Neutral Citation Number: [2019] EWCA Crim 2245
Case No: 201900005 C1 / 20190015 C1 / 20190017 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SNARESBROOK CROWN COURT

HHJ Kamill

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/12/2019

Before :

LORD JUSTICE HAMBLEN

SIR NICHOLAS BLAKE

and

HIS HONOUR JUDGE LODDER QC

- -

Between :

(1) Ahmed Qasem

(2) Eric Mathew Oppong **Appellan**

- and -

Regina **Respond**

- -

- -

Ms Knights appeared on behalf of the **First Appellant**

Mr Fessal appeared on behalf of the **Second Appellant**

Ms C Farrelly appeared on behalf of the **Crown**

Hearing date : 29 November 2019

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Approved Judgment

Lord Justice Hamblen :

Introduction

1.
On 29th November 2018, in the Crown Court at Snaresbrook before Her Honour Judge Kamill, the applicant Qasem was convicted of two counts of rape (counts 1 and 2). On the same day, the applicant Oppong was convicted of one count of rape (count 3) and acquitted on another count of rape (count 4).

2.
On 3rd December 2018, Qasem was sentenced to concurrent terms of 13 years imprisonment on count 1 and 15 years imprisonment on count 2 and Oppong was sentenced to 13 years imprisonment.

3.
Oppong and Qasem's applications for leave to appeal against conviction have been referred to the Full Court by the single judge on a ground of appeal relating to jury notes. Both applicants renew an application for leave to appeal on another ground of appeal refused by the single judge, which relates to the exclusion of evidence under s.41 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act"). In addition, Qasem renews his application for leave to appeal against sentence following refusal by the single judge.

4.
The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where 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 that offence. The judgment shall be anonymised accordingly.

The outline facts

5.
On the evening of the 30th March 2018, the complainant, AS, spent the evening drinking alcohol and socialising with friends at the Curtain Club in London. Having become separated from her friends, she left the club alone in the early hours of the 31st March. She was feeling extremely drunk. She could recall ending up in a car with a group of males. They drove to a number of different locations and the complainant said that, at some point, she was taken to a flat. It was alleged that over this period, which was around 90 minutes, they orally and vaginally raped her. It was alleged that the complainant was let out of the car at around 5am. She walked to the nearest road and travelled by bus to her home in Aldgate. She then disclosed what had happened to her boyfriend and later reported the incident to the police.

6.
She was examined at the Haven sexual assault referral clinic later on the 31st March 2018. Injuries to the back of her body were noted which included swelling and grazing to her right arm and abrasions to her buttocks. Redness and bruising was also noted to her vagina, specifically the labia minora and the posterior fourchette. Various swabs, including vaginal swabs, were taken from the complainant. Blood and urine samples were also taken and the complainant provided the police with the clothing that she had been wearing the previous evening.

7.
Forensic examination revealed that the inside back area of the complainant's knickers contained traces of semen and the DNA profile recovered was found to match Oppong**.** The DNA profile recovered from the vaginal swabs was a match for Qasem. The toxicology evidence revealed that the complainant's alcohol intake could have been sufficient to cause a high level of intoxication which would have resulted in her being confused, having impaired coordination and having reduced awareness.

8.

The applicants were arrested and interviewed in respect of the allegations. Both applicants denied the offences and stated that any sexual activity with the complainant had been consensual.

9.
The Prosecution case was that the applicants had taken advantage of the complainant's drunken state and had raped her as alleged.

10.
To prove its case the Prosecution relied in particular upon the following:

(i)
Evidence from the complainant in relation to the allegations;

(ii)
Expert evidence from Mr Queenan (forensic scientist) in relation to the DNA analysis;

(iii)
Expert evidence from Mr Tyler (forensic scientist) in relation to the toxicology evidence;

(iv)
Evidence from Dr Shardlow in relation to the complainant's injuries;

(v)
Evidence from the complainant's boyfriend RO and PC Wilson in relation to her first complaint;

(vi)
Evidence from the complainant's friends CS and EL in relation to the complainant's demeanour at the Curtain Club;

(vii)
CCTV evidence of the complainant inside and outside the Curtain Club and some of her movements during the early hours of 31st March 2018.

11.
The Defence case was that all sexual activity with the complainant had been consensual. Qasem gave evidence that they had offered the complainant a lift home as she was alone and running in the street. He stated that the complainant had consented to have oral and vaginal sex with him. Oppong gave evidence that the complainant had initiated sexual activity with Qasem and undressed herself. She had willingly performed oral sex on Oppong. He did not have vaginal sexual intercourse with her. It was submitted on behalf of Qasem that the complainant may have regretted what she had done when she saw her boyfriend and instead of telling the truth had told him that she had been raped. Thereafter she had to maintain the allegation and if any difficult or awkward questions arose in relation to the events in question, she simply stated that she could not remember.

12.
The issues for the jury were:

(i)
Whether they were sure that Oppong had had vaginal sexual intercourse with the complainant; (count 4) – on which he was acquitted.

(ii)
Consent - for both applicants on all counts.

The evidence at trial

13.
The Prosecution adduced evidence from the complainant in an Achieving Best Evidence interview of 1st April 2018. Her evidence was that she went to the Curtain Club with her university friends CS and EL for dinner. The next thing that she could remember was being in a car with three or four males. They kept driving around and stopping in various places. She could not remember the precise order of events and, although her memory was a little hazy, she could remember some specific incidents. She remembered sitting in the back seat with one male sitting next to her. He was holding her and with the assistance of the front seat passenger and the driver, was trying to take her clothes off so that they could have sex with her. She remembered that the males penetrated her mouth with their penises. She was taken to a flat where one of the males tried to have vaginal sex with her. All of the men penetrated her mouth with their penises in the flat. She was taken back into the car and made to perform oral sex again. One of the males appeared to be younger and he ejaculated into her mouth. The other males laughed at him. At one point she tried to masturbate the male as he was penetrating her mouth with his penis. She just wanted the incident to be finished and for them to leave her alone. She could remember the males cheering at this point. She assumed that this was due to the fact that she was actively participating whereas previously she had been unresponsive to what they were doing.

14.
At some point they let her go and she wandered to the nearest road. She walked along, found a bus stop and travelled back to her flat. It was around 6am. She told her boyfriend what had happened, brushed her teeth and went to sleep. When she woke up she told him some further information in relation to the incident and they went to report the matter to the police. She stated that they used to be in a long distance relationship and her boyfriend would worry about her if she went out drinking. Since they had started living together he had been trying to worry a little less.

15.
In cross examination, she maintained that she was very drunk and that she could not remember how she came to be in the vehicle. She would not have told the males that she was single and invited them back to her house. She also stated that she would not have initiated any sexual contact with them. She had not taken off her clothes herself. She accepted that she spoke Spanish and had been told by friends that she babbled in Spanish when she was extremely drunk. She accepted that in the past she could tolerate a lot of alcohol but since starting her marathon training she had been drinking a lot less alcohol. She maintained that she was telling the truth about the incident.

16.
CS and EL gave evidence that they had been friends with the complainant since university. They had met at the Curtain Club and knew that the complainant had shared a bottle of wine with her boyfriend before meeting them. They had further drinks including a bottle of wine at the table, whisky sours and whisky shots. By around 2am the complainant appeared to be acting unusually. They knew that she had not been consuming alcohol prior to that night because she had been training for the marathon but had also been unwell. They lost her at some point during the night and called her phone. She was mumbling and slurring her words and coupled with the noise of the club, it was difficult to understand what she was saying. They told her to meet them outside but the bouncer told them that she had walked away. They were concerned as she had been very drunk and they were in possession of her coat and bag. They traced her movements for a while using the Find my Phone application and

thought that she was on her way home. They left her belongings with the concierge of her building and went home.

17.
For the Defence, Qasem gave evidence that he had stopped the car to offer the complainant a lift. She accepted the offer and got into the car. He wanted to drop off his two friends, Oppong and Benson at the Kingsmead estate. They got out and went to Oppong's car and the complainant followed. They got in the car to chill; the complainant was happy to do so. It was still intended that they would take her home so they started driving. During the journey he tried to kiss her and she reciprocated. He moved her hand to his groin and she opened his jeans. She then performed oral sex on him. The complainant had been trying to direct them to her house but had been unable to do so. They were intending to go back to where they had found her but then stopped at the Wally Foster car park as this was a private area. The complainant took off her clothes and had sex with all three of them: oral sex with Benson and Oppong and vaginal sex with him. Benson tried to have vaginal sex with her but she said no and put her clothes back on. They then took her to the bus stop and Oppong took him back to Kingsmead to collect his car. When he drove past the bus stop he could see the complainant waiting there in the company of Benson.

18.
Oppong gave evidence that was consistent with the co-accused's version of events as to how they met the complainant and the sequence of events. He denied that he had had vaginal sexual intercourse with her but stated that she had performed oral on him until he ejaculated. He stated that some of the semen dribbled out of the complainant's mouth. She must have touched this and transferred it to her clothing. This might account for his DNA being found on her knickers. The complainant had consented to sexual activity with all of them; she had either initiated it or responded to what they were doing. At no point did she say no to him or try to push him away. At no point was she forced to do anything that she did not want to do. She was steady on her feet and able to chat to them. At some point she spoke to them in Spanish. There were no concerns that she was too drunk to consent to sex with them.

The grounds of appeal

19.
The grounds of appeal are that the convictions are unsafe because:

(i)
The Judge erred in not disclosing to counsel questions or comments from the jury that related to the trial; and/or

(ii)
The Judge wrongly excluded evidence under s.41 of the 1999 Act.

Ground 1

20.
We grant leave to appeal on this ground.

21.
The relevant principles to be applied in relation to notes received from the jury before retirement are conveniently summarized in Archbold 2020 para. 4-327 as follows:

“In R v Andriamampandry (2003) 147 S.J. 871, CA, it was said that where a judge receives a note from the jury, it may be dealt with without reference to counsel if it concerns an administrative matter unconnected with the trial; but in almost every other case, the judge should state in open court the nature and content of the communication and, if he considers it helpful to do so, seek the assistance of counsel. If counsel ask to see the note, normal practice would be to permit this. In that case, during the course of a trial, the jury had asked 17 questions in a series of notes, all of which had been handed to the judge in open court in full view of all parties. It was held that the failure of the judge to read out the whole of two of the notes constituted an irregularity; if the judge did not think it appropriate to read out the whole note, he should have showed it to counsel, so that counsel could have decided whether to make submissions in relation to that which had not been read out or to pursue it in the evidence. However, in the context of the case as a whole, the omissions were trivial and, in relation to a third note, which consisted of comment on the evidence, there had been no irregularity in the judge not reading it out, but instead referring it back to the jury with a request for clarification (which was never forthcoming). If counsel asks to see such a note, it should normally be shown. It was held that the failure to read out in full three of the 17 notes had not, therefore, deprived the defendant of a significant line of evidence or argument and had had no effect on the safety of the verdict.”

22.
In giving the judgment of the court in Andriamampandry Judge LJ stated as follows at [22]-[24]:

“22. …the principle arising for consideration in this appeal was analysed and decided in Gorman [1987] 85 CrApp R 121 . Lord Lane CJ explained that, if the communication from the jury raised administrative issues, “unconnected with the trial”, the judge could deal with them without referring to counsel or, indeed, asking the jury to return to court.

In almost every other case a judge should state in open court the nature and content of the communication which he has received from the jury and, if he considers it helpful to do so, seek the assistance of counsel.”

Lord Lane concluded his judgment by examining the reasons underpinning the principle.

“… The object of these procedures, which should never be lost sight of, is this: first of all, to ensure that there is no suspicion of any private or secret communication between the court and the jury, and secondly, to enable the judge to give proper and accurate assistance to the jury on any matter of law or fact which is troubling them. If those principles are borne in mind, the judge will, one imagines, be able to avoid the danger of committing any material irregularity.

23.. The principles, therefore, are clear. In the present case, the fact of each of these notes, including the three particular notes under consideration, and their receipt by the judge, took place in open court, in public view. They were not and were not treated as private communications between the judge and the jury. In most cases, the terms of the note were read out in open court, and the appropriate question duly asked by the judge. In those cases, in the absence of any express request, there was no requirement for the notes to be physically handed to counsel, although if counsel had asked to see them, it would have been normal practice to allow them to do so.

24. Given these principles, unless the note was of such a character as to come within the exceptional range of which a specific example was given in Gorman itself, an irregularity occurred when a note was received from the jury which was neither read out in open court, nor physically handed to counsel. Although Gorman was concerned with a note received after the retirement of the jury, the objective underpinning the principle applies to notes received before, as well as after retirement.”

23.
In the present case, a total of no fewer than 67 jury notes have been produced by the Crown Court in response to this court's direction; although it is common ground that in fact there were at least four more notes than that. Some of these notes requested information about the evidence; some were comments on the evidence already heard. None were concerned with management issues. There are differences of recollection between counsel as to how and when the judge responded to them, but it is apparent that a number of these notes were not read out in open court or communicated to counsel.

24.
Counsel made requests to see the jury notes. This is reflected in the Court Log in a request made to the Court Clerk on 16th November 2018. It was repeated in a request made by counsel for Oppong on 23rd November 2018. It was repeated again in an email request made by counsel for Qasem after the jury had retired.

25.
We were informed by the appellants' counsel and accept that they were told on 23rd November 2018 that jury notes which consisted of comments from the jury were not to be disclosed to counsel. This is consistent with the response received to the later email request which states that the notes were not to be seen by Defence counsel.

26.
Although the judge's distinction between evidence and comment was supported by the Crown in their written submissions, this stance was rightly not maintained at the hearing. The "objective underpinning the principle" generally applies to jury comments as well as to jury questions. If the comment relates to the trial, then counsel will normally be entitled to know what the jury's comments are. It may affect their approach to the evidence, to the questioning of witnesses, to submissions made to the jury and to the conduct of the trial generally. Such communications should not normally be kept private between the jury and the judge. There may be exceptional circumstances where disclosure is not required, but it is not suggested that any such circumstances arise here. Transparency is essential if justice is to be both done and seen to be done. Unfortunately none of the advocates drew the attention of the Judge to the passage in Archbold or to the authorities referred to above.

27.
Although there is a dispute as to whether some of the notes were or were not shown to counsel, it is clear that a number of them were not. The Court Log is not comprehensive as to how each note was dealt with. Neither it seems was the note of the evidence taken by the pupil to Prosecuting counsel. The Defence advocates did not keep a note of what notes they had seen or had read to them.

28.
In summary, in the present case:

(i)
Some jury notes were shown to counsel, but a number were not;

(ii)
Some jury notes were read out, but a number were not;

(iii)
Some jury notes were dealt with by the Judge without being shown to counsel or read out;

(iv)

Counsel were not made aware of the precise content of a number of the jury notes;

(v)
The way in which the totality of the jury notes was dealt with by the Judge was inconsistent and, in relation to jury comments, wrong.

29.
In these circumstances we are satisfied that irregularities occurred in this case.

30.
The Crown contends, however, that such irregularities were not material and do not arguably affect the safety of the conviction.

31.
In so far as the undisclosed notes raised questions about the evidence, it is submitted that the substance of those jury questions were put by the Judge or by counsel. This may be so, but it is important for the Defence to know whether questions by the judge are a response to a jury note or not, and it is relevant for counsel to know precisely what questions the jury has been raising. Moreover, unless the note or the substance of it is disclosed, it is not possible to tell whether it has adequately been addressed by the judge or counsel and, in any event, knowledge of what the jury are querying may lead counsel to a further or different line of questioning or to revise their approach to the conduct of the trial.

32.
In so far as the undisclosed notes raised comments, it is similarly submitted that the substance of the matters raised were addressed at trial. Even if that be so, counsel were deprived of the opportunity of making a fully informed decision as to what matters to address and how to do so. Again, unless the note or the substance of it is disclosed, it is not possible to tell whether the matter has been adequately addressed and, in any event, knowledge of what the jury's comments are querying may affect counsel's conduct of the trial.

33.
Leaving aside the difficulty raised by those notes which have not been provided, we have been taken in detail through a number of the jury's notes. Concentrating only on those which the Crown do not contend were seen at the time, it is apparent that a number of them were material to the conduct of the trial. For example:

(i)
Note 37 relating to the "automatic action" of a drunken person. An important issue at trial was how incapacitated by drink the complainant was. We accept that had this been brought to Defence counsel's attention it would have been explored in greater detail with the toxicology witness, Mr Tyler.

(ii)
Notes 46 and 47 relating to missing CCTV footage at the Community Centre car park. The fact that the police had failed to obtain this before it was deleted was an important element of the Defence case, in particular in circumstances where from the outset the appellants were urging that such footage be obtained because they claimed it would help to exonerate them. We accept that, if these notes had been disclosed, the relevance and significance of that cross examination would have been made clearer and a different approach would be likely to have been taken in relation to that issue. In

the event, the Judge, who alone had knowledge of the notes, dealt with this issue fairly dismissively in her summing up, stating that:

“Now as to the defendants, can I say that I am not going to go through all the other aspects, like the police gathering evidence and all that sort of thing? You heard it and it doesn’t necessarily impact upon the issues that you have to decide and, therefore I’m not going to repeat it now.”

(iii)
Note 55 which related to AS’s movements with the man named as Benson. An important part of the Defence case was that AS, having left the car, remained in the company of Benson (who, on the defence case, had had sexual relations with her in the car) for at least 20 to 30 minutes, contradicting her evidence that she left the car and was alone at the bus stop. We accept that had Defence counsel been aware of this question they would have sought to clarify the timings to show how they were consistent with the later CCTV sighting of AS with Benson walking back into the estate at 05.13 and to clear up the apparent misunderstanding of the evidence suggested by the note.

(iv)
Notes 42, 56, 57, 59, 62, 64, 65 relating to Benson. We accept that, had Defence counsel been fully appraised of the sheer number and nature of the jury notes relating to this issue, they are likely to have addressed matters differently. Although it was for the defence to call evidence to identify the existence of Benson, Ms Knights may well have re-visited her application for the jury to be discharged and for such information as was obtained about him during the trial relating to the identification of Benson to be further investigated.

34.
We accordingly accept that the failure to make sure that counsel were aware of both the fact and content of jury notes was a material irregularity. The Defence were deprived of the opportunity to assess and address those notes in a transparent and fair way. In all the circumstances we are driven to conclude that these were material irregularities rendering the convictions unsafe.

35.
The appeal against conviction must accordingly be allowed.

36.
In those circumstances it is not necessary to address the renewed application for leave to appeal in relation to ground 2.

37.
We would, however, observe that although the applicants present their case on this ground as one in which they were wishing to elicit evidence of relevant background facts, it is apparent that they wished to ask questions in relation to that evidence regarding AS’s sexual behaviour and therefore had to bring themselves within the relevant provisions of section 41. Moreover, as the Crown points out, the sexual behaviour which the applicants wished to highlight was of a very different kind and arose in a very different context to the alleged offending. It was also separated in time. In such circumstances, we can well understand why the single judge concluded that the Judge was entitled to reach the conclusion which she did.

Conclusion

38.
For the reasons outlined above, the appeal against conviction is allowed.