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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 9th May 2019

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE SPENCER

MR JUSTICE MORRIS

R E G I N A

v

R.R.

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Mr Owen Greenhall appeared on behalf of the **Applicant**
Mr Alaric Bassano appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. **MR JUSTICE SPENCER**: This application for an extension of time and for leave to appeal against conviction has been referred to the Full Court by the Single Judge. We grant the extension of time and we grant leave to appeal against conviction.

2. It is a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead to the identification of the alleged victim of the relevant sexual allegations underlying the conviction. The prohibition applies unless waived or lifted in accordance with section 3 of the Act.

3. We are grateful for the comprehensive written submissions of Mr Greenhall on behalf of the appellant, who did not appear at trial, and for the written submissions on behalf of the Crown from Mr Bassano, who did appear at trial. In the circumstances we can explain the position fairly shortly as the Crown very properly do not oppose the appeal. However, it will be necessary to explain in little detail how that conclusion has been reached.

4. In November 2017, in the Crown Court at Manchester, Minshull Street, the appellant (now aged 45) stood trial on an indictment alleging two offences of rape (counts 1 and 2) and an offence of doing acts tending and intended to pervert the course of public justice (count 3). The alleged victim of the rapes was his wife. The jury acquitted the appellant of the rapes. They convicted the appellant by a majority of eleven to one on count 3, perverting the course of justice. That conviction was recorded on 22nd November 2017.

5. On 20th December 2017 the appellant was sentenced by the trial judge, Mr Recorder Lasker, to a term of eight months' imprisonment. The judge also made a restraining order pursuant to section 5 of the Protection from Harassment Act 1997 prohibiting contact by the appellant with his wife (the complainant in the counts on which he was acquitted) and his children, save in specified circumstances. The appellant was also ordered to pay £690 towards the prosecution costs. That sum (in cash) had been recovered by the police during the investigation, and, on the judge's direction, the money in the possession of the police was earmarked to meet the order for costs.

6. To put the appeal in context it is necessary to summarise the background very briefly. The complainant met the appellant in 2004 and they married the following year. They spent only limited time together during the early years of their marriage as the appellant worked away on cruise ships. In 2007 their first child, a daughter, was born. In 2009 the complainant and their daughter joined the appellant in England, where they lived for over three years with one of his friends. In 2013 their son was born.

7. The prosecution case was that over time the appellant had become controlling and forceful, demanding sexual intercourse with the complainant on a regular basis when she did not want it. The allegations of rape related to occasions in June and July 2016 when she refused his sexual advances. It was alleged that he continued regardless to have vaginal intercourse with her. She reported the allegations to the police on 23rd November 2016. The appellant was arrested the same day. He vehemently denied the

allegations. He was granted bail with a condition not to contact her directly or indirectly.

8. The basis of count 3 was that soon after his release on bail, and in breach of that condition, the appellant contacted various members of the complainant's family and friends, including her work colleagues. The contact was mainly by text message. He also sent her £690 via a friend following a child contact meeting. The complainant handed over to the police copies of text messages and other communications which the appellant had conducted with members of his own family and her family in India. Much of the material was exhibited for the jury during the course of the trial.

9. In his sentencing marks the judge summarised the effect of the material in this way:

> "... the Crown's case, which was plainly accepted by the jury, was that you were attempting, through these messages, to have pressure placed on the complainant via members of your or her extended family. In particular, you messaged the complainant's brother, again over an extended period of time, and when he failed to respond to you, you messaged him with pleas and comments such as 'This is not the time for silence'. You said: 'Everybody's life is going to be such a mess if you don't step in. Do you not understand your role as a brother?' Also in a later series of messages, you said that the reason you were contacting him was to pass on messages to the complainant. You asked him to come to the UK and you promised to bear all the expenses of any visit that he made. You also sent messages reminding him that you had always been helpful to him in the past and that it was important to make her (that is to say the complainant) understand that the police and the court would not lose anything but that you would be destroyed. To SA, the wife of the complainant's brother, you texted that it was her husband's job to set things right."

10. The judge went on in his sentencing remarks to explain that the appellant's position at trial was that, although he admitted sending all the messages, he had no ulterior motive and his actions were not in any way motivated by an intention to have family pressure applied to the complainant in order to get her to withdraw the complaint. He had sent his wife the sum of £690, which he sought to justify as simply to assist her with rent for the property. The judge observed in his sentencing remarks that if the appellant had genuinely wanted to pay the rent he could sent money direct to the landlord especially as he regarded the complainant as a prolific spender. The judge expressed his view that the money was no more than an ill-disguised bribe. The jury had rejected that account, he said, and he was on bail for the allegations of rape when he had committed the offence with a condition in force of no contact with the complainant.

11. Later in his sentencing remarks the judge said:

> "I have to say that I take the view that it was a deliberate and sustained offence, and the pressure that you sought to apply was subtle; there may have been no threats of violence expressed, but you sought to use your

cultural background in an equally effective manner in order to pervert the course of justice."

12. The judge gave the jury comprehensive written directions which he repeated orally in his summing-up. Following the approved modern approach, he assisted the jury by giving his directions of law before counsels' speeches. His directions of law were agreed by both counsel. In respect of count 3 he said this:

> "This offence is committed if the Crown can prove each of the following three elements, namely: (1) that the defendant carried out an act or a series of acts, (2) that those acts had a tendency to pervert the course of justice, and (3) that it was intended by the defendant to pervert the course of justice.
>
> Now, the particulars to count 3 as set out in the indictment which you have specify that the act or the series of acts alleged here was the contact made by the defendant via social media with the complainant's family and other work colleagues in an attempt to persuade the complainant to reconcile with him, thereby bringing the criminal investigation, meaning this prosecution, to an end.
>
> For the purposes of this trial, the criminal investigation leading to the prosecution of the defendant for rape does amount to a course of public justice, that is the way it is described in the indictment.
>
> The defendant says he is not guilty of this offence and, whilst he admits sending all of the messages which you have in your jury bundle behind tabs 4 and 5 and which plainly amount to a series of acts, he says that his intention was nothing more than wholly innocent in the sense that, although he wanted his family life to continue as before, he had no ulterior intent in seeking for the complainant to be persuaded to withdraw her allegations.
>
> And so you will see what I have now set out are the questions you should ask yourself in arriving at your verdicts in relation to count 3. Again, deal with them in the order in which they are set out here.
>
> Question 1, ask yourselves, 'Are we sure that the defendant carried out a series of acts as alleged, that is to say sent text and other messages?' And, as I have said, this is admitted, so you can move to question 2.
>
> Ask yourselves, 'Are we sure that they had a tendency to pervert the course of justice, that is to say a tendency to bring the criminal prosecution for rape to an end?' If your answer is 'No', your verdict would be not guilty. If your answer is 'Yes', move on to question 3.
>
> And question 3 is as follows, 'Are we sure that the defendant intended these messages to bring the criminal prosecution for rape to an end?' If your answer is 'No', your verdict will be not guilty. But if your answer is

'Yes', your verdict will be guilty."

13. Those directions of law did not address the scenario which developed during the jury's deliberations, namely the question of whether the appellant could still be guilty on count 3 even if the jury acquitted him on the counts of rape. We shall return to this point.

14. In summarising the evidence for the jury, the judge reminded them that the officer in the case had told the appellant that he should not be contacting him as he was the investigating officer; he advised him that any contact should be by email. As a result of the text messages provided to the police by the complainant, the appellant had been arrested and interviewed again. The jury had a summary of that interview. As to the appellant's attitude over the months leading up to the trial, the officer in the case said that there had been quite a lot of contact; the appellant had always been polite, generally animated, upset and, on occasions, angry. He himself had received about 50 emails from the appellant, who had always maintained that he was innocent of the charges. He had sent photographs to the officer of his family life, making the point that he had a happy family life.

15. The judge reminded the jury of the appellant's own evidence about count 3 and the period when he was on bail with conditions. The appellant had said it was a terrible time for him and he could not sleep properly; he had no appetite. The £690 he gave the complainant was to pay the rent and expenses: "Any good thing can be twisted." He accepted that he had spoken to relatives both on his own side of the family and on his wife's side of the family. He told the jury:

> "I was trying to express my feelings, and I did intend that these things, or some of these things, should be passed on to my wife. But I never asked them to get her to withdraw the charges because I know dropping the charges is a big offence."

16. The judge reminded the jury that the appellant was taken through some of the messages in cross-examination, although he was not himself going to remind the jury of all the points; the jury could read the messages for themselves and would recall the submissions from both counsel in their closing speeches.

17. The judge reminded the jury that in re-examination the appellant had repeated that his intention in sending the messages was for his wife and children to come back to him; it was not that he wanted his wife to drop the allegations. He did want his brother-in-law to intervene. He wanted him to speak to complainant. He wanted him to persuade her to come back to him. When he had written in the text message, "What will happen to the woman?" he was referring to how she could survive. He did suggest that his brother should come to England for a few days. He insisted that the money he sent was for rent and expenses; it was not a bribe.

18. During the course of the jury's deliberations they sent a note with the following two questions:

> "1. Can we ask if the decision on the first two counts [i.e. the counts of rape] will impact on the decision on the third count?
>
> 2. Could you be found guilty of perverting the course of justice based on a charge that he may not be guilty of?"

The judge discussed the note with counsel. He said he thought the answer to the first question should simply be 'No' and the answer to the second simply 'Yes'. Counsel for the appellant submitted that no more explanation than that was required because "to answer that will take some time and it could answer it in a way which may unintentionally influence them ... I think that is probably the safest ... because otherwise we get into all sorts of interpretations". Mr Bassano for the Crown agreed.

19. Accordingly, the judge answered the questions in the jury's note in this way:

> "Well, I can answer them both very simply.
>
> Question 1, 'Can we ask if the decision on the first two counts will impact the decision on the third count?' No. I told you, you consider each count separately because the evidence is different.
>
> Question 2, 'Could you be found guilty of perverting the course of justice based on a charge he may not be guilty of?' The answer is 'Yes', and I don't propose to say any more."

20. The jury resumed their deliberations. They returned within half an hour to return unanimous verdicts of not guilty on the counts of rape. They indicated that they had not reached a unanimous verdict on count 3, so the judge gave a majority direction. Within just over an hour, the jury returned a majority verdict of guilty on count 3.

21. There was no appeal against conviction lodged initially, although there was an appeal against sentence. The application for leave to appeal against sentence was refused by the Single Judge on 23rd January 2018 and was not renewed.

22. On 24th October 2018 the appellant, acting in person, lodged grounds of appeal against his conviction on count 3.

23. On 14th December 2018 the Single Judge, Butcher J, spotted that there was potentially an error of law in the judge's directions which merited the consideration of the Full Court. May we, with respect, pay tribute to the thoroughness of the Single Judge's consideration of the papers in spotting this point, which in the event has led to the quashing of the conviction.

24. Following the grant of legal assistance by direction of the Single Judge, Mr Greenhall was instructed. His ground of appeal is encapsulated with commendable succinctness as follows:

> "The learned trial judge erred in law in failing to direct the jury to consider the propriety of the ends and means employed by the appellant

> in assessing whether the acts tended to pervert the course of public justice and/or were intended to do the same."

25. Developing the ground in his written argument Mr Greenhall submitted that the trial judge's direction was to the effect that a tendency to bring the criminal prosecution for rape to an end was of itself a tendency to pervert the course of justice, and that an intention to bring the criminal prosecution for rape to an end was necessarily an intention to pervert the course of justice. He submits that the trial judge should have directed the jury that if they concluded that the appellant intended to bring the prosecution to an end but that he genuinely believed the rape allegations were false then the jury should consider the propriety of the means adopted by the appellant to achieve his end. He submits that the need for such a direction was heightened in a case where the alleged pressure placed on the complainant by the appellant was assessed by the trial judge in his sentencing remarks to be "subtle".

26. Mr Greenhall submits in relation to the transfer of £690 to the complainant that the circumstances of the case required the jury to be directed specifically that they could only convict on that basis if they were sure that the money amounted to a bribe or other improper pressure. Nor, he submits, were the jury provided with sufficient assistance on how to approach the text messages. They should have been directed that they could only convict if they were sure the text messages constituted improper pressure on the complainant to withdraw her allegations.

27. In support of these submissions Mr Greenhall relies on the leading authority of R v Kellett [1976] QB 372. Stephenson LJ, giving the judgment of the Court, said at page 388:

> "... we would not consider that the offence of attempting to pervert the course of justice would necessarily be committed by a person who tried to persuade a false witness, or even a witness he believed to be false, to speak the truth or to refrain from giving false evidence.
>
> ... we think that however proper the end the means must not be improper. Even if the intention of the meddler with a witness is to prevent perjury and injustice, he commits the offence if he meddles by unlawful means.
>
> Threats and bribery are the means used by offenders in the cases, and any pressure by those means -- or by force, as for example by actually assaulting or detaining a witness -- would, in our opinion, be an attempt to pervert the course of justice by unlawfully or wrongly interfering with a witness. If he alters his evidence or will not give it 'through affection, fear, gain, reward, or the hope or promise thereof' (in the words of the oath which used to be administered to the foreman of a grand jury), the course of justice is perverted, whether his evidence is true or false and whether or not it is believed to be so by him who puts him in fear or hope."

Later, at page 392-393, Stephenson LJ continued:

> "We have already given our opinion that some means of attempting to influence witnesses are outside the limits of this particular offence. But subject to the qualification that the means must be unlawful or improper, such as force or a threat of force, a reward or the promise of a reward, we accept his general submission that an intentional interference with a witness is enough.
>
> There may be cases of interference with a witness in which it would be for the jury to decide whether what was done or said to the witness amounted to improper pressure, and so wrongfully interfered with the witness and attempted to pervert the course of justice, and it would be not only unnecessary and unhelpful but wrong for this court or the trial judge to usurp their function. The decision will depend on all the circumstances of the case, including not merely the method of interfering, but the time when it is done, the relationship between the person interfering and the witness and the nature of the proceedings in which the evidence is being given. Pressure which may be permissible at one stage of the particular proceedings may be improper at another. What may be proper for a friend or relation or a legal adviser may be oppressive and improper coming from a person in a position of influence or authority. But it is for the judge to direct the jury that some means of inducement are improper and if proved make the defendant guilty, and this was such a case. A jury should be directed that a threat (or promise) made to a witness is, like an assault on a witness, an attempt to pervert the course of justice, if made with the intention of persuading him to alter or withhold his evidence, whether or not what he threatens (or promises) is a lawful act, such as the exercise of a legal right, and whether or not he has any other intention or intends to do the act if the evidence is not altered or withheld."

28. Mr Greenhall has also drawn our attention in his written submissions to the decision of this Court in R v Thomas [2008] EWCA 183 which was a similar case to the present, in that the allegation of perverting the course of justice related to persuading the complainant in a rape case to withdraw her complaint. In that case the trial judge had directed the jury that they had to decide whether the defendant had applied improper pressure to persuade or compel the complainant to withdraw the allegations, but he had also wrongly directed the jury that as a matter of law any inducement of a witness to refrain from giving evidence in criminal proceedings is unlawful. This Court referred to the passages we have quoted from Kellett and concluded that there was evidence capable of giving rise to the application in the defendant's favour of the principles set out in Kellett, and the possibility should have been left open to the jury with an appropriate direction in the summing-up. The conviction was quashed.

29. On behalf of the prosecution Mr Bassano has realistically and responsibly conceded that the judge's direction was inadequate, and in particular that there should have been a fuller direction in answer to the jury's question. He accepts that the jury's note and the judge's answer to the jury's question brought into focus the inadequacy of the original direction. Rather than a simple 'Yes' or 'No' in answer to the jury's questions, there

needed to be a fuller direction. Mr Bassano accepts that it is impossible to say that the verdict would have been the same if a fuller and accurate direction had been given. He accepts that the means employed by the appellant to dissuade the complainant from continuing with the allegations were not manifestly improper; there was no threat of violence and the alleged bribe was not particularised in count 3.

30. It is unfortunate that the judge was not given more assistance by counsel in formulating the legal directions in relation to count 3. It is apparent that otherwise his direction were meticulously careful, helpful and accurate, and there could be no conceivable criticism of the rest of the summing-up or of his conduct of the trial. However, what needed to be brought home to the jury in the directions of law on count 3 was that although they could still convict on count 3 even if they acquitted the appellant of the rapes, he would only be guilty of this serious offence if the jury were sure that he had used improper means to persuade the complainant, directly or indirectly, to withdraw her evidence. For example, specifically in relation to the sending of the £690, the jury would have had to be sure that it was intended by the appellant to be a bribe or inducement to withdraw the complaint. The jury needed to be directed that if what the defendant said was true or might be true as to his motivation then he could not be guilty of the offence unless the jury were sure that the means he used were unlawful or improper.

31. It may well be that had the jury been directed in these terms they would still have convicted, but we cannot possibly say this would necessarily have followed, particularly as there was one dissenting juror in any event. In these circumstances we conclude that the appellant's conviction on count 3 is unsafe and must be quashed. Accordingly, we allow the appeal against conviction and quash his conviction on count 3. Mr Bassano has indicated that the Crown do not seek a retrial, not least because the appellant has already served his sentence in full.

32. That leaves the question of the restraining order. Even if the appellant had been acquitted on all counts at trial, it would still have been open to the judge to make a restraining order pursuant to section 5A of the 1977 Act, which provides in subsection (1) as follows:

> "A court before which a person ('the defendant') is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order."

Subsection (3) provides:

> "Where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section."

33. We are told that the complainant has been spoken to and has requested that the restraining order should remain in place. Mr Bassano submits that there was evidence given at the trial which continues to make it necessary to protect the complainant from

harassment, namely the number and nature of the messages sent by the appellant, the alleged violence to the complainant, the appellant's evident displeasure that the allegations had been made against him and that the complainant had deserted him, and the complainant's own testimony against him.

34. In his sentencing remarks in respect of the restraining order the judge said this:

> "You continue to blame your wife and I am concerned about what I read in the pre-sentence report: that you are said to harbour deep and abiding resentment towards her which the probation officer fears will become amplified after sentence and that you will continue to present an active risk to your wife. The report says you are driven by a sense of injustice and betrayal such that you will continue to seek her out, to try to find information about her work and her personal life. In my view, therefore, it is appropriate to consider the inherent safeguards of a restraining order, and I take those words directly from the comments made by the author of the pre-sentence report.
>
> In my view, the provisions of section 5 of the Protection from Harassment Act apply to your case by virtue of section 5A. I am entitled to make the restraining order and I do so. In making such an order I want to make it clear that it is not my intention to prohibit proper contact in the future between you and your children, but the order that I make is that you should be prohibited from contacting your wife and your children (S and S) by any means: whether by direct contact by yourself or by indirect contact through third parties, and that includes, but is not limited, to contact by social media, telephone, letter, text or otherwise on the internet. The order, however, does not prohibit the following: namely, contact with the complainant through a solicitor or other court-appointed official concerning the former matrimonial property or applications or discussions about contact with the children; secondly, any contact with the children which may be permitted by a Family Court exercising its proper jurisdiction under the Children Act. It is my view that the restraining order should remain in force 'until further order' of this court."

35. On behalf of the appellant Mr Greenhall submits that this Court should not remit the matter to the Crown Court for consideration of making such a restraining order. He submits that it is now unnecessary. Since the sentence was imposed and the restraining order was made family proceedings are in progress, and those proceedings should be allowed to regulate contact between the appellant and the complainant and the appellant and the children. Mr Greenhall also submits that in any event, contrary to the submission by Mr Bassano, if it is to go back to the Crown Court the matter should not be remitted specifically for Mr Recorder Lasker to deal with it. Mr Greenhall emphasised that he intends no disrespect to the learned Recorder, but he submitted that there might be the appearance of bias, at least in the eyes of the appellant, if the same judge were to deal with the matter again.

36. We have considered these submissions carefully. We note that the wording of subsection (3) of section 5A of the Act simply permits this Court to "remit the case to the Crown Court". It does not require, and perhaps does not even entitle, this Court to direct that a particular judge should deal with the matter if it is remitted.

37. We take the view that it is appropriate that the case be remitted to the Crown Court for consideration as to whether there should be a restraining order continuing in force under section 5A of the Act. We say that not least having regard to the undercurrent of hostility between the appellant and the complainant which is very evident from the material we have seen, to which I will return in a moment.

38. We therefore make the order under section 5A(3) remitting the case to the Crown Court to consider whether to proceed under that section.

39. We are not going to direct (even if we had the power to do so) that the matter should be heard by Mr Recorder Lasker. However, we should indicate that it seems to us that there is nothing wrong in principle with Mr Recorder Lasker dealing with the matter again. If he himself felt in any way embarrassed and felt the need to recuse himself no doubt he would say so. We think the proper course is to leave the matter to the good sense and discretion of the resident judge at the Crown Court at Manchester Minshull Street, if necessary in consultation with the presiding judges of the Northern Circuit.

40. We mentioned a moment ago other material we have seen. We should say for completeness that we have seen extensive correspondence from the appellant to the Registrar and her office, much of it complaining about the investigation which led to the prosecution for rape and the appellant's wife's conduct in relation to the investigation and the allegations of rape themselves. He even sent further such messages to the office this week. We have read the material, but it has no relevance to the appeal, not least because he was acquitted of the rapes in any event. That material does, however, reinforce our view that the depth of bitterness and resentment harboured by the appellant towards his wife makes it appropriate that the question as to whether the restraining order should continue should be considered by the Crown Court afresh.

41. That leaves one question outstanding. The order for costs made in favour of the prosecution in the sum of £690 was made as part of the sentence following conviction. It follows that that order is quashed now that the conviction itself has been quashed. The money which was in the possession of the police was earmarked for payment of that sum to the prosecution. Preliminary exchanges with Mr Bassano on behalf of the Crown during the course of argument reveal, however, that the question of whether the money still in the possession of the police (if that is where it still is) should be returned to the appellant is something which is not straightforward. The question of the disposition of that money is one which will have to be considered elsewhere, possibly by the judge considering the restraining order when the matter is remitted to the Crown Court, or ultimately under the Police (Property) Act 1897.

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