R v Kay

[2017] EWCA Crim 2214

Court of Appeal, Criminal Division

Simon LJ, Goss J and Judge Walden-Smith

21 December 2017

Judgment

Mr Philip Rule for the **Appellant**

Mr Stephen Kemp for the **Respondent**

Hearing dates : 17th November 2017

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Approved Judgment

MR JUSTICE GOSS :

Introduction

1. On 23rd September 2013, in the Crown Court at Derby before Mr Recorder Elsom the applicant was convicted by a majority of 10 to 2 of an offence of rape of A. He was acquitted of two further counts of rape of a different complainant, B. On 11th November 2013 he was sentenced by the trial judge to 4 years and 6 months' imprisonment.

2. He now applies for an extension of time of approximately 2 years and 5 months in which to apply for leave to appeal against conviction. His applications have been referred to the full Court by the Registrar.

3. The provisions of the Sexual Offences (Amendment) Act 1992 relating to the reporting of this case apply. No matter relating to a complainant in this case 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 unless waived or lifted in accordance with s.3 of the Act.

Facts

4. The applicant is now 26 years of age having been born on 26th April 1991. In 2011, when aged 20, he was in a relationship with B, who was 4 years younger than him. That relationship, which had been intermittent, finally ended in December 2011. B made an allegation

that the applicant had assaulted her, making a witness statement on 24th December 2011. On 26th April 2012 he was sentenced for common assault of B. Subsequently, in early August 2012, she alleged she had been raped by the applicant towards the end of their relationship on two occasions.

5. Around the 1st of February 2012 the applicant approached the complainant A, who was also almost 4 years younger than him having been born on 11the July 1995, on Facebook. They exchanged messages on Facebook as well as their telephone numbers and arranged to meet in person. B noted the Facebook exchange and contacted A, advising her against involvement with the applicant. Nevertheless, A did meet the applicant in person after assuring B that she would be careful.

6. On 28th July 2012, in an ABE interview, A alleged that the applicant had raped her in early February 2012 on the sofa in his living room. The applicant was arrested. When interviewed on 3rd August 2012 he initially denied knowing A, but later recalled her when her workplace was mentioned. He said that they had had consensual sexual intercourse on one occasion. In evidence, he said that he had met A on 2 occasions and had consensual sexual intercourse with her on the second and final meeting.

7. On 3rd and 8th of August 2012, in ABE interviews, B alleged that the applicant had raped her on two occasions in December 2011. When interviewed, he denied he had raped her. In evidence, he said they had been in a sexual relationship but denied that there had been any act of sexual intercourse with B on the occasions he was alleged to have raped her.

8. The defence case at trial was that the only plausible explanation for the failure by both B and A to report matters promptly and the inconsistencies in the evidence, to which we shall refer, had been that they had concocted false allegations for their own purposes or had influenced or colluded with each other, thus impinging on their credibility and reliability.

9. The issues for the jury were whether, in the case of B's allegations, the acts of intercourse had taken place at all and, if so, whether they were acts of rape, and, in relation to A, whether they were sure that she had not consented and that the applicant had not reasonably believed that she had consented.

The evidence

10. A's ABE interview was adduced as her evidence-in-chief. She stated that the applicant contacted her on Facebook and they exchanged messages. Sometime after 1st February 2012 she met the applicant and they sat in his car and talked. On the second occasion that they met they went to the applicant's home and watched television. She had been lying on the sofa and the applicant kissed her, but she did not reciprocate. They talked and the applicant pulled her trousers down. A said she did not want to and pushed the applicant's chest. The applicant penetrated her vagina with his penis and asked her if it hurt. She told him that it did and to stop. The applicant replied *"No, just a bit more"* as he wanted to ejaculate. He got up and wiped semen onto his clothing. The applicant then drove her to work at her request. She had been at the applicant's address for about 30-40 minutes. She did not scream as the door had been locked. After work she went home and the applicant texted her but she did not reply. She told police she had no further contact with the applicant thereafter.

11. A later accepted that after the rape she had contacted the applicant by text message saying *"I can't believe you did that"* and referring to the possibility that she was pregnant. They had also had a conversation that led to her taking an emergency contraceptive.

12. She told a friend, Richard Clay, that the applicant had raped her and, in June or July 2012, made disclosure to her grandmother and mother. She said she had not been influenced by what B had said about the applicant.

13. A was asked by the police to retrieve copies of the Facebook messages she had exchanged with the applicant. Three pages of messages were printed and became an exhibit in the trial. In cross-examination she accepted that she had deleted some of the Facebook messages, she said to free up storage space. This may have included messages she sent to the applicant. She denied sending naked images of herself to the applicant, but accepted that she had taken some in the mirror. She agreed that she may have told the applicant she had had two or three sexual partners, whereas her account to police had been that she had told the applicant she was a virgin. She accepted that she and her family were Jehovah's Witnesses and sex before marriage was not permitted and that she had obtained an emergency contraceptive in March 2012 as she had had unprotected sex on 19th March 2012. In re-examination she stated that she believed all the messages from 1st February 2012 onwards were available. She had deleted Facebook messages on her mobile phone but the messages had stayed on her computer. The conversation on 21st March 2012 may have been incomplete but that may have been because it had been interspersed with text messages. She had been hurt by how the applicant had treated her and had not replied to him. Mobile telephones belonging to the applicant and A were interrogated. A had sent the applicant 429 text messages between 1st and 17th February 2012 and five more on 13th March 2012. The applicant had sent A 410 text messages between 1st and 17th February 2012 and 13th March 2012. The content of the messages could not be retrieved.

14. There were further contradictions in the accounts that A gave of events. There were admissions in the case that A had been examined on 6th August 2012 and told the nurse she had not been in a sexual relationship since the incident. A had attended a clinic on 9th and 24th of February 2012 but not in connection with matters of a sexual nature. She had attended a clinic on 24th July 2012 and spoke to a doctor about having unprotected sex about two months previously. Dr Mills gave evidence that he had examined A on 3rd August 2012; she had told him that she had not had penetrative vaginal sex before or after the incident.

15. The statement of A's friend, Richard Clay, was read. He stated that A had informed him that she had been raped but did not disclose the rapist's identity. She had said that she did not want to involve the police. He had noticed a change in her character since February 2012. The statements of A's grandmother and mother were also read detailing complaints A had made to them. A further friend of A's gave evidence that A had made disclosure to her on 27th July 2012.

16. The applicant gave evidence that he had sent a Facebook relationship request to A as his relationship with B had ended. She had sent him pictures of her in her underwear and said she had had sexual intercourse two or three times before. He had met her twice; the first time they just talked. On the second occasion they went to his address. He may have locked the door but would have left the keys in the lock. They kissed on the sofa, he asked A to go upstairs and she agreed. They undressed one another and engaged in foreplay before having consensual sexual intercourse in which A had been a willing participant. A had not said that she was in pain nor asked him to stop; if she had, he would have stopped. Afterwards they watched television and he drove her to work. He contacted A later that day and she said she had enjoyed herself. Contact after that was fine. A told him that B had told her that he had hit her, been controlling and aggressive and A stopped contact with him after that. A did contact him again as she was concerned that she was pregnant. When he was contacted by A about pregnancy, he told her to go to a pharmacy and get the 'morning after' pill.

17. The applicant was acquitted of the alleged offences of rape of B and convicted of raping A.

Appeal

18. Following conviction, the applicant's trial counsel provided a written advice on appeal dated 23rd December 2013. His current solicitors had, by then, already been contacted by the applicant and received legal aid forms in February 2014. They received the case papers from the former solicitors on 2nd May 2014. They were considered in detail and the applicant's instructions were obtained on 27th June 2014. Counsel was instructed on 3rd September 2014. On 6th February 2015 Counsel indicated he required further documentation. That was finally received by the current solicitors on 29th July 2015 and funding was obtained on 27th November 2015. Final grounds of appeal and further advice from Counsel were received on 15th March 2016. The application for leave to appeal conviction was received by the court on 23rd March 2016, almost 2 years and 5 months out of time.

19. Due diligence in accordance with R v McCook [2014] EWCA Crim 734 was then undertaken. Trial Counsel for the applicant provided a note dated 26th July 2016 indicating that she "did not disagree with the facts of the case as they are set out" and added that "in so far as the submissions contained within the Grounds of Appeal themselves are concerned, their validity or otherwise is ultimately a matter for the Court of Appeal". On 15th March 2017 the Registrar directed that the waiver of privilege procedure be initiated. The applicant declined to waive privilege.

The grounds of appeal

20. There are two grounds of appeal against conviction:-

(1) The directions to the jury as to the meaning of reluctant consent and/or reasonable belief in consent were flawed. The judge erred in directing the jury that they had to determine the case on the basis of A's account (she clearly said 'no') or the applicant's account (she was a willing participant). The judge effectively withdrew mistaken but reasonable belief in consent from the jury, whereas it should have been a live issue for the jury to consider.

(2) Fresh evidence in the form of Facebook messages are now available that go directly to A's credibility. Edited and misleading copies of the Facebook messages were adduced at trial.

21. Mr Rule has pursued the second ground relating to further Facebook messaging as his main ground of appeal. Leave under section 23 of the Criminal Appeal Act 1968 is sought to adduce fresh evidence in the form of statements from Sarah Maddison and her partner, Aston McGarry, the applicant's brother, Rebecca Horne, the applicant's solicitor, and the applicant himself. The purport of these statements is that, at the request of Aston McGarry, Sarah Maddison was able to locate an archive on or around 9th May 2014 on the applicant's Facebook account containing further messages of which she was able to take screenshots. His solicitor, Rebecca Horne, having logged on to the applicant's account on 16th September 2016 was able to print out the messages that Sarah Maddison detailed in her statement. It was thereby confirmed that A had deleted messages from her account but that they remained in the applicant's account in an archived folder.

22. The Respondent has lodged further statements from A dated 15th October 2016 and the officer in the case dated 7th October 2016 respectively. In her further statement A cannot explain why only part of the conversation was initially recovered but speculates that her deactivating her account may have made a difference. She denies having deleted individual messages to provide a misleading picture. The officer in the case states he had been with A when they printed the messages from her archived folder by taking a screen shot. He made sure no messages were missed and exhibited the material as PJN/9. When PJN/9 was produced neither the complainant nor the officer deleted any messages. Investigations with a digital spe-

cialist officer have revealed that it is only possible to delete a whole message and not just part of it: messages once sent or received cannot be edited.

Discussion

23. The admission of fresh evidence is governed by section 23 of the Criminal Appeal Act 1968. Evidence may be received if it is necessary or expedient to do so. The applicant must satisfy the court that (1) the evidence appears to be capable of belief; (2) it affords a ground for allowing the appeal; (3) it would have been admissible at trial; (4) there is a reasonable explanation for its not having been adduced at trial.

24. It is the applicant's case that this new material in relation to the Facebook conversation was not available until after conviction, that the collation and consideration of the papers took some time, the delay is not the fault of the applicant and it is in the interests of justice to grant the extension of time sought.

25. The evidence is clearly capable of belief and would have been admissible at trial. The controversial areas are whether it affords a ground for allowing the appeal and the reasonableness of the explanation for it not having been adduced at trial.

26. It is submitted that the evidence of the full message exchange goes directly to the veracity of both A and the applicant. A deleted a total of 29 separate messages sent and received in February and March 2012 from the record. A comparison between the version of the messages in the exhibit before the jury and the full exchange reveals that the messages deleted were selective. In consequence, a number of significant and misleading impressions were given in the edited trial version.

27. The contact began on 1st February 2012, A responding to the applicant adding her as a friend, A indicating she did not mind and saying that she was only nearly 17. The ensuing messages, which were deleted from the version before the jury, were the applicant asking A whether she was single and her saying that she was. However, in the jury's version, the applicant had apparently responded 'me too' to her message that she was 17. This was something about which he was vigorously cross-examined. His evidence was that he never indicated he was the same age as her: the full exchange of messages reveals he was telling the truth.

28. Another, more significant consequence of the jury having the deleted version was that it supported A's account that the only contact after the alleged rape was to do with A's concern as to her pregnancy and the taking of the 'morning after' contraceptive pill. Although there was a gap in Facebook messages they resumed on 19th March with the applicant asking A for her phone number as his phone had deleted it. She immediately provided it ending her message with kisses. These messages were deleted from the version before the jury. Two days later, between 21st and 23rd March, there was another exchange of messages, whose edited version before the jury gave a very misleading context for his message "sorry", which was in fact in response to her asking him why he was ignoring her. Her response, again edited from the jury's version was "Dnt be". In its edited form before the jury, the context was capable of being construed as an apology for something that had happened between them. Far from being evidence supportive of A's account of events, the full version of the exchange not only undermined her account but also supported the applicant's version. Although the jury was aware of a large number of text messages being exchanged, there was no evidence of their content. The exhibit of the edited Facebook entries was of obvious significance in a case of one person's word against another and, indeed, during their deliberations, the jury requested a colour copy. Mr Rule submits that the full Facebook message exchange both contradicts the prosecution's case, based on A's evidence that after 17th February there was very little contact between the two of them both in terms of the frequency and nature of contact, and goes to

support the applicant's case that he was being truthful and that the act of intercourse was consensual.

29. The applicant was aware prior to and at the time of trial that the Facebook messages exhibited were incomplete and that further messages existed. In his witness statement dated 5th April 2016 he states that "at the time of trial I believed I had tried everything I could to obtain this evidence. I contacted Facebook to no avail and I browsed through all the messages in my inbox folder. I was not aware that an archive folder existed and this was not obvious on viewing the webpage." The Respondent submits that no great expertise was required to locate the archive folder and there is no evidence as to why he left it until after the trial to seek assistance from his brother or someone with greater knowledge of Facebook than he had to assist him in his endeavours. However, the applicant was repeatedly urging the prosecution to obtain the full Facebook exchange and the police had his phone and laptop and could have accessed his Facebook account.

30. We have come to the conclusion that, in a case of one word against another, the full Facebook message exchange provides very cogent evidence both in relation to the truthfulness and reliability of A, who, in any event, gave a series of contradictory accounts about other relevant matters, and the reliability of the applicant's account and his truthfulness. We are, of course, mindful of the approach directed by *R v. Pendleton* [2002] 1 WLR 72, HL. We are satisfied that this further evidence does raise a reasonable doubt as to whether the applicant would have been convicted had it been before the jury, thus rendering the conviction unsafe. We also consider that there is, in the unusual circumstances of this case, a reasonable explanation for the failure to adduce the evidence at the trial.

31. The delay in bringing the appeal was not excusable. However, the overriding consideration is whether it is in the interests of justice that the time limit should be extended. Given our view as to the merits of the appeal and the reasons for the delays, we are prepared to grant leave, extend time and admit the fresh evidence which we find affords a proper ground for allowing the appeal. In the light of the new evidence, we consider that the conviction is unsafe and we allow the appeal.

32. In these circumstances it is not necessary to consider in detail the first ground of appeal relating to the direction to the jury on consent. In summary, the submission is that, firstly, the direction failed to differentiate between a demand by an offender, overbearing free will, and a desire or intention by a partner to have sex, thus setting the threshold for conduct that would qualify as constituting the offence at a level lower than the law properly provides. Secondly, it is argued that the terms of the direction removed as an issue of fact from the jury what was a vital second issue, namely, proof of no reasonable belief in consent.

33. Although the direction was not helpful in its precise terms, the Recorder made plain that the absence of consent and of any reasonable belief by the applicant of consent must be proved by the prosecution to the requisite standard. It was not left solely on the basis that if the jury believed A's evidence about the matter then the applicant was guilty. The Recorder went on to emphasise that it was for the prosecution to prove not only lack of consent but also that the applicant did not have a reasonable belief that she was consenting. Accordingly, there is no merit in this ground of appeal.

34. We note in passing and with some concern that the jury was not assisted by written directions as to the elements of the offence that had to be proved or a route to verdict. The Recorder relied solely on reference to the Indictment supplemented by his oral explanations and directions. Given the different issues relating to the two complainants and the nature and features of the case, we are of the clear opinion that, as is now directed in CPD VI 26K.12, written directions or a route to verdict would have been of great assistance.

Decision

35. We quash this conviction. Having been informed that, in the event of the appeal being allowed, the Respondent would not seek a retrial we make no further orders.