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Regina v Mustapha Kadiu

No: 200204263/7221/C2

Court of Appeal Criminal Division

10 February 2004

Neutral Citation Number: [2004] EWCA Crim 487

2004 WL 62170

Before: Lord Justice Judge (Deputy Chief Justice of England and Wales) Mr Justice Nelson Mr Justice McCombe

Tuesday, 10th February 2004

Representation

- Miss J Gillard appeared on behalf of the Appellant.
- Mr P Grieves- Smith appeared on behalf of the Crown.

JUDGMENT

LORD JUSTICE JUDGE:

1. This appeal first came before the Court over which I was presiding, but otherwise differently constituted, on 27th November last year. Counsel for the appellant, not Miss Gillard, then opened the appeal before lunch. After lunch he continued his submissions. We adjourned to wait for some material to be copied. On our return to court we were told for the first time that the appellant did not understand English. He needed an interpreter and none had been provided.

2. On investigation we discovered that the appellant had indeed been provided with an interpreter throughout the proceedings in the Crown Court. We were also told by counsel that in the pre- hearing conference with his client counsel believed that the client's language had improved significantly since the date of his conviction in June 2002. However, after a further conference at court between counsel and the appellant, it became clear that the appellant, while perhaps able to follow some parts of the process, had not sufficiently comprehended them. The appellant has the right to be present. That right means more than mere physical presence. If he was unable reasonably to comprehend what was going on, he might just as well have been excluded from the hearing. Accordingly, we adjourned the hearing of the appeal and ordered a completely new hearing. That is what has taken place today. The appellant has been represented by Miss Gillard.

3. The Crown Court is responsible for notifying the Registrar of the need for an interpreter. This is usually carried out by an entry on the Crown Court documents. In this particular case, for the first time in the experience of any member of the Court considering the appeal when it was first listed, the appropriate entry was omitted from the Crown Court papers. Hence, when the appeal was called on no interpreter was present. If counsel had raised the point at the outset of the hearing, it would still have been adjourned because by then it was already too late for a suitably qualified interpreter to be found.

4. There is no reason why a practice which has worked well should be changed. The existing arrangements at the Crown Court should continue. However, a problem having been identified, in future the person, whether barrister or solicitor, responsible for signing the application for leave to appeal, whether against conviction or sentence, should say in written grounds that an interpreter was used for the intended appellant in the Crown Court. This should be done in every such case.

5. Before giving that direction, we invited comment from the General Council of the Bar and the Criminal Committee of the Law Society. Neither has expressed any concern, or suggested that this additional obligation should dramatically increase the burdens on advocates.

6. We can now turn to the issues raised in the appeal.

7. On 24th June 2002 in the Crown Court at Southwark before His Honour Judge Wadsworth QC and a jury this appellant faced a nine count indictment. Counts 1, 3, 5 and 6 alleged rape. Count 7 alleged attempted rape. Counts 2 and 4 alleged indecent assault as alternative counts to the rapes alleged in counts 1 and 3 respectively and were based on the inability of the victim, because of her age, to give consent in law. The victim in each of these counts was the same young woman, D. Counts 8 and 9 alleged living on the earnings of prostitution, the prostitution of the same young woman.

8. Verdicts of not guilty were directed on counts 6, which was an allegation of anal sex, and count 7. The jury acquitted the appellant on counts 1 and 3. They found him guilty on counts 2, 4, 5, 8 and 9. On count 5 the appellant was sentenced to seven years' imprisonment; on counts 2 and 4, 18 months' imprisonment to run concurrently; on counts 8 and 9, three years' imprisonment to run concurrently among themselves, but consecutive to the remaining sentence. The total sentence, therefore, was ten years' imprisonment, and a recommendation was made for deportation.

9. A co- accused Edmund Ethemi, pleaded guilty to count 9, living on the earnings of prostitution. On 22nd November, on a severed indictment, while he was convicted of possessing a class A controlled drug, cocaine, with intent to supply, the present appellant was acquitted. Ethemi was sentenced to a total of six and a half years' imprisonment and also recommended for deportation.

10. This appeal against conviction is brought with leave of the single judge.

11. The main ground of appeal is an alleged inconsistency in the jury's verdict arising from the acquittal of rape on counts 1 and 3 and the conviction on count 5. A further ground related to the admissibility of evidence relating to £30,000 found in the flat which the appellant shared with his co-accused. We shall return to that later in the judgment.

12. The complainant in this case was born in Romania, according to her birth certificate, on 20th August 1985. In the context of the issues which we have considered that dating is important. She left Romania in 2000, but was soon introduced into prostitution. She worked as a prostitute in Yugoslavia and Italy. She claimed that the appellant had bought her, provided her with false Italian documents and paid her passage to England where she arrived at the beginning of July 2001 when she was still 15 years old.

13. In England for a time she shared a room with the appellant in the co- accused's flat. The co-accused was living there with his wife, Valbonna, otherwise known as Anna Maria, who also worked as a prostitute. Later they shared a flat alone.

14. The appellant encouraged the complainant to work as a prostitute in a variety of brothels. She said that she had no option but to obey. She was last working as a prostitute at the end of September, when, with the assistance of another woman who contacted the police, she escaped from the situation in which she had found herself.

15. The essential case for the prosecution was that the appellant was living on the earnings made by the complainant as a prostitute, but also, and separately, that the appellant had had sexual relations with her against her wishes both before and after her sixteenth birthday.

16. There were two particular complications to the evidence, the first arising from such evidence as there was about her precise age, which the judge left to the jury to decide, and, second, her own perception of the meaning of rape. This is perhaps best encapsulated in her evidence that:

> “I had sex with him because I felt I had to. He never took my clothes or hit me before sex and he never raped me. I had sex because, if I said no, he would get angry and start swearing and shouting. I know what rape is and he never raped me.”

17. She said to the jury that she had had sex with the appellant because of his conduct and language. She said that he became angry and started shouting and swearing, but the appellant had not raped her as she understood it. She believed that rape meant sexual intercourse involving violence.

18. When she was recalled later in her evidence she stated that she had not mentioned rape in her application for asylum because she believed there had been no rape. She said, “He had sex without my consent many times but not by force.”

19. When he came to sum the case up to the jury Judge Wadsworth QC directed them that, although the complainant had said on a number of occasions that she was not raped, she was:

"… defining rape as sexual intercourse procured by force."

20. He directed the jury that Parliament had defined rape more widely. The test was not whether the man used or threatened force, but whether or not the woman in fact consented. The judge distinguished between submission and domination and consent.

21. We need not deal in further detail with the judge's directions on this issue. No criticisms were directed at them, nor indeed at the judge's directions about the state of mind required to be established against the appellant. For obvious reasons it nevertheless was a point of some significance in the case that the victim, alleging rape, expressly asserted that rape had not taken place, but gave evidence from which it was open to the jury, if they accepted it, to conclude that she had in fact been the victim of rape. Naturally they would have been rightly concerned to ensure that in reaching their verdicts in accordance with the judge's directions their conclusions were entirely consistent with her evidence. That represented one problem with the language used by the complainant to describe the various incidents which had happened to her.

22. It is fair to say at the outset that, when interviewed by the police, the appellant denied all the offences alleged against him. When it came to trial he did not give evidence. The evidence of the complainant was, therefore, decisive, so far as the jury was concerned, on two questions: whether the jury was satisfied that it was proved that she had not consented and whether it was proved to the jury's satisfaction that on the evidence available to it the appellant knew or was reckless whether she had consented or not.

23. The submission was made that, if the jury could not be satisfied by her evidence that she did not consent during the period covered by counts 1, that is to say 1st July 2001 to 1st August, and count 3, 31st July 2001 to 1st September, it was illogical for the jury to be satisfied that she did not consent and that he knew or was reckless whether she consented during the period covered by count 5, 31st August 2001 to 3rd October 2001.

24. In her submissions, attractively presented to us on behalf of the appellant, Miss Gillard suggested that there was no logical distinction to be made in the evidence before the jury so as to enable them to reach the verdicts which they did.

25. We are inclined to agree that the sensible interpretation of the verdicts on counts 1 to 4 should lead to the conclusion that in relation to those counts the jury could not exclude consent by the complainant, or that it might have been left in doubt as to knowledge or recklessness by him. If the jury was not convinced of those matters in relation to counts 1 and 3, the issue which we must address is whether there was anything in the evidence which logically served to explain the guilty verdict in count 5.

26. It would, however, be superficial simply to assume that a logical inconsistency is demonstrated by a narration of the verdicts which were reached. We have, therefore, examined the complainant's evidence in detail. It is clear, examining that evidence in context and making reasonable allowance for her difficulties with the English language, that the complainant gave evidence which the jury was entitled to accept that a time came, in what the jury may well have thought was a fairly tempestuous relationship, when the appellant's behaviour towards her became increasingly aggressive and unpleasant and much closer to what she, ignorant of legal principles in this jurisdiction, would indeed have regarded as rape. Having examined the evidence in that way, we can well see why the jury would have discerned a gradual change, eventually resulting in a significant difference in the way in which the appellant treated the complainant during September by when she had started work as a prostitute for him.

27. There are three critical dates which seem to be clear: the first has already been mentioned, her birthday as evidenced by the birth certificate, 20th August; the time when she started working as a prostitute, which was put at the beginning of August; and the final parting, which occurred either on the last day of September, or, perhaps more specifically, on 2nd October. So the events with which we are concerned took place within a narrow compass in a changing relationship.

28. We can illustrate some of the issues by taking extracts from her evidence:

Question: Were you scared in July?

Answer: I wasn't scare of him. I was scared of it's when you see when people are

argument and they were fighting.

Question: You have said that you did not want to have sexual intercourse with him in July. Did you say anything to him about this?

Answer: There was some days when I didn't want and he did accept as just soon after I arrived and I was saying I don't feel very good, or I was on my period that.

Question: Were there times when he did not respect your wishes?

Answer: There were after that I start working. He didn't care if I am on period or I am not."

29. In a passage in her evidence she described how:

"In July everything was okay. It wasn't as bad as everything was normal.

Question: Did that change?

Answer: It did.

Question: Tell us how it changed?

Answer: Well, when I started working … if I didn't want to have sex with him on the nights he used to hit me and beat me really, really bad."

30. She went on to describe what she meant by "really, really bad":

He always when he used to hit me it was only on the face. So you cannot see that I was hit and he used to strangle me with his hands and spit on my face and swear and hit me again and leave me without breath.

Question: Leave you without breath?

Answer: While he was trying to strangle me.

Question: When did he start to treat you in that way, the physical way you have described?

Answer: I guess middle of the August.

Question: Middle of August?

Answer: Yeah. After that I did start work like. Few weeks in work I had.

Question: How often would he do that to you?

Answer: Well, it became very, very often by the end of August beginning of September. It did become very, very often. Nearly every day we used to argue and he used to swear and he used to hit me."

31. Counsel asked her month by month of the relevant months whose idea it was to have sexual intercourse. We take this passage. As to July she said "his idea":

His always.

Question: What would you say?

Answer: I wouldn't say anything

Question: Did you ever say no?

Answer: In July there were times when I did say no.

Question: When you said no to him, did he accept what you said?

> Answer: Well, it wasn't that, no, I don't want to have sex with you. There always had to be an excuse not to have sex with him.
>
> Question: But did he accept what you said?
>
> Answer: Yeah, at very, at the July he did.
>
> Question: In August was it the same situation?
>
> Answer: No, it wasn't any more. Late August it wasn't any more."

32. She was asked why she had sexual intercourse with him in August and she answered:

> Because he then started showing if I may say his real face or his real character. He start being different and how I used to know him."

33. She was asked:

> "In August was it the same situation?
>
> Answer: No, it wasn't any more. Late August it wasn't any more.
>
> Question: By late August. I don't whether you can remember whether that was before or after your birthday?
>
> Answer: Before he start.
>
> Question: Tell what would happen?
>
> Answer: What would happen when? At the moment when I am saying no. When I am trying to find an excuse."

Then she described what would happen if she refused.

34. She gave evidence in answer to questions about injuries and whether she received any during the course of what she described as "his fighting". She was asked about the physical force he had used. She said that he had used his hand. She went on:

> "Just around the face, just from up here everything. And one day it was September, just before I left with the week, I think we were."

35. She went on to describe an incident in which she objected vehemently to the life she was leading with him and that the appellant had armed himself with a kitchen knife, or knives, and with his hand around her neck had shown the knives near to her face leaving her with the impression that he was going to kill her. Eventually he threw away the knives and struck her with his hands. That she described as one of the times when he actually "used other things than his hands".

36. We have had our attention drawn to a number of different passages in the transcript to what can reasonably be described as an inconsistency in her evidence about the count relating to anal sex and whether that amounted to rape or not, and to the way in which that may be linked with the incident which we have just described from the complainant's account of the use of kitchen knives.

37. In the forensic argument by Miss Gillard, and we understand the reasons for it, she spent some time trying to point out to us that the case which was being made against the complainant was rather more damaging in August, and indeed possibly in July, than it may have appeared from the jury's verdict. The reason for that approach to the argument is perfectly understandable. It enabled her to argue that there was no particular reason why the jury should not be satisfied about August, at any rate, and yet be satisfied about September.

38. The longer we have studied the transcript of the evidence the clearer it has become that the jury's decision was, on examination, entirely logical. In essence it came to this. Prior to September the jury was rightly prepared to give the benefit of doubt to the appellant and to give the benefit of doubt so as to allow for some margin between incidents which happened, or were said to have happened,

immediately after the birthday on 20th August. That meant they would not convict of incidents in July and August.

39. If, however, and it was a matter for the jury, the complainant's evidence about the discernible change in his attitude and behaviour was correct, then it was entitled to conclude that in relation to September, whatever benefit of doubt there may have been in relation to August, there was no longer any benefit of doubt to be given to the appellant. That seems to us not to provide an inconsistency at all. It rather reflects what we believe was an extremely cautious and meticulous approach to the evidence by the jury rightly giving separate consideration, as they had been directed by the judge, to each count before them. The verdicts which were returned were logically supported by and consistent with the evidence of the complainant.

40. We can briefly consider the facts relating to the convictions on counts 8 and 9. There was ample evidence that the complainant had worked as a prostitute. She said that she had been forced by the appellant to do so. He would drive her to saunas and had provided her with a massage diploma which was false. There was evidence of a large number of phone calls between his mobile telephone and the complainant's, sometimes in the early hours, sometimes from his telephone to her telephone and also to a sauna on the night of 30th September to 1st October. He and the complainant lived with the co- accused and his wife. He and the co- accused were frequently together in the locality and there was a good deal of evidence of the activities of the co- accused's wife as a prostitute.

41. We must come to the police search of the flat belonging to the co- accused at a time when all four were living there. That search produced travel documents, an identity card in the appellant's name and the complainant's Italian passport and identity card which bore his fingerprints. The search also revealed £30,000 in cash wrapped in a bundle, and this money included a £50 note which was handed to the co- accused's wife by an undercover police officer. A quantity of cocaine was also found in the flat which provided the basis for the subsequent conviction of the co- accused.

42. At the trial with which we are concerned the Crown's case was that this large sum of cash represented the proceeds both of drug dealing and of prostitution and the funding for it. The Crown could not say what proportion of that sum of money belonged to which of the two men, the appellant or his co- accused. In the end at the trial of the co- accused the evidence of the finding of this cash was excluded.

43. We know, but the jury did not, that the co- accused admitted to the police that the £30,000 belonged to him. The judge rejected submissions, first, that the evidence of the money should not be admitted in this trial and, second, that, if the evidence were admitted, then the jury should be informed of the admissions which the co- accused had made.

44. In the result the judge admitted the evidence. We can see no basis for concluding that his decision was wrong arising from the fact that at the second trial, a different trial with different issues, the court decided that that evidence should not be admitted. It may very well be that that was a very favourable, indeed over favourable, decision so far as the then defendants were concerned.

45. As to the observations by the co- accused, the appellant did not seek, as he could, to call the co-accused himself in support of what the co- accused had told the police, nor did the appellant choose to give any evidence himself relating to the £30,000 in cash.

46. The comments to the police by the co- accused were inadmissible in this trial. They were hearsay. Despite Miss Gillard's valiant submission, they did not go to that man's state of mind at all. Unless it was an assertion that this money belonged to him and not to the appellant there was no possible use that the appellant could have made of it. We add that that admission would have been inadmissible in the case of the appellant even if there had been a joint trial of all counts on the original indictment of the two defendants together.

47. We must add this. It was open to the Crown to admit that all the money belonged to the co-accused. But the Crown did not believe that that was the truth, so the Crown was right not to make the admission. It was, as we have said, open to the defence to call the co- accused. If so, of course, he would have been cross- examined. So a decision was taken not to call him for understandable forensic reasons. It is not possible for the appellant to return to court now and suggest that the conviction is unsafe because that material was not before the jury when he was not prepared to risk putting it forward in admissible form.

48. For these reasons the appeal against conviction is dismissed.

49. There is a renewed application for permission to appeal against sentence. We will consider that at quarter past 2.

(Submissions made in relation to a renewed application for permission to appeal against sentence)

50. LORD JUSTICE JUDGE: The single judge referred the application for leave to appeal against sentence to the Full Court. We have heard Miss Gillard's submissions which, attractively put, come to this. For a man of good character the sentence for the offence of rape with the allied indecent assaults at seven years was rather too long and that the sentence for living on the earnings of prostitution was itself a little too long, so that the totality amounts to a sentence which is manifestly excessive.

51. The factors which have weighed with us are these. This case proceeded as a trial. It was pre-eminently a case in which the trial judge was able to form his own view about the culpability of the appellant and the extent of the fragility of the complainant's personality and the impact of what the appellant did to her and forced her to do at the age when she was forced to do it and in the background circumstances, she being an asylum seeker, and his control over her, on any view, exceptionally powerful.

52. The judge said that the appellant had been convicted of most unpleasant crimes. He said that the appellant had been fully aware of the complainant's age, that he had subjected her to sexual intercourse and to work as a prostitute in which he, the judge, regarded the rape as part of the campaign of domination and subjugation to keep her working as such. He said that a deterrent sentence was essential. We agree with the judge's view that in this sort of situation a deterrent sentence must be considered and certainly would be appropriate in many cases.

53. Reflecting on these matters, it seems to us that there is no ground for concluding that the judge did other than pass a fully merited severe sentence on the appellant. Accordingly the application will be refused.

54. MISS GILLARD: My Lord, may I just mention the legal aid position? There was full legal aid for the appeal against conviction in respect of Mr Femiola, but — I don't know quite how — when the certificate was transferred it was only in respect of an application for leave to appeal against sentence.

55. LORD JUSTICE JUDGE: That must have been an error.

56. MISS GILLARD: I think it was an error.

57. LORD JUSTICE JUDGE: It may have been caused by the fact that we nearly got to the end of the appeal against conviction. Assuming we have power we will order, and if we do not have power to order we shall indicate, that the certificate for today's hearing should cover a full appeal against conviction and the application for permission to appeal against sentence. We are very grateful to you for your assistance.

58. As for you Mr Grieves- Smith, well, you will have harder days than this one. Thank you for your assistance.

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