[2025] EWCA Crim 637

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT BRADFORD
(HIS HONOUR JUDGE WATSON) (T20227375)

Case No 2023/04554/B3

Tuesday 18 March 2025

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE McGOWAN DBE

MR JUSTICE NICKLIN

R E X

- v -

NASSER AHMED NAWAZ

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Non Counsel Application

J U D G M E N T
(Approved)

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LORD JUSTICE HOLROYDE: I shall ask Mr Justice Nicklin to give the judgment of the Court.

MR JUSTICE NICKLIN:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that 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 the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. This is a renewed application for leave to appeal against conviction following refusal by the single judge.

3. On 1 December 2023, in the Crown Court at Bradford, the Applicant (then aged 55) was convicted in his absence of one count of rape, contrary to section 1 of the Sexual Offences Act 2003. On 8 December 2023, the Applicant was sentenced, in his absence, to 12 years' imprisonment. A co-accused was also convicted of rape and was also sentenced to 12 years' imprisonment.

4. Since his failure to surrender to bail at his trial, the Applicant has been at large. He was represented at trial by solicitors and counsel. The same solicitors have lodged his application for leave to appeal.

5. An initial point therefore arises for determination: whether the solicitors have the Applicant's authority to renew an application for leave to appeal on behalf of the Applicant. The principles are set out in ***R -v- Okedare*** **[2014] 1 WLR 4071**:

> [36] The question then arises what happens if the single judge refuses the application or declines to refer it. It becomes much harder to infer authority where there is a real risk of adverse consequences to the convicted person, for example one who has been remanded in custody. The full court may well exercise the powers referred to in form NG, where a wholly unmeritorious application is pursued to the full court and precious time and resources (better devoted to meritorious applications) are wasted. This might mean an order for costs or that time served pending the determination of his appeal shall not count towards a sentence.
>
> [37] Thus, the lawyer has a duty to his client to advise him of possible rather than theoretical consequences of pursuing an application. For this reason, it became common ground during the course of argument that a lawyer should consider his duties to the client and to the court very carefully before advancing a renewed application that might have adverse consequences for the client, absent clear instructions from him. In these circumstances, the court may be unwilling to infer authority to renew from the mere fact of his having been instructed to represent the client at trial. However, again, the interests of justice may prevail and there may be cases where the court is prepared to entertain a renewal application notwithstanding any issue over authority.
>
> [38] If the defendant has nothing to lose by renewing an application, as

> may well be the case, it may be easier to persuade the court that authority should be inferred from all the circumstances, but, we emphasise, it remains a decision for the court.
>
> [39] Thus, unless the interests of justice demand a hearing of the merits (for example in the case of an unlawful sentence), the full court may well treat an application to renew made without instructions as ineffective. Time will continue to run in respect of it.
>
> [40] If the application to appeal/renew is out of time then the fact that it is being made by a person who has absconded is a matter which the court can properly take into account (amongst other factors including the reason for its delay and its merits) when deciding whether to extend time to the defendant or not. Such an approach is not disproportionate.

6. The Criminal Appeal Office raised with the Applicant's solicitors the issue of their authority to renew the application for leave to appeal. In an email, dated 23 January 2025, the solicitors replied as follows:

> "1. Mr Nawaz was tried and convicted in his absence. Mr Nawaz remained in contact throughout his trial. Following his conviction, Mr Myerson KC advised positive grounds to appeal against conviction. Mr Nawaz was made aware of this.
>
> 2. Mr Nawaz was informed of the refusal by the single judge and his options of renewing the application before a full court.
>
> 3. Mr Nawaz provided express instructions to renew the application for leave to appeal against his conviction. Mr Nawaz was to place us in funds.
>
> 4. Mr Nawaz was advised he would have to pay privately if he wished to be represented for the renewed application.
>
> 5. We have not been placed in funds and have no further instructions from Mr Nawaz.
>
> 6. We will not be representing Mr Nawaz for any renewed application."

7. That email establishes to our satisfaction that the Applicant was aware of the refusal of his application for leave to appeal by the single judge. Although not stated expressly in terms, we are satisfied that, in accordance with their duties, the solicitors would have advised the Applicant of the risks of the potential adverse consequences of renewing the application if it were ultimately to be unsuccessful. We are satisfied, therefore, that the solicitors did have the Applicant's authority to renew the application. The fact that the Applicant has not provided any further instructions to his solicitors, nor apparently put them in funds to represent him, does not alter this fact.

8. We therefore turn to consider the renewed application for leave to appeal against conviction.

9. The brief facts are these. The complainant was born in March 1988. In January 2019,

a report was made to the police that, when she was aged 15, the Applicant had taken her to Bradford to obtain drugs. In Achieving Best Evidence interviews in January and November 2020, the complainant made allegations against the Applicant and others.

10. The Applicant was interviewed by the police on 5 November 2020. He said that he had not known the complainant until she was aged 16 or 17 when she had lived with her dad. He said that allegations made by the complainant were lies, and that he had never had sex with her.

11. At trial, the prosecution relied upon evidence from the complainant and evidence from the complainant's brother.

12. Although he was absent from the trial, the case advanced by his representatives to the jury was that the Applicant had not had sexual intercourse with the complainant. The complainant had not made the complaint at the time, or in the years that followed, and it was said that she had later become convinced that the events had occurred, due the passage of time, effect of the use of illicit drugs and "tricks of the mind and memory". As he was absent from the trial, the Applicant did not give evidence.

13. The issue for the jury was whether the Applicant had vaginal sexual intercourse with the complainant. It was conceded that if the Applicant had had sexual intercourse, then the remaining elements regarding consent were proved.

14. In her written directions of law to the jury, as well as the usual directions relating to assumptions or stereotypical views about sexual offences and the effect of delay, the trial judge gave the following directions under the heading "Differing Account":

> "23. When you consider this allegation, you must not assume that the evidence C gave in court is untrue because she said something different to another person in the past. You heard that she did not mention the rape by either defendant when she spoke to a psychologist whilst in youth custody. She agreed that she had not told anyone in authority about the rapes.
>
> 24. You have to consider why she did not say it before. Just because C has not given an account previously does not necessarily mean that her evidence is untrue. Experience has shown that if someone has a traumatic experience such as the kind alleged in this case, their memory may be affected in different ways. [In some] it may affect that person's ability to take in and later recall the experience. Also, some people may go over an event afterwards in their minds many times and their memory may become clearer or can develop over time. But other people may try to avoid thinking about an event at all, and they may then have difficulty in recalling the event accurately.
>
> 25. The defence say that her memory has played tricks on her, and that what she remembers now is not a true memory. The defence say that whilst she may truly believe what she has told you, that she has misremembered what happened and/or who was responsible due to the passage of time, and the effect that the use of illicit drugs, at the time and in the months since, have had on her.
>
> 26. Your assessment of these factors will be influenced by your

> conclusions as to the facts of this case. You must form a view of what happened in this case based on all the evidence [that] you have heard. I am explaining these points so that you [can] think about them in your deliberations. I am not expressing any opinion. It is for you to decide whether or not C's evidence is true. To answer this question, you must look at all of the evidence. This includes any inconsistencies and differences in the accounts she has given, and her failure to mention the rapes at other times when she had an opportunity to do so. You must decide what effect these have on C's truthfulness and reliability.
>
> 27. If you are sure that C's account is [a] true reflection of what happened rather than something that she has misremembered, then you can rely on it in reaching your verdict. But you cannot rely upon it in reaching your verdict if you are not sure it happened or if you think [that] she did, or might have, misremembered it."

15. Mr Myerson KC, who represented the Applicant at trial, sought to persuade the trial judge to include a legal direction to the jury in the terms of paragraph 1.3 in the Appendix to Civil Procedure Rules Practice Direction 57AC in respect of the fallibility of human memory, which states:

> "Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:
>
> (1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but
>
> (2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore
>
> (3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."

16. Mr Myerson argued that such a direction was consistent with what Leggatt J had said about the fallibility of human memory in ***Gestmin -v- Credit Suisse*** **[2013] EWHC 3560 (Comm)** [15]-[23].

17. The trial judge refused to include a direction in the terms sought by Mr Myerson, but she did make amendments to the directions that she gave to the jury about the approach they should adopt to assessing the complainant's evidence. The judge did not consider that a practice direction governing the preparation of witness statements in civil litigation in the Business and Property Courts had a bearing in criminal proceedings. In the ruling that she gave she said this:

> "I am satisfied that the authority of *Gestmin* does not lay down general principles for the assessment of evidence in a criminal case, let alone a criminal case relating to non-recent sexual abuse. Rather, in my judgment, it emphasises the fallibility of human memory and the need to assess witness evidence in its proper place, alongside contemporaneous documentary evidence and evidence upon which undoubted or possible reliance can be placed, and it is expressly addressed to commercial cases where documentary evidence will often be the first port of call ahead of unaided

> memory. That is not the case in most of the non-recent historical sexual allegations that come before this court.
>
> It is common for this court to give juries directions regarding matters which are in the experience of the court but outside the experience of the jury. In cases of non-recent sexual assault, that involves response to sexual assault, assumptions that juries may have, and directions in relation to the delays in complaint and the reasons for it. The fallibility of memory is not something for which a specific direction is ever required. It is something that, in my view, is well within the understanding and experience of a jury…
>
> … I am satisfied that, sitting in a criminal jurisdiction, I am not bound to give the directions as set out in the Civil Procedure Rules, or any amendment of them as set out following the judgment of ***Gestmin***. And, in those circumstances, I decline to make the direction as sought. But, as I say, and as I made clear to Mr Myerson at the time, I amended the directions that I gave in relation to the matters that have been raised to make it clear, the defence case in relation to memory, and will direct the jury accordingly."

18. In the Advice prepared for the appeal, Mr Myerson KC, argued that the failure to direct the jury on the approach to evidence in accordance with this guidance, was to be contrasted by the extensive directions given on the approach to be taken by the jury when assessing the evidence of a complainant in a sexual offence case. The amendments that the judge made to the directions to the jury consequent upon her refusal to direct them in the terms of paragraph 1.3 of the Practice Direction, Mr Myerson argued, were insufficient to redress this balance. He particularly identified paragraph 24 of the written directions as not properly reflecting the guidance on the fallibility of memory. In consequence, he says that the summing up was unfair and unbalanced and that the jury's conviction was unsafe.

19. In refusing leave to appeal, the single judge gave the following reasons:

> "Attractively though the point is put, I do not think that it is remotely arguable. The whole of the judge's directions on the issue of memory, delay, changing accounts and potential prejudice to the defendants have to be read of a piece. Instead, the grounds of appeal focus on just one paragraph (paragraph 24 in the written directions on the law). If that paragraph is taken in isolation, there may be some force in the contention that it is pro-prosecution. However, a number of other paragraphs in the directions provide the necessary balance.
>
> I have to say that these legal directions, rather than being arguably flawed, are in my view exemplary.
>
> Finally, there is no advantage in seeking to draw analogies from a different legal context, viz. commercial law."

20. On this renewed application we have carefully considered the points that have been advanced for the Applicant in the Advice and proposed Grounds of Appeal.

21. The question on this appeal is whether the directions of law, particularly the directions as to the jury's approach to the assessment of evidence, were fair. Like the single judge, we are satisfied that they were.

22. The jury would have been left in no doubt of the factors that they needed to consider when assessing the complainant's evidence and deciding whether they were sure that her account was truthful. They had the benefit of Mr Myerson KC's speech which emphasised the points he made on behalf of the Applicant. This was not a case of nuance, for example a dispute between the accounts of two witnesses about what was said at a meeting. This was a case where the jury were asked whether they were sure that the complainant was telling the truth in the account that she gave. By their verdict they were.

23. The proposed ground of appeal advanced on the Applicant's behalf has no real prospect of success. The application for leave to appeal against conviction is therefore refused.
