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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2022/01991/B3  
NCN [2022] EWCA Crim 1111



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Thursday 28<sup>th</sup> July 2022

**B e f o r e:**

**THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION**  
**(Lord Justice Holroyde)**

**MRS JUSTICE FARBEY DBE**

**MR JUSTICE BENNATHAN**

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**REGINA**

**- v -**

**ANP**

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**Miss G Young QC** appeared on behalf of the Applicant

**Mr P Jarvis** appeared on behalf of the Crown

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**J U D G M E N T**

Thursday 28<sup>th</sup> July 2022

**LORD JUSTICE HOLROYDE:**

1. This is an application by the prosecution for leave to appeal, pursuant to section 58 of the Criminal Justice 2003, against a terminating ruling by a judge in a rape trial. We emphasise at the outset that these proceedings and this judgment are subject to important reporting restrictions. We shall set those restrictions out at the conclusion of the judgment. We shall refer to the complainant as "C" and to the accused as "D".

2. D is charged with two offences: rape of C (count 1), and sexual assault on C (count 2). The events giving rise to the charges took place in licensed premises in the early hours of the morning. The prosecution case, in outline, is that D took advantage of C, who was highly intoxicated, by first kissing and touching her (count 2), and then vaginally raping her (count 1). CCTV footage is available covering the former incident, but not the latter. C herself has given an account in a video recorded interview. It is apparent that she did not have a complete memory of relevant events, but she made a clear allegation of rape, although she did not refer to any earlier sexual assault. The defence case is that C consented, or was honestly believed by D to be consenting, to such activity as took place, which comprised only kissing and cuddling and brief oral sex by D on C, with no vaginal penetration.

3. The CCTV footage is relied on by the prosecution as showing that C was plainly so intoxicated that she was not capable of consenting, and could not honestly be thought to be consenting, to any sexual activity. Evidence is available as to the dishevelled and distressed state in which C left the premises and as to the manner of her speech shortly after the relevant events. The defence rely on that combination of evidence as rebutting the prosecution case as to C's level of intoxication.

4. D further relies on evidence that analysis of penile swabs taken from him revealed no cellular material matching C; and on entries in C's medical records, which may be relevant to her reliability and credibility as a witness.

5. C was seen by the police shortly after the events. Samples of her blood and urine were taken, as were vaginal swabs. Her underwear was kept for examination. These items were packaged and refrigerated as necessary. A month or so later, there was an internal re-organisation which should have involved the items being moved to new places of storage. Somewhere in that process, they were all lost. The fact that they have been lost was made known to the defence soon after the case had been sent to the Crown Court for trial. In addition, body-worn camera footage was not retained, so that there were no contemporaneous images of the premises in which the events occurred, and no video recording of C's first complaint.

6. No application was made to dismiss either or both charges. No specific issue was identified in relation to the lost items at the plea and trial preparation hearing, but the possibility of an application to stay was raised in a Defence Case Statement. Rule 3.28(2)(a)(i) of the Criminal Procedure Rules makes clear that a defendant who seeks a stay of proceedings must apply in writing as soon as practicable after a defendant becomes aware of the grounds for doing so. Criminal Practice Direction I, at paragraphs 3C.1 and 3C.5, makes further provision in this regard.

7. An oral indication of a possible application to stay the proceedings as an abuse of process was first given at a pre-trial review. The scheduled trial date then had to be vacated for an unconnected reason, and arrangements were made for the abuse of process application to be made at a separate hearing before the trial judge. Counsel on both sides put in helpful written submissions in advance of that hearing. It was submitted on behalf of D that the prosecution

should be stayed as an abuse of the process on the ground that he could not receive a fair trial. It was submitted that the lost samples and underwear were highly relevant to the central issues of C's level of intoxication, credibility, consent or belief in consent, and vaginal penetration. Reliance was placed on the decision of this court in *R v Ali* [2007] EWCA Crim 691.

8. Counsel for the respondent readily acknowledged that there had been significant, though not deliberate, failings in the police investigation. It was submitted that those failings affected both sides and did not prevent D from having a fair trial. Reliance was placed on *R(on the application of Ebrahim) v Feltham Magistrates' Court* [2001] EWHC 130 (Admin); [2001] 2 Cr App R 427.

9. The judge ruled that D could not have a fair trial and accordingly directed that the indictment be stayed. He rightly directed himself that he was not considering a submission of no case to answer, and that an application to stay was not to be seen as a means of punishing the prosecution for lamentable failings in case preparation. He also reminded himself that a stay is an exceptional remedy. But, he said, everyone in the case was faced with "an evidential vacuum". He regarded the circumstances as being similar to those in *R v Ali*, with no significant evidence to support C's own "confused and limited recollection". The judge concluded that he could not give directions which would mitigate the prejudice suffered by D as a result of the loss of the various items. In the course of his ruling he said (at page 6E of the transcript):

"I would be required to tell the jury not to speculate about evidence they have not heard, which logically would require them to disregard the possibility that had the swabs been examined, they may well have been supportive of the defendant's case both as to consent and as to his belief as to her consent. I ask rhetorically, can that ever be fair?"

Later in his ruling, whilst acknowledging that applications to stay must be considered on a case by case basis, the judge said (at page 6F):

"When evidence is missing and there is a mere possibility of some advantage that could have been achieved by the defendant and which has now been lost, then without more that would not justify a stay as it could indeed be managed by the trial process. Where the missing evidence has the real potential to go to the very issues that the jury must resolve, then its absence must inevitably cause a level of unfairness that the trial process cannot remedy."

10. The judge granted some time for the prosecution to consider an appeal. The prosecution thereafter took all necessary procedural steps to bring the matter before this court, including giving the "acquittal undertaking" required by section 58(8) of the 2003 Act.

11. In this court, it is submitted on behalf of the prosecution that the judge's ruling was wrong in law and that his decision should be reversed so that the trial may proceed. Reliance is placed on the decision of this court in *R v PR* [2019] 2 Cr App R 22 (a case which had not been cited to the judge). Counsel submits that the judge fell into error in particular because, having considered what had been lost evidentially, he did not sufficiently go on to consider whether

what still remained evidentially was sufficient for there to be a fair trial.

12. It is submitted on behalf of D that the judge made no error of law or principle, that he gave careful consideration to all relevant factors, and that there is no ground on which this court could properly reverse his decision. Counsel draws particular attention to the loss of blood and urine samples, which could be expected to give at least some indication one way or the other relevant to C's level of intoxication and/or to the possibility that she may have taken non-prescription drugs; but counsel emphasises that it is the combination of all that has been lost, and the little which remains, which entitled the judge to reach the decision that he did.

13. We are grateful to both counsel for their detailed written and oral submissions.

14. As is well known, there are two types of case in which a criminal prosecution may be stayed as an abuse of the process: where it will be impossible for the accused to receive a fair trial; and where the circumstances are such that it would offend the court's sense of justice and propriety to try the accused: see *R v Maxwell* [2010] UKSC 48, in particular at [13]. These are commonly referred to as category 1 or limb 1 abuse, and category 2 or limb 2 abuse, respectively.

15. The burden is on an accused to show on the balance of probabilities that he is entitled to a stay on grounds of abuse of process. In the circumstances of this case, which is concerned only with category 1 abuse, it was necessary for D to show, on the balance of probabilities, that it was impossible for him to have a fair trial. A stay of criminal proceedings is always an exceptional remedy: see *Hamilton v The Post Office* [2021] EWCA Crim 577. As Gross LJ put it in *DPP v Fell* [2013] EWHC 562 (Admin) at [15], the grant of a stay

"... is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process".

16. The police were plainly under a duty to preserve the samples and underwear which they had taken. A stay of proceedings is not, however, to be granted as a means of punishing failure to comply with that duty.

17. Where a stay is sought on grounds arising from the loss of evidence or exhibits, the starting point for consideration has long been *R (on the application of Ebrahim) v Feltham Magistrates' Court*. We cite two passages in which Brooke LJ stated the applicable principles. First, at [25] he said:

"Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:

- (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.

- (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded."

At [27] he said:

"It must be remembered that it is a commonplace in criminal trials for a defendant to rely on 'holes' in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

18. In *R v Ali*, the facts were that the accused were charged with sexual offences alleged to have been committed more than a decade earlier against two girls then aged 13. There had been a long delay in prosecution, in the course of which a number of relevant documents had been destroyed or lost. In particular, each of the complainants had made a claim for compensation from the Criminal Injuries Compensation Authority. Only one of the claim forms was available by the time of trial. It contained what the girl in question admitted to be a number of lies. The claim form of the other girl had been lost. The judge refused an application for a stay.

19. This court quashed the convictions. At [29] Moses LJ, giving the judgment of the court, referred to the principles stated by Brooke LJ in the passages which we have cited. Moses LJ continued at [30]:

"But in considering such powers to alleviate prejudice, Brooke LJ (at para 27) emphasised the need for sufficiently credible evidence, apart from the missing evidence, leaving the defence to exploit the gaps left by the missing evidence. The rationale for refusing a stay is the existence of credible evidence, itself untainted by what has gone missing."

Moses LJ also referred to what the court saw as a significant difficulty raised in that case by the terms in which the judge had directed the jury against speculation. He went on to say, at [40], that those considerations of themselves might not have led the court to allow the appeal. They did not, however, stand alone. It was the combination of the loss of material evidence, the unsatisfactory evidence as to how the complaints were first made, and the terms of the directions to the jury which collectively caused doubt as to the safety of the convictions.

20. More recently, in *R v D* [2013] EWCA Crim 1592, Treacy LJ, giving the judgment of the

court, stated the relevant principles as follows at [15]:

"In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant."

21. The principles have most recently been reiterated by this court in *R v PR*. Fulford LJ, giving the judgment of the court, stated them as follows at [65]:

"It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused. Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused, whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested."

22. Fulford LJ went on to say, at [66], that the question of whether the accused can have a fair trial will depend on the particular circumstances of the case, the focus being on the nature and extent of the prejudice to him. A careful judicial direction will in many instances ensure the integrity of the proceedings. In that regard, Fulford LJ explained at [73]:

"The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty. ..."

23. We have reflected on the application of those principles to the circumstances of the present case. We pay tribute to the obvious care which the judge took in considering his ruling, and we have been slow to interfere with his decision. Nevertheless, and with all respect to the judge, we are satisfied that he did fall into error.

24. First, we cannot agree that the loss of the samples and the underwear left "an evidential vacuum". The judge was wrong to make his decision on the basis that there was such a vacuum. There was certainly an absence of some evidence, which should have been available. We can well understand why the judge referred more than once to potential weaknesses in the evidence which remained available to the prosecution. But those possible weaknesses would primarily affect the prosecution as the party which bears the burden of proof. The burden of proof at trial is, in our view, always an important factor to keep in mind when considering an application to stay in circumstances such as these.

25. In any event, the simple fact is that there remains the evidence of C, the CCTV footage, the evidence of those who saw and spoke to C very soon after the events, and the potential for D himself to give and/or to call evidence if he chooses. It is not a case in which there has been any culpable delay by the prosecution. Nor is it a case in which D was first questioned long after the material time. In those circumstances, it cannot be said that there is such an evidential vacuum as to make a fair trial impossible. Once one eliminates any question of using the application to stay as an inappropriate means of registering disapproval of police negligence, it seems to us that the overall position is broadly the same as it would have been if, for example, C had not made her allegations until some considerable time after the events, having in the interim washed both herself and her clothing.

26. Secondly, it seems to us that the rhetorical question posed by the judge at page 6E of his ruling reveals an error of principle in his approach. The answer to the dilemma which the judge felt is that the jury can and should be directed in conventional terms to try the case on the basis of the evidence, and not to speculate or guess about anything not shown by that evidence. In addition, as the court said in *R v PR* (and as the trial judge had done in that case) the jury can and should be directed that the loss of relevant material may have put D at a disadvantage, and that they should take that into account in deciding whether the prosecution had made them sure of guilt. The precise terms of that direction will depend on the evidence and issues at trial, and the judge will no doubt wish to discuss them with counsel.

27. Thirdly, in his conscientious efforts to formulate the test he should apply, the judge, in the passage we have cited from page 6F of his ruling, fell into error when he said that if evidence

has “the real potential to go to the very issues which the jury must resolve”, its loss "must inevitably cause" a level of unfairness that the trial process cannot remedy. As the case law to which we have referred shows, there must be a case-specific assessment which focuses on the importance of the missing evidence in the context of the case, and the nature and extent of any prejudice caused to the accused by its loss. We bear very much in mind the submission on behalf of D that the judge's use of language may have been slightly loose, and that he was not purporting to lay down any principle applicable to all cases. Nonetheless, considering that passage from his ruling in conjunction with the earlier passage we have cited, it seems to us that the judge did fall into error.

28. In the present case, the relevant material was lost before it had been sent for analysis. It is therefore unknown what investigation of it would have revealed. It is unknown whether meaningful results would have been recoverable from all or any of the analysis. If they had been, it is not known whether those results may have been helpful to D, may have been helpful to the prosecution, or may simply have been neutral. But what remains available is a body of evidence and material which can be deployed by D in cross-examination of C. D also remains able, if he wishes, to give his own account of events, with the advantage that the one piece of scientific evidence which was obtained is favourable to him, and without any risk of other scientific evidence supporting the prosecution case. In addition, D is able, if he wishes, to adduce other evidence, including expert evidence.

29. For those reasons, we grant leave to appeal. We allow the prosecution's appeal. We reverse the judge's ruling and refuse D's application for a stay of proceedings. The practical consequence is that the case will proceed on its scheduled trial date.

30. Again, meaning no disrespect at all to the judge, we think it better in all the circumstances if it is heard before another judge.

31. This application has raised issues of general importance as to the approach to be taken to an application to stay a prosecution as an abuse of the process on the basis that evidence or exhibits seized by the police have been lost. We have therefore given our judgment in terms which can be reported. But, as we have said, there are important restrictions on reporting.

32. First, the restrictions imposed by section 71 of the 2003 Act apply. We make an order, pursuant to section 71(2), that they shall not apply only to the extent that this judgment may be reported. Further, although section 71(8) would normally permit the reporting of certain basic facts, such as the name of the accused and the court of trial, we are satisfied that the reporting of those facts would give rise to a substantial risk of prejudice in the proceedings. We therefore make an order pursuant to section 4 of the Contempt of Court Act 1981 postponing, until the conclusion of the trial, reporting of any of the facts mentioned in section 71(8). Consistent with that order, we direct that D's name must be anonymised in any report by the use of the random letters "ANP".

33. Secondly, C is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment ) Act 1992. Accordingly, during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of these alleged offences.



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

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