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2018/01497/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 17th July 2019

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lady Justice Hallett DBE)

MR JUSTICE PHILLIPS

and

MR JUSTICE EDIS

R E G I N A

- v -

RYAN JOHN ROSTRON

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Mr J Elliott appeared on behalf of the Applicant

Mr S Heptonstall appeared on behalf of the Crown

J U D G M E N T
(Approved)

LADY JUSTICE HALLETT:

1. Reporting restrictions apply to protect the identity of the complainant in this case.

The Background

2. On 23rd November 2015, in the Crown Court at Cambridge, the applicant pleaded guilty to an offence of threatening to destroy or damage property (count 6).

3. On 23rd May 2016, following a trial, he was convicted by a majority of 11:1 of making a threat to kill (count 1), rape (counts 3 and 4), and assault occasioning actual bodily harm (count 5).

4. The applicant now renews his application for an extension of time (654 days) to apply for leave to appeal against conviction following refusal by the single judge. He renews his application for leave to rely on fresh evidence and an alleged retraction of the rape complaints, pursuant to section 23 of the Criminal Appeal Act 1968.

The Prosecution Case

5. The applicant and the complainant were in a relationship. During a holiday abroad, the applicant allegedly caused a three inch, full-thickness laceration to the complainant's eyebrow. The doctor who attended the complainant reported the incident to the UK police. On the couple's return to the United Kingdom, in a series of text messages sent on 21st September 2015, the applicant threatened to burn the complainant's car. When the police saw her about the cut to her eyebrow, the complainant disclosed the allegations that featured on the indictment.

6. We can take the facts of the alleged offences before us relatively briefly.

Count 1: Making a threat to kill

7. The applicant and the complainant had an argument when out driving. The applicant stopped the car and forced the complainant into the boot of the car. He threatened to kill her. When she managed to climb free, he threatened to kill them both by driving under a lorry.

Counts 3 and 4: Rape

8. In the early days of their relationship, the applicant took the complainant into fields behind his house and assaulted her. He hit and kicked her, knocked her to the ground and insisted that she suck his penis, which she did. He had vaginal sexual intercourse with her, without her consent, following which he asked her: "Have I just raped you?"

Count 5: Assault Occasioning Actual Bodily Harm

9. The applicant struck the complainant with a metal bar during an argument. It caused a deep laceration and impacted a ring on her finger. The resulting injury required hospital treatment.

The Defence Case

10. The defence case was that the complainant had made up the allegations maliciously because she was jealous of the applicant's relationship with his sister.

The Grounds of Appeal

11. The applicant seeks leave to introduce fresh evidence, primarily from Daniel Gibbs, that is said fundamentally to undermine the credibility of the complainant on all counts.

12. In a statement dated 1st March 2018, Gibbs described a brief encounter with the complainant

in autumn 2016. After meeting in a club in King's Lynn, they returned to his house. During the night, the complainant told him that the applicant, Ryan Rostron, whom he did not then know, was in prison. He "pressed her for information". She informed him that the applicant had been convicted of raping her. She added that he deserved to be in prison for the terrible things he had done to her, but that she had made up the allegation of rape as revenge because the applicant had slept with her sister.

13. Gibbs claimed that he then researched the name "Rostron" and found two people called Rostron on Facebook, one of whom was the applicant's mother. He sent her a message on 22nd May 2017. We have a copy of their exchange. In it he told her that he had contacted Downham Market Police Station to give them some information about her son, but that they would not take a statement and so he contacted King's Lynn Police Station, but had the same response. He therefore dialled 101 and had expected a call from the police to make an appointment.

14. On 24th May 2017, he sent a message saying that he had chased the police and "an officer will be calling me this afternoon". The applicant's mother asked for the information. Gibbs told her that he had met the complainant in 2016 at a club and had taken her out for a meal, during which she admitted that she had made a false allegation of rape against the applicant. He knew her by her nickname "P" and had only recently discovered her real name through a dating website.

15. The Facebook exchange does not mention any sexual relationship between them; nor does it include any reference by the applicant's mother to the applicant's defence at trial, albeit Gibbs has stated that she had told him the defence was that the rape allegation was an act of revenge for the applicant sleeping with the complainant's sister. In the Facebook exchange, he gave his phone number for solicitors to contact him on 2nd June 2017; and on 9th August 2017 he said:

"Things are moving".

16. We discovered, as a result of our enquiries during yesterday's hearing, that the applicant's present solicitors were instructed in June 2017. They took a statement from Gibbs in September 2017. Despite our pressing Mr Elliott, who appears for the applicant, that statement has not yet been made available to us. When it is found, for the sake of completeness, we wish to see a copy.

17. On 12th February 2018, in a letter to the police, the applicant complained about their failure to take a statement from the complainant's "boyfriend who she is not with now". On 26th February 2018, a sergeant in the Norfolk Constabulary asked the applicant for more details. The applicant repeated his assertion that Daniel Gibbs had tried to report the retraction of the rape allegation to them. On 1st March 2018, Daniel Gibbs made his second statement.

18. On 29th March 2018, an application for leave to appeal was lodged.

19. On 4th April 2018, the applicant was informed that the Norfolk Constabulary could find no record of any approach by Gibbs.

20. On 13th June 2018, the complainant was seen. She told police officers that she had first met Daniel Gibbs at the wedding of the applicant's friend, Matthew Wardell. Daniel Gibbs was best man. She claimed that she saw him and the applicant speaking. The second time that she saw Daniel Gibbs was at the Seventh Heaven Club, where she worked. She had sex with Gibbs on two occasions, six months apart, about two years before. On the second occasion, she was with two friends, Jade Palmer and Toni Harrison. She said that Daniel Gibbs knew her real name because she used it on her Facebook page, where they communicated. Her nickname, "P", was

only used by close friends and family. She admitted that she had spoken to Gibbs about the applicant, but only to tell him that he was in prison. She said that she last saw Gibbs two to three months before the interview took place, when he visited a bar where she worked with Jordan Reed and Christian Grange. She thought Jordan Reed was the applicant's cousin. They had discussed the applicant because he had threatened Gibbs for sleeping with her, and Grange confirmed that the applicant had also threatened him.

21. On 24th July 2018, Detective Sergeant Nicola Lamport made a statement about her contact with the two possible witnesses, Jade Palmer and Christian Grange. According to DS Lamport, (who interviewed Jade Palmer with a colleague DC Rouse but DC Rouse was too ill to attend the hearing before us) Palmer originally gave an account of a violent relationship between the complainant and the applicant, during which the applicant beat the complainant. Palmer, however, was adamant that the applicant had not raped the complainant. She also stated that the applicant and Gibbs knew each other and the fact that Gibbs had slept with the complainant had got back to the applicant and Gibbs was scared. When DS Lamport spoke to her about the statement, Palmer claimed that the officer had mis-recorded what she had said. She insisted that she had not said that Gibbs and the applicant were friends, but that they had mutual friends.

22. DS Lamport prepared a second statement with those amendments, but Palmer still refused to sign it. She stated that it showed the complainant as the victim and the applicant not in a good light. She wished to have removed any reference to the assaults committed by the applicant, albeit she confirmed that they were true.

23. Both Jade Palmer and Toni Harrison confirmed to police that they were present with Gibbs and the complainant at his mother's house when they had sex with each other. This was obviously a second and different occasion from the first date between Gibbs and the

complainant.

24. Christian Grange told DS Lamport that he thought the applicant and Gibbs would know each other because they had the same circle of friends. He knew Gibbs from the Shapers Gym. He confirmed the visit to a club with Gibbs and Reed, dating it to 26th January 2018. He said that on that occasion Gibbs and the complainant appeared friendly. He admitted that he had received threats from the applicant as a result of his relationship with the complainant, but refused to assist the police.

25. In response to the enquiries, the applicant lodged further fresh evidence:

(1) A statement from the applicant, dated 18th September 2018, in which he denied knowing Gibbs and denied paying him or threatening him to give the fresh evidence. He further confirmed that he knows Christian Grange, but was not aware that he had slept with the complainant until he read the contents of her interview. He insisted that he was not bothered by this fact. He also confirmed that he knows Matthew Wardell and that he went to his wedding reception, although not with the complainant. He went with his aunt and uncle. He stated that he knows someone by the name of Jordan Reed, but he is not his cousin.

(2) A statement from Lee Else, dated 16th October 2018, in which he stated that the complainant had contacted him on Facebook, asking him to provide her number to the applicant in prison. He sent a copy of the message to DS Lamport and to the applicant's mother.

(3) A statement from Matthew Wardell, dated 19th October 2018. He confirmed

that he knows both the applicant and Mr Gibbs. Mr Gibbs was best man at his wedding on 28th June 2014. The applicant also attended the wedding. Mr Wardell claimed that he never introduced them to each other and was not aware that they spoke at the wedding. He did not recall the complainant being at the wedding, because the applicant attended only with his uncle and aunt.

(4) A further witness statement from Daniel Gibbs, dated 25th October 2018, in which he said that, after speaking to the complainant in bed, "he did not know Rostron's full identity", although he did accept that the complainant had told him the applicant's name in the restaurant. He agreed that he went to a strip club and saw the complainant (he used her nickname P) with two friends of his, Reed and Grange. He did not recall meeting the applicant at Mr Wardell's wedding and had not had contact with the applicant directly regarding the appeal. He had only had contact with the applicant's mother.

(5) A witness statement from Jade Palmer, dated 26th October 2018, in which she stated that she knows both the applicant and the complainant. She disputed DS Lamport's account of attempts to take a statement from her.

26. The proper approach of this court to applications based on an alleged retraction of a complaint of rape was set out in *R v V(S)* [2013] EWCA Crim 150, [2013] 1 Cr App R 35, in which the court provided helpful guidance. It recommended that it would be wise to obtain a statement from a complainant in circumstances such as this as to the truth or otherwise of her alleged retraction and then to hear from the fresh evidence witness or witnesses *de bene esse*. At that stage, the court can decide whether it is necessary to put the complainant through yet another examination and cross-examination. We endorse that procedure and that is the

procedure we adopted yesterday.

27. We received oral evidence *de bene esse* from:

(1) The applicant

He confirmed the contents of his statement, served as fresh evidence, save for the fact that he did now agree that Jordan Reed is a distant cousin.

(2) Daniel Gibbs

His evidence varied somewhat from his previous accounts. He admitted that he used the Shapers Gym, as did the applicant, Wardell and others. He also admitted that he has friends in common with the applicant but denied that he has ever met the applicant. He insisted that he had to carry out research online to discover who he is. He denied seeing the applicant at the Wardell wedding, although he did see the applicant's aunt and uncle, who are customers of his.

He explained to the court that he was so shocked by what the complainant told him, he could not sleep and it preyed on his mind. When pressed as to why, if that was so, he delayed contacting the applicant's mother, he stated that he had spoken to Matthew Wardell about it and asked him if he knew about the applicant. Matthew Wardell told him that he knew the applicant well. This conversation seems to have occurred in 2016, yet, although he claimed to have carried out his Facebook research soon after speaking to Wardell, he did not contact the police or the applicant's mother until May 2017. His exchange of messages with her suggested that it was fortuitous that he had tracked her down by his own researches, rather than it being prompted by his conversation with

Matthew Wardell. In response to a leading question from Mr Elliott, Gibbs gave as one explanation for the delay the fact that he was in a relationship at the time and that he did not want his then partner to discover he had slept with the complainant.

He admitted in cross-examination by Mr Heptonstall that he had seen the complainant twice after the alleged retraction of the rape complaint: once when he was with Jordan Reed and Christian Grange, as she had described; and once when they were both with Toni Harrison and Jade Palmer and they all went back to his parents' house.

He denied that he had had sex with the complainant on the second occasion when they went back to his house with Jade Palmer and Toni Harrison, but admitted taking the complainant upstairs several times, he said, in an attempt to extract confirmation that her rape complaint was false, so that he could record it on his telephone. Initially, he claimed that he had not rung the applicant's mother, but the court asked to see the first draft of his second statement before amendment by the applicant's solicitors. When the contents of the unamended statement were put to him, he admitted ringing her twice claiming the first call was to find out what was happening in the applicant's case and the second call was to commiserate with Ms Rostron on the death of the applicant's brother, whom he knew. He also knew Ms Rostron's ex-husband who lived near him.

(3) Matthew Wardell

Wardell said that he knows the applicant from the gym. He insisted that the applicant went to his wedding with his aunt and uncle, but not the complainant.

He explained to the court that at the end of the evening the applicant wanted him to go out clubbing, but Wardell was not allowed to do so. He was sure that the applicant and Gibbs did not know each other and that they were not introduced at his wedding. He said that Gibbs mentioned to him during a 'chat' in 2016 that he had slept with the complainant. Gibbs spoke of his conquest. Wardell was confident that Gibbs had slept with her twice. Gibbs added that the complainant told him that she had made a false allegation of rape. Wardell said that he had contacted the applicant's mother and told Gibbs to do the same. This happened very soon after their conversation.

(4) Jade Palmer

Palmer claimed that DS Lamport mis-recorded what she had said about the applicant and Gibbs being friends. She said that she had only told DS Lamport they shared mutual friends. She was confident that they did not know each other. She did know of an occasion when Gibbs and the complainant slept together, because she was present with her friend Toni at his parents' house.

(5) Lee Else

Else confirmed that he received a message from the complainant stating that she wanted to speak to "him". He assumed by that that she meant the applicant, but he did not know what her purpose was.

28. Having heard from those witnesses, we then asked to hear from DS Lamport. She confirmed that the statements she compiled were based on what Jade Palmer had told her at various times.

Discussion

29. In *V(S)* the court observed that caution should be exercised where allegations of post-trial retractions are made. Even where the fact of a retraction is admitted by a witness, that will not necessarily determine the appeal. We endorse those observations.

30. The issues for the court are simple to state: Is the evidence of Daniel Gibbs capable of belief; and does it undermine the credibility of the complainant to the extent that it renders the convictions unsafe?

31. We considered the account given by Daniel Gibbs with some care and compared it with other available evidence, as Mr Heptonstall invited us to do. Having done so, we were entirely satisfied that his account was incapable of belief, and we decline to receive it. In those circumstances, we did not need to hear from the complainant.

32. We have a number of reasons for rejecting Daniel Gibbs' account:

(1) The timeline

Gibbs claimed that he had sex with the complainant once in the autumn of 2016, and on that occasion she told him that she had made up an allegation of rape as an act of revenge. She told him the name of her alleged assailant. Gibbs then spoke to Wardell to try to track him down. Wardell knows the applicant well. Although Wardell and Gibbs say that they took steps immediately, Gibbs did not manage to contact the applicant's mother or try to report the matter to the police until several months later.

(2) The second occasion at Gibbs' parents' home

Gibbs claims that after the complainant admitted making a false allegation of rape, he had no intention of having sex with her again. Yet Jade Palmer confirms the complainant's account that they did have sex again on a second occasion, when Jade Palmer was in the house with Toni. In an attempt to explain the second occasion, for the first time in the witness box Gibbs said that he took the complainant upstairs at the house because he wished to record her admitting that she had made a false allegation. We consider that assertion highly unlikely, particularly given that he had done nothing else by then. It would have been far easier simply to report the alleged retraction. This seemed to us to be an untruthful explanation of the second occasion on which he had had sex with the complainant. It caused us to doubt entirely his account that on the first occasion the complainant had told him she had made a false allegation, after which he wished to have nothing more to do with her.

(3) Inconsistencies in Gibbs' account

There were numerous inconsistencies in the various accounts Gibbs has given. When pressed, he was able to produce no sensible explanation for them. If, as became apparent only when he gave evidence, he knew how to contact the applicant's mother after speaking to Wardell in 2016, there is no obvious reason why he would allow an apparently innocent man to languish in prison.

We reject his belated assertion that he was trying to keep the truth from his then partner, and we question why he did not explain earlier that he had spoken to Wardell about the alleged retraction. He made no mention of speaking to Wardell in his written statements and made it abundantly clear in those written statements that it was only by his own researches that, fortuitously, in May 2017

he found out how to contact the applicant's mother.

In the light of what we now know, his Facebook exchange with the applicant's mother appears contrived. It is inconsistent with the evidence called before us yesterday. We also note the differences in that account from the accounts he later gave about his contact with the complainant for example he told her he had a meal with the complainant during which she told him she had fabricated the allegation of rape.

(4) The relationship between Gibbs and the applicant

On the papers there appeared to be virtually no connection between Gibbs and the applicant, other than what the complainant had said. Yet they lived in a small community. We now know that Gibbs was not a complete stranger to the Rostron family, as had been portrayed. There was a relationship between some members of the Rostron family and Gibbs. He knew the applicant's dead brother. He knew the applicant's mother well enough to ring her and offer his condolences. He knew her telephone number. He knew her ex-husband. He did some work for the applicant's aunt and uncle (not called before us).

(5) The inherent implausibility of Gibbs' account

There was no reason for Gibbs to press the complainant for more information, as he described in his first statement, as to why a man he claims he did not know was in prison. It would be a very unusual woman who would sleep with a virtual stranger and tell him that she had made a false allegation of rape against another man. Nor is there any satisfactory explanation, as we have indicated, for his delay in contacting the family or the police thereafter.

(6) The fact the complainant knew about the wedding

In 2014, the applicant and the complainant were contemplating becoming re-engaged. She was known as his partner. Yet the witnesses claimed that she was not at the Wardell wedding. If so, one questions how she knew so much about it, including the fact that Gibbs was best man and the applicant's aunt and uncle were present.

33. Having made every allowance for the frailty of human memory and the difficulties in giving evidence in this court, we found Gibbs' account frankly incredible.

34. The other witnesses, Wardell and Jade Palmer, in our judgment, were prepared to assert facts they could not possibly know were true, namely, that the applicant and Gibbs did not know each other and had never met, when they knew that both the applicant and Gibbs lived in the same area (a relatively small community), attended the same social events, such as Wardell's wedding, attended the same gym, and mixed with the same friends. This all appeared, in our judgment, to be an attempt to assist their friend.

35. Lee Else's evidence added nothing to the appeal, even if true.

36. For all those reasons, we decline to receive the fresh evidence produced by the applicant and we refuse the renewed application for leave to appeal.

37. Mr Heptonstall, you may note that we wanted to see that statement –

38. **MR HEPTONSTALL:** My Lady, yes.

39. **LADY JUSTICE HALLETT:** Could we impose upon you to do what you can to make sure that Mr Elliott knows of that fact and gets it to us?

40. **MR HEPTONSTALL:** I will make sure he knows of it today, my Lady.

41. **LADY JUSTICE HALLETT:** Thank you very much.

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

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