



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 61
HCA/2016/000418/XC

Lord Menzies
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MALCOLM

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

RC

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty, Macintosh; John Pryde SSC
Respondent: S Fraser AD; Crown Agent

9 May 2017

[1] After trial the appellant was convicted of a charge of rape committed on 28 December 2014. His defence was one of consent. In this fresh evidence appeal against conviction, he submits that the complainer's social media posts demonstrate that she lied when giving evidence about how the rape had affected her, and the contact she had with another witness (KH) after that date. It is suggested that KH also lied about the contact she

had with the complainer. The appeal is based upon the proposition that had this material been available to the defence at the trial, it would have been put to the complainer and the witness in cross-examination, thereby demonstrating that they were neither credible nor reliable witnesses. After the appeal hearing the court intimated that the appeal was refused and that written reasons would be intimated in due course. (In the course of this opinion we shall also deal with an appeal against the sentence imposed, namely one of seven years' imprisonment.)

The Evidence at Trial

[2] The relevant evidence at the trial can be summarised as follows. The complainer and her friend, KH, fell into the company of the appellant during a night out. He was not previously known to them. KH and the appellant kissed and, while in a club, spent time together. The complainer passed her time in the club with someone else. The club closed at around 3am. A taxi was hailed. The complainer, KH, and the appellant travelled in the taxi to KH's flat. KH and the appellant sat on a settee and continued to flirt with and kiss each other. The complainer watched television. KH said that she was going to bed, telling the appellant that he could stay over until the morning, sharing a bed with her, though she was not going to have sex with him. They went to bed. There was some kissing, but beyond that no sexual activity. This was in contrast to the later account given to the police and to the jury by the appellant. In due course KH fell asleep and was unaware of anything else until the aftermath of the rape.

[3] At some point the complainer retired to the spare room. She was clear in her evidence that she had no interest in the appellant, and had given no indication of such. The complainer was in "quite a deep sleep" when awakened by a feeling of pain in her vagina.

She became fully conscious and felt someone lying on top of her. She realised that it was the appellant having sex with her, his penis being inside her vagina. He was holding her down. He had removed her pants and a tampon, and had moved her nightdress up to her waist. The appellant was pinning her to the bed. She told him to get off but he ignored her. At some point he removed himself and did up his trousers. He walked calmly into the hallway saying "It shouldn't have happened." He left the house. The complainer woke KH. The complainer was screaming and shouting. KH attempted to comfort and calm her. KH testified to the complainer being desperately upset, inconsolable and frightened. The police were contacted.

[4] So far as the appellant's account is concerned, he said that he had been invited to the flat by the complainer and KH. The complainer had said that she regretted that the person with whom she had been chatting in the club had a girlfriend, because she wanted to "bang him all night." In his report the trial judge notes that this was an attempt to suggest that the complainer was in some way sexually voracious. The appellant stated that when he went to bed with KH she kissed him, fondled him, and engaged in various forms of sexual activity for some considerable time before falling asleep. The appellant then decided to leave the flat.

[5] For reasons which the appellant could not properly explain, he decided to go into the bedroom of the complainer and say goodbye. Her bedroom door was open. She was awake. As he knelt down beside her, she pulled him towards her, removed his lower clothing, removed her clothing and a tampon, and proceeded to have intercourse with him. He left the house in a hurry as he wished to avoid the ire of both women which he felt was bound to follow when each discovered that he had had sexual involvement with the other. He left his phone behind. He told the court that he made his way out of the flat and left the

area, concealing himself behind a wall. He walked for some distance, got into a taxi and went home. He retired to his bed and was awakened the following afternoon by police officers who detained him on suspicion of rape.

The Grounds of Appeal

[6] Leave to appeal has been granted in relation to the fresh evidence of a number of social media postings made by the complainer since the appellant's arrest. This evidence was brought to the attention of the appellant post-conviction. The Crown accepts that the reasonable explanation test has been met. The primary issue for the jury was the credibility of the complainer and her friend as against that of the appellant. It is contended that the social media posts demonstrate that the claimant lied when giving evidence about how the rape had affected her, and as to her contact with KH after that date; and furthermore that they show that KH lied when giving evidence about her contact with the complainer between the rape and the date of the trial. The submission is that this material would have demonstrated that the complainer and KH were not credible and reliable witnesses and would have raised a reasonable doubt in the minds of the members of the jury.

[7] It is stated that at the trial, in response to questioning by the advocate depute the complainer gave evidence that since the appellant's attack upon her she:

- i. was unable to go to work;
- ii. could not go out with friends;
- iii. was no longer confident and outgoing;
- iv. had panic attacks about going out and did not lead a normal life;
- v. had very little contact with KH;
- vi. had not been back to KH's flat; and

- vii. was no longer interested in having a relationship or sexual contact with anyone.

None of this information was included in statements disclosed to the defence. The appellant's solicitor advocate had no reason to believe that the complainer was not telling the truth.

[8] The various postings, which were recovered by the appellant's brother, are contained within a dossier lodged for the purpose of the appeal. They indicate that between 28 December 2014 and 30 September 2015 the complainer made references to a college course on two occasions; implied that she had been working on six occasions (the first of these being 27 February 2015, some two months after the rape); made references to nights out on eight occasions, and this over a nine month period since the rape; talked of moving house on two occasions; indicated that she had been to KH's flat, and referred to a night out in the company of KH. It is submitted that had this material been available to the defence, permission would have been sought to ask questions designed to demonstrate that the complainer had lied to the jury about the impact of the appellant's actions upon her. The jury would have been asked to take the inconsistency between the evidence in chief and the postings into account when deciding whether to accept the complainer's account that she had been raped, including whether all of this raised a reasonable doubt as to the appellant's guilt.

The Relevant Evidence of the Complainer

[9] The relevant evidence of the complainer was as follows:

"Now, in December 2014, you were working. Is that right? – Yes.

You were employed as a carer? – Yes.

Is that so, or in the ...? – yes.

What sort of work was it? Was it with elderly people, or young people, or...? – With the elderly.

With the elderly. Right, okay. How did this incident affect you? How has it, how have you been since this happened? – I couldn't go to work. I just haven't, haven't been out. I haven't been able to go up town. I haven't been able to go out with my friends. I'm just not the person that I was.

When you say you're not the person you were, how would you have described yourself, before this incident, as an individual? I know that's quite difficult at times. But what sort of person were you? – A confident, outgoing person that just loved going out with my friends, and loved going out and just have a good time with people.

Yeah. Did, were you in a relationship, at this time, or had you been in a relationship? – No.

So, by comparison with what you have described as being what you were like, before December, the 28th of December 2014, how have you been since then? – Just quiet. I don't go out anymore. I get panic attacks about going out. I just can't live a normal life.

Have you been back to visit KH's flat? – No.

Have you been in touch with KH? – Very little contact.

Right, okay. Have you managed to go back to work? – I went back for a short time. But I'm...

Yeah. - ... back off work now.

You're back off work, right? – Yeah."

The Relevant Evidence of KH

[10] KH gave evidence that she had met the complainer at college. They had been out together in a group before, but the night of the rape was the first night they had gone out themselves. They were not close. When asked if she had kept in contact with the complainer following the rape, she said the following:

“Okay. I, I mean, since the events of, of this evening and the early hours of the morning you’ve been telling us about, have you kept in contact with (the complainer) – Not as much.

But to, to some extent? – Yeah.

And has she been to your house? – Once.

Right. So, she’d been to your house once since this happened? – Since this happened, yep.

[...]

Have you met up at all over the time? – Not in the past, maybe, year.

Well, I’m, I’m really, I mean, I’m asking about the period since this happened, so since the 27th or 28th of December 2014, have you met up? – Yes, we’ve met up a few times.

Right but, obviously not at your house? – Not at my property.

What sort of context have you, you met up in? – Met up for a coffee, went shopping.

I see. Right. So you’ve gone shopping together? – Yes.

And, and gone for a coffee? – Yes.

Okay. Have you met her when you’ve been out, out, out in the evening? – I don’t go out much anymore.”

Affidavit of the Complainer

[11] In advance of the appeal hearing the complainer lodged an affidavit. In summary she states that she took three months off work following the rape, returning to work in March 2015. She has not worked since 26 December 2015 as a result of an injury to her back and the effect of the rape on her mental health. During that period she was unable to work for more than a couple of months at a time. She has seen KH a handful of times since the rape and been to her house on no more than three occasions. Nine months after the rape, she and KH attended a Foo Fighters concert as KH had a spare ticket. The picture in one of

the post-rape postings is of the other man she met in the club that night. It is a “throwback”, in that it was taken on 27 December 2014, not on the date of the posting, namely 20 February 2015. Before the rape, if the complainer was on a night out she would take and post a number of photographs. That was her usual practice. If she had stopped doing this following the rape, people would have asked her why she was not posting. She wanted to maintain a *persona* on social media given that she had not told many people about the rape. She did not want people to think that there was something wrong, so she kept her social media presence as close to “normal” as possible after the rape. Her social media portrayal was not an accurate picture of how she was feeling at the time. The complainer also explains particular nights out: the AC/DC tribute night was a last minute thing; she was at the Hive Nightclub for about an hour and a half and did not drink as she was driving; and in respect of another posting, she was having a drink with friends in a beer garden as it was a half day at college and it was a pleasant day.

The Affidavit of KH

[12] In her affidavit KH states that she did not mention the Foo Fighters concert when questioned at the trial as she did not think it was relevant. She had a spare ticket and it was a last minute arrangement with the complainer. She has had much less contact with the complainer since the rape. She accepts that the complainer was in her flat after the rape.

The Evidence at the Appeal Hearing

[13] Both the complainer and KH were led in evidence by the Crown at the hearing and were cross-examined on behalf of the appellant.

The Complainer's Evidence

[14] It is unnecessary to recount the complainer's evidence in detail. She was taken through a large number of pictures and postings placed on social media by her. She explained her work record. She began working for a healthcare company in March 2015, some three months after the rape. She did shift work for six - eight months. She regularly took sickness leave. There could be appointments, or she would be stressed and anxious. She had not told her employers about the rape. She did not want to be considered a victim. She left work in December 2015. Her subsequent return to college was short lived. She could not cope within a social setting.

[15] The complainer was taken to the posting of 15 March 2015 relating to the AC/DC tribute band concert in Bathgate. She attended with two friends. It had been arranged the night before. The complainer testified that she used to go out every weekend, and even during the week. In comparison, since the incident she had hardly gone out at all. However she did go out occasionally. She had not been "up to town", ie a night out in Edinburgh. She accepted that the posting of 6 April 2015 related to a visit by her to the Hive Nightclub in Edinburgh. She was catching up with a girlfriend, whose choice it had been to go there. She was not comfortable being there.

[16] The complainer was taken to a number of other postings indicating her attendance at social events, for example a daytime visit to a beer garden. She was there with girlfriends. She did not drink, and she drove them all home. The complainer accepted that there were seven postings showing seven separate nights out. The rest of the postings referred to were "throwbacks" dating before the rape. The result was about seven nights out between December 2014 and the trial date of June 2016. When asked why she did not mention them at the trial, she stated that she did not give them a lot of thought. She gave short and blunt

answers. She had not expected to be asked about this. She denied trying to mislead the court.

[17] The complainer was referred to postings concerning three visits to KH's flat. Added to the Foo Fighters posting, this amounted to four occasions when she met KH. At the trial she was asked whether she had visited KH's flat, and she replied in the negative. The complainer explained that she did not remember the visits. She would not have remembered them without seeing the Facebook posts. Again she did not give a lot of thought to the matter. She had been trying to maintain a "bubbly" *persona* on social media.

[18] In cross-examination it was put to the complainer that at the trial she said that she could not go to work, and later had said that she went back to work for a short time. Her evidence was that she had returned to work from March to December 2015. The complainer agreed that the reference to "a short time" was misleading. She agreed that it was not correct to say that she had not been out, not able to go up town, and not able to go out with friends. She had not been prepared for the questions. She insisted that it was unfair to say that she had been lying or deliberately misleading the court.

KH's Evidence

[19] KH explained that she did not mention the Foo Fighters concert at Murrayfield in September 2015 as she did not think it was relevant to what happened to the complainer. She found the trial, and what happened to the complainer in her house, stressful. The concert had slipped her mind. She was not deliberately trying to hide anything. At the trial she mentioned the complainer visiting her house once since the incident. The postings showed that the complainer had been at her house on three occasions, not once. KH stated

that if she said once, that is what she would have remembered at the time. She was not deliberately lying to the court.

[20] In cross-examination KH stated that she had forgotten about the concert. It was a last minute thing for the complainer, though not for her.

The Submissions for the Appellant

[21] The Crown having accepted that there is a reasonable explanation as to why the evidence was not heard in the trial proceedings, the Dean of Faculty addressed the issues focused in *Al Megrahi v HM Advocate* 2002 JC 99, paragraph 219. The court set out the following propositions:

- (1) The court may allow an appeal against conviction on any ground only if it is satisfied that there has been a miscarriage of justice.
- (2) In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit.
- (3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.
- (4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.
- (5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a

kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial.

(6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial.

[22] The Dean of Faculty did not submit that the jury would have been bound to acquit if the new evidence had been available at the trial. His submission was that the matter was relevant and of such significance that the verdict is a miscarriage of justice. A reasonable jury would have found the new evidence of material assistance when considering its verdict. The critical issue was the complainer's credibility. The advocate depute had opened the door to this chapter of evidence by asking the complainer how she had been affected by the rape. The court was invited to consider the impact if defence counsel was able to put to the complainer evidence which contradicted her answers. The Dean submitted that it would have a "dramatic affect."

[23] It was submitted that the new material would demonstrate that the complainer had been inaccurate in her answers to questions relating to her work after the incident; in claiming that she was unable to "go up town" and go out with friends; and in respect of her visits to KH's flat. Defence counsel could submit to the jury that they had been misled by the complainer. They would be able to see how she reacted to the inconsistencies. Overall this was significant material which would substantially increase the chances of an acquittal.

[24] So far as KH is concerned, she had not mentioned the Foo Fighters concert, and painted a false picture in relation to the complainer's visits to her flat. All of this supported the main proposition that there had been a clear miscarriage of justice.

The Submissions for the Crown

[25] For the Crown it was submitted that there had been no miscarriage of justice. Whether the complainer had been out and about after the rape and how it had affected her, was "neither here nor there" to the key facts which the Crown required to prove in a rape trial. In any event, it was only at first glance that there was any discrepancy between the complainer's evidence and the new material. In the overall picture this new material would not have had any major bearing on the trial. It relates to a peripheral matter which had been addressed at the trial in a "broad brush way." The manner in which the questions had been asked and answered was of such a general nature as to render them immaterial in the context of the main issues at the trial.

[26] The explanations given by the witnesses at the appeal hearing would have been available to them if challenged at the trial. For example, KH said that she forgot about the other visits to her house by the complainer. As to the Foo Fighters concert, she was not being asked to recall a concert, and it is understandable that the complainer's presence there did not come to mind.

[27] As to the complainer's evidence, no jury would take the comment "I just haven't been out" literally. She was speaking in broad terms. She was not asked to explain her comment, no doubt because of the peripheral nature of it. If challenged with the productions available now, in all probability her response would have been as given to the appeal court, including the contrast between her behaviour before the event and that since

the event, in particular only seven nights out over some 17 months. This was in stark contrast to her previous lifestyle. She had not been asked how many times she had been out with friends, but how the incident had affected her. As to visits to KH's flat, she said they had "very little contact." There was no material difference between the evidence at the trial and that given at the appeal hearing. As to her work record, initially she said that she could not go to work, but moments later explained that she had gone back to work for a short time. This was a broad answer to a question she had not been anticipating. She did not have to hand the dates and times which are now available. Although her employment extended over about ten months, she explained that she phoned in sick on a number of occasions. She was unable to continue with her college course. In any event none of this is directly relevant to guilt or innocence.

[28] It was submitted for the Crown that it is necessary to consider the whole evidence led at the trial. The Crown case was compelling. Plainly the accused's evidence was rejected by the jury. The court was invited to refuse the appeal.

Reply for the Appellant

[29] In reply the Dean of Faculty referred to *Angus v HM Advocate* 1935 JC 1, and in particular at page 4. Credibility was a key issue at the trial. The complainer had not been particularly impressive in her response to the contradictions implicit in a comparison between the postings and her evidence at trial.

The Appeal against Sentence

[30] As to the appeal against sentence (7 years' imprisonment) it was submitted that the trial judge was in error in stating in his report that the appellant "forced his company on the

two women.” This was not an accurate reflection of the evidence. Furthermore the trial judge would have been influenced by the now disputed evidence. It would have been at least a factor in the sentencing exercise. For these reasons it was suggested that the sentence chosen by the trial judge was excessive.

Decision

[31] The appeal turns on the application of the principles laid down in *Al Megrahi* (quoted above at paragraph 21). In particular, is the court satisfied that the new material, had it been available, would have been important evidence of such a kind and quality that it was “likely to have had a material bearing on, or a material part to play in the determination by (the jury) of a critical issue at the trial?” The evidence must be of such significance that its absence at the original proceedings amounts to a miscarriage of justice. In the view of the court, these tests are not met. We accept the submissions for the Crown, and would elaborate upon our reasons as follows.

[32] The evidence from the complainer and KH which might have been challenged by reference to the social media postings was in short and general terms, and concerned a peripheral matter wholly unrelated to the critical issues concerning proof of the rape itself. The complainer said that after the rape she “couldn’t go to work”, which was true – she was off work for several weeks. She said that she managed to go back to work “for a short time”. In fact she returned to work from March until December 2015, albeit she was regularly off work because of ill-health. Still in the context of the question as to how the rape had affected her, she said that she had not been out, had not been able to go up town, nor to go out with her friends. “I’m just not the person I was”. The examination of the complainer at the appeal hearing demonstrated that, making allowance for the broad and general nature of the

questions, her answers at the trial were substantially accurate. She has not been the person she was, though for understandable reasons she tried to maintain some kind of normality on social media. It is doubtful that any member of the jury would have taken it that, quite literally, she never went out. As it is, her lifestyle after the rape has been severely curtailed, all as explained above. It is in marked contrast to her description at the trial that before the rape she was “a confident, outgoing person that just loved going out... (to) have a good time with people.”

[33] In these circumstances, it is highly unlikely that cross-examination at the trial by reference to the postings would have had any material bearing on the complainant’s credibility in relation to her evidence about the rape. The same would apply in respect of her evidence that she had not been back to KH’s flat. At the trial the complainant could have responded in similar fashion to the explanations given in evidence to the appeal court, all as summarised earlier. In any event, there was evidence before the jury from KH that the complainant had been at her house on at least one occasion.

[34] KH failed to remember two visits by the complainant to her flat; and when asked if they had gone out in the evening, she did not mention the claimant’s last minute attendance at the Foo Fighters concert. In our view none of this has the potential significance attributed to it by the appellant, and in any event, once again KH would have been able to give the reasonable explanations tendered at the appeal hearing.

[35] We consider that any differences and inconsistencies between the evidence at the trial and what can be taken from the postings have been exaggerated, as has their potential significance in the overall context of the issues and evidence at the trial. In *WB v HM Advocate* 2014 SCCR 376, at paragraph 21, the Lord Justice Clerk (Carloway) said that there is a danger of ascribing to the new evidence more significance that it would have had at the

trial. It should be assessed “in the context of the whole testimony adduced at (the) trial”. The evidence concerning the rape itself has been summarised above. In his report the trial judge commented that he was not persuaded that the postings contradicted what was said by the complainant in a short passage of evidence which was of no real significance at the trial. He observed that, while the Crown relied upon the complainant’s evidence as the bedrock of its case, there was also the evidence of KH, which flatly contradicted that of the appellant. He described the appellant’s version of events as “wholly improbable”, for example that he would go into the complainant’s bedroom simply to say goodbye, and that she would then immediately initiate sexual intercourse. And why did he conceal himself behind a wall? The trial judge correctly suggested that the present appeal must be viewed against the totality of the evidence presented to the jury.

[36] In *WB* the court applied its collective experience and understanding of criminal trials and had regard to the observations of the trial judge. Having done the same, and after careful scrutiny of the evidence at the trial, the content of the relevant postings, and the evidence tendered at the appeal hearing, we are satisfied that there has been no miscarriage of justice. We are wholly unpersuaded that if the complainant and KH had been cross-examined at the trial under reference to the postings, this would have had a material bearing on the outcome of the trial.

[37] As to the appeal against sentence, having regard to all the relevant circumstances it cannot be said that imprisonment for 7 years was excessive, and this with or without any element relating to the impact of the rape upon the complainant. Nor do we consider the issue raised in the case and argument as to whether the appellant was or was not invited back to the flat to be of any importance with regard to the appropriate sentence.

[38] The result is that the appeals against conviction and sentence are both refused.