IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202201229/B2

[2023] EWCA Crim 227

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 14 February 2023

Before:

LADY JUSTICE WHIPPLE DBE
MRS JUSTICE CUTTS DBE
THE RECORDER OF NORWICH
HER HONOUR JUDGE ALICE ROBINSON
(Sitting as a Judge of the CACD)

REX
V
JOSH ABBOTT

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G ROBERTS, Counsel appeared on behalf of the Appellant
G STABLES, Counsel appeared on behalf of the Crown

J U D G M E N T

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY, THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.

IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

LADY JUSTICE WHIPPLE:

Reporting restrictions

1. 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 section 3 of the Act.

2. This judgment is subject to an order made under section 4(2) of the Contempt of Court Act 1981, postponing publication of any report of these proceedings until the conclusion of any retrial in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.

Introduction

3. On 30 March 2022 in the Crown Court at York before a jury presided over by His Honour Judge Hickey, the appellant, who was then 25 years old, was convicted by a majority of 10 to 2 of one count of rape, contrary to section 1(1) of the Sexual Offences Act 2003. On 28 April 2022 before the same court the appellant, who by then was aged 26, was sentenced to four years' imprisonment. The usual ancillary orders were made.

The appellant now appeals against conviction with the leave of the single judge.

The facts

4. On 20 November 2017 the appellant, who was then aged 21, went to Sheffield to visit a friend, Liam Dyson. Mr Dyson invited two females to accompany them. Those females were the complainant, who was then aged 18, and another friend called Ashleigh Gormanly. The two women did not know each other or the appellant.

5. The four of them went to a cocktail bar in the centre of town and drank for a number of hours before returning to Mr Dyson's one-bedroomed flat where some of them had further drinks. By that stage the appellant was clearly drunk. During the course of the evening the appellant and the complainant were alone together in the bedroom where they had consensual sexual intercourse. While they had sexual intercourse they were interrupted by Mr Dyson who walked through the bedroom to use the toilet and made a remark to the effect that he and Miss Gormanly could hear what was going on. The appellant and the complainant then slept in the bedroom, while Mr Dyson and Miss Gormanly slept in the lounge.

6. The following morning, 21 November 2017 the complainant told Mr Dyson that the appellant had forced himself upon her. Mr Dyson confronted the appellant and the appellant's response was to try to apologise to the complainant but Mr Dyson prevented him from doing so.

7. On 22 November 2017 the complainant contacted the police to complain of rape. The

following day she was taken to Hackenthorpe Lodge, a Sexual Assault Referral Centre ("SARC"). Injuries were recorded on a body map.

8. On 24 November 2017 the complainant provided a video which was a recorded account given to the police in which she said that she had consensual sex with the appellant following their night out. She suggested that the appellant had tried to have anal sex with her but she had said "no". She then fell asleep but was woken at around 6.15 to 6.30 am by an alarm that she had set at the instigation of Mr Dyson who, she said, had to open up a pub where he worked at the time. She woke Mr Dyson and then went back to bed with the appellant. At that point she said the appellant tried to rouse her, first by kissing her, then biting her back, before having sex with her even though she told him "no".

9. On 10 January 2018 the appellant was interviewed after voluntarily attending Knutsford Police Station. He denied any allegation of rape. He said he was woken at around 10 or 11 am to be confronted by Mr Dyson making allegations that he had forced himself on the complainant. He said he did not recall an alarm going off. He denied that anything sexual had happened after the alarm and in the morning.

10. The prosecution case was that the appellant raped the complainant. The defence case was that there was one single consensual piece of sexual activity. The appellant denied that there had been any second piece of sexual activity in the morning and denied rape. The appellant was of previous good character.

11. The issue for the jury was whether the jury could be sure on a separate occasion and after

the first consensual act of intercourse that the appellant had penetrated the complainant's vagina with his penis.

Investigation, delay and disclosure

12. The original officer in the case was DC Carnell. In late 2017 Mr Dyson provided a witness statement to the police and provided screen shots of messages between himself and the complainant dated 21 and 22 November 2017. It appears that around this time there was some attempt to contact the other witness, Miss Gormanly. Police records indicated that DC Carnell was asked to submit a case to the CPS on 16 March 2018. However the case was not progressed.

13. DC Carnell subsequently departed from the police force and on 27 March 2020 the case was reviewed. DC Taylor was assigned as the new officer in the case and picked up the investigation. She realised that the initial statement from Mr Dyson had been lost and that there were no up to date contact details for Miss Gormanly. Mr Dyson provided a replacement witness statement at her request. That was dated 16 April 2020.

14. In September 2020 the case was sent to the CPS for a charging decision. Following a positive decision from the CPS a summons was issued for the appellant to attend court on 8 June 2021.

15. The defence statement was served on 7 October 2021. The schedule of unused material was served by the Crown in response to the defence statement in August of 2021. That schedule made no reference to any initial statement by Mr Dyson, any attempt or actual

contact with Miss Gormanly or any medical examination of the complainant. It made no reference to any visit by the complainant to the SARC.

16. Further disclosure was in the form of a pocketbook entry from a DC Kenny in which she said she had spoken with the former officer in the case, DC Carnell, who made it clear that he did not wish to add anything and would not cooperate with any aspect of any police investigation, historic or otherwise, being undertaken by South Yorkshire Police.

17. The trial took place over three days in March of 2022 - that was four-and-a-half years after the events complained of.

Evidence of the complainant

18. The complainant's evidence-in-chief was by pre-recorded ABE interview. The version of the ABE played to the jury did not contain any reference by the complainant to the consensual sex, the judge having refused an application made on behalf of the appellant pursuant to section 41 of the Youth Justice and Criminal Evidence Act 1999. After the ABE was played, the judge acceded to a submission by counsel for the appellant that the issue of consensual sex would and should be admissible under section 41(3)(a). On that footing counsel was permitted to ask a number of limited questions of the complainant about the consensual sex.

19. The complainant said she went for drinks with Mr Dyson, Miss Gormanly and the appellant. She remembered flirting with the appellant whom she had never previously met. They went back to Mr Dyson's flat whereby the appellant passed out on the couch.

The complainant, Mr Dyson and Miss Gormanly chatted on Mr Dyson's bed. However at some point during the evening she ended up in the bed with the appellant.

20. She said she had set an alarm for 6.30 am at the request of Mr Dyson. Having been woken by the alarm, she woke Mr Dyson and then went back to bed. When she got back into bed the appellant tickled her back and then he started to bite her back. She told him to stop because it hurt. The appellant, she said, tried to turn her over. She told him "no", that she did not want to, she was tired and wanted to go back to sleep. The appellant persisted for about five minutes. She kept her back to him and shuffled towards the wall.

21. After a few minutes the appellant started to stroke the inside of her thigh from behind. She was in a foetal position with her legs right up and her thighs together. She asked him what he was doing and told him to stop it. He told her to turn around, to which she said: "No, I'm going back to sleep." The appellant told her he was going to tease her if she did not turn around. The appellant reached around her and put his hand down her pyjamas and underwear and managed to insert his finger into her vagina. She tried to position her body to make it as difficult for the appellant as possible. She shuffled herself towards the wall and clamped her legs together. The appellant persisted and pulled her pyjama bottoms down and her underwear down. The complainant was against the wall and said: "What are you doing? I don't want to." The appellant shuffled up behind her so she was trapped. The complainant did not know what to do so just froze. She felt the appellant penetrate her. She just looked at the wall and held onto a pillow. After about 15 minutes the appellant stopped, pulled out, lay on his back and said: "Oh, for fuck's sake." He then rolled over and went to sleep. She fell asleep for about 10 minutes, then woke and went

into the living room and told Mr Dyson what had happened. She also told Miss Gormanly because she needed a female to confide in. Mr Dyson then went to speak to the appellant.

22. In cross-examination she agreed that at the end of the evening she and the appellant were in the same bed and after a few minutes they kissed and had consensual sex. She could not remember Mr Dyson entering the room while they were having sex. She said she did not call out for help during the non-consensual sex because she did not know the appellant well and did not know if he had the potential to be violent.

23. She was asked about the appellant biting her. This is the key exchange: Transcript of the complainant's cross-examination on page 8B. It starts with the question:

> "Q ... You said that he started to bite you?
> A Yes, at the bottom of my back.
> Q The bottom of your back?
> A Yes.
> Q What, by your spine?
> A Yes.
> Q And it was a bite that was hard enough to bruise?
> A Yes.
> Q Did you ever seek medical attention for that?
> A I did yes, at Hackenthorpe Lodge.
> Q At where, sorry?
> A At Hackenthorpe Lodge.
> Q Okay. Were any photographs taken of those bruises?
> A I believe so, yes, and also a sheet that was marked on to as well.
> Q And these bruises were as a result of Liam - sorry, of Josh Abbott biting you?
> A Yes."

24. The cross-examination of the complainant continued. She said she did not scream out or push the appellant off because she was scared and she froze. Following the

non-consensual intercourse she went back to sleep in the same bed as the appellant. She accepted she may have slept for approximately three hours rather than the 10 minutes she had told the police.

25. She said the second act of sexual intercourse did happen. She denied that she was confused due to the alcohol she had consumed. She conceded that Mr Dyson had seen her having sex with the appellant. She said she gave a part account when she told Mr Dyson what had happened and did not feel comfortable to say she was raped. She did not tell Mr Dyson about the appellant biting her because she did not think it was necessary to mention all the details and neither was she confident enough. She said that Mr Dyson was one of her friends whom she trusted and it was not the case that she had feelings for him and that was the reason why she had come out with the false allegation or the confused allegation.

The body map

26. The first time the defence team knew that the complainant had attended Hackenthorpe Lodge, the SARC, was in the course of the exchange in cross-examination set out just now. Prior to that, the defence had been unaware that the complainant had undergone any form of medical examination or that there was a record of that examination. None of this had been mentioned in the complainant's ABE interview, nor had any of this material been served by the Crown or listed in the schedule of unused material.

27. The day after the complainant had given evidence, the Crown obtained the body map that was referred to by the complainant in her cross-examination. It was in the possession of

the CPS having been included with the original case papers. The prosecution sought to adduce the body map as evidence during the evidence of the officer in the case, DC Taylor.

28. That body map showed a bruise on the complainant's front chest which she was noted to have said was "from the bed frame". There was another bruise marked on her front right hip. To the rear the body map showed two 1 cm by 1 cm circular green bruises on her left hip and a 3 cm by 0.5 cm linear red dry abrasion on her upper left buttock.

29. No medical notes or notes of the discussion with the complainant were produced by the Crown, nor were any photographs produced. The only material which was forthcoming from the complainant's visit to the SARC was the body map.

30. Counsel for the defence, Mr Roberts, did not object at that time to the introduction of the body map and took the view that he could cross-examine the officer about the evidence and include complaints about the delay in producing it and the failure to produce other material which might be held by the SARC in his closing speech to the jury.

<u>The evidence of DC Taylor</u>

31. DC Taylor had taken over the case in March 2020 following the departure of DC Carnell from the police force. DC Taylor confirmed that the CPS had had sight of the body map. She could not explain why it was not disclosed by the Crown or included on the schedule of unused material. DC Taylor confirmed that the records show that the complainant was examined by FNE K Webster. She thought this was a nurse, not a doctor. However, the

precise qualifications of Nurse Webster were not known.

32. She said there were no formal statements or notes made by Nurse Webster or any doctor about any medical investigation so far as DC Taylor was aware. She did not know whether there was in existence a statement from a doctor which included an account given by the complainant. She did not know if there was a statement of opinion by such a doctor. She did not know whether the injuries were as a medical matter consistent or inconsistent with the complainant's account. She confirmed that when she took over the case there was no record of Mr Dyson's earlier statement so a replacement statement was taken. She had never seen a statement from Miss Gormanly and did not believe one had ever been taken. There were no notes on record of any discussion with Miss Gormanly.

Defence evidence

33. The appellant gave evidence that he had been out that evening with Mr Dyson, the complainant and Miss Gormanly. He and the complainant were very friendly with each other and were flirting. The complainant reciprocated his movements. He had a hazy recollection of the evening due to the amount of alcohol he had consumed and there were blanks in his memory. The only snippet of memory that he had before the sexual intercourse was being sat on a chair drinking a gin and tonic. He had no memory of getting into the bedroom. His next memory was of the complainant being on top of him while they had consensual sexual intercourse. He said he may have bitten her in a sexual type of way as that was something he did in the course of sex but he had no real memory of it. Mr Dyson appeared while they were having sex and told them to keep the noise down. He responded by laughing but he said the complainant looked embarrassed.

34. After the sexual intercourse he fell asleep and said he did not make any further sexual moves towards the complainant. He woke at about 10 or 11 o'clock and was told by Mr Dyson that the complainant was upset that he had forced himself upon her. He was frustrated and upset on hearing the allegation and wanted to speak to the complainant but Mr Dyson told him to stay in the bedroom.

35. In cross-examination he denied that he had put forward a false narrative. He denied there was a separate incident about the consensual sexual intercourse. He simply went to sleep after the consensual sex.

Directions to the jury

36. In summing-up the case to the jury, when it came to the body map the judge reminded the jury of what injuries were shown on that body map. He told the jury it was for them to decide whether the body map supported the complainant's story. He told them:

> "There is no medical evidence in this case as to how old bruises are or what colour they go, we simply do not have that type of evidence in the case, so please again please do not speculate, ladies and gentlemen, as to how old those bruises are. They are put before you the girl says, 'I remember going to Hackenthorpe Hall and they marked them on a body sheet', and you do have a body sheet. It is for you to decide whether they support her account."

Grounds of appeal

37. The appellant has leave to appeal against conviction on three grounds which substantially overlap. They are:

    1. The police were incompetent and lost the statements and documentation

surrounding the complainant's visit to the SARC (ground 1).

2. Disclosure was wholly inadequate with the police and prosecuting authorities failing to provide a comprehensive schedule of unused material. Instead they provided one that was materially misleading to the defence (ground 2).
3. The judge erred by failing to adequately direct the jury about the police and CPS failures in this case or allow defence counsel to explore in detail the reasons for the failure with the officer in the case (this was originally ground 4).

38. The appellant had originally advanced wider grounds seeking to challenge the way the judge summed up the case on the law but those grounds were refused by the single judge and are not renewed before this court.

39. Mr Roberts represented the appellant at trial and conducts this appeal on his behalf. In written submissions he records his surprise when the complainant had said, in answer to his question about why she had never sought medical attention for the alleged biting injuries, that she had attended the SARC where her injuries had been photographed and noted. We have set out that part of the exchange in cross-examination above.

40. Mr Roberts says, and we accept, (1) that he would never have asked her that question if he had been aware of the full facts; (2) that he would, if he had known she had attended the SARC, sought disclosure of any records held or prepared by the SARC well in advance of trial; and (3) if she had been examined by a doctor he might well have asked that doctor to attend the trial to give evidence.

41. Mr Roberts also says, with the benefit of hindsight given the Crown's case which relied on the body map once it was produced, that he should have applied under section 78 of the Police and Criminal Evidence Act 1984 to have the body map excluded from evidence given the delay in producing it and given the likely existence of other documents and photographs held by the SARC which were still missing. He accepts that he was able to make these points in his closing speech but he argues that the late production of the body map gave rise to substantial unfairness.

42. In oral submissions Mr Roberts goes a little further. He says that the body map should have been excluded as unfairly prejudicial to his client's defence under section 78. If the judge was not willing to exclude that document, then he might next have made an application to discharge the jury on grounds that a fair trial could not take place in front of this jury who had heard him stumble onto the fact of the complainant's attendance at the SARC and further and in any event he needed time to reflect on the discovery of the body map and the Crown needed time to try to locate the other SARC records, for example notes by Nurse Webster or a doctor and the photos. This trial should have been adjourned to allow these steps to be taken.

43. It is Mr Roberts' considered view now that he would have wished to investigate the body map further, pursuing the point about whether there was further material from the SARC, notes or photos; alternatively, he would have wished to instruct a medical expert to advise on whether the injuries shown, in particular the bruises to the complainant's left lower hip and buttock, were consistent with her account. This was evidence which the judge had acknowledged was missing in this case and he directed the jury not to

speculate about, in particular about the age of the bruises. But Mr Roberts says he should have had the opportunity to obtain medical evidence which might have exculpated his client. Further, he argues that the judge's directions to the jury about the body map were, with the benefit of hindsight, insufficient. The judge should have given a much stronger direction to the effect that the Crown had failed to produce the body map in advance of trial as it should have done, that the defence were not able to investigate whether it did in fact show injuries consistent with the complainant's case, and that in the circumstances the jury should be very cautious about reliance on it. He further suggests that the direction the judge gave in standard terms about delay in this case failed to touch on the absence of the other SARC documents, the notes and the photographs which had been mentioned by the complainant in evidence but were not before the jury. Here too the jury should have been warned in clear terms about the potential prejudice to the appellant. He accepts that he did not invite the judge to give directions in these sorts of terms.

Grounds of opposition

44. The prosecution have lodged a Respondent's Notice and Grounds of Opposition in which they submit so far as the grounds which are before the court are concerned:

    1. It was an oversight by the CPS that the body map evidence was not served. The defence should have been made aware of the existence of the body map by stage 1 (which would have been 17 August 2021). A statement from the medical examiner would not normally be provided unless specifically requested and none was requested here.
    2. The Crown failed to serve the body map in evidence prior to trial or to place it on the schedule of unused material. Whilst that should not have happened, the

position was ultimately rectified by serving the body map in evidence. There was no real prejudice to the defence as a consequence of late disclosure.

3. No direction was required. The body map was provided in time and the defence were able to make reference in the defence closing speech to these matters so that the judge's directions were adequate.

45. In oral submissions, Mr Stables, who prosecuted at trial and appears for the Crown on this appeal, maintains his position that whatever failings there might have been the defendant has not thereby been prejudiced and his conviction is safe.

46. This court is grateful to both counsel for the care with which they have prepared this appeal and for their most helpful submissions.

Discussion

47. There were long delays and multiple failures in the Crown's preparation of this case and in getting it to trial. But the grounds of appeal for which the appellant has leave focus on one aspect of the lamentable history of this case. This appeal relates in essence to the late disclosure of the body map and the impact that had on the trial. As we have recorded, the body map was only produced part-way through the trial after the complainant had given her evidence and in circumstances where the Crown had simply failed by its own admission to produce it earlier. The remaining SARC documents, including photographs if they exist, were not produced. We conclude that the appellant has been prejudiced and materially so by the Crown's failure to disclose the body map in advance of trial.

48. As to the way the defence team should have handled that late disclosure, we accept Mr Roberts' submission that he could, and perhaps should, have made an application under section 78 to exclude the body map. There is no doubt that the body map was prejudicial to the defence because it showed bruising on the back of the complainant's lower left hip which the complainant had said related to the appellant biting her before he forced himself on her. One way of dealing with the late disclosure of the body map would have been to exclude it.

49. If the court had ruled against the defence on a section 78 application to exclude, we accept Mr Roberts' next submission that he would, and perhaps should, have made an application to discharge the jury, to allow the defence time to consider the body map further and to correct any poor impression caused by the defence stumbling by its questioning onto the fact of the complainant's visit to the SARC. We are unable to say what the outcome of such applications might have been, but the appellant was entitled to advance these arguments which were purely responsive to the Crown's disclosure failings. That no such applications were made because of the way the events unfolded has created prejudice for the appellant.

50. If the body map was to be admitted, either as part of this trial or possibly as part of another trial following an adjournment, then it is very likely that the defence team would have sought to investigate the content of the body map further. If no commentary from the SARC in the form of a medical opinion was forthcoming, and even if it was forthcoming, a further obvious line of enquiry would have been to instruct an independent medical expert to give an opinion on whether the injuries marked on the

body map were consistent with the complainant's case. It is not obvious to this court that the description of small round green bruises and a linear red mark on the rear of the left hip and left buttock are necessarily consistent with an account which involves the complainant being bitten on her lower back several times. We note that the CPS reviewing lawyer had herself noted "there are no marks on the back" which suggests that there is at least some doubt about whether the body map was consistent with the complainant's case. This could and should have been investigated. Indeed, in his directions to the jury the judge stated in terms that they lacked medical evidence to help them assess the extent to which the body map and the injuries it recorded assisted or undermined the complainant's case. The defence should have had the opportunity to obtain such evidence. This is a second and discrete form of prejudice to the appellant.

51. We note that the appellant admitted that he may have bitten the complainant in the course of the consensual act which means that the presence of injuries consistent with bite marks does not necessarily undermine the appellant's case. But if the injuries were not consistent with biting then that would be of considerable support to his case and it is that which needed investigation.

52. We also accept Mr Roberts' submission that if the body map was to be admitted in evidence in this trial then the judge should have been asked to give a stronger direction to the jury, warning them of the hazards of relying on the body map given its late production and the lack of opportunity for the defence to investigate it and given that the other SARC documents were still missing. We have set out the judge's direction above. It contained little in the way of a warning about reliance on the body map. It did not

point to the late disclosure or to any prejudice thereby caused to the defence who could not investigate its contents or seek medical opinion to advise on the nature of the injuries recorded and whether they were consistent with the complainant's account. This was a third and discrete form of prejudice to the appellant.

53. It is still not clear to this court whether a full search has yet been conducted to see if there are further records held by the SARC. In cross-examination at trial the officer in the case accepted that an SARC would in normal circumstances record the comments of an individual seeking help from the SARC. The complainant referred to photographs, and it is not clear whether they still exist as part of the SARC record. Just as the body map was an important piece of evidence, so too would these other materials be. If they exist then they should be produced and their non-disclosure creates further potential prejudice to this appellant.

54. In that connection we conclude that there is merit in the submission that the judge should have given a clearer direction to the jury in relation to delay, to the effect that documents which might have been expected to exist, namely the full SARC documents including notes and photos, were not in evidence before them and that that might be attributable either to delay or to difficulties on the part of the Crown in preparing for trial and that that was a matter that the jury should have in mind when considering the respective merits of each party's case.

55. We do not criticise Mr Roberts for failing to take these various steps which we have considered at trial. It would have been better if he had considered some of these steps at

least, as he now appreciates. But Mr Roberts dealt with matters as he thought best at the time and it is only in hindsight that a fuller appreciation of the disadvantage to his client has become clear. Mr Roberts should not have been put in the position of having to make difficult decisions on the hoof in this way and the difficulty which he was put in was a consequence of the Crown's failures of disclosure and the fact of the very late disclosure of the body map. Nor do we criticise Mr Stables who likewise was taken by surprise by late disclosure of the body map.

56. We do however criticise the Crown's conduct of this case. The CPS failed to make disclosure of important evidence in advance of trial. The disclosure regime exists to protect defendants from ambush at trial. In this case the Crown's breaches of the disclosure rules have led to the appellant being significantly prejudiced in the ways that we have set out.

57. The simple fact of late disclosure is not the reason for our concern. Even in the best prepared cases it sometimes happens that documents come to the fore later than they should have done. The court's procedures enable courts to deal with late disclosure and to avert any prejudice as a consequence of late disclosure. Our concern in this case relates to the prejudice which has been visited on the appellant as a consequence of the late disclosure of the body map, which in our judgment could have been mitigated at trial (this trial or a new trial) but in fact was not.

Disposal

58. The Crown failed to disclose material which was highly relevant to the single issue in the

case. The SARC records go directly to the credibility of the complainant's account. Part of those records emerged during the trial after the complainant had given evidence. Other parts are still as far as we know missing.

59. We accept that the jury by a majority believed the complainant and rejected the appellant's case, but as a result of the Crown's failures the appellant was deprived of a proper opportunity to exclude or challenge the body map which was put before the jury by the Crown as a document which supported the truth of the complainant's account. It was an important piece of evidence. The lack of opportunity to challenge or investigate it, and the lack of warning to the jury about reliance on it, creates prejudice for the appellant. There were a number of routes open to the defence to deal with this late and missing material, which routes were not explored. Any one of them could have altered the outcome in this case. We are not satisfied in these circumstances that this conviction is safe.

60. We also wish to record our concern about the way in which the judge summed up this offence to the jury. We note that he did not direct the jury at all on consent or reasonable belief in consent, two of the ingredients of rape. He invited the jury only to consider whether the appellant had penetrated the complainant's vagina with his penis on that second occasion. This aspect of the case is not part of the appeal grounds before us and it is only necessary for us to mention it for consideration on any retrial.

61. For the reasons we have given this appeal is allowed. We quash this conviction. This judgment will remain subject to an order made under section 4(2) of the Contempt of

Court Act 1981, postponing publication of any report of these proceedings until the conclusion of any retrial in order to avoid a substantial risk of prejudice to the administration of justice in those proceedings.

62. LADY JUSTICE WHIPPLE: Mr Stables, do you have instructions?
63. MR STABLES: Your Ladyship, I do and those instructions are to apply for a retrial.
64. LADY JUSTICE WHIPPLE: Very good. In those circumstances we allow the appeal, we quash the convictions under section 2(2) and we order a retrial under section 7 on the single count of rape. We direct that a fresh indictment is served under section 8(1) in accordance with the Criminal Procedure Rules, Rule 10.8(2) which requires the prosecution to serve a draft indictment on the Crown Court Officer not more than 28 days after this order. We direct the appellant should be re-arraigned on the fresh indictment within two months of today's date, pursuant to section 8(1) as amended by section 43 of the Criminal Justice Act 1988. We would propose that the venue for retrial should be determined by the presiding judges for the North Eastern Circuit. We direct that the Registrar should order a transcript of the sentencing remarks in this case to be sent to the prosecution who must ensure that the transcript is provided to the Crown Court Judge who conducts any sentencing hearing following a retrial.
65. MR ROBERTS: My Lady, can I address the court in relation to bail?
66. LADY JUSTICE WHIPPLE: Of course.
67. MR ROBERTS: Mr Abbott was hitherto a man of good character.
68. LADY JUSTICE WHIPPLE: We anticipated that this issue might arise. We think that it would be much more appropriate for the Crown Court seized of this case to deal with matters of bail. So we would invite you to take this to the Crown Court Judge. As

matters stand this is a Sheffield case, so it is before Sheffield Crown Court and that is where you need to go. We will, in short order, alert the Presiders on the Circuit to the facts of this case and they will determine where the next trial is best heard and whether the case needs to be transferred out of Sheffield.

69. MR ROBERTS: Thank you, my Lady.

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