[2022] EWCA Crim 467
IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202102988/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 1 April 2022

Before:

LADY JUSTICE MACUR DBE

MRS JUSTICE LAMBERT DBE

HIS HONOUR JUDGE PATRICK FIELD QC)
(Sitting as a Judge of the CACD)

REGINA
V
AARON STEPHEN JACKSON

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MS N CHBAT appeared on behalf of the Appellant.
MR W EAGLESTONE 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.

1. LADY JUSTICE MACUR: Aaron Stephen Jackson ("the appellant") appeals against conviction. On 29 April 2021 he was convicted by a majority of 10:2 of one count of rape. Subsequently new evidence has come to light which forms the basis of an application and which it is said is such to afford a ground for allowing the appeal. Ms Chbat, who appears on behalf of the appellant, makes no complaint as to the summing-up nor as to the procedure at trial. The appeal stands or falls on the new evidence.

The Facts in Brief

2. The complainant and the appellant first met in about 2011 when they were teenagers. Although they dated for a very short time, their relationship had continued predominantly as friends since that time. In 2015 the complainant moved into a house with her then partner, and her son was born later that year. She and her partner separated before 11 May 2016, which is the relevant date for the purpose of these proceedings, although they remained living in the same property.

3. On 11 May the appellant visited the complainant at her home address for they intended to watch a film together. They pulled out a sofa bed from which to watch the film, and the prosecution case was that the complainant fell asleep and woke to find that the appellant was on top of her, had penetrated her vaginally and was having sex without her consent. She said she was in shock, she pretended to be waking up, at which point the appellant dismounted her and pretended to be asleep and then to wake up; he then left and she did not hear from him again.

4. After some initial reluctance to do so but bolstered by speaking to her ex-partner, she eventually made a complaint and about 18 months later indicated to the police that she would support a prosecution. She was interviewed in October 2017. At trial she was cross-examined by Ms Chbat concerning contact after 11 May 2016 with the appellant: the complainant denied that there had been any such contact.

5. The appellant when first interviewed about these matters in December 2017 denied that sexual intercourse had taken place at all and said he could not even recall visiting the complainant on the day in question. He did however say that he had been in contact with the complainant since May 2016, via Facebook conversations. He was interviewed again

on 25 March 2018 and persisted in saying that sexual intercourse had not taken place. However, on 20 February 2018 the complainant's leggings that she had worn on 11 May 2016 were examined forensically. A small area of semen was detected in the crotch of the leggings which expert analysis concluded was more likely to have been deposited in the inside of the leggings rather than the outside and that when analysed the DNA profile matched that of the appellant.

6. The Defence Statement that was lodged as late as 10 September 2020 continued to deny intercourse. A second Defence Statement was served the week before the trial started. In this Defence Statement, the appellant admitted for the first time that he had sexual intercourse with the complainant but said that it had been initiated by the complainant, was fully consensual although it was clear to him that immediately or soon after the act the complainant had come to regret having sex with him.

7. During trial he admitted that he had lied to the police in interview and that he had continued with that deception until shortly before trial. He maintained that he had had contact with the complainant post 16 May 2016.

8. The appellant was convicted, as we have indicated, but shortly afterwards his mother, who had been dealing with his affairs post-sentence, came across a mobile telephone that had been packaged up some time before and left with her, amongst with other items, for safekeeping. Although she was unable to access the mobile telephone, her daughter-in-law could and the phone when accessed revealed that indeed the complainant and the appellant had been in contact by Facebook from at least 1 June 2016 and into July. Screenshots were made of the messages and submitted to the appellant's solicitors. They undoubtedly indicate a continuing friendly relationship and concerned conversation with both the complainant and the appellant expressing affection for, and interest in the day-to-day life and children of, the other. No reference whatsoever appears to the sexual intercourse which took place in May 2016. If anything, it appears to us that the messages tend to show a united front against the rest of the world - both appellant and complainant mutually supportive of the other.

9. These messages form the basis of the application pursuant to section 23 of the Criminal Appeal Act 1968.

10. In a Respondent's Notice the prosecution reminds the court of the appellant’s deceit in denying that sexual intercourse had taken place and had lied in interview and in his defence statements, contrasting the complainant who was said to have been consistent in her allegation.

11. Today Mr Eaglestone, who appears on behalf of the respondent prosecution, seeks to focus upon section 23(2)(d), and submits that there is no reasonable explanation for the

failure to adduce the evidence in the proceedings in the court below. He concedes however that there is no reason to believe that these messages are anything other than authentic in terms of their substance and the displayed dates that they were sent and received. Further, he concedes that this evidence would have been admissible in the proceedings in the court below. However, does not concede that they may afford a ground for allowing the appeal since he contends that they are not directly relevant to the central issue in the case which he describes as "whether or not the complainant was asleep at the time that sexual intercourse took place".

Determination

12. We have no doubt that this new evidence is capable of belief. Equally, we have no doubt that technically an appropriately IT-intelligent individual would have found it possible to access the messages earlier if required. In this regard we do note that, although the appellant in his first interview said that he had had continuing contact with the complainant by Facebook, no further investigation was conducted by the police, whether by asking the complainant directly if contact had continued or inviting her to disclose her mobile handset. As it happens it appears that still no attempt has been made to ask the complainant about these messages once they were disclosed to the prosecution.

13. That aside, we have no doubt as to the provenance of the messages in terms of them being discovered by Mrs Jackson, post the trial, entirely fortuitously. It appears to us that there would be absolutely no reason for the appellant or any member of his family to have wished to conceal those messages from the court below. There is nothing to his disadvantage within them.

14. In those circumstances, we are satisfied, bearing in mind medical issues which were before the jury as an agreed fact, that this was material that may not have been readily available at trial. Those medical issues concern the appellant and an unfortunate motorbike accident that occurred in 2015. The agreed facts disclose that the appellant suffered a catastrophic head injury which required him to be placed in an induced coma for a number of weeks. Subsequently, there is medical evidence which reveals that from November 2015 the appellant has been complaining of symptoms associated with the head injury, including a poor short-term memory. Subsequent scans have confirmed the previous traumatic brain injury and in September 2016 a consultant in neurological rehabilitation indicated that the appellant "is a lot more forgetful than before" and that "his mother confirmed this ... He keeps calling her to remind him what he was supposed to do. He writes everything... He repeats himself".

15. The new material obviously affords a ground of appeal. The issue in the trial was credibility - the complaint's and the appellant's. In his closing speech to the jury Mr Eaglestone, as he concedes, criticised the appellant, suggesting that he had lied about further contact with the complainant to bolster his defence of consent. In the summing-up the judge reminded the jury that the appellant had said in evidence that he had an old telephone, which he no longer had, on which he had messages received from

the complainant after the events in question but also that the complainant had denied that this was so. In written directions to the jury the judge reminded them that the complainant had described the traumatic effect of the events upon her to account for the delay in her disclosures.

16. All of these issues go to credibility. The fact and substance of the retrieved Facebook messages are pertinent to the jury's general assessment of credibility.

17. The conviction is rendered unsafe. The application to admit new evidence is allowed. The appeal is allowed.

18. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under the provisions, where a sexual offence has been committed or alleged against a person, no matter relating to the complainant shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as a complainant or victim of the offence. This prohibition will apply unless waived or lifted in accordance with section 3 of the Act. However, and in any event this judgment is now subject to an order made pursuant to 4(2) of the Contempt of Court Act 1981 which, to avoid a substantial risk of prejudice to the administration of justice in these proceedings, postpones publication of any report of these proceedings until the conclusion of the retrial.

19. We order a retrial on the basis that it is understood that the complainant will consent to give evidence in the trial. There has been no contact with her, either about the messages or about a retrial and therefore, regrettably, this Court is unable to be clear as to whether or not a trial will proceed. It is regrettable on many fronts, not least in terms of the complainant's expectations being managed but also because this appellant remains in custody.

20. We therefore intend to direct that the prosecution shall inform the Court office, directing their email to Mr Mariani (the court clerk) by Tuesday morning at 10 o'clock as to whether or not the complainant has consented to giving evidence in the retrial. Subject to that, a fresh indictment shall be served no more than 28 days after this Order. The appellant will be re-arraigned on the fresh indictment within 2 months. The venue for the retrial and allocation of the judge to try the case shall be determined by the presiding judge for the Circuit. Any application for bail will be made to the Crown Court. Obviously, if the retrial is not to proceed, and the Crown Prosecution Service must be conscious of its responsibilities to make a realistic assessment of the likelihood of the trial continuing, then this appellant will be released from custody.

Are there any further matters Ms Chbat?
MS CHBAT: No thank you.
LADY JUSTICE MACUR: Mr Eaglestone?

MR EAGLESTONE: No, my Lady.
LADY JUSTICE MACUR: Thank you both 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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