COA/CRIM/01/18

JUDGMENT

George BUTLER

Appellant

And

Regina

Respondent

before
JUSTICES OF APPEAL
COURT OF APPEAL

GIVEN ON

27th July 2018

*Representation*
*Mr Ciaran Rankin* — *Appellant*
*Mr Joseph Hart* — *Respondent*

*This judgment will be published indefinitely for this reason:*

- *The authors of this judgment are of the view that indefinite publication of this judgment is appropriate.*

*Any concerns about the publication or content of this document will be placed before the Judicial Officer(s) for consideration.*

## Appeal of Butler

1. On 16th April 2018 this appellant was convicted of one offence of rape by a jury, and on 20th April he was sentenced to 7 years imprisonment by the Chief Justice of the Falkland Islands.

2. We have given him leave to appeal his conviction as we consider that his grounds are arguable.

3. Reporting restrictions apply to this case and nothing must be published about this case which could lead to the identification of the complainant who we shall refer to as AB.

4. The offence is said to have occurred in 1979 or 1980 when AB was 13 or 14. The Appellant was 47 or 48. He is now 86 years of age.

5. It is unnecessary to deal with the facts of the case in any detail. The rape is alleged to have occurred when AB and her older sister who we will refer to as CD were staying each night in a house owned by the Appellant. They were not staying with their mother because of domestic difficulties and the Appellant and his wife were putting them up. The Appellant and his wife lived at a different address where the girls normally were but at night there was insufficient room for them all so the girls stayed in the other house and the Appellant on some occasions stayed with them. This continued for about a fortnight.

6. According to the complainant on a number of occasions over this period the Appellant had sexual intercourse with her. She also said that the Appellant behaved similarly with her sister CD who was in the same room when the rapes occurred.

7. AB said that she and her sister told their mother what had happened at the time but she did not believe them. AB made further complaints about this conduct over the years but it was not until March 2017 that the Appellant was arrested. He denied the allegations and said that nothing had happened between them. That was also his case at trial.

8. CD also complained to the police that over the same period of time she had been raped by the Appellant and he was interviewed about her allegations as well. He denied that anything had happened with either of the girls.

9. The Appellant was charged on an indictment containing 9 counts. There were 3 counts of raping AB and 6 of raping CD. On the 9.4.2018, which was due to be the first day of the trial, CD told the prosecution that she would not give evidence because of the effect that would have on her mental health. Despite efforts being made to persuade CD to attend the trial and give evidence she refused. The prosecution took the decision to offer no evidence on the 6 counts of rape against CD and she took no part in the trial. Not Guilty verdicts were entered on the counts concerning CD.

10. The trial took place on the 3 allegations of rape against AB. The 3 counts reflected the fact that the rapes were said to have occurred over a period of time.

11. In the event the Appellant was convicted on count 1 but acquitted on counts 2 and 3.

12. There are 2 distinct grounds of appeal against conviction. First it is submitted that the Judge should have acceded to a submission made on behalf of the Appellant that evidence from AB that she saw sexual activity between her sister and the Appellant on the occasions that she was raped should be excluded. Secondly it is submitted that the verdict of guilty on count 1 is inconsistent with the verdicts of not guilty on count 2 and 3. We have to consider whether individually or cumulatively these rendered the verdict of guilty on count 1 to be unsafe so that we should quash it.

13. We will deal with the grounds separately but will consider their effect on the safety of guilty verdict both separately and cumulatively.

14. AB's evidence in chief was by way of an ABE interview (achieving best evidence) conducted by the police. She was cross examined over a video link. That is now perfectly normal and is designed to help complainants in sexual cases to be more at ease when giving evidence. In that ABE interview AB described the rapes that she said the Appellant committed on her and also the sexual activity which went on with her sister who was in the same bedroom. The Appellant applied to exclude those parts of the ABE interview in which AB described sexual activity with her sister. It was accepted that the mere fact that AB was describing events which amounted to criminal offences but which were not included on the indictment did not render the evidence inadmissible. The application to exclude was made on the basis that it would be unfair to allow that evidence to be put before the jury.

15. The Judge's power to exclude otherwise relevant and admissible evidence is contained in s. 341 of the Criminal Procedure and Evidence Ordinance 2014 of the Falkland Islands which reads as follows:

    *In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

16. This reflects the terms of s. 78 of the Police and Criminal Evidence Act 1984. We have been referred to a number of cases from the CACD of England and Wales dealing with how we should approach a review of the Judge's decision whether to exclude evidence. The trial Judge has a discretion whether to exclude evidence. In reviewing the exercise of that discretion this court will consider whether the Judge has applied the correct test and whether he has taken into account all relevant matters and left out of account irrelevant matters. It is accepted in this case that the Judge did apply the correct test and took into account all relevant matters. If the Judge has correctly applied his mind to the right considerations, this court will only interfere if it concludes that the decision of the Judge was unreasonable. While that may sound a high hurdle, if all the members of this court were to agree that we would have reached a different decision, that is likely to go a long way to satisfying the test of unreasonableness.

17. The description of the events by AB was of sexual assault on her and on her sister at about the same time. The events relating to both sisters were closely intertwined. To require AB to give evidence only about the sexual assaults on herself and not on her sister would make giving evidence of those events not only more difficult but also artificial. Preventing a witness from giving a full description of the events surrounding the alleged crime can be unfair to the witness and also give a distorted view of the witness' evidence to the jury. This can affect the fairness of the trial either for the defence or the prosecution or both.

18. The Judge identified the correct test and in our judgment properly took into account all relevant considerations and did not take into account any irrelevant considerations. He considered what, if any, unfairness there would be to the Appellant by allowing the evidence to be given. While the evidence was of additional offending, it was entirely dependent on

the evidence of AB and does not provide any support to her account. The issue for the jury was the credibility of AB in relation to each of the counts that the Appellant faced. The inclusion of those additional allegations did not make it any more or less likely that AB was telling the truth. What it did allow the witness to give was a complete account of what she said happened.

The Judge said this in his ruling *"Given the issue in this case is primarily the credibility of the complainant, I cannot see how the defence are prejudiced by the complainant saying that the defendant raped her sister as well at the same time. Such evidence does not enhance the credibility of the complainant, nor does it forensically prejudice the defence. The defence is that the defendant did not rape either of the sisters and the incidents simply did not happen. The defence will presumably say to the complainant she is not telling the truth, and the fact that the complainant has included her sister does not make that any more difficult for the defence to deal with. Indeed, the absence of counts against the defendant involving her sister, if anything, assists the defence on this point rather than prejudicing them."*

19. The Appellant further complains that there were discrepancies between the accounts of AB and CD that he was unable to get before the jury. He argues that that is significant because without those being before the jury, the jury would conclude that CD supported AB's account. We do not think that that follows. The jury could not make any assessment of whether CD would have supported the evidence of AB or contradicted it. To do so would involve speculation about the evidence which they were directed by the Judge they should not do. If the Appellant wished to get those discrepancies before the jury then no doubt that could have been done although it is unlikely that it could have been done without the jury also hearing those parts of CD's statement which supported AB's account. For those reasons it is unlikely that the defence would have made a tactical decision to seek to put CD's evidence before the jury.

20. There is nothing wrong in our judgment in the decision of the Judge not to exclude this evidence.

21. Inconsistent verdicts: The CACD in *R v Fanning* [2016] EWCA Crim 550 has made clear the test that has to be applied by an appellate court in deciding whether verdicts are inconsistent. A strong court was assembled to consider the matter as different tests seemed

to be emerging. Having reviewed many authorities the Court concluded that the test was as set out in *R v Durante (Reginald William)* [1972] 3 All ER 962. That test is as follows: *"When an appellant seeks to persuade this Court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly on him. He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is upon the defence to establish that…"*

22. It is unnecessary to consider any other authorities as Fanning definitively sets out the applicable test.

23. The Judge gave the following direction in the course of his summing up: "*Each count is separate and the evidence on each is separate and involves a different occasion. So you must decide each count individually, and although while it is entirely a matter for you, you may think that they stand or fall together because it is unlikely she is telling the truth or not telling the truth on one and not the other. Of course if you are only satisfied so you are sure that the rape only occurred once, or twice, in those two weeks…….. you will only convict of one or two of the counts*."

24. While the Judge did express the opinion that the jury might conclude that the counts stood or fell together, that was not an observation that could bind the jury as the Judge went on to say. It is based on the assumption that the jury might have concluded that either the witness was accurate about all her allegations or none of them. As the Judge correctly went on to say that was in the end a matter for them. The appellate courts have also made it clear that a jury is perfectly entitled to accept as accurate part of a witness' evidence but not all. At paras 26 and 27 of Fanning the Court said this: 26. '*It appears to have been suggested on occasions …….that if the credibility of the complainant was rejected on one count, it was difficult to see how it could not be rejected on another. 27. However in a series of decision …….that suggestion was rejected. It became clearly established that absent a specific direction, it was generally permissible for a jury to be sure of the credibility or reliability of the complainant or witness in relation to one count in the indictment and not to be sure of the credibility or reliability of the complainant on another count.'*

25. Mr. Rankin on behalf of the Appellant argues that it was not permissible for the jury to convict on only one count in this case as there was nothing factual to discriminate between the counts. AB said that she was raped on a number of occasions and therefore, he argues, the jury should have convicted on all counts or on none. We do not accept that argument. We consider that the jury were entitled to say having considered the evidence that they were sure that AB was raped once but not more than once. In our judgment they were entitled to come to that conclusion whether or not there were any factual distinctions specified in the counts, between the allegations of rape. While AB did allege that she had been raped in different ways that was not specified in the counts. It would however have been possible for the jury to accept one description of the manner of the rape but not others.

26. The interpretation of the jury's verdict would appear to be that they were sure that AB had been raped once by the Appellant but not sure that he raped her on more than one occasion. As the Judge told the jury they were entitled to reach that conclusion if they felt it was right. It is always important to respect the primacy of the jury. They have heard the evidence and they are entitled, if they think it right, to choose those parts of the evidence which in their judgment meet the evidential standard required in a criminal trial.

27. In addition to considering each of the grounds of appeal individually we have gone on to consider whether cumulatively they affect the safety of the verdict of guilty. Having concluded that there is no merit in each of the grounds of appeal, they do not render the verdict unsafe when considered cumulatively.

28. It follows that the appeal against conviction is dismissed.