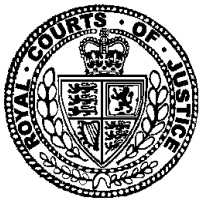

Neutral Citation Number: [2022] EWHC 1205 (Admin)

Case No: CO/4770/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT (ADMINISTRATIVE COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE MAY

- -

Between :

(1) RONALD JOHN BULLOCK **(2) CAROLE EILEEN BULLOCK**	**Claimants**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**
-and-	
DE	**Interested Party**

- -
- -

Philip Rule (instructed by **Thomas Horton LLP Solicitors**) for the Claimants
John Price QC (instructed by **Director of Public Prosecutions**) for the Defendants

Hearing dates: 15 March 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
LADY JUSTICE THIRLWALL

This judgment was handed down remotely by circulation to the parties' representatives by email, release to the National Archives. The date and time for hand-down is deemed to be 10:30am on 20 May 2022.

Lady Justice Thirlwall DBE:

1. This is the judgment of the court, to which we have both contributed.

Introduction

2. On 1 March 2015 police received an allegation of rape against RB. They arrested and interviewed him but quickly decided to take no further action. Nevertheless, at the age of 38 and just over a year after the allegation had been made against him, RB took his own life. The Claimants to this application for judicial review are his parents. They seek to challenge the Defendant ("DPP")'s decision dated 12 September 2019 not to prosecute the Interested Party, being the woman who had made the original allegation of rape against RB.

Reporting restriction

3. The provisions of the Sexual Offences (Amendment) Act 1992 apply. Nothing may be reported which could, during her lifetime, tend to identify the Interested Party as the alleged victim of a sexual offence. We refer to her in this judgment as DE.

4. Permission to bring these judicial review proceedings was granted by Supperstone J on 10 February 2020. Directions made on that occasion included joining DE as an Interested Party. Despite being joined, however, DE has never sought to make any contribution to proceedings. She was not present, or represented, at the hearing before us.

5. We are very grateful to both counsel – Philip Rule for the Claimants and John Price QC for the DPP – for their excellent written and oral submissions in this sensitive case.

Factual background

6. In February 2015, RB worked as a forklift driver at a company to which we shall refer as C. His shifts were from 1pm-9pm. DE was employed as a contract cleaner at two buildings on the same site where C was located, one of which was the office from which RB worked.

7. Sexual intercourse between RB and DE took place in one of the offices on site on Wednesday 25 February 2015. On Friday 27 February 2015 RB was informed by C that he had been suspended from work.

8. It subsequently appeared that DE had made a complaint of rape against RB to her employers on Friday 27 February 2015. On Sunday 1 March 2015 she made the same complaint to police. However, DE declined to make a written statement, to be medically examined or to be formally interviewed by police for an ABE (Achieving Best Evidence) video recording.

9. On Monday 2 March 2015 RB was arrested at his home by police on suspicion of rape, taken to Kidderminster Police Station and interviewed. Prior to interview RB, represented by the duty solicitor, was given advance disclosure of the matter about which he was to be interviewed. The written disclosure contained the following allegation:

"[DE] has alleged that…she and [RB]have gone upstairs at which point [RB] forced her onto [a] chair and started kissing her. She tried to push him away because she did [not want] to kiss him. He dragged her from the chair, bent her over a table, pulled her trousers down and had sex with her"

In interview RB gave a full account of consensual sex with DE. He said that he had asked DE if she wanted to go into the empty offices upstairs and have sex, to which she had assented. They had gone up together, kissed and had then had intercourse with her face down over a table. RB told police that DE had never given any indication that she did not want to have sex with him.

10. During the interview RB produced his phone to police, showing a series of WhatsApp messages exchanged between him and DE in the days and weeks leading up to their encounter on 25 February 2015, as well as messages sent by DE shortly afterwards on the same night and during the next two days. We have seen a full transcript of those messages.

11. The messages leading up to the encounter between RB and DE on 25 February 2015 are flirtatious and increasingly sexually explicit. Intercourse appears to have occurred at some point between 15.59 and 21.42 hours on Wednesday 25 February 2015, after which the messages continued. On Friday 27 February 2015 RB was suspended from work and by Saturday 28 February 2015 he was evidently unwilling to communicate with DE any further: he responded to a series of messages from DE on 28 February saying *"Dnt talk 2me ur a shit stirrer"* and then, in his final message to her *"Dnt think so u got me the sack so stay away"*.

12. After his interview RB was released on bail. It seems that his mental health difficulties, previously well-controlled, re-surfaced. At the end of May 2015, the police notified RB that no further action would be taken as there was insufficient evidence. He appears to have received a standard letter to the effect that the matter may be reviewed if any further evidence should come to light.

13. Despite learning that no further action was to be taken, RB's mental health continued to deteriorate and, in the early hours of 5 March 2016 he took his own life at his parents' home, where he was then living. His mother found him. Following an inquest, the coroner observed that he had no doubt that RB ultimately took his own life as a consequence of the rape allegation.

14. We understand how and why RB's parents and family, in their shock and grief at his death, should have sought answers and "accountability", as it is put in their application. We do not lose sight of the terrible pain which any parent must experience at losing a child, at whatever age, and particularly under these circumstances.

15. West Mercia police interviewed DE under caution on 29 March 2018, with her solicitor present. In that interview DE continued to maintain that RB had had sex with her on 25 February 2015 without her consent; she gave an account of what she said had happened, and she was asked about some of the messages which she had sent to RB after they had had sex. She told police that, although she had been due to be married to her partner within 6 weeks of the incident of sex with RB, she "had every intentions of building a relationship" with RB and having an affair with him. However, on the evening in question, although she had been happy to engage in kissing with RB she told

police that she had said to him that she did not want to have sex. DE informed police that two days later she had eventually told her partner about the sexual encounter, saying that it had been without her consent. She had also told her mother and was persuaded by them both that she needed to make a complaint to her employers and to police.

16. At the conclusion of the interview the officers told DE that the papers would be submitted to the Crown Prosecution Service ("CPS") and that she may be prosecuted for the offence of perverting the course of justice. The matter was sent to the CPS for a charging decision.

17. On 23 May 2019 RW James, Acting District Crown Prosecutor, informed the Claimants that the decision had been taken not to prosecute DE for any offence arising out of the allegation of rape which she had made to police in 2015. On 24 May 2019 the Claimants' solicitors wrote to the DPP asking whether the Victims Right to Review ("VRR") scheme would be extended to them, to enable them to seek a review of the decision not to prosecute DE.

18. The Claimants were told that the VRR scheme would not be extended to them and on 12 August 2019, the Claimants' solicitors sent a Letter before Action preparatory to proceedings seeking judicial review of the CPS decision. On 13 August 2019 a Mr English responded, on behalf of the DPP, saying that the matter would be reviewed afresh by a Specialist Prosecutor at the CPS Appeals and Review Unit ("ARU"). There followed an exchange of correspondence under which the Claimants' solicitors sought disclosure of all the material which the Specialist Prosecutor, Mr David Hurlstone would have available to him when considering his decision. This was refused and accordingly, on 11 September 2019 the Claimants' solicitors submitted representations without having had sight of any material other than that which they had already managed to obtain through their own efforts.

The Decision under Challenge

19. The Specialist Prosecutor's decision is dated 12 September 2019 ("the Decision"). Mr Hurlstone confirmed that DE would not be prosecuted, upon the basis that the case against DE failed the evidential stage of the CPS' Code for Crown Prosecutors. He decided that there was not a "realistic prospect of conviction".

20. The Decision went on to explain how and why Mr Hurlstone had arrived at this conclusion. He began by referring to the messages exchanged between DE and RB in the period leading up to 25 February 2015, describing them as *"flirtatious…increasingly sexually explicit. It appears that a sexual encounter between the two was anticipated"*. He noted that sexual intercourse took place although DE and RB's accounts of precisely what had happened differed, summarising this as follows:

"*The suspect asserts that she went upstairs with [RB], where he forcibly had vaginal sex with her before ejaculating on to her clothing. [RB]'s account in his police interview was that they agreed to go to a secluded part of the office where they kissed before having had consensual sex over a table."*

21. The Decision went on to refer to flirtatious messages exchanged after the event before dealing with the complaint made by DE, RB's arrest and the decision of the police to

cease the investigation and take no further action, followed by RB's death and the coroner's observations concerning the impact on RB of the rape allegation.

22. The Specialist Prosecutor then moved to deal with DE's interview by the police on 29 March 2018, recording as follows:

"She said that she had intended to have sex with the deceased at some point, but not on that particular night. She explained that the flirtations and friendly messages exchanged afterwards were because she did not wish to raise any concern or suspicion in case anyone at work found out what had happened."

23. The Decision referred to The Code for Crown Prosecutors together with further CPS guidance, including specific guidance relating to false complaints, before identifying the two main questions as (1) whether there had been an unambiguous complaint and (2) whether there was sufficient evidence to prove that the allegation was false.

24. As to the first of these, the Specialist Prosecutor concluded that whilst DE did not make a detailed or formal complaint of rape at the time, her account was nevertheless sufficient to enable the police to launch an investigation and to identify and interview RB; accordingly he would proceed on the basis that DE had made an unambiguous complaint.

25. Having reminded himself of what he described as a "crucial" passage in the CPS guidance (set out at paragraph [33] below), the Specialist Prosecutor proceeded to consider whether there was sufficient evidence to prove that DE's rape allegation was false. The key reasoning is to be found at pp5-7 of the Decision:

"The text message communications are the most important strand of evidence, and can be categorised as 'Pre-incident' and 'post-incident' messages.

The pre-incident messages are flirtatious and at times overtly sexual, but they do not in themselves establish that the rape allegation is false…The suspect said in her police interview that she was menstruating at the time of their encounter, they had no contraception, and the encounter was in the workplace. Against that background, the suspect's assertion that she went with [RB] for some form of consensual intimate encounter, anticipating it would fall short of full sexual intercourse, is not implausible.

The post-incident messages are more probative. They contain no expression of anger or annoyance, and they are signed affectionately with a kiss 'x' symbol. When [RB] asked her directly about whether she had a good time, rather than remonstrate or challenge the suspect simply replied "It was alright I suppose!! X". The messages are accordingly capable of suggesting that the sex had been consensual. However in her police interview the suspect offered an alternative explanation for her ostensibly friendly demeanour in the post-incident messages. She said that she was trying to remain as normal as possible and remained in usual contact with [RB] because she did not want to raise any concern or suspicion at work. I have considered the impact of the suspect's explanation for her apparently friendly messages in the aftermath of the alleged rape.

The CPS Guidance on rape and sexual offences reminds me of certain societal myths and stereotypes in relation to how victims behave. Prosecutors are obliged to recognise

and challenge these stereotypes…. With these factors in mind, the suspect's explanation as to why she continued to communicate with the deceased in a normal and affectionate manner is not so far-fetched as to be inherently implausible. I accept that the suspect's explanation is perhaps not the most likely interpretation of the messages, but it remains a reasonable possibility.

I note your representations in respect of alleged discrepancies between the suspect's original account and her later police interview. I am not convinced that any such differences are material, particularly when the original account was not recorded in a formal statement or ABE or in any great detail…I concluded that any potential discrepancies between the suspect's initial account to the police and her explanation in interview are not so significant that they establish that her allegation was demonstrably false.

As in all criminal cases, the prosecution would bear the burden of proving each and every element of the offence so that the court is sure of the suspect's guilt. Any doubt would be resolved in favour of the suspect, who in this case would also receive the benefit of a good character direction.

The guidance requires me to exercise particular care in cases where "it is necessary to show the suspect consented to a sexual act in order to prove falsity". The post-incident text messages exchanged are not unequivocal admissions to having had consensual sex. Although there is a possibility that the suspect fabricated the allegation of rape, there also remains a possibility that her original allegation "might reasonably be true." Accordingly, the theory that the suspect might have been raped cannot be reasonably excluded, and it therefore follows that the second step in the CPS guidance is not met."

Grounds of Challenge

26. In his Grounds of Challenge and in his skeleton prepared for this hearing Mr Rule raised five grounds of appeal as follows:

(1) Failure to consider all relevant facts and matters and/or a failure to take into account relevant matters and/or a material factual error in reaching the decision.

(2) Denial of justice, error of law and/or misunderstanding or misapplication of the DPP's own guidance on prosecuting offences, including in relation to prosecuting false allegations of rape.

(3) Failure to discharge the state's obligation to conduct an effective investigation into the offence in breach of Articles 2, 3 and/or 8 of the European Convention on Human Rights ("ECHR").

(4) Failure to disclose to the Claimants all the material in the possession of the decision-maker and upon which he would make his decision.

(5) The decision not to prosecute was Wednesbury unreasonable i.e. one that no reasonable prosecutor could have arrived at.

27. As we indicate below, whilst Mr Rule did not formally drop grounds 3 and 4, they were not at the forefront of his submissions at the hearing. His focus before us was on the way in which the Decision dealt with aspects of the evidence, in particular messages exchanged between DE and RB immediately after the incident of intercourse, and inconsistencies in the accounts of the incident given by DE to police at the time, and subsequently.

28. Before turning to the argument, we review what is required to establish an offence of perverting the course of justice arising from a false allegation of rape, together with relevant prosecutorial guidance.

False allegation – perverting the course of justice

29. It was not in dispute that a false allegation of rape is capable of constituting the common law offence of perverting the course of justice. The key element of that offence, as it concerns an allegation of rape, is whether the allegation is false. Before a jury could convict, they would need to be sure that the allegation was untrue; in some cases that might involve a finding that sex had not taken place, but in this case, where it was not in dispute that intercourse occurred, the jury would need to be sure that DE had consented to sex with RB before they could convict her of perverting the course of justice.

Prosecutorial guidance

The DPP and the Code for Crown Prosecutors

30. By section 3(2)(a) of the Prosecution of Offences Act 1985 the DPP is responsible for the conduct of all (non-exempted) prosecutions brought by the police following investigation.

31. Under section 10 of the 1985 Act the DPP is required to issue a Code for Crown Prosecutors giving guidance on the general principles to be applied in determining whether, in any given case, a prosecution should be instituted ("the Code"). The section of the Code entitled "General Principles" includes the following:

> *"2.2 It is not the function of the CPS to decide whether a person is guilty of a criminal offence, but to make assessments about whether it is appropriate to present charges for the criminal court to consider..*
>
> *2.5 It is the duty of prosecutors to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible..*
>
> *2.10 Prosecutors must apply the principles of the [ECHR] ..at every stage of a case. They must comply with any guidelines issued by the Attorney General and with the policies and guidance of the CPS issued on behalf of the DPP…CPS guidance contains further evidential and public interest factors for specific offences and offenders.."*
>
> A following section of the Code, entitled "The Full Code Test" sets out the two-stage test which is required to be met before a prosecution may be initiated. The following provisions are material to the present case:

"4.1 Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test..

4.2 The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage.

..

4.4 In most cases prosecutors should only consider whether a prosecution is in the public interest after considering whether there is sufficient evidence to prosecute…

Under the next heading, "The Evidential Stage", the guidance includes the following:

"4.6 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.7 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

4.8 When asking themselves whether there is sufficient evidence to prosecute, prosecutors should ask themselves the following:

Can the evidence be used in court

…

Is the evidence reliable?

…

Is the evidence credible?

…

Is there any other material that might affect the sufficiency of the evidence?

…"

32. The second strand of the Full Code Test, namely the Public Interest Stage, is not relevant to our decision on this application, since the Decision in this case was concerned solely with the first, evidential, stage. Having decided that the evidential test had not been met, the Specialist Prosecutor did not need to, and did not, go on to consider the public interest stage.

Further prosecutorial guidance on false allegations

33. The CPS has issued further guidance for prosecutors specifically addressing prosecutions in cases of false allegations: *"Guidance for Perverting the Course of Justice and Wasting Police Time in Cases involving allegedly False Allegations of Rape and/or Domestic Abuse"* ("the False Allegation Guidance"). The False Allegation Guidance contains the following material directions:

"1. This guidance applies to cases when a charging decision is being made on a person who has made an allegation of rape or domestic abuse and one of the following situations apply:

- *It is suggested that their allegation is false*

…

3. Prosecutions for these offences in the situations above will be extremely rare and by their very nature they will be complex and require sensitive handling. On the one hand, victims of rape and/or domestic abuse making truthful allegations require the support of the criminal justice system. They should not be deterred from reporting their allegations…On the other hand, false allegations of rape and/or domestic abuse can have serious adverse impact on the person accused. This is why these cases must be examined thoroughly by suitably experienced prosecutors who should strike the right balance between ensuring genuine victims are believed and not criminalised whilst recognising the need to protect the innocent from false allegations.

Under a heading "Core Considerations" there appears this guidance:

"6. Prosecutors must not resort to using myths and stereotypes once associated with victims of rape and/or domestic abuse….

7. The vulnerabilities of the suspect under consideration must be properly assessed and taken into account..

8. The context in which the original complaint was made must be considered…

There follows a section entitled "Observations on the Evidential Stage" which includes the following:

"Cases Where it is Suggested that the Complaint is False

11. A person who deliberately makes a false allegation of a crime in the knowledge that there is a risk that the police will conduct an investigation would have committed one of the relevant offences and is liable to be prosecuted subject to public interest considerations.

12. The first question will be whether the suspect has in fact made a clear and unambiguous complaint of a crime against an identifiable individual in the first place…

13. The second question will be whether there is sufficient evidence to prove that the allegation was in fact false. <u>If the evidence is such that the original allegation might reasonably be true then there is not a realistic prospect of conviction and no charge</u>

should be brought. The mere fact that the original allegation did not meet the evidential stage of the full Code test does not mean that the prosecution can prove that it was false. That involves an entirely different question. Likewise, where a complainant withdraws their support for a prosecution but nevertheless maintains their allegation is true, this is unlikely in itself to be sufficient to found a case for one of the relevant offences.

14. Most cases of rape and/or domestic abuse will involve one person's word against another. Prosecutors should work proactively with police to make sure any other evidence which may be relevant to the issue has been obtained. Such evidence will include… telephone traffic, text message or other electronic message exchange…

15. It is important that such evidence is scrutinised with care to see whether it really does support the falsity of the allegation made and, if so, to what extent or whether it tends to support its truth. When applying such scrutiny the quality and true value of the evidence must be assessed in the light of what [is] sought to be proved by it. The evidence may, for example, more readily and clearly prove falsity where it is incontrovertible evidence [such as clear CCTV footage] which shows that the parties were not even together at the time the allegation is said to have occurred,. It may less readily and clearly do so, for example, in situations where it is necessary to show the suspect consented to a sexual act in order to prove falsity. Care must be taken to apply the appropriate weight to such evidence.

16. Inconsistencies in the various accounts provided by the suspect whether given in statements/ABE interviews or informally…can be considered. It is important, however, to bear in mind that it is common for true victims of sexual and domestic abuse to give inconsistent accounts due to the trauma of the attack or for other reasons. The extent and circumstances of any inconsistencies must be carefully scrutinised. Positive contradiction of the suspect's allegation is of much more value than inconsistencies." (emphasis added)

Court review of prosecutorial decisions

34. The independent role of the DPP and the constitutional principle of the separation of powers means that the courts will intervene very rarely in prosecutorial decisions. The position was summarised recently by the Divisional Court in *R (Monica) v DPP* [2019] QB 1019 (Lord Burnett, CJ, and Jay J), [44]-[47], where the court distilled the following principles, at [46]:

> "(1) Particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: L's case 177 JP 502, para 32.
>
> (2) a significant margin of discretion is given to prosecutors: L's case, para 43.
>
> (3) Decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.

> (4) It is not incumbent on decision-makers to refer specifically to all the available evidence. An overall evaluation of the strength of the case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment."

The Parties' arguments

35. As we have indicated, Mr Rule's principal focus in argument was upon the evidential material which underpinned the Decision. He addressed grounds (1), (2) and (5) together in arguing that the Decision had failed correctly to appreciate the facts and evidence, in particular the evidence of contemporaneous messages, inconsistencies in the accounts given by DE and what he termed the "inherent implausibility" of relevant aspects of her later interview account.

36. In relation to Ground 2, in his written submissions Mr Rule suggested that the decision-maker had incorrectly applied the Full Code test, wrongly usurping the function of the jury to hear the evidence and make assessments of credibility. It is fair to say, however, that he did not press this line of argument at the hearing.

37. Mr Rule's main attack was directed to the treatment in the Decision of the post-incident messages, in particular these messages from DE to RB sent shortly after they had had intercourse:

    (i) Message sent at 22.56 hours on 25 February from DE to RB *"..I can't believe what happened tonight why? x"*, to which RB replied *"You didn't have to did ya?? X"* and DE responded *"Yes I know that…I don't do things like this iv only ever slept with people that like me ha ha x"*

    (ii) Later the same evening a message from DE to RB *"…must be mad letting u ha ha x"*, to which RB replied *"U did say u were crazy haha x"*, after which DE messaged *"I'm completely crazy…so why did u do that tonight? X"* and RB responded *"Coz I thawt that we'd have a gud time X"* to which DE replied *"[emoji smiley face] yeah! X"*

38. Mr Rule submitted that the Specialist Prosecutor wrongly characterised these messages as merely suggestive of consent, rather than as proof of consent by means of contemporaneous messages from DE's own mouth which directly contradicted her later account of non-consensual sexual activity. Further, when considering myths and stereotypes, the Specialist Prosecutor had not dealt with what Mr Rule called the "flat contradiction" in the content of the messages.

39. Moving to the police interview of DE, Mr Rule emphasised the absence of any plausible explanation given by DE when confronted with the above messages. He pointed to inconsistencies and obvious implausibilities in what she said to police in interview as follows:

    (1) Telling police that she was not concerned whether her fiancé found out or not: Mr Rule says that not only was this inherently implausible, but it was also contrary to DE's contemporary concern expressed in her messages to RB to keep the encounter a secret.

(2) In interview DE said that she had gone upstairs willingly and that there had been consensual kissing before sex. Mr Rule drew attention to the inconsistency with her original account given to police, to the effect that she had been forced upstairs and kissed against her will.

(3) DE told police that she had been uncomfortable with having sex because, for one reason, she was menstruating. However contemporary evidence, including from GP records recently disclosed, indicates that her period did not start until the next day, 26 February 2015.

(4) DE told police that she had had every intention of embarking on an affair with RB, but had declined to meet him in town as that would arouse suspicion. She gave no explanation of where she and RB would meet for their affair, if not at work.

(5) DE's admission in interview - that she knew a friend of RB was standing guard to make sure they were not interrupted - was inconsistent with the notion that she did not go upstairs with RB intending and agreeing to have sex with him there.

40. Mr Rule submitted that the Specialist Prosecutor had failed properly to acknowledge or analyse the effect of the above inconsistencies/implausibilities. Moreover, whilst accepting that motive is not a necessary element of the offence, Mr Rule argued that motive was of evidential significance and that the messages showed DE to have made a false allegation against RB for one of the following reasons: revenge for breaching her request to keep the sex between them a secret, protecting herself from discovery of her infidelity and/or wider knowledge of it reaching her mother at work (since her mother worked at the same place) and/or her fiancé. The Specialist Prosecutor had wrongly ignored the strength of this evidence, Mr Rule submitted.

41. Referring to the passage in the False Complaint Guidance highlighted above, Mr Rule submitted that taking the evidence of what DE said in the messages at the time, combined with inconsistencies in her account given to police, her account of not having consented to sex with RB was simply not a reasonable possibility. It was Wednesbury unreasonable, he argued, to read the messages as consistent with a case that the rape allegation was true. Mr Hurlstone's characterisation of the messages as "not unequivocal admissions (of consensual sex)" was a finding that was not properly open to him in the light of their content, taken together with the implausibility of DE's explanation for them.

42. Although references to Article 2 and 3 appeared in Mr Rule's skeleton argument dealing with Ground 3, it is fair to say that he did not press his submissions on the ECHR at the hearing. Nor did he pursue Ground 4, the lack of disclosure point, in view of the earlier interlocutory decision in this case made by a different court (Dame Victoria Sharp, P, and William Davis J at [2020] EWHC 2259 (Admin)), inter alia refusing to make an order for further disclosure.

43. Mr Price, for the DPP, responded succinctly. In a case such as the present, he said, which turned on irreconcilable accounts given by the only two parties to a sexual act, the decision turned on the analysis of the strength of the evidence of the text messages, and DE's explanation of them. The CPS lawyer had assessed those messages, had applied the correct test, and in clear and rational reasoning he had come to the conclusion that the evidential test in the Code had not been met.

44. Mr Price stressed that the assessment involved the exercise of expert prosecutorial knowledge and jury trial experience, in circumstances where DE had consistently maintained that she had not consented to sex with RB on 25 February 2015.

45. Mr Price pointed to the special considerations which apply to the case of a sexual complaint. Referring to the case of *Hodge* [2018] EWCA Crim 2501 he accepted that there was no rule by which a jury must be directed to beware erroneous assumptions when assessing evidence of a defendant accused of making a false complaint of rape; but nor was there, he said, a rule that such a defendant may not have the benefit of any such direction. It would be for the trial judge to decide in each case. That being so, he suggested, it would have been wrong for the Specialist Prosecutor not to have taken such a direction, and its effect upon the jury's deliberations, into account when considering the evidential test in the Code.

46. Mr Price submitted that what Mr Rule had characterised as discrepancies in the accounts given by DE were not straightforwardly to be identified as such, given that DE had declined to make any formal statement or give an ABE interview in 2015 when she first approached police. There was no record, therefore, of precisely what she told police, beyond what was put to RB at the time he was interviewed; if DE did not now accept that she had said what the police put to RB then there would be no record to contradict her.

47. In his written submissions Mr Price dealt shortly with Ground 3 and Articles 2 and 3 of the ECHR by pointing out that faithful compliance with the Code suffices to discharge obligations of a prosecutor under the ECHR, referring to the case of *R (da Silva)* [2006] EWHC 3204 (Admin).

Discussion and conclusions

48. Prosecutorial decisions will rarely be interfered with by the court, and then only where there is an obvious mistake. An error of law, such as that identified in *R (F) v DPP* [2014] QB 581 is one example; another, more recent one, is to be found in the case of *R (Torpey) v DPP* [2019] EWHC 1804 (Admin) where the court found that statements made by the CPS lawyer in his decision were "not easily identifiable in the evidence" and that the decision, taken as a whole, gave rise to a real concern about the care, thoroughness and detail which had gone into it.

49. Mr Rule's grounds and written submissions had suggested an error in the way the Specialist Prosecutor had approached the evidence, arriving at his own view rather than considering what view a jury might properly take. However, Mr Rule was right not to press this line of argument at the hearing; taking the decision as a whole it is clear to us that the CPS lawyer approached his task in accordance with the prosecutorial guidance to which we have referred above.

50. We considered whether there was a possible tension between the Code test at para 4.7 – *"..an objective, impartial and reasonable jury... properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged"* - with the guidance appearing at para 13 of the False Complaint Guidance, viz *"If the evidence is such that the original allegation might reasonably be true then*

there is not a realistic prospect of conviction and no charge should be brought". We have concluded that the passage at para 13 of the False Complaint Guidance is more properly to be seen as a refinement of the general balance of probabilities assessment, adapted to a case of false complaint, reflecting a prosecutorial recognition that if the original complaint might reasonably be true then a jury properly directed as to the burden and standard of proof must necessarily acquit. When further explored, Mr Rule's criticism was not so much that the Specialist Prosecutor had applied the wrong test, but rather that no prosecutor could, on the evidence, have considered DE's account of non-consensual sex a reasonable one.

51. We consider that Mr Rule was also right not to pursue his Ground 3 reliance on Articles 2 and 3 of the ECHR. We agree with Mr Price that this point stands or falls with the question as to whether there has been full compliance with the Code. It has never been the Claimants' case that the provisions of the Code itself give rise to breaches of the ECHR. We say no more about Ground 3.

52. The real focus of Mr Rule's case, therefore, was upon the content of the CPS lawyer's reasoning and his approach to the evidence, in particular to the contemporary text messages and inconsistencies between the complaint as initially put by the police to RB, and three years later when DE was asked about it in interview, together with inherent implausibilities in that latter account. Mr Rule contended that there was an insufficiently detailed engagement with the evidence in the Decision and that, had the Specialist Prosecutor analysed it more closely as he should, then he could not have reached the view that DE's account of not having consented to intercourse was a reasonable one, on the evidence.

53. We see some force in Mr Rule's point that the text messages which DE sent after the sexual encounter appear directly to contradict her account that the sex was non-consensual, and that the Specialist Prosecutor's characterisation of them in his Decision as "capable of suggesting" consent underplays to some extent the strength of that evidence. But as Mr Price pointed out, the issue of consent thrown up by these messages required the Specialist Prosecutor to go on and consider DE's explanation for those messages, which he then proceeded to do. Unfortunately, in her interview, instead of confronting her directly with the meaning of the messages to which we refer above, police asked instead how the messages made DE feel, and failed thereafter to revert, so there was no clear response by DE in interview for the Specialist Prosecutor to consider.

54. We also considered whether the Specialist Prosecutor's reasoning suggested that he had wrongly restricted his assessment of the impact of the messages as showing a lack of confrontation, or challenge, from DE, rather than more directly identifying them as indicating positive consent, thereby missing their full importance within the evidence as a whole. The references on p.3 of the Decision to "ostensibly friendly demeanour" and the discussion about myths and stereotypes in the following paragraph tended to support Mr Rule's argument. However, on the next page of the Decision the Specialist Prosecutor concludes that *"the post incident text messages exchanged are not unequivocal admissions to having had consensual sex"*, indicating that he had considered the messages with that question – whether the messages provided direct evidence of consent – well in mind. Taken as a whole, therefore, we are unable to say that the Specialist Prosecutor failed to consider the full import of the messages in relation to the issue of consent. Nor are we prepared to say that, taking the text messages together with the account which DE gave in interview as to why she continued

to correspond with RB following their sexual encounter, the lawyer was obviously wrong in his assessment of the messages as *"not unequivocal admissions"*. When we asked Mr Rule whether it was out of the question that a jury could find that DE was embarrassed and had sent the messages to try to maintain the appearance of normality he acknowledged that it was not, although he maintained his submission that the message content was consistent only with consent.

55. We think Mr Price was right to say that the CPS lawyer would have been expected to consider the effect upon a jury of a myths and stereotypes direction, indeed we did not understand Mr Rule seriously to suggest otherwise.

56. There are inconsistencies between the account as put to RB in interview and as given to the police by DE when she was interviewed 2 years later. Chief amongst these is the difference between the account of being forced upstairs and forced to kiss before having non-consensual sex, as put to RB in interview, with DE's later account in interview of intending to embark on an affair and of meeting RB at work that day with a view to intimacy, before going upstairs with him and kissing consensually.

57. We bear in mind the principles summarised in the extract from the case of *Monica* set out above, in particular that a prosecutor is not required to refer to every single piece of evidence. Nevertheless, it would have been preferable for the Decision to have identified and dealt with the inconsistencies in DE's account in more detail; the reasoning in this respect is rather brief. But although the Decision omits specifically to identify any individual discrepancy, the Specialist Prosecutor does refer to representations submitted to him in writing by the Claimants' solicitor. We have seen and considered those representations, in which, as might be expected, each of the inconsistencies now relied upon by Mr Rule was identified and brought to the attention of the Specialist Prosecutor, along with points on the implausibility of DE's account given to police. In those circumstances, although the reasoning in the Decision is brief, we are unable to find that the Specialist Prosecutor did not properly consider the effect upon a jury of the inconsistencies and implausibilities. Moreover, as Mr Price pointed out, the evidential value of inconsistencies between the account which DE gave to the police in 2015 as against her account given in interview three years later has to be considered in circumstances where there was no signed witness statement made by DE, nor an ABE interview with her, thus no formal recording of what she did say in 2015, with which she could be confronted at any trial.

58. We also agree with Mr Price that the evidence from the GP record of when DE's periods started could not have justified re-opening the decision. The effect of this additional piece of evidence could not in our view have altered the Specialist Prosecutor's conclusion regarding the impact upon a jury of evidence of inconsistencies in DE's account generally.

59. Thus, although we regard some of the reasoning in the Decision to be rather briefly expressed it does not prevent us from identifying how the Specialist Prosecutor's reasoning was founded in the evidence, nor is it such as to give rise to a concern that his approach lacked care or thoroughness, as the court found in *Torpey*. As Mr Price rightly pointed out, there will be cases where reasonable prosecutors may come to different decisions. We are unable to find that the decision in this case was so unreasonable as to fall outside the wide margin of prosecutorial discretion. This is not

one of the rare cases where it can clearly be said that the decision not to prosecute was wrong.

60. For these reasons the Claimants' application must be dismissed.