Neutral Citation Number: [2011] EWCA Crim 460
No: 201003792/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 28th January 2011

B e f o r e:
LORD JUSTICE HOOPER

MR JUSTICE OPENSHAW

MRS JUSTICE SHARP DBE

R E G I N A

v

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(Official Shorthand Writers to the Court)

Mr A Baker appeared on behalf of the **Appellant**

Mr J Jenkins appeared on behalf of the **Crown**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE HOOPER: In 2005 the appellant (as he now is) was convicted of the rape of his daughter, aged under 16, contrary to section 1(1) of the Sexual Offences Act 1956. He was subsequently sentenced to 10 years' imprisonment. He was acquitted by the jury of a further count of rape of his daughter, that being count 1 and he was acquitted by the jury of a count of indecent assault of his daughter (count 3). There was a further count (count 4) which alleged indecent assault on his daughter and on that count he was acquitted by the jury on the direction of the judge.

2. He has applied for an extension of time (some 5 years) in which to apply for leave to appeal against conviction and to rely on fresh evidence. That application has been referred directly to this court. We grant the necessary extension. We grant the application for leave to appeal. We allow the appeal and we quash the conviction.

3. After his conviction in April 2005 the appellant approached an organisation alleging that he had been wrongly convicted. He subsequently became disillusioned with the apparent lack of progress and went to a firm of solicitors, Chris Saltrese Solicitors. They put in hand the obtaining of the necessary funding from the Legal Services Commission and eventually obtained a report from a Dr Goy and that report was shown to the respondent. The respondent themselves instructed another expert, Dr Allard, who confirmed the conclusions of Dr Goy.

4. To understand the fresh evidence we need to say something about the facts of this case. The appellant had been married for nearly 16 years and there were three children. The complainant was aged 14 at the time and there was another brother and a sister. There was evidence before the jury that the house occupied by the appellant and his wife and their children was a very untidy house and that clothes which had been left in the laundry pile for washing by one member of the family were sometimes removed and used by other members of the family. There was also, on the evidence, a sharing of clothes. That is important when we look at the evidence which was before the jury and the evidence which is now available to us.

5. We say no more about the counts upon which the appellant was acquitted, save only to say that the jury must have had some difficulty with the evidence of the complainant on those other matters.

6. The count which is relevant to this appeal (count 2), as we have said, alleged a rape. That rape took place, so it was said, on a specified date in 2004. It was the complainant's evidence that it was a Friday, that she had gone to bed and that her father, the appellant, came into the room, pulled her shorts and underwear down, pulled down his own trousers and inserted his penis into her vagina.

7. The appellant consistently denied that this occurred. He called his wife to give evidence and the effect of her evidence and that of the daughter was to the effect that this alleged rape had not occurred.

8. A Dr Watkiss gave evidence that she had examined the complainant some four days after the alleged rape. She had had over 30 years' experience in children's health and

specialised in sexual abuse cases. The effect of her evidence was that the opening to the complainant's vagina was "lax" and gave the appearance that Dr Watkiss regularly saw in "a sexually active teenager", which the complainant denied she was. That evidence was important to the extent that it showed that someone had had sexual intercourse with the complainant but did not show that it was the appellant.

9. The evidence which was fundamental to the prosecution's case that it was the appellant who had had intercourse with the complainant came from a forensic scientist, Dr John Whiteside, who we are told has now retired.

10. The underwear which the complainant had been wearing at the time was, by the time of the investigation, no longer available for examination. But on the complainant's evidence she was wearing a pair of shorts which were available. Dr Whiteside gave evidence that he found on the shorts (which he described as very well worn and grubby) semen matching the appellant on the crotch of the shorts, together with DNA that could only have originated from the complainant. Dr Whiteside's evidence therefore supported the prosecution's case that the appellant had ejaculated into the complainant's vagina and that this had been followed by drainage from the vagina into her shorts. We note in passing that the vaginal swabs taken some days after the alleged rape did not show any semen.

11. It is not necessary to go into the detail of the reports of Dr Goy and Dr Allard. It is sufficient to quote one sentence from the report of Dr Allard who, as we say, was asked by the respondent to examine the conclusions of Dr Goy. She wrote:

> "In my opinion scientific findings do not help to progress the issue of whether vaginal intercourse occurred."

12. This completely undermines Dr Whiteside's evidence.

13. The prosecution accept that if this evidence had been available to the jury, it may very well have made a difference to the verdict which the jury reached. The respondent did not seek a retrial, giving the following reasons. The complainant has made a new life for herself and she does not wish to go through a retrial. She however maintains the truth of her original allegation.

14. In those circumstances we quash the conviction. We do not order a retrial. We direct his immediate release.

15. I think it is important that this matter be reported, probably by the Crown Prosecution Service to whatever body is responsible for this kind of forensic evidence. You say that Dr Whiteside has retired but a copy of judgment, when available, should be sent to the Criminal Cases Review Commission in case they have any cases involving Dr Whiteside.

16. MR JENKINS: My Lord, I will report that back.

17. LORD JUSTICE HOOPER: Your solicitors are to be congratulated on all the work they have done.

18. MR BAKER: I will pass that on. This is very difficult work to fund. It is a very thankless task and there are very few people willing to undertake it. It is astonishing the diligence with which this solicitor acted, when three other firms, who purported to do this type of work, rejected any potential grounds.

19. LORD JUSTICE HOOPER: I think this court is aware of the problems faced by solicitors when dealing with this kind of work but this court certainly congratulates them and, of course, you on all the work you have done.