

Neutral Citation Number [2019] EWCA Crim 1353

No: 201800783/C4-201802186/C4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 23 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

HIS HONOUR JUDGE MICHAEL CHAMBERS QC
(Sitting as a Judge of the CACD)

R E G I N A

v

M. E.

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)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

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.

Ms C McCulloch appeared on behalf of the **Applicant**

Ms E Marshall appeared on behalf of the **Crown**

J U D G M E N T (ON DIRECTIONS)
(Approved)

1. LORD JUSTICE HOLROYDE: On 8 March 2016, after a trial in the Crown Court at Woolwich before Her Honour Judge Downey and a jury, the applicant was convicted of three counts of rape. The victim in each case was his wife. On 27 April 2016 he was sentenced to a total of 10 years' imprisonment.
2. No appeal was brought at the time, but the applicant subsequently applied for a long extension of time to apply for leave to appeal against both conviction and sentence.
3. The proposed application for leave to appeal against sentence and the linked application for an extension of time in that regard have now been abandoned with the leave of the court. Ms McCulloch, for whose submissions on behalf of the applicant we are grateful, has confirmed today that all but one of the original grounds of appeal against conviction are also to be abandoned. In that one respect however, she seeks to pursue an application for disclosure which she contends is necessary in order to present the remaining ground of appeal against conviction. The matter has been listed before the full Court today for directions.
4. The victim of the offences is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime, no matter shall be included in any publication if it is likely to lead members of the public to identify her as the victim of any of these offences. Given the relationship between the applicant and his victim (to whom we shall refer as "A") any report of this hearing and this judgment will have to be anonymised.
5. It is necessary to begin by outlining very briefly the essential facts. The applicant and A had been married for 14 years. They have children, one of whom, a girl (to whom we shall refer as "N") who was aged 11 at the material time, gave evidence as a prosecution witness.
6. A alleged that during the marriage the applicant had repeatedly raped her and had repeatedly subjected her to violence. Three counts in the indictment alleged offences of violence. The applicant was acquitted of those charges.
7. Of the three counts of rape one related to an allegation of vaginal rape on a specific date, 3 July 2015, which could be identified because it was the date when A was discharged home after a period in hospital. The applicant gave evidence of being raped that evening and N gave evidence of being in the house at the time and hearing her mother saying: "No, no, no". The applicant's defence to the charge was that there had been vaginal intercourse but it had been consensual.
8. The other two counts of rape were multiple incident counts, relating to repeated vaginal rapes and to repeated anal rapes respectively. As to these, the applicant's case was that all sexual activity between him and his wife had been consensual.
9. At some stage after 3 July 2015 the applicant went to Egypt. He remained there until mid-September when he returned to this country and was arrested.

10. No criticism has been made of the judge's directions of law and no suggestion is made as to any material irregularity in the course of the trial.
11. Three broad grounds of appeal were advanced initially by the applicant acting in person. First, he made a series of wide-ranging criticisms initially of all his legal representatives at trial and latterly of his trial solicitors. He waived legal professional privilege in order to pursue these criticisms and we have therefore read the responses of trial counsel and solicitors. Secondly, the applicant complained that he had been visited whilst in prison by a prosecution witness. Thirdly, he advanced a complaint that the officer in charge of the case was a DC Azariah and that it had recently come to light in Press reports that in other cases in which DC Azariah has been involved the prosecution had been halted following complaints that important evidence had not been disclosed to the defence.
12. The applicant said in this regard:

"This is the same officer who was investigating me and I believe that he has withheld evidence in my case and not investigated the case properly which would have impacted on me. This means the case against me was weak."
13. Of those three broad grounds, we have been told today by Ms McCulloch, that the first and the second can no longer be pursued. In relation to the third she makes the present application for disclosure.
14. The application initially related to the mobile phone handsets of both the applicant and A. Very helpfully Ms McCulloch has been able to narrow down the period of time in which she is interested to the period between 1 July 2015 and 13 September 2015. It seems that the complainant, A, had two different mobile phones. One had ceased to be used some time before that relevant period began, the other was seen by the police but not seized and is therefore not in the possession of the prosecution. In the event, therefore, the present application relates only to the applicant's own mobile phone.
15. The application is that this phone should be made available to a defence expert so that a download of its contents can be made. Linked to this is an application for a download of the image of the raw data downloaded by prosecution experts in advance of the trial, this being necessary to provide a point of comparison in case the mobile phone handset has for any reason degraded during the intervening period.
16. The basis for this application is that Ms McCulloch has been instructed by the applicant that he is sure there will be material stored on the phone handset which will exonerate him from guilt of rape. It is suggested that there are messages passing between the couple after 3 July 2015 in which A said that she loved the applicant. The only specific matter which is mentioned is that Ms McCulloch has referred us to one point in the cross-examination of the applicant at trial, in which he said that he was sure that the text messages between them included one in which he had spoken of how the couple had laughed together in the matrimonial bedroom on the night of 3 July 2015.

17. We should note in this regard that Ms McCulloch has helpfully told us that at trial a bundle was collaboratively prepared by prosecution and defence counsel containing a number of transcripts of text messages and other social media exchanges between the applicant and A.
18. Ms Marshall QC, who represented the prosecution at trial and represents them again today, tells us that, to the best of her recollection, the applicant, apart from referring to the text message speaking of the couple laughing together, did not at any stage at trial suggest that other specific messages were missing from the material provided, or that the material being presented to the jury was an unfair and unbalanced selection.
19. In resisting the application Ms Marshall relies on two broad points. First of all, she has set out for us in a written response what relevant material was served in advance of the trial. Although there is some complaint that at least some of the served material arrived only a few days before the trial, Ms McCulloch very fairly acknowledges that she has no basis on which to contradict the timetable put before us by Ms Marshall. From that timetable it would appear that the entire contents of the downloaded material from the applicant's handset were served several weeks before the trial began. Secondly, Ms McCulloch relies on the decision in R (on the application of Nunn) v Chief Constable of Suffolk Yorkshire Police [2014] UKSC 37, as to the limits of the disclosure duty on the prosecution following the conclusion of a trial. Ms Marshall readily acknowledges that if there is any basis for thinking either that material already in the possession of the prosecution or material which has come into their position since trial may assist the defence or undermine the prosecution and so cast doubt on the safety of the conviction, then the prosecution are under a duty to disclose it. But, says Ms Marshall, the strong public interest in finality of proceedings means that disclosure issues will only be reopened after trial if a convicted defendant demonstrates a good reason for doing so. Ms McCulloch acknowledges that that is the principle (broadly summarised, for present purposes) which this court must today apply.
20. In the light of the submissions made by counsel, we summarise what appears to be the position as follows. First of all, the applicant's mobile phone was seized at the time of his arrest and the contents of it were downloaded. It is suggested by Ms McCulloch that that exercise may not have been proficiently carried out by police officers whose training for the task was insufficient. Ms McCulloch has not been in a position, on the instructions she has from the applicant, to put before us any basis for that suggestion.
21. Secondly, all of the material which had been downloaded from the handset had been served on the defence well before trial.
22. Thirdly, apart from the one text message to which we have referred, the applicant appears to have said nothing at all at trial to the effect, either that the downloaded material was incomplete or that the selection of messages placed before the jury presented an unfair and unbalanced picture. Given the submissions which he now makes through counsel, that is a striking state of affairs. No legal or technical knowledge is needed for a suspect who believes that an unfair or incomplete picture is being presented to a jury to make the

simple point that he recalls other messages or other exchanges on social media, which would show him in a very different light to the jury.

23. Fourthly, and again strikingly, the initial grounds of appeal prepared by the applicant made no complaint of the sort now advanced. That was so despite the fact that, as we have said, the applicant was making wide-ranging complaints about the standard of legal representation which he received. Again, we are bound to say, that if the applicant felt at trial that an unbalanced or incomplete picture had been presented to the jury, there is no obvious reason why he did not make that point loud and clear from the outset.
24. Fifthly, the closest the applicant came at that stage to making any complaint relevant to the matter now before the court is in the third ground of appeal in which he referred to DC Azariah in the terms which we have quoted. It will be noted that what was said about DC Azariah at that stage was in the vaguest possible terms. It amounted, in our view, to nothing more than saying, that having read in the press that DC Azariah had been criticised in other cases, the applicant wished to assert that DC Azariah must in some unspecified way have behaved improperly or incompetently in investigating this applicant's case.
25. Sixthly, it is now said that a download of the contents of the applicant's handset is necessary because such a download may differ from that previously obtained by the prosecution and served on the defence, either because the earlier download was inadequately performed or, as is suggested, because investigation techniques have improved over the years and it may now be possible to recover more information from the handset. Again, we are bound to say that no basis whatsoever has been identified in support of either of those propositions.
26. Seventhly, having read the significant quantity of material placed before us and having listened to the helpful submissions of Ms McCulloch, we find ourselves no nearer receiving any clear indication of what it is that the applicant suggests was missing from the evidence presented at trial. Beyond a bare assertion that there must have been material to exonerate him, and/or expressions of affection continuing after 3 July 2015, nothing has been done to identify any specific matter which it is said should have been before the jury but was not. In particular, despite the fact that the material has on the face of it been in his possession since early 2016, or has been obtainable by him because it was in the possession of his lawyers, the applicant has done nothing to identify any material which he now wishes to say should have been before the jury at trial but was not.
27. In those circumstances, it seems to us that although Ms McCulloch has undoubtedly done her best to advance this application on her lay client's behalf, she faces the difficulty that she has been trying to make bricks without the applicant having provided her with any straw. Years have passed since conviction, let alone since the relevant events, but the applicant has not shown any basis whatsoever for the suggestion that a fresh download of the contents of the handset would reveal more than was disclosed to the defendant as served material well in advance of his trial.
28. The application strictly relates only to the examination of the handset and disclosure of the

raw data downloaded at that stage. The contents of the download were served in evidence in advance of the trial. There is therefore a limit to which the principles set out in Nunn apply at all. But in so far as they do, we are entirely satisfied that no good cause has been shown for any further or fresh disclosure exercise to be undertaken. It is, in our view, entirely speculative to say, on the basis of a bare assertion by an applicant who is in a position to give more detail if there be more detail to give, that further examination would reveal material to his assistance.

29. We are left with the distinct feeling that having read in the press about something relating to DC Azariah in other cases, the applicant has optimistically latched onto that as a speculative basis for advancing a ground of appeal.
30. For all those reasons and notwithstanding Ms McCulloch's submissions, this application must be refused.
31. We have indicated already that we are told that all but one of the previous grounds of appeal against conviction are to be abandoned. We will hear shortly about the remaining one in the light of this judgment.

LORD JUSTICE HOLROYDE: That concludes the judgment.

Ms McCulloch, where does that take us?

MS McCULLOCH: That takes us to the position where I need to have a very serious and in-depth conversation with my client as to where we take these matters now. My Lord, I apologise that I feel that I would like to give some form of hope or submission that could take this forward but until I have taken instructions from my client I feel it would be wrong so to do?

LORD JUSTICE HOLROYDE: Yes. Can you do that this afternoon, if we enable you to make use of the video link?

MS McCULLOCH: My Lord, I would be grateful. Thank you.

(The Bench conferred with the Registrar)

LORD JUSTICE HOLROYDE: If we effectively clear the court for 15 minutes so you can have a private consultation with only the applicant and the interpreter in the room, would that assist you do you think?

MS McCULLOCH: That would greatly assist. My Lord, there is just one point I would raise for completeness and that is I know that everything here is put on tape. I am assuming ... in the Crown Court it would be against a certain number but I assume that it would not be against this case whilst I am having conference with him.

LORD JUSTICE HOLROYDE: If you speak to the Associate he will no doubt have some technical wizardry which enables him either to turn off or to ensure that the relevant

section is not in any way made public.

(The Bench conferred with the Registrar)

MS McCULLOCH: If it is not against the case, my Lord I have never been in this position before. I am sure it will be treated with the privilege that it requires.

(A short while later)

LORD JUSTICE HOLROYDE: Yes Ms McCulloch?

MS McCULLOCH: May I start from the stance that I am extremely grateful for the time to speak with my client. However, I am afraid I am no further forward but if I could put it like this: whilst I am well aware that the decision today has .. The legal position is that it is unlikely that we would be successful in any form of an appeal, my client is not able to give me instruction at the moment because he has found the whole process which he was expecting to be going away I think with a different finding and he has asked if he can give me instruction in a conference. My Lord, I know that I would probably be unlikely to be paid for that but under the circumstances my Lord, if you would grant me just 2 weeks, bearing in mind that I have said that I am aware of what the legal position is but I feel that this has been going on with him now for 4 years - it is coming up for 5 years, this appeal process - and I think there are many questions that he wants to put to me and now ask me.

My Lord, I am totally in your hands of this position at this point.

My Lord, if it were to be so whether it would ... I am just aware of Ms Marshall's very pressing diary and I do not wish to put her to any inconvenience.

LORD JUSTICE HOLROYDE: If we are going to allow you time Ms McCulloch, and we will consider that in a moment, but if we are, the practicalities are that the time that would be allowed would be for you to either give notice of abandonment or to produce revised proposed grounds of appeal - for which you would need to seek leave and a further extension of time. You need to have in mind the case of Youngs - I think it is - a decision of Hallett LJ a year or two ago, on the position where counsel seek to advance grounds which were not advanced by trial counsel. So, in other words, the case would not be coming back at the end of the fortnight.

On an important practical note, given that the applicant we see is detained at HMP Belmarsh, I think our collective experience is that the arranging of visits is often a lengthier process than might be expected.

MS McCULLOCH: My Lord, I am grateful for those observations. If I could say at this point, and I intend no disrespect, every time I have now asked for four or five conferences which we have had to cancel for reasons beyond anybody's control, and we have always managed to get within the four to five days of...

LORD JUSTICE HOLROYDE: You obviously have a magic touch Ms McCulloch.

MS McCULLOCH: My Lord, not I, it is Saunders Solicitors.

LORD JUSTICE HOLROYDE: You would like some time to consider the position with the applicant.

MS McCULLOCH: I would very much like time to advise him.

LORD JUSTICE HOLROYDE: We can understand that.

Ms Marshall, do you seek to argue against that?

MS MARSHALL: No, I do not. I am happy that the applicant has an opportunity to discuss matters with his counsel and she can confirm the position in writing forthwith.

LORD JUSTICE HOLROYDE: All right.

(The Bench Conferred)

LORD JUSTICE HOLROYDE: Ms McCulloch, we will give you slightly longer than you ask, just in case your hitherto remarkable success in obtaining earlier appointments takes a dip. If we say 3 weeks from today, that will be 13 August. So we will direct that by 13 August the applicant must either give notice of abandonment of the applications for extension of time and leave to appeal against conviction or lodge draft amended grounds of appeal clarifying precisely what grounds it is sought to argue and including any necessary application for leave to amend and/or a further extension of time.

Ms Marshall, if we then gave you 2 weeks to 27 August in which to respond, if so advised, and the case to be listed thereafter?

MS MARSHALL: Yes, I am content with that.

LORD JUSTICE HOLROYDE: If we say by 27 August the respondent to respond in writing if so advised. Thereafter to be listed for hearing of applications for extension of time and leave to appeal against conviction. Time estimate to be provided by the parties. Although it is not practicable to preserve the same constitution, I will reserve it to me given that I have spent a considerable time reading the papers and it is undesirable to duplicate that work. Does that cover everything?

MS MARSHALL: My Lord, it does.

MS McCULLOCH: My Lord, may I say one thing which is slightly extraordinary? One of your members of staff have always been on the end of the phone, extremely helpful and I wondered, as I have not been able to see Ms Sillis to thank her personally, whether there would be a message got to her to say how grateful I am to her for her assistance.

LORD JUSTICE HOLROYDE: I am sure the Associate will pass that on but as a matter of fact Ms McCulloch, we too have always been assisted by Ms Sillis and I will speak to

her myself at some stage.

Thank you both. Essentially we need the applicant to focus on whether he is wanting to instruct you to try to battle on and, if so, it will have to be a very focused application.

MS McCULLOCH: Indeed. We will get instructions.

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