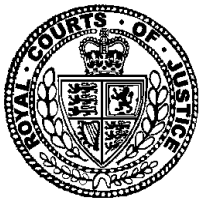

Neutral Citation Number: [2021] EWCA Crim 635

Case No: 2020/02330/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM GREAT GRIMSBY CROWN COURT
HHJ WATSON QC
T.20147175

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2021

Before:

LADY JUSTICE MACUR
MR JUSTICE ANDREW BAKER
and
MR JUSTICE HENSHAW
- -

Between:

REGINA	**Prosecution**
- and -	
CRAIG HARDY	**Applicant**

- -
- -

Mr Mark Newby (instructed by QualitySolicitors Jordans LLP) for the **Applicant**
Mr James Baird (instructed by CPS, Humberside) for the **Crown**

Hearing date: 16 April 2021
- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 09.30 on Friday, 7 May 2021.

Macur LJ:

1. This application for an extension of time (2022 days) and for permission to appeal against conviction has been referred to the full court by the single judge. The basis of the prospective appeal is new evidence, consisting of reports detailing text messages between himself and the complainant, which the applicant seeks to admit pursuant to section 23 Criminal Appeals Act 1968. The Prosecution was required to attend in the anticipation that, if leave were granted, this court would proceed to consider the substantive appeal.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

3. On 30 January 2015, the applicant was convicted of five counts of rape, contrary to s.1(1) of the Sexual Offences Act 2003. Significantly, in our view for the reasons we indicate below, he was acquitted of two other counts of rape and one count of sexual assault.

4. On 26 February 2015, he was sentenced to an extended sentence of 20 years, comprising a custodial term of 15 years and an extended licence period of 5 years (s.226A Criminal Justice Act 2003) on each count concurrent. The judge imposed a restraining order under the Protection from Harassment Act 1997. Other usual ancillary orders were made.

5. Mr Newby appears on behalf of the applicant. Mr Baird appears for the Prosecution.

Background as revealed by the summing up.

6. The applicant had been in a long standing on-off and volatile relationship with the complainant, AB, since some time in the late 1990s when both were about 13 years old. The Prosecution case was that the applicant's position in the relationship was abusive and controlling. AB did not always consent to engage in sexual intercourse with the applicant, but the applicant had 'forced himself upon her' which led to him being charged with rape.

7. AB made complaint and was interviewed on 1st October 2014.

8. AB said that during the period December 1998 to December 2000, she would go to the applicant's house almost every day and listen to music in his bedroom and smoke cannabis. On some occasions she would want to have sex with him but not on others. The applicant would continue to do so regardless, and once did so in the presence of a friend. The applicant then moved to a different school and they no longer saw each other. This formed Count 1on the indictment. The applicant was acquitted.

9. The applicant went to prison in 2009 having been convicted of the rape of another former partner. AB agreed during cross examination that she had not mentioned the

applicant having non-consensual sex with her in her dealings with police in relation to the applicant's previous charges for the rape of the former partner, nor with representatives of social services, the applicant's risk manager, probation officer and a person from Women's Aid who had seen her after the applicant's release from prison.

10. AB continued their relationship after his release. She became pregnant with his child, T. She was unwell during her pregnancy and did not wish to have sex whilst pregnant. Nevertheless, she said there were around seven occasions when the applicant had had sex with her without her consent during this time. On occasion, she would tell him 'no', but he would either carry on or they would have an argument. She was afraid of him. These facts formed the specimen count 2, namely rape between December 2011 and December 2012. The applicant was convicted by a majority.

11. AB and the applicant split up after T was born. On one occasion, the applicant visited her at home and had fallen asleep on the sofa. AB went upstairs to bed. Later, the applicant got into her bed. She said she objected to his sexual advances, but he persisted and as a result, she became pregnant with 'B'. She complained to her sister. This event occurred in January 2013 and formed Count 3 on the indictment. Her sister gave evidence in support of AB's claims, but the applicant was acquitted.

12. Thereafter AB and the applicant resumed their relationship in April 2013 when she was pregnant with child 'B'. She did not want to have sex with him as she was pregnant and would pretend to be asleep, but he had had sex with her anyway. There were around five occasions when, AB said, the applicant had sex with her without her consent while she was pregnant. She had mentioned this to him in text messages and specifically about him pinning her down by the throat. He told her he would go to a police station and 'hand himself in' but she talked him out of it and told him she would not press charges. She could not locate this text message sequence on the phone that she supplied to the police during their investigation and suggested it may be elsewhere. The officer in the case, DC Goodman, agreed the applicant's mobile phone had been examined and there were no text messages which matched those AB described, nor on the one mobile phone that AB had provided. These events formed the specimen Count 4, for the period April 2013 to 31 August 2013. The applicant was convicted by a majority.

13. Sadly, B died less than two weeks after birth. AB and the applicant's relationship ended shortly after B's death. AB said the applicant put his hand up her top and tried to touch her bottom at B's funeral. This incident formed the basis of Count 5 on the indictment, namely sexual assault in August 2013. The applicant's stepfather and AB's sister gave evidence in support of AB's account, but the applicant was acquitted.

14. In April 2014, AB and the applicant went on a trip to York with T and A, AB's eldest child from a previous relationship. AB said they were not in a relationship at the time but nevertheless all shared a family room in a bed and breakfast hotel. The applicant had sex with her without her consent even although A was sitting on the bed at the time. This incident formed the specific Count 6 of rape. The applicant was convicted by a majority.

15. AB said that the applicant would have sex with her without her consent on other occasions. Between August 2013 and July 2014, he would come and go as he pleased.

She did not want to have sex with him because she was scared of "falling" pregnant. On two or three times this offending occurred in the kitchen when A had been in the house and she had not consented to sexual intercourse because of her worry about A coming upon them; on one occasion she, A, tried to get into the kitchen. On another occasion, the applicant was helping AB with some gardening and because they were getting on well, he thought they would have sexual intercourse. AB said she did not wish to become pregnant again and told the applicant she did not want to have sex because she did not want another baby. Nevertheless, he proceeded to have sex with her without her consent and she did become pregnant. AB suffered some bleeding when she was five weeks' pregnant. She had not told the applicant she was pregnant but did not wish to have sex with him. When she was eight weeks' pregnant, the applicant had sex without her without her consent. These events formed the basis of specimen Count 7, covering the period August 2013 to 31 July 2014. The applicant was convicted by a majority.

16. In September time 2014, AB confronted the applicant saying that she had contracted chlamydia from him. They went to a bingo event together and returned to AB's house. AB said she did not want to have sex with him for fear of being infected with chlamydia again and, because she was pregnant, for the safety of her baby. However, the applicant had sex with her without her consent. She sent him text messages in which she referred to these circumstances and he did not deny it, he just said he did not have chlamydia. AB had a screen shot of the message that the applicant sent her thereafter in which he texted 'It went in half a centimetre, I came, that were it'. This formed the specific Count 8, of rape on 14 September 2014. The applicant was convicted unanimously.

17. The applicant gave evidence. His case was one of consent and/or denial. He had two previous convictions for sexual offences, namely sexual assault, and rape, which were admitted as evidence of his propensity to commit sexual offences. He said that AB was aware of the circumstances of the conviction of rape following his guilty plea and visited and wrote to him while he was in prison. They had continued to have sex when AB was pregnant with 'B'. He recalled an incident when AB had said 'no' to sex and he had 'left it at that'. AB had never had to fight him off and he never got angry or argued with her if she said 'no'. He had never had sex with AB when she had pretended to be asleep or seemed asleep and had never sent a text to AB saying that he would hand himself in to the police.

18. He denied having sex with AB when they were in York. They stayed in a family room but did not have sex. He denied having sex with AB in the kitchen of her home. Between January and March 2014, they were not in a relationship but had consensual sex when he occasionally stayed at her home. The last occasion on which they had had sex was around his birthday on 14 September; it had been entirely consensual. He had dropped AB at her house after going to bingo. She later sent him a text message inviting him back. He returned and they had had consensual sex.

Appeal process

19. The applicant was convicted as indicated above. He received a negative advice on appeal from defence trial counsel. The subsequent McCook 'due diligence'

correspondence between his present solicitors and trial counsel does not take the matter forward in terms of the applicant's instructions at the time of trial concerning text messages passing between himself and AB. However, clearly the applicant had some recollection of such communications, for he instructed new solicitors in 2016 who obtained funding to conduct a review into mobile telephone messages on the appellant's phone which had been seized following his arrest.

20. Inquiries continued of the applicant's original solicitor and the applicant himself throughout 2016 and 2017. In January 2018, a forensic report was received cross-referencing text messages disclosed at trial. Further Legal Aid funding was obtained. A different forensic firm were instructed in July 2018 and Legal Aid funding extended.

21. In December 2018, another forensic report from new consultants identified further messages which could be reconstructed. In March 2019, a second forensic report was received appending details of further text messages. Counsel was instructed in June 2019 and a transcript of summing up obtained and further enquiries made of trial representatives and CPS in December 2019. Following further and necessary 'administrative' steps, the application for leave to appeal was lodged in September 2020.

22. The appeal is dependent on new evidence of messages between the complainant and the applicant that were recovered post-conviction in the process described above. The applicant does not allege deliberate, or negligent, non-disclosure by the Prosecution. We agree with the single judge, and with the submissions of Mr Newby that it would be "unprofitable" to embark on this course. The relevant messages would not have been automatically accessed by the original forensic software which examined 'live' messages; deleted messages, as the relevant ones were, needed to be manually reconstructed. The applicant argues that certain messages cast doubt upon the complainant's assertions at trial in respect of counts 6 - 8 and give context to messages originally disclosed shortly before the trial commenced. This new evidence is said to fundamentally undermine AB's credibility and thus also to taint the convictions in respect of counts 2 and 4.

23. An application to admit new evidence, that is the forensic reports revealing the 'recovered' messages, is lodged with supporting detail and documents in proper form.

24. The Prosecution accept that the evidence is new, in that it was not available to the police to be disclosed to the applicant. No reference had then been made to the platforms via which the messages were ultimately obtained, and it is unknown whether the software used at the time would have been amenable to this task. However, Mr Baird submits that the applicant must have been aware of the messages at the time and could have given evidence about them, and that in these circumstances we should be slow to admit the new evidence. Further, he argues the new evidence does not undermine the safety of the convictions. In respect of the York incident in Count 6, the applicant had denied sexual intercourse occurred; as regards other counts, AB's evidence was corroborated in significant regards by the evidence of her sister, the applicant's stepfather, and the applicant's own text message relevant to Count 8.

The New Evidence

25. There are four forensic reports which deal with the extraction and examination of messages from the appellant's phone, in particular application files attributable to messages between the applicant and AB. We consider the first report in time to have no relevant entries. The second in time appends messages that we do not consider advance the applicant's case, particularly during the period covered by the time frame in Count 2. The next in time, prepared in December 2018 relates to messages the period 15 February to 6 October 2014, and are of similar substance to the earlier texts. The content of the messages supports the view that this was a volatile relationship, both the applicant and AB veering between sentimental or suggestive sexual texts to outright abuse. These reports do not support any ground for allowing an appeal; it is neither necessary nor expedient in the interests of justice to admit them in the exercise of our discretion pursuant to s 23 (1) (c) Criminal Appeal Act 1968.

26. The fourth report, in March 2019, appends a total of 46 pages of incoming messages from AB, and outgoing messages from the applicant, during April to August 2014. The Prosecution take no issue with the expertise of the forensic scientist who prepared it. The evidence contained in the report appears to us to be capable of belief and would have been admissible at trial. Many of the messages fall to be described as we indicate in [25] above, but others are pertinent to the issue of consent. We are satisfied that they may afford a ground for allowing at least some part of this appeal, and despite our uncertainty as to whether they were 'identified', at least by general description, or may or ought to have been professionally 'retrieved' for their timely production at trial, we nevertheless determine that it is necessary and expedient in the interests of justice to receive them in evidence for the purpose of the application for leave, and subsequently (as we have determined that permission should be granted) for the appeal itself.

27. We bear in mind the significant delay that has occurred in securing this fresh evidence. There is little delay in the chronology of investigations, although some complaint could be raised as to gaps during which legal advice was sought. We are satisfied that the delay is through no fault of the applicant. His early insistence that the text messages that were accessed by the police and deployed in prosecution were not the complete picture has been borne out after more complex forensic examination techniques post-conviction than were apparently available to the Prosecution pre-trial. We regard Mr Baird's submission that the applicant could have given evidence as to the contents of the messages regardless of their non-availability as unrealistic, for it is the detail and chronology of the messages that are key. That we have determined to admit this new evidence, since we find it to afford a ground of appeal, and that it is just and expedient to do so, informs our decision as to the extension of time. We grant the extension of time required to pursue the applications to adduce new evidence, for permission to appeal and appeal. We refer to the applicant hereafter as the appellant.

The Appeal

28. The relevant text messages, as we find them to be, for the purpose of the application for permission to appeal and appeal relate particularly to Count 6, and also have some relevance to Count 7. The March 2019 report details the recovery of messages including one from AB on the 21st April 2014, upon returning from York, thanking the appellant "for a brilliant weekend I have enjoyed it so much…", and in a message shortly thereafter inviting the appellant to wake her if he wanted a "repeat performance of last night", referring to what is apparently a prelude to a sexual act. The messages

are framed affectionately. In a message on 3rd May, AB refers to "wanting to go back to how we was in York", and on 4th May reveals that "all I want is for us to be together I really want another baby…"

29. AB has not had the opportunity to give any alternative explanation for the wording and timing of these texts, but we have little hesitation in concluding, and Mr Baird concedes that, on the face of them, they are capable of undermining AB's allegation of rape which she said occurred when she spent the weekend with the appellant, and her daughters, in York. We are not persuaded by Mr Baird's submissions that the appellant's denial of sexual intercourse with AB at this time counters the point. Whatever the appellant's reason for denying sexual intercourse, the conviction would necessarily be based in significant part upon AB's evidence. Consequently, we conclude that the conviction is unsafe.

30. The impact of the messages upon Count 7 is far less obvious. This was a specimen count, and the jury were correctly directed that they only needed to be sure that on one occasion during the time period concerned the appellant raped AB. This period commenced prior to the trip to York. AB's evidence on the point was nonspecific as to date, although she did give detail regarding two particular events in the kitchen. Her explanation for withholding consent on the occasions when, she said, sexual intercourse occurred against her will during this time was apparently based upon (i) the likelihood of A coming across them *in flagrante* and (ii) her fear of pregnancy.

31. After some hesitation, not least because the judge's summary of AB's evidence in relation to this period refers to vaginal bleeding at five weeks of pregnancy, and in light of the considerations we discuss in [35] and [36] below, we nevertheless conclude that the appellant reasonably could point to the fact that the presence of A and the prospect of her interrupting the couple in the act of intercourse did not appear to have led AB to withhold consent when in York. Further, the text messaging in May refers to AB's desire to become pregnant, contrary to what she said in evidence was the reason for her to refuse intercourse on the occasions which are the subject of Count 7. In the circumstances, we are not satisfied that this conviction is safe.

32. We are not persuaded, however, that the text messaging undermines the safety of the other convictions.

33. Count 8 was a specific count referring to the last occasion on which AB alleged that the appellant had raped her. Her evidence on this allegation is consistent with her text messages to the appellant. His response was not explicit other than as to penetration but, we note, did not deny her stated resistance on the basis of her having been infected with chlamydia by him, and the risk to her unborn child. Initially, Mr Newby suggested that the text was consistent with withdrawal from penetration upon the appellant becoming aware that AB did not consent, but accepted that this submission was not made on instructions and was not the defence case which was run before the jury. Further, he conceded in submissions that the appeal in relation to Count 8 was difficult to argue, beyond an attack upon the general credibility of AB by reason of what the text messages reveal about the visit to York.

34. As regards the impact of the new evidence upon AB's credibility, we bear in mind that the jury returned not guilty verdicts in relation to Counts 1, 3 and 5 and conclude that

they had strictly heeded the direction of the judge to consider the evidence on each count separately and that:

> "…obviously to some extent the prosecution evidence hinges around the evidence of [AB], but it may be that there are things that she said that you accept, some things that you think you don't accept or you're less sure of."

35. This was undoubtedly a difficult case for the jury to unravel, since AB made clear that on occasions she had consented to sexual intercourse despite the volatile nature of the relationship and what must, on her own evidence, have been previous instances of rape. The basis of the jury's verdicts cannot be known, but it is notable that in respect of Counts 2 and 4, AB gave as a reason for her refusal of consent the fact of her ill health during her pregnancies. That she was pregnant at these times was beyond doubt as demonstrated by the birth of T and B. The convictions in relation to 6, 7 and 8 refer to counts when it is again notable that AB gave evidence of the reason why she had not consented to sex, whether the presence of A or her fear of pregnancy having regard to the trauma of B's death, or the risk of sexually transmitted disease, namely chlamydia.

36. This analysis should not be interpreted to suggest that a complainant of rape is required to justify the reason for refusal to engage in the act of intercourse. S/he most certainly does not. Nevertheless, we have necessarily considered whether these guilty verdicts are inconsistent with the not guilty verdicts, since both rely upon the same source of evidence, predominantly that of AB, in order to assess whether the new evidence necessarily carries with it a new perspective upon the evidence she gave as regards the different counts.

37. The verdicts on Counts 1,3 and 5 indicate that the jury were not sure of the reliability of AB's evidence of the first allegations in time, represented in the first specimen count, or the specific allegation in Counts 3 and 5; or that of the applicant's sister and stepfather in relation to Count 5. The alleged rapes depicted in Counts 1 and 3 were at times when AB said her relationship with the appellant was at an end, but in the context of her acceptance that the relationship was characterised as consistent only in that it was constantly on-off. The evidence she and others gave in relation to B's funeral was obviously to be seen in the light of evidence relating to the appellant's own grief.

38. We have concluded that the verdicts in relation to Counts 2 and 4 are not inconsistent with the other verdicts, even considering the impact that the new evidence has upon the convictions in relation to Counts 6 and 7. They are consistent with and entirely explicable by the evidence when seen in the round. The jury's verdicts in relation to these counts are not undermined by the new evidence, which relates to a different set of circumstances and time.

39. Therefore, we allow the appeal against conviction in relation to Counts 6 and 7 but dismiss the appeal against conviction in relation to Counts 2 ,4 and 8.

40. Mr Baird made known at the conclusion of the hearing that, the Prosecution having already sought the views of AB, he did not seek a retrial in the event the appeal against conviction was allowed in whole or part. Reasonably, Mr Newby was unable to say whether he would seek permission to appeal from sentence until the extent of the applicant's success in appealing conviction, if any, was known. In these circumstances,

and entirely without any indication of our view on the merits of such an application, not least because we do not have a transcript of the sentencing remarks, we intend to extend time to seek leave to appeal sentence. Any such application must be made in writing in the usual way, and within 28 days of the date of the hand down of this judgment. Whilst we do not give any direction in this regard, in light of Andrew Baker and Henshaw JJ's labour in dealing with this appeal, it may be thought appropriate that any such application that is made should be considered by one of them.