Neutral Citation Number: [2021] EWCA Crim 100

Case No: 2020/00395/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CHESTER CROWN COURT
HHJ R Dutton

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2021

Before :

LADY JUSTICE MACUR
MR JUSTICE BRYAN
and
MRS JUSTICE STACEY

- -

Between :

MATHEW JAMES CHARNOCK	**Applicant**
- and -	
REGINA	**Respondent**

- -
- -

Mr B Stuart (instructed by **Cobleys Solicitors**) for the **Applicant**
Mr M Dunford (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 14 January 2021

- -

Covid-10 protocol: This judgment was handed down remotely by circulation to parties' representatives by email, realised to BAILII and publication on the Courts and Tribunal Judiciary website. The date and time for the remote hand-down is deemed to be Tuesday, 2 February 2021 at 10am.

MACUR LJ:

1. This is an application for permission to appeal against conviction and for an extension of time of nearly two years in which to do so, referred by the single judge, on the asserted basis that the prosecution significantly failed to meet its disclosure obligations by taking all proper steps to obtain from the complainant her mobile phone and social media records. Criticisms are also made of trial defence counsel for failing to pursue the matter of this disclosure with any appropriate vigour, including by failing to seek to stay the proceedings, and of the trial judge for failing to adequately identify the prejudice to the appellant/defendant of the absence of such evidence, in his summing up.

2. Mr Stuart appears on behalf of the applicant. Mr Dunford appears on behalf of the respondent prosecution.

3. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Background facts:

4. In early 2017 the complainant, AM began a relationship with the applicant and they began to live together. Their relationship became volatile. On 21st August 2017, the applicant assaulted AM causing her injury and leading to charges of assault and criminal damage. He pleaded guilty to these offences prior to trial for the offence of rape.

5. In the early hours of 24th August 2017 AM made a 999 call to the police during which she alleged that on the night of 23rd August, she and the applicant had engaged in sexual activity during which he had become violent towards her, hitting her, and strangling her, and had continued sexual intercourse with her even after she had withdrawn her consent. She contacted a friend, DS, who came to the address. She did not initially want to call the police but subsequently phoned them to report the assaults.

6. Police attended at her address and found her to be visibly upset and with injuries to her face. She was admitted to hospital. When examined, AM said that whilst being strangled she had developed tunnel vision, had seen flashing lights and spots in her vision, had buzzing in her ears, felt dizzy, and had difficulty breathing. She had ongoing pain in her neck and chest, tenderness to her Adam's apple and groin area. She had some difficulty remembering. Medical examination revealed bruising and an abrasion to her neck, bruising to her left temple, her lip, and her hip, abrasions on her right buttock and sternum, a swelling under her collar bone, and bleeding under her left eye. There was further bruising to her eye and arms which she attributed to the earlier incident. There were no injuries to her genitalia. Many of the injuries noted were consistent with her account of strangulation.

7. Bloodstaining subsequently identified as arising from AM was found in the bedroom and bathroom.

8. The applicant was arrested later that day. In reply to caution he said, "I don't know anything about it, I wasn't here last night."

9. Police officer's obtained AM's mother's phone during the investigation. A series of text messages between AM and her mother, proximate to the date of the offences, were written in terms to suggest that AM would provoke the applicant to assault her to ensure his arrest. For example:

   Mother: "Get ZamZam to punch you, go hospital and get him done."

   AM: "Ha ha, what a plan. xxx" "I tried the other night, but he knew what I was doing. ..

   AM: (in response to her mother's threat to stab the applicant) "Ha ha, you don't need to stab anyone. I know it's worth fucking him over, would love to see him being put in a van. "… "Don't worry, I have my plan, ha ha."

   AM: … I'm being quiet for now. I could do him over bad, just got to wait for the right time".

   AM: "I really want him to start on me near the stairs so I can fall down and get him done." …" I really want to push him to the limit …", "he deserves so much karma, he's been such a dick to me." … "My revenge is all floating into place."

10. On 21st August, AM posted a message on her Instagram account: "Sweet as sugar, hard as ice, hurt me once I'll kill you twice". On 21st September, attached to the above post, she left the comment, "revenge is sweet" together with a wink face emoji and a knife symbol.

    The trial:

11. The applicant's case at trial, consistent with what he said in interview, was that the complainant had consented to rough sex at all times and did not withdraw that consent. She had deliberately set him up and her complaint was motivated by a desire to take revenge on him for the way in which he had repeatedly cheated on her before leaving her for someone else.

12. The issue for the jury was whether AM had withdrawn her consent during sexual intercourse because of the applicant's sudden violence and made it plain to him that she was no longer consenting.

13. AM gave evidence to the effect that what commenced as consensual sexual intercourse was soon to become violent. The applicant said he wanted to hurt her, grabbed her hair, and pulled her neck backwards. He smacked her heavily across the face. She told him that she was scared and to stop hitting her. He ignored her and punched her once causing disturbance to her vision and hearing. He resumed having sexual intercourse with her and continued despite her telling him to 'stop' and trying to push him off. He began to strangle her with his

fingers tight around her neck and said to her, "Let yourself pass out, it's fine". He continued to have sex with her without her consent. He stopped strangling her and started hitting her again. She feared that he was going to kill her.

14. She had physically resisted but she stopped as her attempts were only making him more aggressive. He turned her over and as he continued to have sex with her, he pulled her hair causing some of it to rip from her head. He started to suffocate her by wrapping a pillow around her head before hitting her again. He left the house around 9pm.

15. She had been in the process of breaking up with the applicant. She was aware that he was in contact with another woman and was upset about it. They continued to live together since she could not afford to move out or afford to pay the rent alone. Towards the very end of their relationship, the applicant would engage in slightly violent sex with her during which he would slap her hard enough to cause bruising, but he would always stop when she asked him to. He had previously put his hand around her neck during sex, with her consent, but never applying any pressure.

16. She denied that she was seeking revenge. She did not deliberately spread her own blood around the house.

17. The police had asked her twice to surrender her mobile phone for examination but explained that it was voluntary. They had said that it might be useful for the contents. She had refused. She did not have a landline at the time. She was anxious about not having a phone and all they did was to suggest that she got another one whilst they spent some time examining it. Everything about her life was on the phone. Although the police said that she would get it back after the trial, she did not want to give it up for that length of time. She understood that her refusal meant that everyone else, including the defence, would be prevented from seeing the contents.

18. In respect of the texts, she exchanged with her mother, she had sent these because the applicant was bullying and intimidating her. She did not really know what she meant when she stated that she was going to "fuck him over" and that her "revenge was floating into place". She did not encourage him to hit her so that she could get back at him.

19. DS gave evidence that he had gone to AM's house after she had messaged him. He found her curled up in bed in her underwear, shaking. He saw the blood in the bedroom and bathroom and the injuries to her. She gave an account of having been raped and strangled by the applicant. She was clearly distressed when she contacted him. It was he who suggested the police be called.

20. The applicant gave evidence. He said that his relationship with the complainant had become very intense and physical very quickly. The relationship was at an end in August 2017. He had assaulted AM and caused criminal damage on 21st August. However, on 23rd August they had sex. They had previously had rough sex together. They would slap and bite each other. He would place his hand around her throat now and again, not restricting her breathing. On this occasion he asked if she was okay and she was. She put her hand around his throat. At

one point he asked if he was hurting her to which she replied, "No, do you want to?" He said he would if she wanted him to. He slapped her cheek and she said, "fine". They slapped each other's faces whilst continuing to have intercourse. He put her hand over her throat without pressing and she did not tell him to stop. She was not struggling to breathe and said nothing at all. She did the same to him. They kissed on the lips and he bit her lip. He did not intend her any injury. He turned her on to her front and penetrated her from behind whilst he slapped her bottom. She did not withdraw her consent at any point. He did not know why he had no injuries to show as a result of the mutual violence they had engaged in during that evening.

21. He saw no blood either on her or on the bed. He was not aware of any physical injury and there she did not complain. The complainant asked him not to go but he did. AM got nose bleeds from time to time when she cried or was upset. He suffered no injuries.

22. When he returned to the house the next day, he saw blood inside the house but had no idea how it had got there. When he contacted the complainant by phone she said, "You know what happened". There were several text messages between them in which she accused him of having beaten her up. He was fearful he was being set up. He phoned the police and waited at the house for them to arrive. He was unaware of the text messages between the complainant and her mother.

23. The trial judge reminded the jury in his summing up that:

> "The defendant's case is, in effect, this is all a put-up job. She is complaining of something that she agreed to all along in order perhaps to get some revenge for the way that he cheated on her, repeatedly in the relationship, and, in effect, was moving on to somebody else, leaving her in the house. Well, might that be the case? The prosecution ask you: well, why is she telling lies if that might be the position? Well, that might be an explanation, I suppose. It is not for the defendant to provide an explanation as to why she may not be truthful, but it is a question that you will want to consider very carefully. You might be suspicious about her motive and about what she was doing. You have read those text messages and seen them."

Later, he referred again to the texts between AM and her mother:

> "Again, I am not going to go through the texts, you remind yourself of what was said at various times. Might those texts indicate that this is some sort of attempt to gain revenge? Might they be explained by feelings that she had, not translated into doing anything, but the feeling that she felt betrayed and let down by the way that he had behaved towards her or might it be that it was all a precursor to the plan that she had hatched to in some

> way get her revenge against him in the way that the defence say has happened here? Well, these are all arguments for you and you need to think about it and decide what you make of it."

24. The trial judge reminded the jury that AM had been requested to hand over her mobile telephone and the reason she gave for refusing to do so. The applicant was convicted by a majority and subsequently sentenced to an extended sentence of 14 years imprisonment, comprising a custodial term of 10 years with an extended licence period of 4 years. Concurrent determinate sentences were imposed for the assault and criminal damage. The usual ancillary orders were made.

The appeal.

25. Trial defence counsel advised that there were no arguable grounds of appeal against conviction. Mr Stuart was instructed subsequently to advise. We have not interrogated the explanation for the delay in making the application for permission to appeal in any detail pending our consideration of the merits of the application; in short, we would extend time if there were merit in the substance of the application.

26. The grounds of appeal are referred to in [1] above. We are satisfied that Mr Stuart exercised due diligence by contacting defence trial counsel in accordance with R v McCook [2014] EWCA Crim 734. Subsequently, the applicant waived privilege, and both defence trial counsel and solicitors have responded to the Registrar. The chronology of instructing counsel, and late substitution of counsel, is revealed. The reason why no application to stay the proceedings for abuse of process for seek for want of disclosure of AM's telephone is explained.

27. Before us, Mr Stuart expanded upon his written arguments contained in his advice and perfected grounds of appeal, regarding the importance to the trial process and fairness to the applicant in securing AM's mobile telephone for interrogation. He submits that it could not, in the context and content of the text messaging that was taking place between AM and her mother in the days before the alleged offence, be regarded as a speculative fishing expedition to require its surrender. It must have been obvious to the prosecution, that AM's social media accounts and messaging and phone records were essential in conducting a fair and proper investigation of the allegations made by AM and that it was a "reasonable line of enquiry". The simple refusal by AM to hand over her phone and give access to her social media accounts should not have been the end of the matter. Neither should defence representatives have failed to make any attempts to obtain AM's mobile phone or to seek to stay the trial on the basis that it would be impossible to give the applicant a fair trial without the relevant messaging and social media information. It would have been possible to seek a witness summons to obtain the mobile phone. The court has power to order the production of such items both from AM and from the social media account providers.

28. The defence could not make any meaningful application to stay proceedings unless they had taken the necessary steps to obtain the phone. However, an

application claiming abuse of process could have flushed out the deficiencies in the investigation and disclosure process and the trial judge made aware of the issue before cross examination of AM on the point. The trial process was inadequate in the circumstances of this case to deal with the issue.

29. If she had good reason not to hand over her mobile telephone, the investigating officers could have considered other means to obtain the information of her SMS messaging to others, for example by taking screen shots of the messages she had sent and received at the relevant times immediately before and after the alleged offence, as they had in the case of AM's best friend, ZZ.

30. The judge failed to address the issue of AM's refusal to hand over her phone other than to remind the jury of the reasons she gave not to do so. He did not address the prejudice to the applicant in being deprived of this line of investigation in his summing up in the context of the text conversations between AM and her mother. Defence trial counsel had failed to bring this to the attention of the judge. However, the "real gravamen" was the failure to obtain the phone, the trial was "fatally flawed" before it was started.

31. Mr Stuart cites *R. v. Alibhai [2004] EWCA Crim 681 @ [57]:*

> "In a case where a complaint is made of non-disclosure of documents, it is not always necessary for an appellant to demonstrate that the disclosure of the material would have affected the outcome of the proceedings. As was observed in R v Ward, (1993) 96 Cr App Rep 1 at page 22: —
>
> "Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence."
>
> "We accept that in many cases it would suffice for an appellant to show a failure on the part of the prosecutor to meet disclosure obligations so that it is reasonable to suppose such failure might have affected the outcome of the trial….That said, even where there has been a failure on the part of the prosecution to make disclosure, this court will not regard a conviction as unsafe if non-disclosure can properly be said to be of "insignificance in regard to any real issue": see R v Maguire, (1992) 94 Cr App Rep 133 at page 148."

32. Mr Dunford has expanded upon the contents of the Respondents Notice to the effect that the prosecution did not fail to meet its disclosure obligations. AM refused to hand over her phone to the police and was cross examined about this. The prosecution was able to obtain, and disclose, considerable amounts of messaging involving AM, including messaging between AM and her mother which were rendered into agreed facts for the jury. These messages were the

subject of full and proper cross examination and enabled the defence to fully put their claim that the Appellant had been 'set up' before the jury. It would have been a wholesale fishing expedition to seek to obtain AM's 'social media accounts and messaging and phone records' and was not justified as a reasonable line of enquiry.

33. He cites *R v Bater-James & anor [2020] EWCA Crim 790 @ [99]* in support of his arguments:

> "In conclusion on the fourth issue and answering the question: "what is the consequence if the complainant refuses to permit access to a potentially relevant device or if the complainant deletes relevant material?", it is important to look carefully at the reasons for a refusal to permit access and to furnish the witness with an explanation and reassurance as to the procedure that will be followed if the device is made available to the investigator. If it is suggested that the proceedings should be stayed, the court will need to consider the adequacy of the trial process, and whether this will ensure there is fairness to the defendant, particularly by way of cross-examination of the witness, coupled with appropriate judicial directions. The court should not be drawn into guessing at the content and significance of the material that may have become unavailable. Instead, the court must assess the impact of the absence of the particular missing evidence and whether the trial process can sufficiently compensate for its absence. An application can be made for a witness summons for the mobile telephone or other device to be produced. If the witness deletes material, although each case will need to be assessed on its own facts, we stress the potential utility of cross-examination and carefully crafted judicial directions. If the proceedings are not stayed and the trial proceeds, the uncooperative stance by the witness, investigated by appropriate questioning, will be an important factor that the jury will be directed to take into account when deciding, first, whether to accept the evidence of the witness and, second, whether they are sure of the defendant's guilt."

Analysis

34. We do not doubt that the context and content of the texts between AM and her mother provided a proper basis for the prosecution or defence to pursue an application for a witness summons in the face of AM's refusal to voluntarily hand over the device. This would not have amounted to a speculative 'fishing expedition' on the part of the defence. Equally, we are satisfied that investigating officers could have taken steps to obtain details of her text messages to others at the relevant times without the need to remove the phone

from her possession. There is no explanation of why they did not suggest to AM that they replicate what they did with regards to ZZ's phone. However, in all the circumstances of this case, we cannot accept Mr Stuart's submission that the trial process was inadequate to deal with this issue.

35. In the light of the authorities considered by *Barter- James (above)* we do not regard the decision of defence trial counsel not to pursue an application for stay of proceedings for abuse of process to be unreasonable, and not merely, as Mr Stuart suggests, because of the previous omission to seek a witness summons. Defence trial counsel may or may not have accurately predicted the trial judge's response, and it appears from Mr Dunford that the judge was already aware of the 'telephone issue', that the matter could be adequately addressed in the trial process. However, we are satisfied that if the judge had refused such a prospective defence application and an appeal had been raised following conviction that he had been wrong to do so, for reasons we indicate below, it would be dismissed.

36. Our focus, having regard to "The Fourth Issue of Principle: what is the consequence if the complainant refuses to permit access to a potentially relevant device or if the complainant deletes relevant material?" identified by *Bater-James* (see above), is "*the adequacy of the trial process, and whether it will ensure there is fairness to the defendant, particularly by way of cross-examination of the witness, coupled with appropriate judicial directions."*

Also, as per *R V R.D [2013] EWCA crim 1592 @ [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**".**

37. The ammunition available to the defence, from the agreed evidence as to the contents of the text messages between AM and her mother, as to set up, was considerable. Whatever criticisms are made about the lack of any attempt to obtain AM's telephone, or to seek stay of proceedings if she continued to refuse to release it, we are satisfied that trial defence counsel deployed this information to its full extent in cross examination. The judge reminded the jury of the defence case, the text messages, and the fact of AMs refusal to release her telephone. What neither defence counsel nor the trial judge could do was to invite the jury to speculate about what any text messages that may have been

sent by AM may have contained. Whilst it seems to us that, the trial judge should have explicitly identified to the jury the possible prejudice arising from the intransigence on the part of AM to deliver up her phone, we do not regard this omission to undermine the safety of the conviction.

38. The issue in the trial was continuing, not initial, consent in the context of an escalating violence during sexual intercourse AM had not previously experienced. The evidence of injuries inflicted was objectively and independently observed, and congruent with AM's, rather than the applicant's evidence. There was 'recent' complaint evidence from DS, who may have been regarded as partial, but it was not suggested then, nor now, that he was complicit in a conspiracy to pervert the course of justice. We note from the DCS file that other devices belonging to those whom AM may have been expected to contact after the event, such as ZZ or her mother, revealed no evidence which resembled that which had taken place in the preceding days between AM and her mother.

Conclusion

39. The principle to be derived from *Alibhai* is not at odds with *Bater- James* or *RD*. We are satisfied that the trial process was able, and did compensate, for the absence of AM's mobile telephone. The opportunities afforded to the defence by the disclosure made, and the failure to examine AM's phone, were utilised in full in cross examination. The jury were entitled to, and no doubt did, take her explanations as to why she did not want to give up her phone and for the content of the messages demonstrated in [9] above into consideration. The judge's summing up on this aspect of the case was adequate. This court cannot be drawn into speculation as to what may have been found. AM's evidence of withdrawal of consent during what commenced as consensual sex was set in the context of these prior communications and post arrest Instagram posting. Consequently, we are not persuaded that this conviction is unsafe.

40. We dismiss the application for extension of time and permission to appeal.