IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation Number: [2020] EWCA Crim 1202

CASE NO 201601642/C1

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 6 August 2020

LORD JUSTICE HOLROYDE

MRS JUSTICE ANDREWS DBE

SIR RODERICK EVANS

REGINA

V

"AM"

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MR S NEALE appeared on behalf of the Appellant.

MR N CLARKE appeared on behalf of the Crown.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 21 August 2015, in the Crown Court at Manchester Crown Square, this appellant was convicted of the rape of a woman (to whom we shall refer as "M"). He was subsequently sentenced to 7 years 6 months' imprisonment.
2. He now appeals against his conviction by leave of the Full Court granted on 6 March 2020.
3. M 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 this offence. In view of her relationship with the appellant, it may be necessary, in order to avoid identifying her, for his name to be anonymised in any report of these proceedings.
4. The appellant is now aged 45. At the time of the trial he had no other criminal convictions. He is about 15 years older than M. She came to this country in April 2011 on a student visa which was due to expire at the end of July 2012. She was introduced to the appellant, and in 2012 they married in an Islamic ceremony. The appellant was already married to another woman and had a number of children with her. M said that she only found out about that after they had been together for some time, and her discovery of his existing marriage brought an end to their consensual sexual relationship.
5. The appellant said that he had told her about his wife and children before they married and that all sexual activity between them was consensual.
6. In July 2013, M was arrested as an overstayer. She was for a time held in immigration detention. Whilst there, she alleged that the appellant had raped her orally, anally and vaginally.
7. It was the appellant's case that her allegations were untrue and were made in order to assist her attempts to obtain leave to remain in this country.
8. The appellant was charged on an indictment containing three counts. The oral and anal rapes (counts 1 and 2) were alleged to have been committed between 1 November 2012 and 30 January 2013. The vaginal rape (count 3) was charged as having been committed between 1 January 2013 and 9 February 2013. Although date would not normally be a material averment in an allegation of rape, M's evidence was that the offence was committed on or about 1 February 2013. She had suffered a miscarriage which had been confirmed when she attended a hospital on 9 February 2013. That date could be established with precision and was common ground between prosecution and defence at trial. M's evidence was that the rape was committed 8 or 9 days before that hospital attendance.
9. In her ABE interview (which formed her evidence-in-chief) she said that the appellant had initially been angry when she told him she was pregnant. He had slapped her and said she must have an abortion. A few days later however he had apologised and asked her to have sex. She was reluctant because she was worried it might harm the baby but

the appellant said he would be gentle. They had vaginal intercourse but the appellant was far from gentle and afterwards she was in pain and noticed some vaginal bleeding. She described how she had experienced further bleeding over the following days and had eventually gone to hospital on the advice of a woman she referred to as "Aunty". M's belief was that the forceful intercourse to which she had not consented had led to her miscarriage.

10. In cross-examination it was put to M that the appellant had been in Pakistan at the time when she alleged he had raped her in this way. She was shown stamps in his passport which recorded entry into Pakistan on 11 January 2013 and exit on 15 February 2013. For convenience we shall refer to these as "the relevant stamps". M responded to the effect that the relevant stamps could be bogus and the appellant could have had them fabricated.
11. The appellant gave evidence that he had had vaginal consensual intercourse with M on a number of occasions. He denied that he had ever engaged in either oral or anal intercourse with her. He said that he had made a number of trips to Pakistan and was in that country during the period covered by the relevant stamps. M had not told him of her pregnancy before he went. When he returned she contacted him and said she was in jail and needed help. In particular, asking him for £2,000 but she did not mention a miscarriage.
12. In cross-examination, it was put to the appellant that either his passport or the relevant stamps in it were inauthentic. In summing-up, the judge defined the issue for the jury on each of the three counts as being "whether it happened at all at the time she says it happened and in the way it happened". The jury returned verdicts of not guilty on counts 1 and 2 and guilty on count 3.
13. The Full Court when granting leave to appeal also granted the necessary extension of time and leave to adduce fresh evidence. The fresh evidence includes the following: expert evidence of David Browne, a very experienced document examiner, that the relevant stamps are genuine; evidence from Fiaz Niazi an attache at the Consultant General of Pakistan in Manchester, confirming that the appellant did enter and leave Pakistan on those dates and also listing a total of 24 occasions between July 2010 and September 2014, when the appellant entered or left Pakistan.
14. The respondent, by an email to the court on 21 May 2020, did not seek to challenge this evidence and did not require either of those witnesses to give oral evidence but did challenge further evidence on which the appellant sought to rely, namely that of Safia Begum Hussain who is said to be the person referred to by M as "Aunty". The court today heard her oral evidence. Mrs Hussain, now in her late 70s, initially met M in 2012 in connection with the renting of accommodation. She later met the appellant. She gave evidence that around February or March 2013, M contacted her. M said that she had been carrying heavy bags of shopping, that she felt unwell and was bleeding and that she had turned to Mrs Hussain because the appellant was out of the country.
Mrs Hussain advised her to go to hospital which she did.
15. Mr Neale, appearing in this court for the appellant, submits that the conviction is unsafe because there is fresh evidence that the appellant's alibi, which he put forward at trial but which at that stage was not corroborated by official documentation, was accurate and truthful. The evidence covers the specific period which M, in a detailed account, put forward as being the period when she was raped. Mr Neale submits that the appellant

did in fact have an alibi for the relevant period as can now be seen but at the time of the trial he was not able to point to the independent evidence which is now available to confirm that point.

16. The theory put forward by M in cross-examination and adopted by the prosecution that the relevant stamps may be bogus is now shown to be false.
17. The email sent by the respondent in May 2020, to which we have referred, acknowledged that the evidence of Mr Browne and Mr Niazi suggests that the appellant was out of the country on the date when the offence is said to have been committed. It is argued however that an issue remained as to whether the appellant returned from Pakistan some time before the rape and thereafter re-entered Pakistan either without his passport being stamped or using a different passport.
18. In his oral submissions today Mr Clarke, representing the respondent here as he did below, did not pursue that hypothesis of an undocumented journey to Pakistan. He argued instead, that it was common ground between M and the appellant that there had been consensual sexual intercourse up to the end of 2012. The dates charged in count 3 reflected the period during which the rape occurred, with 1 February merely being a possible date. Mr Clarke relied on the fact that M's ABE interview had taken place in September 2013 and submitted that in view of the major life events which had taken place in the preceding months, including her arrest as an overstayer and a period of detention, M could not be expected to be precise as to dates. Her evidence was based on her belief, albeit unsupported by medical evidence, that her miscarriage was caused by the rape. For that reason Mr Clarke submitted she may have mistakenly compressed the period of time between the rape and her attendance at hospital.
19. The admissibility of fresh evidence on an appeal against conviction is of course governed by the provisions of section 23 of the Criminal Appeal Act 1968. Having regard to the factors which subsection (2) requires us to consider, we have no doubt that it is necessary in the interests of justice to receive the evidence of Messrs Browne and Niazi and we do so. The oral evidence of Mrs Hussain was not challenged and was, in our view, credible. It is capable of providing some additional support for the appellant's submissions. The explanation of why this evidence was not called at trial is not entirely satisfactory but we are persuaded that it is in the interests of justice that this court should receive her evidence and again we do so.
20. We have considered the passages in the summing-up which reminded the jury of the details of the account of the rape which M gave in her evidence. That detailed consideration in our view confirms what is apparent from the brief summary which we have given earlier in this judgment, namely that M was drawing a clear link between the rape, her immediate pain and bleeding, her further bleeding over the next few days and her subsequent attendance at hospital where the miscarriage was confirmed. Thus, the essence of her account, whilst not purporting to be precise to the day, was that the interval of time between the rape and the attendance at hospital was little more than a week, sufficiently close in time for her to believe that it was the rape which caused her to miscarry. We bear in mind that the summing-up also shows that M said in her ABE interview that she found out towards the end of 2012 that she was pregnant and immediately told the appellant, who visited her the following day, when he was angry and slapped her. She went on to say that he had returned in apologetic mood "a few days later", that he had then raped her and that he had thereafter gone to Pakistan

returning "after approximately a month".

21. Looking at those details, it is possible to suggest, as Mr Clarke does suggest, that M's account was correct but that the rape was committed before the appellant entered Pakistan on 11 January 2013 and that she was in error in saying that it was 8 or 9 days before she went to hospital. That suggestion is however impossible to reconcile with the essential feature of her account to which we have just referred, namely the short period which elapsed between the rape and the attendance at hospital. If the rape occurred before 11 January, that short period has to be extended by about 3 weeks for which there is no explanation. Date is not usually a material averment in an indictment charging rape, in the sense that an error as to date will not usually give rise to any legal obstacle to a conviction of the offence. In this case date was not a material averment in that sense. The date of the alleged rape was however extremely important, on the issue of the credibility of each of the two witnesses who were the only persons who knew whether the allegation was true. It was important to the credibility of M because, as we have said, the essence of her evidence was that the rape occurred little more than a week before she went to hospital. It became important to the credibility of the appellant because if reliance on the relevant stamps in his passport became a basis of an attack upon his truthfulness, it was therefore necessary in the circumstances of this case for the jury to be able to be sure that M was raped as alleged on or about 1 February 2013. The importance of the evidence of Messrs Browne and Niazi is therefore obvious. On the face of it, it confirms the alibi which the appellant put forward at trial. It is apparent from the jury's verdict on count 3 that they rejected that alibi, which must mean that they felt sure that the relevant stamps were inauthentic, or at least, gave an incomplete or inaccurate picture of the appellant's travel during the relevant period. The fresh evidence is now accepted by the respondent as establishing authenticity.
22. We accept that it would have been possible for the appellant to go to Pakistan on 11 January, return some time before 1 February, commit the rape as alleged, and then go back to Pakistan before finally returning to this country on 15 February. That suggestion has however now been abandoned by the respondent as a basis for resisting this appeal. It was rightly abandoned because the respondent has no evidence to suggest that the appellant did in fact come back to this country between 11 January and 1 February, still less that he did so making use of a different passport or in some way which avoided any record of his entry or exit. Moreover the 24 occasions listed in the document produced by Mr Niazi appear, on the face of it, to reflect 12 visits to Pakistan during that period, each visited being of approximately 3 to 5 weeks' duration. It follows that in order to reconcile M's account of a rape on or about 1 February with the fresh evidence, it would have been necessary for the respondent to show that the appellant had made two return trips to Pakistan in quick succession each of uncharacteristically short duration.
23. We have concluded that the fresh evidence provides strong support for the appellant's defence of alibi and so casts doubt on the reliability of M's evidence of rape and that the conviction is, for that reason, unsafe.
24. The appellant has served the custodial part of his sentence. For that and other reasons Mr Clarke realistically did not seek a retrial.
25. This appeal is therefore allowed and the conviction is quashed.

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