[2024] EWCA Crim 109

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202203548/B5

ON APPEAL FROM THE CROWN COURT AT CHELMSFORD

HHJ Walker

T20217070

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 26 January 2024

Before:

LORD JUSTICE WARBY
MR JUSTICE ANDREW BAKER
THE RECORDER OF CARDIFF
HER HONOUR JUDGE TRACEY LLOYD-CLARKE
(Sitting as a Judge of the CACD)

REX
V
PAUL GELLEN

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NON-COUNSEL APPLICATION

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. Four applications are before the court in this case. First, a renewed application for an extension of time to seek leave to appeal against conviction; secondly, an application for leave to adduce fresh evidence on appeal. There is then, thirdly, an application for leave to add further grounds of appeal coupled with a second and more extensive application for leave to adduce fresh evidence.

2. The case is one to which the Sexual Offences (Amendment) Act 1992 applies. Under those provisions it is an offence to publish anything that might lead to the identification of a person against whom a sexual offence is alleged to have been committed. In this case there is a single female complainant whom we shall anonymise accordingly as C.

3. The applicant however does not benefit from anonymity and there is no need to anonymise him for the protection of the complainant. The applicant is Paul Gellen, now aged 44.

4. On 5 May 2022 in the Crown Court at Chelmsford he was convicted of one count of assault by penetration (count 1), contrary to section 2 of the Sexual Offences Act 2003, one count of sexual assault, contrary to section 3 of that Act (count 2) and two counts of rape, contrary to section 1 of the 2003 Act (counts 3 and 4). He was later sentenced in the same court to an extended determinate sentence of imprisonment of 21 years.

5. The papers before us include the written advice on appeal against conviction that was

provided to the applicant by his trial counsel on 23 May 2022. Counsel advised that there were no reasonable grounds of appeal, recording that the applicant himself had commented that the trial judge had been extremely fair.

6. It was on 17 November 2022, some six months after his conviction, that the applicant filed an application for an extension of time of 168 days for seeking leave to appeal against conviction. At the same time he applied for leave to adduce fresh evidence from his partner, K, with whom he had been in a relationship at the time and has remained in a relationship throughout.

7. The applicant's grounds for extending time were that his trial representatives represented him poorly and then advised him that "he should not appeal" but not that there was a time limit for doing so; that he has had difficulties in finding fresh representatives, and had to rely on family members who, like him, had no legal experience; and that he has mental health issues, and dyslexia.

8. The applicant's original grounds of appeal included details of his criticisms of his trial representatives, both solicitors and counsel. He was therefore required to waive privilege to allow them to respond, which they did, providing a detailed answer to each of the grounds of appeal that concerned the conduct of the defence case. The prosecution filed a Respondent's Notice and Grounds of Opposition. The applicant filed a document in response outlining why he said the court should reject the account given by his former lawyers and how he said the fresh evidence was critical to his appeal.

9. The single judge reviewed all this material: the grounds of appeal, the application to adduce fresh evidence, the documents filed in support, and in response, and in reply. Having done so the judge refused all the applications by way of a reasoned written order. That order addressed each ground of appeal and the fresh evidence. The judge's overall conclusions were that the evidence of K was not fresh evidence as it could have been adduced at the trial, that there were no arguable grounds of appeal, and accordingly that the application for an extension of time was refused.

10. The applicant exercised his right to renew his applications before the full court. Some months later he also filed numerous further applications for leave to adduce fresh evidence, accompanied by a further statement from K and statements from another six witnesses.

11. At the instigation of the Registrar of Criminal Appeals the applicant filed a written explanation of why this further evidence had not been used at trial or in the application at the single judge stage. At the same time he filed an application to amend the grounds of appeal, which now numbered 22, and a written explanation of how on his account the further items of fresh evidence met the statutory tests for admitting fresh evidence on appeal.

12. All of this has been done by the applicant acting in person. The documents tell us that all attempts to obtain fresh legal representation had so far failed. Not having leave to appeal he has no right to appear and represent himself today.

13. Yesterday we received an email from the applicant's brother containing what was said to be the text of a letter from "Advocate", the free representation charity. There was no attachment. The letter took the form of text set out within the brother's email set out in quotation marks. The quoted text was addressed to the court but unsigned and undated. It asked the court to grant a four-month adjournment to allow Advocate to find a volunteer to triage the applicant's case and, if the volunteer deemed the case eligible, to then search for representation by a senior barrister with relevant experience. The Court of Appeal Office responded that any such application should be made to the court by Advocate itself. No such application has been made. We have had no communication of any kind from Advocate itself.

14. We see no good reason to grant any adjournment. It is now some 20 months since the applicant was convicted. His original out-of-time applications were filed some 13 months ago. The single judge's decision to reject those applications was made nearly eight months ago on 9 May 2023. The renewal application was made a month later in June 2023. The further applications to which we have referred were made in September 2023. Assuming that Advocate has been approached by the applicant or on his behalf the inference that we draw is that this happened only recently. No explanation for such delay has been provided.

15. It is plain that Advocate has not yet taken any view on the merits of the proposed appeal. On the face of the papers, the organisation appears to know the broad nature of the case, but there is no evidence that it knows anything at all about any of the detail, including the grounds of appeal or the so-called fresh evidence that is relied upon.

16. We however have had the opportunity, and we have taken it, to review all the papers filed in support of the four applications we have mentioned and to consider whether an appeal would have any real prospect of success. The issues are not legally complex, such that professional representation would provide significant help in our task. Our conclusion is that an appeal would inevitably fail.

17. We can explain our reasons relatively shortly, but the number of grounds makes it impossible to be more concise than we shall be.

18. The facts are set out in the written summary provided by the Criminal Appeal Office. It is unnecessary to rehearse them in detail. The gist of the case against the applicant was as follows.

19. Counts 1 and 2 related to events on the evening of 6 December 2019. The applicant and his girlfriend went to the pub with C and had several drinks. C said that the following morning she woke up in the applicant's bed with little recollection of the night before. A couple of days later the applicant informed her by text message that there had been sexual contact between them that night which she had enthusiastically instigated. She had never been attracted to him and his account of what she had said and done made her think he was lying. She made this clear to him and she recorded some of their conversations thereafter.

20. The counts of rape (counts 3 and 4) related to events some three months later on the night

of 6/7 March 2020. C had been out with friends and become heavily intoxicated. The applicant gave her a lift home. She woke up with little memory of what had happened but bleeding from the vagina. She thought she may have been raped and said so to her son, T, then aged 17, who had been in the house that night. Two days later the applicant messaged C to say that she had instigated sexual contact. She denied it, saying that she would not have done so as she had been "out for the count". T had told her that she had passed out and that the applicant had been in her room for an hour or so.

21. To prove that the applicant engaged in the sexual activity alleged, the prosecution relied on C's evidence but mainly the applicant's own text messages demonstrating that he and C had had sexual relations on each occasion and on admissions that he had made in interview. Otherwise, the prosecution relied on evidence from C, from the friends that she had been out with, and from T, together with some forensic evidence, automatic numberplate recognition and cell site analysis evidence.

22. The applicant admitted and indeed asserted that the sexual activity alleged had taken but maintained that on each occasion it had been initiated by C who had the capacity to consent and did so, or at least he reasonably believed that she consented. He gave evidence in his defence, suggesting - as he had in interview - that C was strongly attracted to him in part at least because of his role as a successful DJ which he suggested had made her starstruck.

23. The issues for the jury were whether they were sure (1) that C did not consent and (2) that the applicant had no reasonable belief that she had consented. The jury returned majority

verdicts of guilty on each of the four counts.

24. Against that brief outline of the case we turn to the original grounds of appeal, which we will address under four main headings.

25. **Ground one: Failure to disclose.** The applicant contends that the police failed to obtain three categories of evidence: (1) text exchanges on the parties' mobile phones from which the full context of messages that were relied on would have been evident and would have undermined the prosecution or supported the defence; (2) CCTV footage of C and the applicant together; (3) evidence of previous false allegations made by C against other men.

26. The single judge said there was no failure to disclose; all reasonable lines of enquiry were pursued. The judge dealt with the three complaints in turn. He said that the police had obtained downloads of C's mobile phones and that of the applicant. Both had said that they had deleted some messages. There was, said the judge:

> " no basis for your assertion that messages in evidence were selective and, in any event, the messages you sent were inconsistent with your case at court, something that you could not explain."

The single judge said:

> "Even if CCTV footage existed and could have been obtained, it would have been a neutral feature. Such failings were emphasised on your behalf at trial. It was what happened on the occasions of sexual activity that were important."

The single judge continued:

> "There is no evidence of C having made demonstrably false previous allegations."

We agree with all of that. We note in particular that the applicant's messages to C made quite clear that he realised that she was unlikely to have any recollection of what had happened between them.

27. **Ground two: Poor representation by the defence team.** Again there are three alleged failures. The first was a failure to call evidence about the applicant's successful music career to rebut the prosecution's suggestion that he was a "Walter Mitty" character who had entertained fantasies about his own importance. As to this, the single judge said:

> "Such evidence as assisted your case could and should have been called at your trial. Such evidence as you were able to produce of your DJ career was before the jury; your apparent earlier success was not apparent from your circumstances at the time of the incidents the subject of the trial. It is apparent from the responses of your trial counsel and solicitor that you were robustly represented and all decisions relating to evidence including the calling of witnesses were made in consultation with you and with your agreement. You never complained about the quality of your representation at the time or even after conviction and prior to sentence."

We agree with all of that. The applicant took considered decisions about how his case should be run at trial. He did so on the basis of competent advice. He has no reasonable grounds now for criticising the advice that he sought and accepted and trying to run a different case on appeal. We would add that evidence about the applicant's music career

would only have been of real probative value if it went to show that C was impressed by it - a point that the applicant has failed to address.

28. The applicant's second complaint about his representation was failure to instruct and call appropriate forensic experts for the defence. The single judge responded that:

> "The sexual acts on which the alleged offences were founded were not disputed. DNA or other forensic scientific evidence could not assist your case. The absence of toxicological evidence was neutral."

We see no reason to differ from that opinion. Indeed we are unable to identify any reason to believe that any forensic scientific examinations or evidence could have helped the applicant's case.

29. The applicant's third complaint against his representatives was of a failure to call K, who he claims could have given important defence evidence. The single judge said this:

> "[K] was available to give evidence. For good reason she did not do so. You were a party to that decision. Her evidence is and would not be 'fresh', would not, in any event, have undermined [C's] evidence and would have been inconsistent with your case. The primary issue in relation to each of the offences was [C's] consent and any evidence [K] could give would not have assisted your case on that issue."

That is all plainly correct. The applicant's lawyers' responses make clear that this is another aspect of the case in respect of which the applicant sought, was given and accepted competent professional advice about how to run his case. He could have called evidence from K but chose, for sensible reasons, not to do so. It is not open to him now

to try to run a different case.

30. **Ground three: misdirection and improper pressure by the judge.** The applicant contends that the judge failed to give proper majority directions and that the jury was "rushed" into a decision in a manner that "some might see" as putting pressure on the jury. These points were made without the benefit of the transcript which is now available to us and was available to the single judge. We have read all the relevant passages of the summing up and the judge's directions to the jury and agree with the single judge, who said:

> "All the judge's directions were appropriate. You received a favourable full "good character" direction. No time pressure was put on the jury."

31. **Ground four: adverse publicity.** The fourth of the original grounds of appeal is that there was adverse publicity that resulted in an unfair trial. Specifically the grounds refer to "excessive and adverse social media reporting" a week after the accuser contacted the police. The single judge said that if there was any adverse publicity it had no relevance to or impact on the trial:

> "The jury was directed to try the case on the evidence."

That is correct and it is sufficient, but we would go a little further. First, the suggestion is that the social media publicity took place shortly after the applicant's arrest. That was a long time before his trial. Secondly, the high point of this ground of appeal is the allegation that there were social media postings using "offensive language" about the applicant. No detail is given and, despite the wealth of applications to adduce fresh

evidence, we have not identified any evidence of any such postings.

32. We turn to the application to amend the grounds. This is extensive. It is best considered alongside the applications to adduce fresh evidence.

33. The overall case advanced by the applicant can be broadly summarised in this way. There was evidence available that undermined the prosecution case or supported the defence case or could have done one or other of those things. There was a wealth of further evidence of a similar nature that the professionals involved could and should have obtained and used or disclosed for the purposes of the trial. This helpful evidence was not obtained or not used or not used effectively. The reason for that was incompetence on the part of the prosecution or on the part of the applicant's defence lawyers or both. But for this the outcome of the trial would or might have been different. The applicant maintains that all the new material meets the criteria in section 23(2) of the Criminal Appeal Act 1988.

34. In support of these over-arching points the applicant has submitted voluminous and detailed written materials. The court has read it all.

35. Some of the points in these documents amount to no more than reiteration of previous complaints. The applicant still maintains that his legal team blundered in failing to call evidence about his music career and not calling K. He rejects what his legal team have said about those matters. But we see nothing in this part of the new applications that credibly undermines the conclusions of the single judge on those points with which, as

we have said, we agree.

36. The applicant's other points fall under six main headings.

(1) First, he says there is evidence that undermines the prosecution case about the timing of events. He maintains that the ANPR and cell site evidence was at odds with the prosecution timeline and with the evidence of T about when the applicant and C were at her home. He says that there was also a photo on K's phone which nobody obtained or used that was similarly inconsistent.

The photo was readily available to the applicant, who was at all times in a close relationship with K. All the other material was in the hands of the applicant's legal team and most of it, if not all of it was before the jury. The times at which the ANPR was activated by the applicant's car and the cell site data were agreed facts. We are not persuaded that the applicant's lawyers arguably mishandled the material, or that there is anything in the material that could afford a ground for allowing an appeal against conviction. The precise timing of events was not an important issue. As the single judge reiterated on several occasions the issue was consent.

(2) Secondly, the applicant relies on social media evidence which he says shows that C was happy to associate with him on several occasions between the first and the second incidents. The applicant complains that the police failed to locate and disclose this material and that his own team similarly failed. He says that the material contradicts or undermines C's evidence.

This is all material taken from K's phone which the applicant and K could themselves have produced to his legal team. We also disagree with the applicant's assessment of its weight. His argument relies on myths about how victims of sexual assault behave. In any event, none of it is significantly at odds with C's evidence. It could not afford a ground for allowing an appeal.

(3) Thirdly, the applicant now suggests that the evidence of T was internally inconsistent. He complains that his legal team culpably failed to exploit the inconsistency. We see no arguable merit in these belated criticisms. The applicant's suggestion that there are other points that might if true have further undermined the evidence of T is no more than speculation.

(4) Fourthly, the applicant raises a number of points about forensic evidence that might have been obtained and called. Some of these are different points from those raised in the original grounds, but the answer is similar. The issue in the case was consent. Most of the forensic evidence discussed in this part of the application could not have had any bearing on that issue. There were agreed facts before the jury as to the effects of drugs and alcohol on C. The suggestion that toxicology evidence could have suggested that C was or may have been alert and thus undermined her evidence (supported by that of others) that she was effectively unconscious is purely speculative and lacking in credibility.

(5) Fifthly, the applicant complains about the way some of the evidence was presented to

the jury in edited form and in writing. He alleges that he was never shown the whole of C's pre-recorded cross-examination and that this and his own interviews should have been before the jury in unedited video form.

The course adopted at the trial was standard and proper practice, agreed to by the applicant's legal team. It was an agreed fact that the jury had been shown the relevant parts of C's cross-examination. The applicant has identified no basis for believing that the way these matters were dealt with was mistaken or caused him prejudice in any way.

(6) Sixth, and finally, the applicant refers to a friend of C's whom we shall call "M" who made a witness statement to the police but was not called to give evidence. The applicant asserts that M withdrew her statement and that it "could be the case" that M pulled out of giving evidence because she knew C's story was made up. The applicant relies on a recent social media message from M.

M was not a witness to any relevant event, but only to a disclosure to her by C and the fact that having received this and seen the applicant's text messages to C she contacted the police to suggest that he had raped C. M could have given evidence about those matters but that could not have helped the applicant's case. We ourselves can see no credible basis for suggesting that the defence could have undermined the prosecution case significantly or at all by adducing any other evidence from or about M.

37. In summary, we see nothing in the proposed additional grounds or in the further evidence that it is sought to adduce that could cast real doubt on the safety of the applicant's conviction.

38. Our overall conclusions are thus in substance the same as those of the single judge.

39. We can understand that the applicant has had some difficulties putting together his appeal papers, but the reasons given for the extensive delay in the first instance are not persuasive. We have, for instance, been shown no corroborative evidence to support the claim that the applicant has suffered mental health difficulties. It has not been considered necessary to investigate the applicant's claim that he was advised there was no time limit for appealing. On the face of things that seems highly improbable. If he genuinely believed that there was no time limit for pursuing an appeal, that was an unreasonable belief. He could easily have found out the true position.

40. In any event, for the reasons we have given we agree with the assessment of Mr Gellen's trial representatives, that he had no good grounds on which to appeal. We agree also with the decision of the single judge that the applicant failed to present any arguable grounds at that stage. And we do not find that the further material that has been filed since the single judge's decision provides any arguable basis for allowing the applicant to advance further grounds of appeal or to adduce fresh evidence or to have a full appeal hearing.

41. The applications are therefore refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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