No: 97/0663/Y3

IN THE COURT OF APPEAL
CRIMINAL DIVISION
Royal Courts of Justice
The Strand
London WC2

Monday 6th October 1997

B E F O R E :

LORD JUSTICE JUDGE

Mr JUSTICE POOLE

and

THE JUDGE ADVOCATE GENERAL CB QC
(HIS HONOUR JUDGE RANT)
(Acting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

- v -

RAMAN KUMAR

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MR C CLARK QC appeared on behalf of the Appellant
MR PC BOWN appeared on behalf of the Crown

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JUDGMENT
(As approved by the Court)

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Monday 6th October 1997

LORD JUSTICE JUDGE: On 10th January 1997, in the Crown Court at Warwick, after a retrial before His Honour Judge Harrison-Hall and a jury, the appellant was convicted of common assault on count 2 and intimidation of a witness on count 4. He was sentenced to four months' imprisonment for common assault and three years' imprisonment for intimidation of a witness. The sentences were ordered to run consecutively. He was therefore sentenced to three years and four months' imprisonment.

The jury on this occasion acquitted him of rape. It is significant that the victim on count 2, the common assault; count 3; the rape; count 4, intimidation of a witness, was in each case alleged by the Crown to be a lady, Mrs Kaloti. It is further significant that this was a retrial. The jury had been unable to reach verdicts in relation to counts 2, 3 and 4 at an earlier trial, but they had agreed a verdict which acquitted him of count 1, a charge of indecent assault on the same lady but on a completely separate occasion. So the end result of this case is that, after two trials, the juries which returned verdicts were not satisfied of indecent assault and rape on a separate occasion but satisfied of common assault and intimidation of the same victim. That is a matter of some concern when examining the safety of the convictions.

The appellant appeals against conviction with leave of the single judge.

The appellant and the victim in these counts had been work colleagues and were close friends. The nature of their relationship was in dispute. She alleged that from April 1995 she had acted as a go-between for him in relation to the conduct by him of his extramarital affairs. He alleged that the person with whom he was having an affair at the time was the victim. She denied that. The case for the Crown was that, whatever the relationship, it had broken down, and the appellant had indecently assaulted her in November 1995 (the former count 1, of which he was acquitted) and assaulted her in the lift in early December 1995 (count 2). He himself had then been assaulted in the street by an unknown assailant. He attributed responsibility for that attack to the victim and he spoke to her by telephone. Then, on 4th January 1996, she parked her car on her way to work. As she locked it, she was bundled into another car and driven off to a car park, where she was raped. She said that two men were involved. The Crown's case was that the man who actually had intercourse was unknown to her, but that he was assisted in a direct practical way by the appellant, who

held her while she was raped. Then, three days later, she received a telephone call at work warning her that the charges should be dropped or her young daughters would be raped in the same way.

In her initial statements to the police the victim made no reference to knowing the identity of either of her attackers in the car, nor, indeed, of the person responsible for the telephone call she received three days later. In subsequent statements she identified of the appellant who had held her while she was raped and as the man who had made the threatening call, but then she mentioned for the first time the assault in the lift (which was count 2 in the indictment). The way in which the complaints came to be made and the identity of the appellant revealed was a matter of some concern to the defence at trial.

Taking the matter in a little more detail, the victim gave evidence about events at work. She identified the woman for whom she had acted as the go-between. She said that on one occasion she had been to a hotel in Dudley to meet his girlfriend and had there filled in the registration card and indeed waited with the girlfriend while the appellant went to the chemist. Then there was cooperation by her when the appellant wanted gifts delivered to his girlfriend, he waiting in the car so that he could avoid the girlfriend's husband. She described these matters and how eventually she decided that she would not deliver anything for him again because of the way he had required her to keep herself hidden on the floor of the car. She said that he continued to pressurise her into helping him continue the affair.

Ignoring events in November 1995, she alleged that he assaulted her in the lift at work; he touched her and pushed her, held her arms and caused a bruise. Hence, the Crown alleged common assault. According to her evidence, he wanted to have sexual intercourse with her. He exposed himself to her. The details do not matter any further, but she screamed for help. Eventually she got the lift up to the fourth floor. The next day she showed a colleague the bruises. In the meantime he continued to telephone her at work and wanted her to help him continue his affair. She refused. She had said that one evening in December he had telephoned her to thank her for getting him beaten up (a reference to an incident where he himself had been attacked).

So we come to 4th January. It was 5.45 am when she arrived at work. As she did so, a car pulled up beside her. As she got out of the car and made to lock it, she was grabbed and taken to another car, and there, as we have indicated, raped, with the appellant holding one of his hands over her mouth and grasping her firmly by the hair and laughing at

her while she was raped. If true, of course, it was a dreadful incident. After the incident was over she telephoned a colleague from a nearby telephone box. She did not identify the appellant at that time, saying, in explanation, that he said he would do the same to the girls if she reported it (meaning to her daughters) which was an echo of the telephone call which she said she received on 7th January.

She was cross-examined in some detail. There were a number of serious inconsistencies between her statements and her evidence. She explained that she was too frightened initially to name the appellant at all. She only mentioned him because the friend to whom she had reported the matter had mentioned his name and so, with reluctance, she had said something about him. On the 7th, as indicated, she received the call from the appellant. She was asked why she had said in her statement that she did not recognise the voice and did not know who had made the call. She said again that she was frightened of the appellant.

She then made a further statement explaining the nature of her involvement with the appellant. According to her account, he wanted to have a sexual relationship with her but she refused to do so. She said that he continued to put pressure on her to assist in acting as a go-between. Then, on 17th January, she said:

"I feel sure that the appellant had something to do with the attack and rape but can't prove it."

She went on to say:

"I realise that the police had to investigate the rape and I want the men who did this to me to be caught. If the appellant was behind it, I want him caught and punished too."

That was significantly different from the evidence that she was to give that the appellant had personally participated in the rape by the second man. She explained this as a consequence of the fear and distress that she felt about what had happened.

She admitted that she had gone to the hotel referred to earlier in this judgment and signed the registration card, but she denied that she was having an affair with the appellant. She said it was not her but the other woman who had been at the hotel room. It was also suggested that she had made telephone calls from that room to check on her children. She denied that. She said the most probable explanation was that the appellant had telephoned her at home. She said her children were not there at the time and the telephone calls must have been answered otherwise there would not have

been an appropriate charge on the hotel bill.

In passing, we should note that it was submitted by the defence that they should be permitted to introduce to the jury the fact that the appellant had been acquitted by the jury at the first hearing of the charge of indecent assault in November 1995. The judge ruled against the defence application. One of the grounds of appeal advanced by Mr Clark QC in writing concerned the validity of that decision, but in the result, in view of the conclusion we have reached in relation to the summing-up, it has not been necessary to examine the submissions criticising the decision.

The lady who received the telephone call from the victim, a Miss McCutcheon, gave evidence. She found the victim at a surgery. She said that she was told that the appellant was responsible. She asked what the victim meant by this, and, according to her evidence, the victim said not that the appellant had raped her but that he had set her up and that next time it would be Kate (a reference to her elder daughter).

She too was cross-examined about inconsistencies between her evidence and her statements to the police and indeed her conversation with the victim. She explained that she did not tell the truth because the victim had blurted things out in distress and asked her not to say anything about these matters because of the possible consequences. There was another application relating to evidence arising from this subject. Again the judge ruled against the defence, and again it has not been necessary to examine the correctness of his ruling.

Another witness, Bill Ark, was called to give evidence of seeing the appellant and the victim together on an occasion when he was in the work's canteen when that the victim was writing a letter at the dictation of the appellant. It was suggested to him by the defence that he had been in a car up the road on the occasion when the appellant had been beaten up and that he was responsible for that incident. He denied it.

Another witness, Graham Waldron, gave evidence recalling a day in December 1995 when the victim had come out of the lift at work with bruises on her arms but she was not able to, or did not choose to, say what had happened when he asked her. She appeared to be shaken. She made no complaint against the appellant.

When he was interviewed by the police the appellant described his relationship with the victim, initially denying that there had been any sexual relationship between her and himself, but subsequently he said that there had been. He explained the nature of his defence, which was alibi, and maintained a full denial of the charges against him, which

when he came to give evidence he repeated. They had had had a sexual relationship; they had been to hotels together, where they had had sexual intercourse, and she had made telephone calls from the hotel room to check on the children; and later, in December 1995, he had been attacked by a white man. As the attacker made off, he saw Bill Ark sitting in his car, which had its lights on, and he then drove away. He said that he had reported that attack and then telephoned the victim and said that, although he did not want revenge, he was blaming her for the attack. On 4th January (when the incident in counts 3 was alleged to have occurred) he was at home with his wife and children. His defence therefore was alibi. His alibi defence was confirmed by his wife. He said that he made no telephone calls on 7th January and therefore there could not have been any intimidating telephone call.

He also called the lady whom the victim asserted had been the woman with whom he was having an extramarital affair. In her evidence she said that there had been a close relationship with him but that had ended in 1989. She had not spent any time with him in a hotel in Dudley, which was the hotel where all the matters referred to earlier were supposed to have happened. She said that a lady had come to her house to tell her that the appellant wanted to talk to her and left her his telephone number but she had never called. Her husband had found out about these matters and she had no further dealings with the appellant.

That rather lengthy summary of the evidence before the jury indicates that this was not a straightforward case. There were a number of difficulties both for the Crown and the defendant and obviously much was going to turn on a carefully prepared summing-up which would leave the jury with accurate directions about the legal principles which they should apply and then a fair and balanced summary of the material evidence. In the result we are constrained to say that, having studied the summing-up in the light of the grounds of appeal and the careful submissions by Mr Bown on behalf of the prosecution seeking to uphold this conviction, it was deficient. We can begin by dealing with some of the directions of law.

One matter which could not of itself form the basis of a serious complaint was that the judge directed the jury in detail about the ingredients of rape and the circumstances in which a joint participant (which is what the Crown's case was against the appellant) might be convicted. When he came to deal with common assault he gave details to the jury of an indecent assault. When he dealt with intimidation he did not direct the jury about the theoretical ingredients of that

offence, nor the offence of common assault. Instead he went directly to the facts and pointed out to the jury that, if the facts alleged by the complainant were proved, then the offences of common assault and intimidation were established. That is not always an appropriate course; indeed, there are times when it is not permissible.

We have tried to take a robust view of this criticism. Mr Clark was unable to suggest any particular ingredient of the offences of common assault or intimidation which was omitted from the jury's consideration by the way in which the judge summarised the matters. Accordingly, on its own, there is nothing in the point, save that there was a distinction between the way in which the judge left the offence of rape to the jury and the way that he left the other two offences, and possibly, putting it no higher than that, it is not without significance that there was an acquittal in relation to which full ingredients were provided and a conviction in respect of the other two offences.

That becomes more serious in relation to a further criticism of the summing-up, which is that the judge omitted to give any direction to the jury that they must give separate consideration to each count in the indictment. On the face of it, the verdicts show that they did give such consideration - as we understand it, as a result of the submissions made to them by counsel for the Crown and the defence. It hardly needs saying that the fact that counsel has made submissions about points of law does not mean that the judge is exempted from responsibility for reminding them of such matters and giving proper directions. But on one view, therefore, this was an error by the judge which might reasonably have been regarded as being without particular significance. On the other hand, another possibility -- and it has troubled us both before we came into court after considering the papers and continues to trouble us -- is that in the context of this particular case the omission might have led to inconsistent verdicts. We do not know and we never shall how the jury approached their task. But the crux of the case in relation to each count before the jury depended on their believing the evidence of the complainant. We are all familiar with the situation where, although the outcome of an indictment containing a number of counts depends on the jury believing a particular witness, verdicts are returned which indicate that, although sure about some, they are not sure about others, none of which proves that the witness must have been treated by the jury as having lied. Although it was not necessary for us to ask for submissions on the subject we underline our concern, amplified by the narrative of events at the previous trial set out in the early part of this judgment.

Then the judge had to consider the question of the appellant's good character. His direction to the jury on this

subject was laconic and to be commended for being short. But he said to the jury that they were entitled to consider good character. That, perhaps, is not as strong as it should be: there is a direction to be given to the jury. More important in the context of this case, this was not only a direction of law, but there was evidence before the jury which went beyond the fact that the appellant was a man without previous convictions. He called positive evidence of his good character and no reference at all was made to this evidence.

Then another criticism concerns the absence of a Lucas direction. A Lucas direction is familiar to all who practise in the criminal courts, but for those present in court today who do not understand it, there is an obligation on a judge to say something to the jury, to direct them to give proper consideration to the fact that an accused man has lied. Proving that an accused has lied does not prove that he is guilty of the offence charged. We hasten to add that we do not propose to add to the jurisprudence on this topic. However, in our judgment a Lucus direction was necessary in this case because a critical issue for the jury's consideration was the precise nature of the relationship between the appellant and the victim. It was also clear that, on the Crown's case and his own case, the appellant had been lying to the police when he was first interviewed when he denied that there had been any sexual relationship with the victim, when, at trial, he was asserting that there had been. In our judgment the nature of the relationship between the complainant and the appellant in this case, crucial as it was to the issues before the jury, required a direction to them about how properly to approach the lies which on his own story he had told in his first interview.

We think also a direction of that kind might well have been appropriate in relation to the possibility that the appellant had been lying about the precise nature of the relationship between him and the woman with whom the victim said she was acting as a go-between and the complainant and the man Ark who, it will be recollected, was a witness called by the Crown.

A number of other criticisms of the summing-up have been made in relation to the directions of law. Is not necessary for us to refer to them further, save in a general sense that one of the complaints made by Mr Clark on behalf of the appellant was that this was a case which required some kind of direction to the jury about caution.

We do not propose to deal with that submission in the context of the legal directions. The judge, as the decision in Makanjuola and E [1995] 2 Cr App R 469 indicates, undoubtedly has a discretion whether to give a warning to the jury

about approaching the evidence of a complainant with care. So far as this matter is concerned, we have not heard argument. We will simply record that we think it would be unlikely that there would be any correct basis for interfering with the judge's discretion if he exercised his discretion by not giving any such direction.

Thus, there were a number of omissions or non-directions of law in a troublesome case. Perhaps those problems might have been cured by a detailed analysis of the evidence and the defence case. We simply record that there was no such analysis. We emphasise that we do not for one moment suggest that a conviction should be set aside because the judge does not include every point made by or which may be or is believed by the defence to be relevant. He has to make his own decision and he will omit some things because, as a matter of his own judgment, he does not regard it as necessary to remind the jury of them.

Largely these questions are matters of scale, but in this case the summing-up simply made no reference to a very large number of matters of true significance to the defence, by which we mean not bad points dressed up as good, but points which in our judgment had genuine substance, and to such an extent that we regret having reached the conclusion that the jury was not provided with a sufficiently balanced analysis of the evidence which supported or might have lent support to the defendant's case. Thus, for example, in the context of the complainant's evidence, she had made a series of statements which, coupled with the answers she had given in evidence both in chief and in cross-examination, suggested major inconsistencies on points of substance. We have touched on some of those in the course of the narrative. There was an inconsistency inherent in the summing-up between the judge's direction to the jury that the question of an affair between the appellant and the victim was "not vital or important so far as innocence or guilt is concerned", whereas earlier he had observed -- in the absence of the jury -- that the relationship was "an integral part of the case", which in our judgment it certainly was. If so, then something should have been said to the jury in the summing-up to the effect that if the appellant and the victim had had some sort of sexual affair themselves in the summer of 1995 it was of potential significance and might serve to undermine the credibility of the victim in relation to the allegations she was making against the appellant.

Again nothing was said in the summing-up about the inconsistencies between the evidence of Heather McCutcheon and the statements she had made to the police, and an admission she made in cross-examination that the second of her

two statements contained a deliberate lie made to assist the victim. Yet again, nothing was said about the evidence about admissions to the hotel and the telephone records at the hotel in Dudley, to which mention has been made in the course of the narrative, which might have undermined the case against him.

There was an insufficient reminder to the jury of the evidence called on behalf of the defence. For example, the references to the evidence by the appellant's wife, and by the woman with whom the complainant said that he was having an affair were abbreviated, confused and confusing. Without setting them out in detail, we believe that those assertions are well founded. Finally, merely touching on relevant matters, there was the omission of any reference to the witnesses who gave evidence of positive good character.

Taking all these matters as a whole - the inadequate directions of law and the summary of the evidence and its deficiencies, after careful reflection it simply could not be right to conclude that this conviction is safe. That being our conclusion, there is no other decision which this Court can reach other than that the two convictions on counts 2 and 4 should be quashed.

Accordingly they are quashed.