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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT BRADFORD
(MR RECORDER DAVID GORDON) [T20227043]

Case No 2023/01438/B4
[2025] EWCA Crim 904

Friday 27 June 2025

B e f o r e :

LORD JUSTICE WARBY

MRS JUSTICE MAY DBE

HIS HONOUR JUDGE SHAUN SMITH KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

JAMES HARTLEY

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Mr K Vaughan KC appeared on behalf of the Appellant

Mr P Jarvis KC and Mr Espley appeared on behalf of the Crown

J U D G M E N T
(Approved)

Friday 27 June 2025

LORD JUSTICE WARBY:

Introduction

1. On 31 March 2023, following a trial in the Crown Court at Bradford before Mr Recorder David Gordon and a jury, the appellant James Hartley, who was then aged 26, was convicted of one count of assault by penetration, contrary to section 2(1) of the Sexual Offences Act 2003 (count 1). He was later sentenced by the Recorder to nine years' imprisonment for that offence, and to a concurrent sentence of 16 months' imprisonment for an offence of assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861, to which he had earlier pleaded guilty (count 2).

2. The appellant now challenges his conviction on count 1 as unsafe on the ground that the Recorder wrongly refused an application to adduce evidence of the complainant's bad character. The appeal is brought with the leave of the full court, granted at a hearing in February 2025. Also before us are two applications: the first, for leave to appeal against conviction on a second ground relating to allegedly false or inconsistent statements by the complainant; and the second, a linked application for leave to adduce fresh evidence, pursuant to section 23 of the Criminal Appeal Act 1968. Both those applications were adjourned to this hearing by the full court.

Anonymity

3. The complainant in respect of each count was the appellant's ex-partner. As someone complaining of a sexual offence, she has the right to lifetime anonymity under the Sexual Offences (Amendment) Act 1992. We will therefore refer to her as "C" and will omit some details that might lead to her identification.

The Background

4. The appellant and C were in a relationship for several years. There was, by all accounts, something of a history of violent behaviour. In February 2021 there was an incident in which the appellant hit C. It was at that time suggested that he had struck her on the arm. He then sought help with anger management. He was supported in this by C who confirmed to the appellant's doctor that the incident had been a one-off. There was a further incident on 17 September 2021, the details of which were disputed. Each party accused the other of initiating the violence. Each made a 999 call to the police who attended and arrested C. The relationship then broke down and the parties separated.

5. The two charges we have mentioned were each concerned with events some months later, on 29 January 2022. The agreed facts about that were that the appellant had visited C's home that evening and had assaulted her. He then went to his sister's home in the early hours and spoke to her about what had happened. She took him to hospital, where he was arrested. On arrest, the appellant said that he had no recollection of events, but "whatever C says I've done, I'm not going to fight and say I haven't done that, because I have no recollection". In interview he said that he had a vague recollection of going to C's home, but was confused and could not understand what had happened. Asked whether C would lie, he said "I don't know why she'd lie". He later admitted the physical assault, as we have indicated, but denied that any sexual assault had been committed.

6. At the trial of that charge, the prosecution alleged that by 29 January 2022, although not living together, the couple had re-kindled their relationship and often stayed overnight with one another. Whilst out socialising, the appellant had gained access to C's phone and thus became aware that she had returned to her previous work as an escort. He read messages on her phone from another man. He was upset, drank to excess, took drugs and then went to C's home, where he assaulted her both physically and sexually.

7. Some basic facts about the incident of September 2021, including the fact of C's arrest at that time, were placed before the jury by agreement. So, too, was evidence of the appellant's guilty plea to committing a physical assault on 29 January 2022. To prove the sexual assault, the prosecution relied on text messages sent by the appellant, which were said to show that he was in a state of advanced sexual jealousy and highly intoxicated, and on an Achieving Best Evidence interview in which C gave an account of what had happened when the appellant came to her home.

8. She said that they spoke for a while, but then the appellant's demeanour changed and he wanted to leave. She did not want him to drive due to his intoxication. So she took his keys and put them inside her bra and would not give them back. She was then assaulted. The appellant grabbed her throat, hit her head against the tiles and, whilst holding her to the floor, choked and strangled her and put his fingers inside her mouth. That was the physical assault in count 1.

9. The disputed allegations were that whilst assaulting C and holding her down by her throat, the appellant had pulled down her leggings and knickers and inserted his hand into her vagina. She later provided a further statement in which she added that whilst the appellant was penetrating her, he asked her why she was still breathing and told her to "just die". C's account went on to say that the appellant stopped the assault and passed out in the bathroom. C then sought help from a neighbour for him. Before the appellant left the address, and in his presence, C called the police and alleged rape or sexual assault.

10. The prosecution called evidence from three other witnesses. The appellant's sister said that he had come to her address at around three o'clock in the morning and had told her repeatedly that he had raped and tried to kill C, and that he needed to go to prison. She said

that he was in a poor state, could barely stand and was foaming at the mouth. She took him to hospital, where he was arrested. C's neighbour said that C had woken her by knocking on her door in the early hours. The neighbour had seen C's injuries, attended C's flat and had seen the appellant fighting with C. A consultant from the Accident and Emergency Department gave evidence of C's injuries, which included a small wound around the inferior aspect of the vaginal entrance.

11. The appellant gave evidence that his memory had now recovered. He was adamant that he had not committed any sexual assault; that C's evidence to that effect was fabricated. He suggested that she may have made it up to help her in the family proceedings between the couple. He suggested that her vaginal injury had been caused on a previous occasion, either by a client who had digitally assaulted her on 26 January, or by the appellant himself on the 27th in the course of enthusiastic, consensual sexual activity. There was some documentary evidence that C had been hurt on the latter occasion. She, however, denied that she had sustained the injury in question in either of the ways suggested. The remarks which the appellant admitted making to his sister were made, he said, when he was intoxicated and had been misinterpreted. He had only been parroting what C had alleged to him, which at the time he believed.

12. After the appellant had given his evidence, his counsel applied for leave to adduce the recording of the 999 call which the appellant had made in September 2021, as non-defendant bad character evidence, pursuant to section 100(1)(b) of the Criminal Justice Act 2003. The submission was that the recording showed C to have lied about what happened on that occasion. The application was refused. No further defence evidence was called, and the Recorder proceeded to sum up the case.

13. At 13.01 on 31 March 2023, the jury were sent out to consider their verdict. The issue for

them to decide was whether they were sure that the appellant had digitally penetrated C's vagina, as she alleged. At 15.12 on the same day, the prosecution served on the defence a Victim Personal Statement ("VPS") made by C. This contained assertions about what had happened between the appellant and C in February and in September 2021. At 15.56 the jury returned its verdict of guilty.

The Grounds of Appeal

14. The first ground of appeal is that the judge was wrong to refuse the defence application to adduce evidence of the 999 call as evidence that undermined C's credibility. The second ground of appeal relates to the VPS. This is said to contain an account of events that further undermines C's credibility by contradicting other accounts she had given about the incidents of February and September 2021, including her evidence at trial, and thereby demonstrating her to be capable of fabrication or exaggeration. It was originally alleged that there had been culpable non-disclosure of the VPS by the prosecution. It is now accepted that the document was not received by the prosecution until shortly before it was disclosed.

15. In the written Grounds of Appeal and in the skeleton argument of Mr Vaughan KC, who has very ably represented the appellant on this appeal, it has been argued that C's credibility was at the heart of the case, which was finely balanced, as shown by the time taken by the jury to reach a verdict, and the fact that the verdict was by a majority of 10:2. It is submitted that each aspect of the evidence now relied on should have been before the jury; they were capable, in combination and in isolation, of demonstrating fabrication and exaggeration. The statutory test for admitting non-defendant bad character evidence was met, and a conviction reached in the absence of such evidence should be declared unsafe.

16. Mr Vaughan has developed these submissions orally before us today. He has placed particular reliance on the decision of this court in *R v Brewster and Cromwell* [2010] EWCA

Crim 1130; [2010] 2 Cr App R 20, where, at [22] the court identified the relevant question as whether the evidence in question was "sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness' creditworthiness".

17. Mr Vaughan has emphasised in particular the contrast that he says exists between C's account of how the appellant had sought to get her out of the bathroom on 17 September 2021 and what can and cannot be heard on the recording of the appellant's 999 call.

Ground 1

18. In our judgment, this ground of appeal needs to be considered in its fuller context, which is as follows. In her ABE interview, C gave a relatively brief account of events the previous September and some account of what had happened in March of 2021. This was included in the version played to the jury. The reasons for that, and the basis on which it was done, remain somewhat obscure. It appears to have been agreed as evidence of the appellant's bad character, but it is important to note that it does not seem to have been presented to the jury in that way.

19. The flavour of the case and the way this evidence was treated by the Crown emerge from the transcript of counsel's opening, in which he summarised this part of the ABE interview as follows:

"Things had happened in September. She says that he hit her. She said that was because she was not particularly nice to him. She pushed him to leave because she did not want to be near him, and he left. She started seeing somebody else and they had been on a date. He beat her up again. The police came and arrested her, as she put it, because 'they couldn't prove who it was', and she was on police bail at the time of this incident, from the September incident that she described, and you can work out from what she says that there is a difference between his account and her account about what happened back in September. He says one thing, she says another. It may not matter, may matter. It is up to you."

20. C was cross-examined, without objection from the Crown, about what had happened in September 2021. It was put to her that the appellant did not throw her down the stairs and assault her, as she had alleged; that the truth was that C had become violent and she had assaulted the appellant by punching him, putting her fingers in his mouth and scratching the inside of his mouth. C denied this. She also denied making an allegation against the appellant that was not accurate. She agreed that there was a time when she was in the bathroom with the children. It was not the case that the appellant had knocked on the door and very gently tried to coax her out. She said that he had been very aggressive and had screamed at her to get out.

21. The appellant gave evidence. He said that events had unfolded in the way that had been put to C in cross-examination. He said that he had phoned the police. C had then locked herself in the bathroom and had called the police herself. As she did so, he had tried to calm her down gently. The appellant referred to the 999 call he had made. The bad character application was then made.

22. The recording of the 999 call was played to the Recorder. It runs to some seven minutes. It begins after the incidents of violence, whatever they were. The appellant gives the operator an account of what had happened and what was happening at the time he was speaking. He can be heard apparently asking C to open the bathroom door. In submissions to the Recorder the recording was said to undermine C's account of events in September 2021 and to show that at least some of her evidence to the jury about what happened on that occasion was fabricated. That, in turn, would undermine her credibility in relation to the issue for decision. This was a novel argument. The defence had made a written bad character application in a timely fashion, but this did not include an application to adduce the recording. The application to adduce the recording was made orally and never reduced to writing.

23. The Recorder could, in our judgment, have held that it was not appropriate to entertain it, being made informally, at the time it was, in contravention of the procedural rules. Nevertheless, he did entertain it. Having listened to the recording, he ruled that it did not "even come close to being admissible". The evidence related to events several months distant from the event in issue. The jury already had some evidence of those events, but the basis on which that evidence had been introduced, without a bad character application, was unclear to the Recorder. The fact that some such evidence had been adduced was not, in any event, a good reason to introduce more. The evidence was not contemporaneous with the alleged assault of September 2021 and did not help as to who was the aggressor in that incident. Even if it was relevant, it did not have, in the terms of section 100, "substantial probative value in relation to a matter in issue in the proceedings that was of substantial importance in the context of the case as a whole". The application raised the prospect of satellite litigation, which was likely to be an unwelcome distraction to the jury.

24. In his summing up, the Recorder mentioned the incidents of February and September 2021 and summarised what had been said each way. He directed the jury that it was not for them to try to resolve the rights and wrongs of those issues. These aspects of the evidence were presented as relevant only as background and context for the events of January 2022. The Recorder did not give a bad character direction, neither party seemingly having suggested that he should.

25. We have listened to the recording and considered with care the submissions of counsel. We find ourselves unpersuaded that the Recorder erred by ruling against the admission of this evidence.

26. In addressing the application, the Recorder correctly identified the issues for his decision under section 100(1)(b). In making a judgment on those issues he was required to take account

of the matters specified in subsection (3) of section 100, that is, putting it simply, the number of events relied on, how close in time they were to the events that were directly in issue, and how similar or dissimilar they were to those events. Having heard all of the evidence in the case, the Recorder was in a very good position to reach conclusions on those points. He plainly understood that the credibility of C was a matter in issue in the case. Accepting that, the Recorder was fully entitled to conclude that the 999 recording fell short of having substantial probative value in relation to an issue that was of substantial importance in the context of the case as a whole.

27. The evidence did not go directly to the single issue the jury had to decide, namely whether on the date in question, having first assaulted C physically, the appellant had then assaulted her sexually by penetrating her with his hand. The evidence related to events on a separate occasion four months earlier. There was no similarity between the two occasions. The evidence went only to C's credibility. It was not capable of showing that she had made a previous false allegation of sexual assault. It was about a single incident. It was not capable of demonstrating a propensity to lie. The evidence could not even demonstrate that she had lied about the essential facts of the physical assault that she alleged against the appellant on the earlier occasion. As the Recorder observed in the course of the argument below, on any view the incident on 17 September 2021 had come to an end when the parties made their respective calls to the police. Accordingly, whatever may have been said in the course of those calls had no bearing on who had been the aggressor. At best, therefore, the recording was capable of demonstrating that C gave a false account of the way in which the appellant sought to get her to come out of the bathroom on 17 September 2021, of his demeanour and of what he said on that occasion.

28. It was, in our judgment, fair and reasonable for the Recorder to characterise this as a satellite issue that risked distracting the jury. The collateral issue of who did what to whom in

September 2021 had already been the subject of evidence from both parties, tested in cross-examination. We do not agree with the submission of Mr Vaughan that this of itself opened the door to the application in respect of the 999 call. An application to adduce it could have been made during C's evidence. We do not know why that was not done. At all events, the introduction of the recording, particularly at this late stage in the case, would inevitably have generated debate about how its significance should be assessed. It was quite proper for the Recorder to draw a line under that aspect of the evidence.

29. Nor do we consider that the non-admission of this evidence casts doubt on the safety of this conviction. The evidence on the central issue was strong. C's allegations of sexual assault in January 2022 were corroborated by evidence of confessions which the appellant conceded he had made to his own sister, unprompted, immediately after his admitted physical assault on C. They were also corroborated by independent expert evidence based on a timely medical examination. The appellant had grounds on which he sought to explain these points away, but those grounds were not strong. His own accounts of events and his behaviour contained a number of improbabilities and internal contradictions.

Ground 2

30. The VPS is relied on as evidence of what C said in an out-of-court statement. As such, it is plainly credible and it could not have been adduced at the trial. Therefore it qualifies as fresh evidence. We do not, however, consider that it could afford any reason to allow this appeal.

31. Taken at face value, and in isolation, this is evidence of the bad character of the appellant, not of C. The VPS could only have utility for the appellant if coupled with evidence that its contents were mendacious or false, or at least materially inconsistent with other accounts C had given in such a way as to cast real doubt on her credibility.

32. Two points are made. The appellant contends, first, that the VPS gives an account of events in February 2021 which differs significantly from the versions that C gave to her GP at the time, and from what she said under cross-examination. In particular, in the VPS, C alleged that she had been punched to the head, as well as to the arms, which is all that she had said to the jury. We can see some differences, but we are not persuaded that the different accounts are irreconcilable. As the Crown has pointed out, the version of events C gave at trial was extracted from her in cross-examination by way of leading questions that were carefully and precisely framed. Counsel did not seek to elicit a full, freeform account of what had happened. The account in the VPS was much fuller. That is understandable given that, as we have been told today, this was C's own work. We therefore see no real weight in the argument that deployment of this aspect of the VPS would have been significantly beneficial to the defence.

33. Secondly, the appellant contends that the VPS gives an account of the September 2021 incident that is significantly different from the version that C gave to the jury, and that it is also contradicted by the 999 call recording. Again, to our minds the differences lie mainly in the degree of detail contained in the accounts and for the reasons we have given that can be easily understood.

34. We are thus brought back to the issue of whether the 999 call should have been admitted as evidence that C had told lies. We do not consider that the VPS bolsters the case for doing so. Rather, the contrary is true. The VPS says little about the events recorded in the call. The little it does say is consistent with the evidence C gave to the jury, and its admission would only have served to expand the scope of the evidence on a collateral and distracting side issue.

Disposal

35. For these reasons we refuse both applications in respect of the VPS, and we dismiss the appeal against conviction.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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