

ENGLAND AND WALES / JUDGMENT

R v Alan Clarke

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[2026] EWCA Crim 184 Before: THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION (Lord Justice Edis) MR JUSTICE TURNER MR JUSTICE PICKEN

R E X

- v - ALAN CLARKE

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Miss C McCulloch appeared on behalf of the Applicant Mr M Eldridge appeared on behalf of the Crown

J U D G M E N T

Friday 6 February 2026 LORD JUSTICE EDIS: I shall ask Mr Justice Turner to give the judgment of the court. MR JUSTICE TURNER:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. 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 the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. On 1 October 2024, in the Crown Court at Woolwich, the applicant pleaded guilty to sexual assault and breach of a Sexual Harm Prevention Order, which had been charged under counts 2 and 4 of a four count indictment.
3. On 3 March 2025, at the same court, he pleaded guilty on re-arraignment to one count of assault by penetration, which had been charged under count 3. However, he maintained his plea of not guilty to count 1, which alleged attempted rape. But on 11 March 2025, following a trial, he was convicted by a majority of the jury (10:2).
4. On 30 April 2025, the applicant was sentenced to an extended determinate sentence of 13 years, comprising a custodial term of ten years and an extended licence period of three years. The matters to which he had earlier pleaded guilty under counts 2 and 3 attracted concurrent terms of imprisonment of two years and five years respectively. No separate penalty was imposed under count 4.
5. The applicant's application for leave to appeal against conviction under count 1 has been referred to the full court by the Registrar with a view to a rolled up hearing in the event that leave to appeal were granted. 6. In short, the trial judge had acceded to a defence submission, following the conclusion of the prosecution case, that there was no case to answer on the count of attempted rape and ruled accordingly. But later that day he changed his mind and gave a ruling that there was after all a case for the applicant to answer. The question arises as to whether this sequence of events vitiated the later guilty verdict reached by the jury. The Facts
7. The facts are these. On the afternoon of 10 December 2023, as she was walking through an alleyway on her way home, the 17 year old complainant was confronted by the applicant who was a complete stranger to her. He told her not to scream, grabbed her in a bear hug and dragged her forcibly into a wood. There he put her up against a tree. She cried for help, but he proceeded to put one hand under her top and touch her breast and nipple (count 2). With his other hand he moved her underwear to one side under her skirt and put his finger or fingers partly into her vagina (count 3).

8. The evidence of the complainant's account was accurately summarised by the judge in his summing up in these terms: "He slapped me on the face. I'd hit my head on the tree, and it was after that when I started screaming that he slapped my face. He didn't use much force, but he said, 'Shut up'. I was screaming bloody murder. I was screaming 'Help me'. He covered my mouth with his hand. He was using a lot of force; I was constantly struggling. I nipped at his hand, and he jumped back a bit. I took it as an opportunity to kick behind me. I guess I kicked his balls. He fell back a bit, and I rolled away a bit. I got up and I tried to walk away. He got up immediately. In fact, he got up before I did. He walked away. He had his pants down. I guess he was trying to pull them up. I only noticed this as I looked back to see if he was following me or not. I saw the tip of, what [the complainant] called, 'his little peepee'. He was wearing sweatpants or jogging bottoms. I started walking towards my house. He was standing there. He did not say or do anything. ... I just saw the tip of a dick. It was obviously hard. From the position I was in, it was erect. He was pulling up his pants but not very fast."
9. The applicant's DNA was later found on the complainant's clothing.
10. The applicant was arrested on 1 September 2024. In interview he answered "No comment" to all questions.
11. He did not give evidence at his trial. His case had been put on the basis that the complainant's evidence was unreliable; that he never took his trousers down; that his penis was not visible; and that he had had no intention to rape her.
12. The central issue in this application arises from what followed a submission of no case to answer made on behalf of the applicant on the third day of trial at the conclusion of the prosecution case. The judge acceded to the application in the following terms: "In this case, a submission is made that no reasonable jury properly directed could find that the Crown's evidence is sufficient to enable them to be sure that count 1, attempted rape, is made out. It is an unusual case because the [applicant] accepts that he surprised a person who was a complete stranger, a 17 year old girl, on her way home from a railway station; that he took her into a nearby wood by force; and that there he sexually assaulted her by forcibly caressing her nipples when she had made it clear that there was no consent to any such act. Then even more seriously, penetrating the entrance of her vagina, her vulva, with his finger. He pushed her to the ground. He slapped her. He used a great deal of force, despite her constant struggles. Those are all matters which are in evidence, and the jury could perfectly reasonably, although some of them are challenged, find that they are sure that those things occurred. But count 1 requires me to concentrate on the act of penile penetration. That is the dispute between the parties. It is because the Crown say that there was an attempt to achieve penile penetration. In this case it seems likely of the vagina, but it could of course have been of either the anus or the mouth. It is because the Crown say that there was an attempt, something more than merely preparatory to do that, that they have persisted in the trial and not found the pleas of guilty to the offences which I have briefly described to be sufficient. I have to decide whether the evidence would permit a reasonable jury properly directed to be sure that he not only was preparing to penetrate the victim with his penis, but

that he actually tried to do so, did something more than ... a merely preparatory act. I have no doubt that a jury could be satisfied on the basis of the evidence that that was the [applicant's] intention. The question is whether there is evidence on which a jury could be satisfied that he actually did something, he took an action, which was more than merely preparatory, that he tried to penetrate the victim. I am not satisfied that, on a careful examination of the evidence, a jury could be so satisfied. Having pushed her to the ground, according to her evidence, the victim notes that he slapped her face, was using a lot of force, and was constantly struggling. He had his hand, she said, and the jury could find that they were sure, over her mouth. She was, as she put it, 'nipping at his hand', although she is not sure she achieved an effective bite. What she did manage to do was to kick him. She thought that her backward kick, because she was facing the ground and he was on top of her, connected with what she called 'his balls'. As a result, he fell back a little bit and she rolled away. Having rolled, she was able to see him. He had walked away some distance, a matter of yards. At this stage, she could see that he had his pants down and was trying to pull them up. She saw the tip of his penis, and she thought it was obviously erect. For his pants, she meant his trousers, to have been down so that he was pulling them up. That means, in my judgment, that a jury would be perfectly entitled to draw the inference that he had taken them down. And that, it seems to me, is the high point of the prosecution case. He had taken his trousers down to expose, or at least part of, his erect penis. But in my judgment, there is no evidence that he actually went beyond those preparations, close as they are to the act of penetration, and no evidence that he actually tried to penetrate her with his penis. In those circumstances, I think that a jury conclusion that he did do such an act would be speculation. There is no proper evidence to support it so that they can be sure that that is what happened. For that reason I allow the submission made by the defence."

13. The judge then invited the prosecution to state whether they intended to appeal his terminatory ruling. The Law
14. The procedure to be followed is laid down under section 58 of the Criminal Justice Act 2003, which provides: "General right of appeal in respect of rulings
 - (1) This section applies where a judge makes a ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.
 - (2) The prosecution may appeal in respect of the ruling in accordance with this section.
 - (3) The ruling is to have no effect whilst the prosecution is able to take any steps under subsection (4).
 - (4) The prosecution may not appeal in respect of the ruling unless — (a) following the making of the ruling, it —
 - (i) informs the court that it intends to appeal, or
 - (ii) requests an adjournment to consider whether to appeal, and

- (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal. (5) If the prosecution requests an adjournment under subsection (4)(a)(ii), the judge may grant such an adjournment.
- (6) Where the ruling relates to two or more offences —
 - (a) any one or more of those offences may be the subject of the appeal, and
 - (b) if the prosecution informs the court in accordance with subsection (4) that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.
- (7) Where — (a) the ruling is a ruling that there is no case to answer, and
 - (b) the prosecution, at the same time that it informs the court in accordance with subsection (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal, that other ruling, or those other rulings, are also to be treated as the subject of the appeal.
- (8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection
 - (9) is fulfilled.
 - (9) Those conditions are— (a) that leave to appeal to the Court of Appeal is not obtained, and
 - (b) that the appeal is abandoned before it is determined by the Court of Appeal.
- (10) If the prosecution informs the court in accordance with subsection (4) that it intends to appeal, the ruling mentioned in subsection (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.
- (11) If and to the extent that a ruling has no effect in accordance with this section —
 - (a) any consequences of the ruling are also to have no effect,
 - (b) the judge may not take any steps in consequence of the ruling, and (c) if he does so, any such steps are also to have no effect.
- (12) Where the prosecution has informed the court of its agreement under subsection (8) and either of the conditions mentioned in subsection (9) is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence.

- (13) In this section 'applicable time', in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the time when the judge starts his summing-up to the jury.
- (14) The reference in subsection (13) to the time when the judge starts his summing-up to the jury includes the time when the judge would start his summing-up to the jury but for the making of an order under Part 7."
15. It is uncontroversial that before the judge purported to reverse his earlier decision, that this procedure had been followed. Prosecution counsel duly asked for time to take instructions from the Crown Prosecution Service. The judge granted the application and adjourned the trial to midday on the following day. The jury were told that there was a matter of law that needed to be dealt with and they were sent home for the day.
16. In the meantime, and to help the CPS come to their decision as to whether to make an application to appeal against the ruling, prosecution and defence counsel put a document together from their respective notes recording what the judge had said in giving his ruling. The document was then emailed to the judge for his comments at 3.36 that afternoon. No read receipt was ever received from the judge. However, at 4.48 on the same day, the judge sent an email stating: "I have concluded that I came to my decision too hastily and it was wrong of me to rule that there was no case to answer on attempted rape. I will set out the detailed reasons for my change of mind in a document which I will upload to the DCS."
17. The judge duly uploaded his reasons to revoke the terminatory ruling: "[The applicant] is being tried on a single count of attempted rape. He has pleaded guilty to offences of sexual assault, assault by penetration, and a breach of a sexual harm prevention order. Yesterday, on 5th March 2025, a submission was made that, the prosecution case having concluded, there was no case to answer on the attempted rape and that I should direct the jury to acquit. I allowed that submission a little before noon yesterday. I was aware that in doing so I was making a terminatory ruling, to which section 58 of the Criminal Justice Act 2003 applied, giving a right to the prosecution to appeal the ruling. The prosecution asked for an adjournment to consider whether they wished to do so. I granted the adjournment until today. During the course of the afternoon, I reconsidered the ruling that I had made. I came to the conclusion that it was incorrect. I informed the parties of this conclusion by email and promised to provide written reasons."
18. The judge then went on to identify the reasons behind his original decision, which we have set out above. He went on: "The reasons for my original ruling were wrong Embarrassingly, I have come to the conclusion that this ruling was delivered too hastily, without proper reflection, and wrong. Distracted by the fact that the [applicant] accepts, and has pleaded guilty to, other serious assaults immediately before the alleged attempted rape, I focused too narrowly on the issue of penetration, and my ruling usurped the function of the jury. It is they, not I, who should decide whether they can be sure that the evidence of the acts of the [applicant], including his pushing [the complainant] to the ground, holding her down,

putting his hand over her mouth and, as they would be entitled to infer, pulling his trousers down sufficiently to expose his erect penis, amounted to acts more than merely preparatory to raping her. And it is they who should decide whether the reason why he did not, in the end, rape her, is because she kicked him in the testicles and thus forced him away. I should therefore have ruled against the submission of no case to answer, and I now do so."

19. The judge went on to deal with the current position in the following terms: "As a result of the prosecution's application for an adjournment, I took no further steps in the trial. I did not inform the jury of my original ruling or discharge them. I sent them away, explaining that there were legal issues which had not yet been resolved and asked them to return this morning. I am satisfied that, although my incorrect original ruling has caused delay and raised hopes in the [applicant] that he would be acquitted of the offence of attempted rape, no unfair prejudice has been caused to him and that the correct course is to continue with the trial."
20. It is not in issue that the judge applied the proper two stage test in accordance with *R v Galbraith* [1981] WLR 1039, albeit that he reached different conclusions in each of his successive rulings.
21. The defence made oral representations to the judge in which they challenged the lawfulness of his volte face. The prosecution, however, successfully argued that the judge was entitled to put into effect his change of mind.
22. The jury were then brought into court. They had no knowledge of what had happened in their absence. The applicant did not give evidence, and the jury went on to convict him.
23. The proposed grounds of appeal are:
 1. That the judge erred as to the law in the procedure followed when he revoked his terminatory ruling made at half time;
 2. That the judge erred as to the law when he revoked his terminatory half time ruling as having put the Crown in charge whilst considering an expedited ruling. The judge was not seized of the matter and thus had no authority to revoke it;
 3. That there was a legitimate expectation by the applicant that the judge would not rescind his terminatory half time ruling.
24. No challenge is raised as to the substantive correctness of the second ruling to the effect that there was indeed a case for the applicant to answer. This, in our view, was realistic. The Issues
25. The issues raised in this application may best be approached in three stages:

1. Does the wording of section 58 of the 2003 Act preclude a trial judge from reversing an earlier finding that there is no case for the defendant to answer during the period of adjournment which is granted to give the prosecution time in which to consider whether or not they will seek to challenge the earlier ruling on appeal?
2. If not, did the judge in this case otherwise have a discretion to decide to change his mind and reverse his earlier ruling?
3. If so, did his decision to change his mind fall within the legitimate parameters of the exercise of such discretion? We shall deal with each of these issues in turn.
26. Section 58(2), (3) and (11) of the 2003 Act provides that the prosecution may appeal in respect of the ruling in accordance with this section. The ruling is to have no effect whilst the prosecution is able to take any steps under subsection (4).
27. Subsection (11) provides: "If and to the extent that a ruling has no effect in accordance with this section —
 - (a) any consequences of the ruling are also to have no effect,
 - (b) the judge may not take any steps in consequence of the ruling, and (c) if he does so, any such steps are also to have no effect."
28. It is argued before us on behalf of the applicant that the judge's second ruling, purportedly reversing his earlier ruling, was a "step in consequence" of the first ruling and must therefore have no effect. On this interpretation, the second ruling was completely ineffective.
29. We reject this analysis. The step in consequence of the ruling does not, in our view, include every step taken by the judge which, but for the ruling, would not have been taken. In this regard we accept the contention made by Mr Eldridge in the Respondent's Notice that the second ruling was a negation of, rather than a consequence of, the first ruling. The clear purpose of subsection (11) is to ensure that the judge takes no step in furtherance of the ruling of no case to answer. Otherwise, even in a case such as this, in which the judge realises that the first ruling was deeply flawed and completely unsustainable, he would have no power to prevent the matter proceeding to the Court of Appeal on the election of the prosecution on a case which, by common consent, although the outcome was inevitable, would give rise to delay, disruption and addition expense, with no compensatory advantages to anyone. The Existence of a Discretion
30. The applicant accepts, in general terms, that a judge in a criminal trial, during the course of that trial and before the jury had delivered their verdicts, normally has a discretion to reverse an earlier ruling. As Miss McCulloch, on behalf of the applicant, conceded, both in her oral submissions before the judge and in her skeleton argument relied upon in this application, it is only her interpretation of the wording of section 58 of the 2003 Act which is said to preclude the existence of the discretion which the judge purported to exercise when

reversing his first ruling.

31. Having rejected that interpretation, however, we need say no more on the otherwise uncontroversial existence of the discretion in the circumstances of this case. The Exercise of the Discretion
32. The only point articulated on behalf of the applicant in support of the suggestion that the judge's discretion should not have been exercised in favour of changing his ruling is because the applicant had a legitimate expectation that the first ruling would stand. As the judge readily acknowledged, his change of mind was bound to come as a disappointment to the applicant. Nevertheless, we are satisfied that this disappointment falls very far short of establishing that the exercise of the judge's discretion fell outside the parameters of what was permissible. Indeed, although it is not strictly necessary to reach a conclusion on the matter, we would go so far as to say that we would have exercised it in the same way. In particular we have regard to the following factors:
 1. The judge's decision to reverse his first ruling was promulgated only about four hours after the first;
 2. Even if the first ruling had been allowed to stand, the prosecution could have decided to appeal against it and go on to be successful in such an appeal before the Court of Appeal;
 3. If there were any merit in the substantive challenge to the second ruling, then in the event of conviction such a challenge could have been made by way of an application for leave to appeal against conviction on the ground that the count of attempted rape ought not to have been left to the jury;
 4. No such ground of appeal has been relied upon before us, and we consider that this omission marks a realistic recognition that the judge's second ruling and the reasons which he set out were, in substance, unimpeachable.

Conclusion

33. In conclusion, we are satisfied that this application should be refused. But we record that, bearing in mind the absence of earlier authority directly in point, we nonetheless give leave for this judgment to be reported and referred to in any future case in which our conclusions may be relevant.

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