

In the Court of Appeal for the Falkland Islands

R -v- Jordan Benjamin Alfred

Judgment

1. On the 15th July 2017 after a trial lasting four days the Applicant was convicted before the Supreme Court of the Falkland Islands of an offence of attempted rape. There was an alternative charge of sexual assault. No verdict was entered on that charge in light of the conviction of the more serious offence. The trial was conducted by Her Honour Judge Kushner sitting as a Judge of the Supreme Court; the Applicant having elected to be tried by a Judge alone. He was sentenced on 12th October 2017 to 42 months at a young offenders institution by the trial Judge.
2. The Applicant seeks leave to appeal against his conviction. His proposed grounds of appeal are that the conviction is unsafe because of the unreliability of the complainant's evidence and because new evidence has come to light which is relevant to consideration of the complainant's behaviour on the night of the alleged offence the subject of this application. There was a further complaint in the notice of appeal that at one stage the Judge reversed the burden of proof. That point has not been pursued in front of us, a decision with which we agree. The complainant in this case must not be identified in any report of this appeal and I shall refer to her as Miss A.
3. It has been argued on behalf of the Applicant that in order to properly review whether this conviction is safe, we need to have a complete transcript of the hearing. That would be made available if we were to grant leave. We do not consider that to be correct. We have had the opportunity to consider a very detailed judgment where the facts were comprehensively reviewed by the Judge which we consider sufficient to properly review this decision.
4. We will start with a brief summary of the facts surrounding the alleged offence. On 11th February 2017 a group of soldiers, including the Applicant, went in to Stanley town for a night out. They drank a considerable amount of alcohol. The Applicant and his friend Mr. Treadwell ended up going back to a YMCA where some locals, who they had met while drinking, lived.

5. Miss A travelled in the same taxi as the Applicant to the YMCA. It is not suggested that anything happened between them in the taxi. Miss A had also been drinking. She says that by the time she arrived at the YMCA she had had enough to drink so didn't drink anymore.
6. At the YMCA both the Applicant and Mr. Treadwell continued drinking. The Judge found that Mr. Treadwell was well on the way to becoming very drunk but the Applicant remained in control. While they were all at the YMCA there is no dispute that the Applicant visited the toilet. There is a dispute about what happened during that visit. Miss A says that she showed the Applicant the way to the toilet. According to Miss A, the Applicant asked her to go into the toilet with him but she refused and nothing further happened. The Applicant's account was very different. He denied that he had asked Miss A to go into the toilet with him. He says that as he came out of the toilet he had not done up his belt properly. Miss A was waiting for him outside the toilet and, without warning, she kissed him on the lips; pulled down his trousers and his boxer shorts; put his penis in her mouth and proceeded to give him oral sex. The Applicant says they both then went back to join the others and nothing further was said.
7. What happened or didn't happen outside the toilet doesn't relate directly to the allegation of attempted rape but it was an important issue for the Judge to decide, when considering the credibility of the two principals in this case.
8. At the YMCA, there came a time when Mr. Treadwell was ill, no doubt because of the amount of alcohol he had consumed. He and the Applicant decided to leave and return to Hillside Camp where they were staying. They didn't know how to get there and they asked for directions. Miss A offered to take them to the camp as it was not out of her way. She intended to return to her home.
9. It is agreed that they set off together. There is an issue as to what happened after they left. Miss A says that she guided them to the Hillside Camp where she left them. The Applicant and Mr. Treadwell said that Miss A didn't take them to the camp where they believed she was taking them but to her house. Having arrived there, she invited them to stay. Miss A's account is that having left them at the camp, she set off home; the Applicant and Mr. Treadwell pursued her and caught up with

her and effectively forced their way into her house. It is agreed that they all ended up in Miss A's house.

10. When the Judge was deciding whether she was sure that the Applicant had attempted to rape Miss A, she had to consider the accounts of what happened that night given by each of the participants to decide where the truth lay.
11. It was at Miss A's house that she says the Applicant attempted to rape her. She says it happened in her bedroom. She says the Applicant pushed her down onto the bed; tried to remove her trousers; unzipped his trousers and exposed his penis. According to Miss A, he then pulled her head down towards his penis while suggesting a threesome with Mr. Treadwell. The Applicant did not succeed in pulling her head down and Miss A says she managed to escape.
12. The Applicant says there was no sexual contact of any sort between him and Miss A at her house. He and Mr. Treadwell say that, having been invited into the house by Miss A, Mr. Treadwell was given a blanket and went and lay down in the sitting room. The Applicant says that he was directed into the bedroom; Miss A came in to the bedroom; put something down on the bedside table and then left. Miss A accepts that she put her keys down in the bedroom. She left them in the bedroom when she left only taking with her her mobile phone. It is common ground that, after she had left her house, the Applicant and Mr. Treadwell also left.
13. Miss A, having left the house before the two men, rang her sister and asked to stay the night at her house. Miss A's sister came to collect her but by that time, Miss A had left the vicinity of her house and she was collected from another location after a further phone call. Miss A's sister described Miss A as having been distressed on the phone.
14. The Applicant and Mr. Treadwell having left Miss A's house were lost but with some help they found their way back to Hillside Camp and went to bed. They were later arrested and the Applicant denied the offence.
15. If Miss A's version of what had happened was correct then the Applicant was guilty of attempted rape. If the Applicant's version was correct then nothing had happened at all of a sexual nature at the house. There was an alternative charge of sexual assault but that did not really arise on the different versions given in evidence. The Applicant was either guilty of attempted rape or not guilty of either charge.

16. The Judge accepted that Miss A's account was correct and convicted the Applicant of attempted rape.
17. It is submitted on the Applicant's behalf that she should not have accepted Miss A's account, principally because of the large number of inconsistencies there were in her evidence.
18. The Judge correctly directed herself as to the burden and standard of proof. She also correctly directed herself that the Applicant was a man of good character and the ways in which she should take that into account in reaching her verdict.
19. The Judge was alert to the fact of the inconsistencies in the accounts given by Miss A. In her legal directions she correctly identified the need to consider the inconsistencies but not to assume because there were inconsistencies that Miss A must have been telling lies. It was necessary to consider other possible explanations for the inconsistencies, such as lapse of memory or because the events were traumatic, as well as lying or unreliability.
20. The Judge correctly directed herself at para 29 of her summing up that 'in deciding whether or not the complainant's account is true I should look at all the evidence. And if having done so I am sure that the complainant's account is true then I am entitled to rely on it. If I am not so sure that it is true or that it is untrue, then I can't rely on it.'
21. In her review of the evidence in her judgment, the Judge considered the various inconsistencies that had been identified in the evidence. There were inconsistencies between her evidence and what she had told her sister immediately after the events. There were inconsistencies between her evidence and what she told the police in interview. There were inconsistencies between her evidence in chief and in cross examination.
22. The Judge considered all of these inconsistencies but concluded at para 66 *'Initially she had not wanted to press the matter further to trial and simply wanted to put it behind her. She was finding it difficult to remember matters outside the central features I have mentioned and she found it difficult to go back there emotionally in her memory. She didn't want to. It was her way of dealing with it. I saw in her no element of wanting to get either man in trouble gratuitously. Further on the salient features and the lead up to the event, from the Narrows Bar to the YMCA to her walk to her home she has been consistent. Those matters, although still traumatic, will be less so than the events of the bedroom*

which perhaps explains why she is rather more consistent. I find that any inconsistencies are explicable and that, nevertheless, she was consistent on the primary details'.

23. The Judge had the considerable advantage that we do not have of hearing and seeing Miss A give evidence. The Judge said at para 65 '*I watched her giving evidence very carefully. Whilst her demeanour was flat, I had a clear impression, and I find, that she was genuinely trying to help the court and genuinely trying to remember and trying to tell the truth. It had been a traumatic event.*'
24. The Judge then went on to consider the credibility of the Applicant. She reminded herself of his good character and how that assisted her. She considered the Defendant's distress in the witness box which she concluded was genuine but concluded by saying that '*ultimately I find that his credibility is dependent on the plausibility of the version of events he puts forward*'. She then goes on to give a detailed critique of the different accounts which had been put forward.
25. Particularly criticism is made of the way the Judge dealt with the evidence that at an early stage of the investigation the Applicant had said that Miss A had told him that she lived alone. He said that she told him that while they were walking to her house. Miss A in her evidence denied that she had said any such thing. The Applicant argues that the only way he could have known that was from her. The Judge accepted in her judgment that the Applicant may well have been right about that and Miss A was wrong and she has factored that into her decision. The fact that the Judge had found Miss A to have been inaccurate about that does not preclude her from finding that Miss A was accurate about the main issue. She properly considered it but was still sure of guilt. There is nothing arguably wrong in that in our judgment.
26. In her critique of the evidence the Judge explains why she found the account of Miss A to be more plausible than the account of the Applicant. She was entitled to reach those conclusions in our judgment.
27. Of great significance to the Judge's final conclusion is that the account of the Applicant provides no sensible reason for Miss A to have walked out of her house late at night. The Applicant also left having previously intended to stay the night at the house. The Judge relied on the fact that Mr. Treadwell stated that the Applicant was stressed when they left the house and there was panic. The Applicant himself accepted that he left

- in a hurry. Such was their hurry that they left leaving the front door open. It is difficult to know why the Applicant left the house and in something of a panic if nothing had happened in the house at all.
28. The Judge concluded at para 81 *'Not only do I find the complainant's evidence to be consistent on the significant and salient matters, but I find her whole version of events has an internal consistency, and an internal consistency that is wholly lacking in Mr. Alfred's version of events.'*
29. The test for us is whether it is arguable that the verdict of guilty is 'unsafe'. It is not for us to substitute our view of the witnesses for that of the Judge. She had the opportunity to see and hear the witnesses. It is the function of a trial to test the evidence of the witnesses and to assess their credibility. The Judge was in a much better position than we are to assess the witnesses and decide where the truth lies.
30. We have considered with care all the arguments presented by the Applicant's counsel. Criticism is made of the Judge's use of the word minutiae when dealing with some of the inconsistencies. Looking at the whole of paragraph 65, it is clear to us that the Judge is not using the word minutiae as meaning unimportant but to describe the fact that what was being talked about were relatively small details of the events. We are satisfied that the inconsistencies in Miss A's evidence were properly considered by the Judge and that she was entitled to rely on her evidence for the reasons she has given. The verdict is not, in our judgment arguably unsafe by reason of inconsistencies in Miss A's evidence.
31. The Applicant seeks leave to admit further evidence before us that was not available at the time of trial which, if it is submitted, renders the verdict of the Judge unsafe. We accept that at the time of the trial this evidence was not available to the defence. It came to light because a member of the public who had attended the trial approached the Applicant's solicitor and expressed surprise that Miss A had not been questioned about a previous incident that she had been involved in that had also ended in a court case. The Applicant's solicitor subsequently found a newspaper report of the previous hearing and also the notes of the hearing which had been kept on the court file.
32. Put briefly the events which are the subject of the application to adduce fresh evidence occurred on 2nd August 2014. Miss A and her brother and three other friends had been out drinking. Among this group was one

other girl who I shall call Miss B. At the end of the evening, the group had returned to the house of E, another of the group, where they continued to drink and listen to music. During the evening Miss B and E went into the bathroom together and remained there for some time. When they eventually emerged, E kissed Miss A and escorted her into the bathroom and closed the door. Miss A's brother became annoyed at what was going on; he broke down the door and assaulted E.

33. It is suggested that, if this information had been known to the Applicant's counsel at the time of the trial, Miss A could have been cross examined on it and, if she denied that it had happened, evidence could have been called to prove the incident. As I have already indicated we shall make our decision on admissibility on the basis that these allegations are true.
34. The first issue that we have to decide is relevance. It is a central rule of admissibility that evidence is only admissible if it is relevant to an issue in the case. It is only relevant if it is capable of making it more likely that a relevant fact is true.
35. Where the evidence sought to be adduced relates directly to the facts of the alleged offence or the surrounding circumstances, the issue of relevance is normally straightforward to decide. Where the events which are said to be relevant are removed in time but are said to make it more likely that a party behaved in a particular way at the time of the offence, the issue is often more difficult to decide.
36. The central issue in this case is whether the Applicant attempted to rape Miss A in her bedroom or that nothing happened at all which are the two competing versions. It is not asserted that the evidence is relevant to that issue. There was however another issue in the case which was what happened if anything outside the toilet at the YMCA. The Applicant asserts that if he had been allowed to adduce this evidence it would have made it more likely that Miss A had behaved in the way he alleged.
37. The way it is put in the advice on appeal is 'had the information been available at the time of the trial and placed before the court the Learned Judge may well have a different view of Miss A. That in turn could have affected the way in which she viewed her credibility and reliability as a witness.' In argument before us Miss Lindop has further suggested that we should consider the fresh evidence in conjunction with the failure of Miss A to mention until trial the invitation that she says the Applicant

made to her to go into the toilet with her. The Judge expressed surprise that Miss A hadn't mentioned it before but went on to describe how Miss A gave this evidence at the trial including the fact that she '*showed some animation, some colour*' when giving this evidence. The suggestion would seem to be that the animation and colour was attributable to the previous incident. We do not consider this to be anything but speculation and extremely unlikely particularly bearing in mind the lapse of time.

38. We do not see how the suggested evidence was capable of being relevant to any issue in the case and in particular is not relevant to a determination as to whether anything happened outside the toilet on the night the offence is said to have happened. The fresh evidence relates to events said to have taken place over two years before. The allegation that she went into a bathroom with a male friend, presumably for some sort of sexual activity, however mild, is not probative of a suggestion that she removed the trousers and underwear of a man who was almost a complete stranger as he left a toilet and had oral sex with him. It does not make it any more likely that she did behave in that way. It is in our judgment not arguable relevant in any way to the decision the Judge had to make.
39. As a result of that ruling, it is unnecessary for us to go on and consider whether, even if it was capable of being relevant, the evidence would have been inadmissible as a result of s. 28 of the Criminal Justice (Evidence) Ordinance.
40. The application to call further evidence is refused. We have considered the proposed grounds of appeal both individually and cumulatively. We are satisfied that it is not arguable that the verdict was unsafe and accordingly the application for leave to appeal is dismissed.