IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202103427/B3

[2022] EWCA Crim 1874

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 29 July 2022

Before:

LADY JUSTICE CARR DBE
MR JUSTICE FRASER
THE RECORDER OF LEEDS
HIS HONOUR JUDGE KEARL QC
(Sitting as a Judge of the CACD)

REGINA
V
SCOTT POWELL

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NON-COUNSEL APPLICATION

J U D G M E N T

REPORTING RESTRICTIONS AND ANONYMISATION APPLY:

Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case.

MR JUSTICE FRASER:

1. This is a renewed application in which the applicant seeks permission to appeal against his conviction for rape and other offences, following refusal by the single judge. He also seeks permission to call fresh evidence under section 23 of the Criminal Appeals Act. The applicant also seeks an extension of time of one year and six-and-a-half months to appeal. We shall return to that point concerning the extension of time at the end.
2. Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainant shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case.
3. On 3 February 2020 in the Crown Court at Leeds the applicant pleaded guilty to two counts of criminal damage, one count of assault occasioning actual bodily harm, one count of burglary and one count of common assault. He was convicted on 6 February 2020 after a trial of a single count of rape. The trial judge, His Honour Judge Batiste sentenced him to a total of eight years' imprisonment. This was made up of sentences of one month's imprisonment on each count of criminal damage (which were concurrent to one another), five years' imprisonment for the offence of rape (which was also concurrent), two years' imprisonment (which was consecutive) for the assault occasioning actual bodily harm and one year's imprisonment (which was also consecutive) for the burglary. Associated notification orders were also made following his conviction of a sexual offence. No evidence was offered against him in respect of another count of controlling and coercive behaviour.
4. The facts are as follows. The applicant, who was then aged 32, was in a sexual relationship with the complainant to whom we shall refer as "S" who was aged 19. They

met in April 2019 and commenced their relationship almost immediately. She moved into his house about a month later. It was in many ways a difficult and turbulent relationship from the outset. In August 2019 the complainant made a complaint to the police she had been raped by the applicant in June or July of that year. She said that it had occurred on an occasion when they had both been drinking and had argued in the course of the evening. In the course of the argument relations between them improved, but she nevertheless made it clear she did not want to talk and wanted to do nothing more than go to sleep. She therefore went to bed for that purpose and was wearing her normal nightclothes at the time.

5. She alleged he then started to kiss her. She did not respond and she told him she did not want to have sex. He nonetheless got on top of her. He asked her: "What's up with you?" to which she responded "Nothing" and either immediately before or immediately after this exchange he inserted his penis into her vagina. She believed the penetration lasted for about five minutes. Initially she just lay there but then told him to stop. He did not reply initially but then said: "No, give me a minute". She allowed him to continue in the hope that she would enjoy it but she was unable to do so and said: "Scott, get off." When he failed to do so she ultimately had to force him off by pushing him away quite hard. He asked her why she did not want to have sex with him. She did not think that he had ejaculated. He went to the bathroom and she lay in bed thinking, "Has he actually just done that to me?" The next day she wanted to get up and leave but the applicant, as she put it, "got into her head" and she never really had time to think about what had happened. He acted as if nothing had happened.
6. In cross-examination at the trial she explained she had primarily gone to the police to report other matters that had happened between her and the applicant, rather than the rape

allegation. She could not be precise about the exact date when the incident had occurred and she had not discussed the incident with anyone before reporting it to the police.

7. In interview the applicant denied that offence and he did not give evidence in the trial on that count. He pleaded guilty to the offences to which we have referred which were not admitted into evidence at his trial for rape. The details of these are relevant as one of the applicant's grounds is that he was wrongly advised to plead guilty to these counts. These offences are as follows:

Count 1 The applicant smashed or otherwise damaged a mobile phone belonging to S on a date prior to the rape. He was in fact said to have smashed her phone on more than one occasion, but the offence was charged as a single incident count to represent the first occasion when this had occurred.

Count 3 This was that on 9 August 2019 he had smashed a glass bottle and picked up some of the glass and rubbed it in the complainant's eye area causing cuts below her eye. He pushed her backwards causing her to fall and bang her head, stamped on her ankle, punched her, swung a lamp at her head, pinned her down on a sofa and pressed a pillow over her head for about 10 to 15 seconds. He also kicked her in the head and further assaulted her later that same night, after she had left to stay at a friend's house he had tracked her down and forced her to return home.

Counts 4 to 6 These arose out of an occasion on 18 August 2019 when S was at the home of her friend Bethany. The applicant banged on the door and having failed to gain admittance climbed a drainpipe into the house through a bathroom window and stole £20. He smashed up the bathroom, grabbed the complainant's phone and assaulted her by grabbing her around the neck. He later attended at the house in the early hours of the morning and smashed windows at the property.

8. The prosecution case against him on the rape charge was that the complainant had not consented to having sexual intercourse and the applicant had known she was not consenting. The evidence consisted of the evidence of the complainant which was an ABE interview recorded by way of evidence-in-chief and cross-examination thereafter.
9. The defence case was that the complainant had been drunk, her memory was therefore potentially faulty in respect of details and the applicant believed any sexual activity that had taken place had been with her consent. As we have observed he did not give evidence on his own behalf.
10. The issues for the jury were therefore whether they were sure there had been penetration. If so, whether they were sure the complainant had not consented. If they were then whether they were sure that the applicant had not believed the complainant had consented and whether that belief had not been unreasonable. They were directed accordingly and he was convicted.
11. His grounds of appeal are as follows. His primary grounds of appeal are contained in a document headed "Application to appeal out of time and grounds of appeal against conviction". That document reads as though it has been drafted by fresh counsel and it makes criticisms of trial counsel to which we will come in due course, but the identity of whoever drafted the grounds is not known and it has in fact been signed and adopted by the applicant. We take the grounds both from that document and another one headed "Notes on appeal" which would appear to have been drafted by him personally. This provides further detail regarding some of the grounds, in particular that of failure at the trial to make use of unused material. The applicant however in the material he has provided to the court also refers to further matters not contained in the primary grounds. We have carefully considered the material submitted by the applicant which is continued

on both from his application following refusal and further material sent to the court this week also.

12. We summarise his grounds only and in doing so we identify all of the diverse matters that he has raised in all of the different documents which he has submitted to the court. The grounds are:

1. His trial counsel took the decision that the applicant would not give evidence prior to having any meaningful conference with him. The applicant says that he wanted to give evidence but his counsel overruled him. There was a necessity for the applicant to give evidence.
2. The applicant pleaded guilty to the other counts other than the rape count upon the advice of counsel even though he protested he was innocent of those counts.
3. There is fresh evidence of post-trial retraction by the complainant, S.
4. Counsel failed to make use of the unused material, namely phone messages which gave an insight into the nature of the applicant and the complainant's relationship and this was contrary to his specific instructions.
5. Post-trial the complainant is said to have admitted to her friend that she fabricated the allegations. That friend contacted the police but they have not acted upon it.
6. The applicant's ex-girlfriend provided a character statement on his behalf and the complainant's ex-boyfriend provided a statement as to the complainant's bad character. Several other people gave statements but the claim is that his trial counsel failed to use any of these statements at trial. He has also addressed what is said to be the concerns of the single judge that the fresh evidence statements were identical and that one of them appeared to have been written by the applicant himself.

13. Further grounds have been submitted following refusal of the applications by the single judge. The applicant says that he has been diagnosed with severe ADHD and is taking

medication, lacks the ability to concentrate, is prone to making rushed and impulsive decisions and these impacted on his decisions at trial and the fresh evidence amounts to statements from those known both to the applicant and to the complainant S. It is said in these documents that she has stated she told them some time after the trial that she had made up the allegations in order to get him out of her life.

14. Fresh evidence can be admitted on appeal under section 23 of the Criminal Appeal Act 1968. That section provides as follows in section 23(1):

> "For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—
>
> ...
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies."

15. Under section 23(2) the Court of Appeal is to have regard to the factors listed at (a) to (d) of that subsection when considering whether to receive any evidence. These are (a) whether the evidence appears to the court to be capable of belief, (b) whether it appears to the court any evidence may afford any ground for allowing the appeal, (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal, and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings. Section 23(2)(d) includes whether there is a reasonable explanation for the failure to adduce the evidence in the proceedings the subject of the appeal, as we have identified.

16. We shall deal with the application for fresh evidence first. We do not consider the evidence submitted meets the standard necessary under section 23. First, it does not

appear to us to be capable of belief. Secondly, even if it were admitted such evidence would only go to credit and credibility of the complainant. These matters were plainly in issue in any event in the trial. Thirdly, many people, particularly those who have suffered from this type of offending, may say a great many different things after their relationship to a great many people in a wide variety of circumstances, particularly as time goes by. Even if S did say what it is alleged in the applicant's statements to have said, that does not mean it is true. Finally, depending upon the circumstances in which these comments were made, they do not necessarily amount to what would ordinarily be described as unequivocal or to constitute a retraction statement. We echo some of the concerns raised by the single judge about the quality, timing and appearance of these statements but in any event, regardless of those concerns, we do not give permission for fresh evidence.

17. We also consider the credibility of the applicant is damaged by his criticisms of his trial counsel and his legal team. Due to the nature of the complaints about their conduct of the trial, which as we have observed only emerged over one-and-a-half years after that trial was over, a waiver form was signed and his previous advisers were asked for their response to the allegations. Not only were they able to provide a detailed and careful explanation of what indeed had happened at his trial, but they were able to produce directly relevant contemporaneous attendance notes in relation to the main issue raised against them - the important decision as to whether the defendant himself would or would not give evidence in his own defence. The very lengthy statement provided by the applicant in terms of his account of his relationship with S and what really happened, which is submitted to this court, is met with the obvious repost that if this account is true, it is exactly the type of material that he could have ventilated before the jury had he chosen to give evidence, which was his right. He would however have been subject to

cross-examination upon that account.

18. The contemporaneous documents available make it clear the defendant at the time was properly advised of the pros and cons of that decision. The decision as to whether to give evidence or not by a defendant is, in a trial such as this, perhaps the most central of any tactical decision that has to be taken during the trial process. Counsel and solicitors who act for defendants in trials such as this one are careful to record the decision at the time and that the advice has been given. Otherwise, it is all too easy for a defendant to say that they wished to do so, but were advised not to, or were never properly advised at all. In this case the defendant himself signed, as sensibly he would have been asked to, the relevant document confirming his decision which is called "endorsing the brief". In any trial the court is told during the trial in open court by a defendant's counsel whether that defendant is going to give evidence and defendants are given the warning of an adverse inference being drawn against them, again in open court directly by the judge. That is what occurred here. There is nothing reasonably arguable in our judgment in any of the criticisms he has made of his legal team.

19. Additionally, the recurring complaint throughout so much of his submitted material for the proposed appeal is that he was not guilty of the numerous offences to which he had pleaded guilty, as well as a belief he appears to hold that had certain text messages been deployed in evidence or put to S when she gave her evidence the outcome of the trial would have been different.

20. Dealing with the first point, nobody is forced to plead guilty to any charge in any count and the decision to plead guilty is theirs and theirs alone. That plea is confirmed in court by the process of the plea being given personally by a defendant in open court. There is no reasonable basis upon which the applicant ought to be given permission to vacate these

pleas or appeal against the convictions which resulted from his pleading guilty.

21. Finally, the text messages upon which he sets such great store were by no means all favourable to him. Some of them are very significantly not. There was a risk in bringing them into the evidence at the rape trial which was recognised both by his trial counsel and by him and the decision was made not to deploy them. The fact that now, so long after the trial, he wishes different decisions had been made on a tactical basis, regrets the decisions that were taken, or believes that a different outcome might have been obtained does not in our judgment much impact upon this application. We are satisfied that his representation at his trial was of a high standard and he was advised correctly in respect of all the areas of which he now complains.

22. We finally turn to the question of the extension of time necessary. This is a very substantial period and in excess of one-and-a-half years. This court does have the power to extend time where there is good reason, but the explanation in this case for such a lengthy extension is threadbare at best. We do not consider there is any good reason to extend time and do not do so.

23. We therefore share the view of the single judge that all the applications should be refused, but we would not in any event extend time. We therefore refuse permission to admit the fresh evidence, we refuse the permission to appeal and we refuse the application for an extension of time.