effect, that it was open to question whether she was telling the truth when she asserted that she had lost her memory. In those circumstances the absence of any specific direction on the subject by the judge does not seem to us to amount to an

arguable basis for allowing the appeal.

25. We have examined each of the passages identified by Mr Fish in his written submissions to see whether, taking them individually or cumulatively, they suggest that, having warned the jury against the risk of speculation, the judge then indulged in speculation of his own and offered theories of his own, in particular in relation to the possibility that the complainant had taken drugs on the night in question. In the summing-up the factual issues were carefully identified to the jury and appropriate directions were given to them by the judge. The observations of which criticism is made seem to us to amount to no more than legitimate judicial comment designed to assist the jury to reach their verdicts. Indeed, on one view (though we do not attach weight to it for present purposes) the acquittal of McDonald demonstrates that the jury was not improperly influenced, certainly against him. Looking at the summing-up as a whole, it would have been impossible improperly to influence the jury against the applicant without the same occurring in the case of McDonald.

26. The third ground of appeal relates to fresh evidence. A civilian witness produced a statement which indicated that from time to time he had heard the complainant say that, having taken a lot of drink, she had no recollection of the previous night. That takes the applicant's case no further. It reinforces (if it is to be taken into account at all) that lacking memory after too much drinking was not asserted on this occasion for the first and only time. It was something which happened on other occasions. The matter is taken no further. Mr Fish rightly did not seek to rely on that evidence.

27. The other element of fresh evidence is expert evidence. We have studied a report prepared by Professor John Birch, a consultant pharmacologist, a professor of biomedical science. His specialist field is psycho-pharmacology. His report is dated 15 May 2012. Towards the end of his report he says:

> "From the evidence of [the complainant] she appears to have suffered anterior-grade amnesia as a result of the high dose of alcohol which she consumed, and in particular that she consumed a substantial dose of alcohol during the last hour or so prior to leaving the nightclub. It appears from the evidence that her short-term memory was functioning at the time around the incident, but that the long-term record of that memory has been ablated by the high concentration of alcohol. There is, therefore, no memory record of those events and attempts to jog the memory may lead to confabulation. The fact that she has no memory of events does not mean that she was not able to participate in a meaningful way in events at that time, and I am quite clear that this includes the ability to make informed decisions in relation to consent. Acute alcohol intoxication may lead to substantial disinhibition and that may in itself lead to unwise judgments being made. But the fact that she does no longer remember having made a decision is a failure of the memory process and not of the decision-making process. Evidence of memory loss as a result of anterior-grade amnesia

does not in itself prove that she lacked the capacity to consent."

28. As we have said, the judge rightly did not direct the jury to consider that loss of memory, even if the jury was satisfied that it was genuine -- that was an issue in the case -- provided evidence that at the time when sexual activity took place the complainant was not consenting. If the judge had said something like that, then the fresh evidence might have been of value. What the evidence does is to reinforce something denied by Dr Eccles: that the claim to loss of memory was not and could not be right. It suggests that, having consumed the amount of alcohol she had, the fact that her memory was lost of itself was of no great significance one way or another.

29. We are asked to consider this as fresh evidence under section 23 of the Criminal Appeal Act 1968 in a trial where the issue of loss of memory in the form of expert evidence was addressed. In effect, it is now proposed that a new expert should be called to disprove the evidence given by the former defence expert and to assert no more than that the claimed loss of memory does not of itself lead to any implication that the complainant was not consenting to sexual activity at the time when it took place.

30. In refusing leave on this ground the single judge observed:

> "I have perused the 29 page report but have found difficulty in identifying those 'specific areas' on which reliance is placed. In any event, the applicant called expert evidence at trial and it appears that the applicant now wishes to adduce some further and better expert evidence. I am not persuaded, especially where the specific aspects of a long report on which reliance is placed have not been identified with clarity, that the fresh evidence, even if admissible on appeal, is such as to render the verdict of the jury unsafe."

We agree with those observations. As it seems to us, this fresh evidence does not, taken at its highest from the applicant's point of view, serve to undermine the safety of the jury's verdict. Accordingly, without further consideration of it, we decline to admit it.

31. The final ground of appeal we were asked to consider was whether, looking at the facts overall, in the light of the concerns drawn to our attention by Mr Fish, we should consider whether this is a case in which to apply the "lurking doubt" principle identified in R v Cooper [1969] 1 QB 267, 53 Cr App R 82. This is not an appropriate time at which to examine why it is inappropriate to describe the Cooper principle as a "lurking doubt" principle. We can see no possible basis which would justify us to interfere with the verdict of the jury which heard all the evidence and reflected on it following a careful summing up by the judge.

32. In those circumstances the renewed application for leave to appeal against conviction must

be refused.

33. When he came to pass sentence the judge said:

> ".... [the complainant] was in no position to form a capacity to consent to sexual intercourse, and you, when you arrived, must have realised that."

That accurately reflected the way in which the verdict should be interpreted. No force had been used on the complainant and no injury had been caused in the course of the rape. But the long-term psychological consequences to her could not be ignored. The judge took the view that they were not lessened by the fact that she had no direct recollection of the events.

34. The appropriate range of sentence for this type of rape, according to the current guideline, is between four and eight years. We are asked to consider the possibility of a relatively small reduction of the sentence from five years' imprisonment to four years' imprisonment. Anything less than four years would be open to the criticism that it was unduly lenient.

35. Having reflected on this sentence which passed by an experienced and highly respected judge, we have come to the conclusion that the sentence fell within the appropriate range. There is no basis to justify interfering with it

36. Accordingly, the renewed application for leave to appeal against sentence must also be refused.
