Neutral Citation Number: [2019] EWCA Crim 1033
No: 201803651 B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 28 March 2019

B e f o r e:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MR JUSTICE JEREMY BAKER

MRS JUSTICE SIMLER DBE

R E G I N A

v

JOSEPHUS OREMI COLE

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr N Robinson appeared on behalf of the **Appellant**
Mr P Jarvis appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. THE PRESIDENT: On 3 August 2018 in the Crown Court at Blackfriars before His Honour Judge Shetty and a jury, this appellant was convicted of fraud contrary to section 1 of the Fraud Act 2006. He was later sentenced to 20 months' imprisonment.

2. There is no challenge to the way in which this trial was conducted and it is not suggested that the judge erred in law or that there was any other material irregularity during the course of the trial. The appeal, however, is based on a challenge to a decision of Her Honour Judge Newbury, who on 30 May 2018 refused to stay the prosecution as an abuse of process. It proceeds with the leave of the single judge.

3. The facts which form the base of the prosecution are material only to the extent that they demonstrate the issues at stake and the significance of the case to the victim, whose interests have over the years properly been the subject of far greater focus than was once the case. That much is clear not least because the Victim's Right to Review, introduced to give effect to the decision of this court in R v Killick [2011] EWCA Crim 1608 which, taken with Article 11 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, stipulated that victims should be afforded an opportunity to require prosecutors to reconsider a decision not to bring or maintain charges against a suspect. Thus as a consequence of such a review, proceedings in the Magistrates' Courts which had been discontinued when it was discovered that the cost of bringing the victim to this country was prohibitively expensive, after complaint and review by a more senior prosecutor, led to the prosecution being pursued a second time.

4. The facts are as follows. The case against the appellant revolved around an allegation that he had deceived the complainant, Lauretta Sowe, into transferring $20,000 into his bank account on the false representation that it would be used as a deposit for a house purchase. That transfer took place on 15 October 2015.

5. The background was that the appellant and Ms Sowe had known each other when they had been growing up in The Gambia, but had fallen out of contact when the appellant came to the United Kingdom in the late 1980s. They met again and had a brief romantic relationship in 1997, but had again fallen out of touch with one another. In the middle of 2015, through a mutual friend, they resumed contact. Ms Sowe, who works for the United Nations, was at the time based in Namibia. They then communicated by email, text and telephone on a frequent, perhaps daily, basis. Ms Sowe's account was that they had resumed a romantic relationship and had discussed marriage, although the appellant disputed this.

6. At that time, the appellant was renting a property at 38 Kingshill Drive, Hoo. In late 2014 he was approached by his landlord, who was looking to sell the property, and who offered him first refusal at a discounted price. He was interested in buying the property and set about trying to raise a deposit and find a mortgage. Unfortunately, the appellant was unable to do either of these things, the principal difficulty being that he was still named on the mortgage of the house he used to occupy with his ex-wife. His account in interview was that he had been unable to obtain a second residential mortgage with anything less than a 25 per cent deposit, which he could not afford. He set about trying to vary the consent order following his divorce in order to obtain

release from mortgage and thus be able to afford a deposit on the new property. Unfortunately that proceeded very slowly, and in the event, by 27 September 2015, the landlord had served a notice upon him to leave the property, although they later extended the deadline and their offer for him to buy it until 27 October 2015.

7. Meanwhile Ms Sowe gave evidence that she had been interested in investing in property in the UK as two of her children attended school in this country and she needed somewhere to stay when on home leave from work. She said that she and the appellant discussed buying 38 Kingshill Drive together, with her providing money towards a deposit. She obtained a loan of $20,000 from her employers for that purpose. Emails between her and the appellant show that she attempted to transfer the money on 8 October 2015, but the transfer was refused by the bank. She emailed the appellant on 14 October stating that she was concerned what would happen to the money if "the rest of the deposit is not sourced". He responded by saying that his mortgage adviser had found a mortgage which he could obtain with a 5 per cent deposit and the application had already been submitted. As a result, Ms Sowe transferred $20,000 to the appellant the following day.

8. The Crown's case was that, on the appellant's own account, there was no prospect of him obtaining a mortgage with a 5 per cent deposit and he had therefore lied to Ms Sowe to pressure her into making the money transfer. Equally her email to him indicated that she was concerned about what would happen to the money if the rest of the deposit was not found, which undermined any suggestion that she viewed the transfer as a gift. Ms Sowe was later to say that as soon as the money was transferred, she was unable to contact the appellant, who did not answer her phone calls or respond to her emails. On 1 November, she asked for the money to be returned as she needed to use it for her children's school fees, but no response was ever received. In the meantime, the offer to purchase the property was withdrawn and proceedings were eventually pursued in the County Court requiring the appellant to vacate the property.

9. So it was that a complaint was made to the police. The appellant was arrested and interviewed on 3 July 2016, giving an account that although he had intended to use the money as a house deposit, the money was essentially gifted to him by Ms Sowe, perhaps in an effort to "buy his love". He had intended to buy the property, but the eventual purchase fell through. He spent the money on his living expenses and finding somewhere else for himself and his daughter to live. He denied there had been any suggestion that he buy the house along with Ms Sowe.

10. The appellant was eventually charged and was sent a summons to attend court on 22 June 2017. At that hearing he consented to summary trial and pleaded not guilty. The trial was fixed for 17 August, but the trial on that day, at which Ms Sowe attended, was not effective because a further bundle of evidence was served. That bundle included the emails between the appellant and Ms Sowe and the banking exhibits, although it has to be observed that the emails between the appellant and Ms Sowe would have been available to him throughout and from the outset. In the event, it was concluded that there was insufficient time to complete the case and it was adjourned so that the defence could read and take instructions on the new material. The date then fixed was 19 October 2017.

11. On 17 October the Crown applied in writing to vacate the trial because arrangements to fly Ms Sowe from Jamaica had not been completed and the cost of the flight had substantially increased. The application was therefore to adjourn the trial until such a time as a more affordable flight could be purchased. There was no explanation as to when these difficulties arose, nor why the application to adjourn was being made just two days before the trial. The defence opposed the application. It was considered on the papers and not granted.

12. As a result, on 18 October, the Crown discontinued proceedings pursuant to section 23 of the Prosecution of Offences Act 1985. The letter giving notice explains:

> "The effect of this notice is that your client no longer need attend court in respect of these charges and that any bail conditions imposed in relation to them cease to apply.
>
> The decision to discontinue these charges has been taken because there is not enough evidence to provide a realistic prospect of conviction **at this stage**."

We interpose that the words "at this stage" are in bold and underlined in the original. The letter goes on with the caption "Important":

> "This decision has been taken on the evidence and information provided to the Crown Prosecution Service as at the date of this letter. If more significant evidence and/or information is discovered at a later date the decision to discontinue may be reconsidered.
>
> In rare cases a decision to discontinue may be reconsidered if a new look at the decision shows that it was clearly wrong and should not be allowed to stand.
>
> Your client has the right to require the discontinued proceedings to be revived if they wish to."

13. The case was then the subject of a request by Ms Sowe pursuant to the Victim's Right to Review. It was considered by a senior prosecutor and eventually the Chief Crown Prosecutor.

14. We now turn to the findings made by Judge Newbury at the application to stay on the grounds of abuse of process. She observed:

> "It is plain that the CPS lawyer must have considered that any hearsay application in respect of the complainant's evidence would be bound to fail in circumstances where all of the key issues revolved around the credibility of her evidence. [The Crown advocate] agrees that the hearsay application was highly unlikely to succeed.
>
> The defendant did not revive the proceedings to insist on his trial taking place the following day and the Crown's case is that he should have done.

> He was warned about the potential to reconsider a decision to discontinue although it could not be anticipated that there would be any new evidence or any new information discovered; after all the case had very nearly been tried twice already.
>
> Towards the end of 2017 the Crown reinstated proceedings against the defendant, sent a summons required him to attend court on 11 January 2018 at which point he elected trial at this court. The case summary served was identical to that served previously: there is no new evidence or information.
>
> Although not set out expressly in his skeleton argument [the Crown advocate] explained that what had happened here was that following the notice of discontinuance, which was served in order to maintain public confidence in the criminal justice system, the complainant complained by way of the Victim's Right to Review scheme. She complained that it was not her fault that the case was discontinued and that she was ready willing and able to attend the trial. [The advocate] concedes that this was not new information but what he now says is that it acted as a trigger for a reviewing lawyer to consider the notice of discontinuance. What the reviewing lawyer decided in November 2017 was that in fact a hearsay application should have been made and that therefore the matter should not have been discontinued. It is not asserted that any lawyer had advised that any application would likely have succeeded but the recommendation of reinstating the case was authorised by the Chief Crown Prosecutor on 30 November 2017.
>
> There appears to be at the very least an irony here in that had the decision been made to proceed to make a hearsay application at the trial on 19 October 2017 it would have very likely failed and the defendant would very likely have been acquitted.
>
> Instead the Crown are ready to go again. The practical effect of the notice of discontinuance and then the revival of the case subsequently has been to circumvent the refusal to adjourn made at the Magistrates' Court. It may have been inadvertent, but the application to stay is based on what is said to be the manipulation here, such that it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case."

15. The learned judge went on to consider the relevant authority, recognising that it was not always necessary to demonstrate bad faith if there was a deliberate decision to take advantage of a procedural rule. She goes on:

> "Mr Robinson [counsel for the appellant] submits that I should infer that at the time the notice of discontinuance was issued it was always the intention to reinstate proceedings once the complainant could be available again. In the light of what was explained by [the Crown advocate] I am

not prepared to draw that inference. My view is that Wardle can fairly be distinguished from the facts here."

The judge observed that a stay was a remedy of last resort and, being satisfied that a fair trial was possible and that it was in the public interest that the defendant be tried, the application to stay was refused.

16. In this court, Mr Robinson does not challenge the finding of the judge that the discontinuance was not done with a view to avoid the consequences of the refusal to adjourn. In other words, he does not allege bad faith in that decision. What he does, however, contend is that the decision to reinstate the case was made in circumstances which unfairly took advantage of the reason that the first case was discontinued. Although the ability to reinstate was a wide power, he submitted that it should not go behind a magistrate's refusal to grant an adjournment.

17. Mr Robinson maintains that the application to read the evidence of the complainant as hearsay was likely, if not inevitably bound, to fail. The proposition that it was bound to fail does not necessarily take full account of the fact that there was email traffic which, certainly by the stage of the hearing on 17 October, had fully been served and available for the court to consider. It appears to cast its own light on what was happening between the parties.

18. The guidance provided by the Crown Prosecution Service on the use of notices of discontinuance states, in relation to bringing of fresh proceedings:

> "Fresh proceedings may be commenced if further evidence, sufficient to provide a realistic prospect of conviction, subsequently comes to light.
>
> Proceedings may also be reinstituted following a review under the Victim's Right to Review scheme where the prosecution conclude:
>
> (a) the earlier decision was wrong in applying the evidential or public interest stages of the Full Code test; and
>
> (b) that for the maintenance of public confidence, the decision must be reversed.
>
> When the proceedings were discontinued on public interest grounds, however, it is appropriate to reinstate proceedings only in exceptional cases."

The view of the Crown Prosecution Service as reformulated was that the decision to discontinue was wrong, based upon the ability to pursue a potential hearsay application, whatever the eventual result might have been. The decision has to be seen in the context of the Right of Review exercised by Ms Sowe and the clear warning on the letter of discontinuance.

19. It is abundantly clear that abuse of process is an exceptional step for the court to take: see for example the observations in R v Maxwell [2010] UKSC 48; [2011] 1 WLR

1837 per Lord Dyson JSC at paragraph 13. The remedy is exceptional. In R v Crawley [2014] EWCA Crim 1028; [2014] 2 Cr App R 16 it is observed at paragraph 18:

> "There is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."

The decision goes on at paragraph 23:

> "Where there has been alleged bad faith, unlawfulness or executive misconduct, the court is concerned not to create the perception that it is condoning malpractice by law enforcement agencies or to convey the impression that it will adopt the approach that the end justifies the means: the touchstone is the integrity of the criminal justice system. This must be balanced against the potential criticism that the court is failing to protect the public from grave crimes. This no doubt explains why cases which fall into this category 'will be very exceptional': see per Lord Bingham CJ in Attorney General's Reference (No 2 of 2001) [2003] UKHL 68; [2004] 2 AC 72 at 25D."

20. Given the concession that the argument advanced that discontinuance was a decision made in bad faith is no longer maintained, it is necessary to review the decision taken by the prosecuting lawyer in the context of the circumstances which we have described. The fact that the Chief Crown Prosecutor decided that the decision was wrong does not in our judgment fall within the category of cases identified by Maxwell or summarised in Crawley. Judge Newbury was correctly directed as to the law. She reached the conclusion that the prosecution of the case did not constitute executive misconduct and was not an abuse of process. She was perfectly entitled to do so.

21. In the circumstances, this appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk