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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT

CASE NO 202403017/B1

[2024] EWCA Crim 1354

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 17 September 2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE NICKLIN
MRS JUSTICE THORNTON DBE

REX
v
BKJ

PROSECUTION APPLICATION AGAINST A RULING
UNDER S.58 CRIMINAL JUSTICE ACT 2003

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MISS J WHITBY appeared on behalf of the Applicant Crown
MISS V MEADS appeared on behalf of the Respondent Defendant

JUDGMENT
(Approved)

1. THE VICE-PRESIDENT: This is an application by the prosecution pursuant to section 58 of the Criminal Justice Act 2003 for leave to appeal against a decision of a recorder in the Crown Court to stay proceedings as an abuse of the process.
2. Reporting restrictions apply to this case. It concerns allegations of sexual offences against three complainants whom we will call "C1", "C2" and "C3". Each of them is entitled to the life-long protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify any of them as a victim of the alleged offences.
3. In the listing of this hearing the name of the accused has been anonymised by replacing his name with the randomly chosen letters BKR. We will not name or otherwise identify him in this judgment because in the circumstances of this case identifying the accused could well lead to identification of the complainants.
4. Further restrictions apply by virtue of section 71 of the 2003 Act. We are however satisfied that provided the orders in relation to anonymity are observed, this judgment may be published in the terms in which it is given. We therefore make an order pursuant to section 71(3) of the Act that the restrictions in section 71(1) shall not apply to any report of this application. We reiterate that the accused is not named or otherwise identified in this judgment.

<u>The facts</u>

5. For convenience we shall refer to the applicant as the prosecution and to the respondent as the accused.
6. The accused is charged with offences of rape and assault by penetration. He admits the alleged sexual activity with each of the complainants but says that they all consented. He

alleges that the allegations against him have been made as a result of collusion between the complainants to make false allegations. The complainants are all known to each other and they had reported matters to the police within about 24 hours of one another.

7. It is unnecessary to say more about the facts giving rise to the charges.

The investigation and trial

8. In the course of the investigation, each of the complainants was asked to provide her mobile phone to the police for examination. This, however, was not done until more than three months after the allegations had first been reported. C1 and C3 provided their phones; C2 declined to do so.

9. No application had been made before the trial to stay the proceedings as an abuse.

10. At trial, as is usual, the evidence-in-chief of the complainants was given in the form of video recordings which we shall refer to as the "ABE interviews". Cross-examination of the complainants had also been recorded in advance of the trial. We understand that the cross-examination of the complainants included putting to them the allegation that they had colluded to give false evidence. The accused for his part had made no comment when interviewed under caution.

11. The officer in charge of the case, to whom we shall refer simply as "the officer", gave oral evidence. She was asked to explain her role. She replied:

> "I gather all the evidence available, review that, record it, and I also look at any further lines of enquiry and exhaust those enquiries to build a case."

12. She explained that she had conducted the ABE interviews, interviewed the accused under caution and liaised with his family and the families of the complainants.

13. In cross-examination, the officer confirmed that her role was to ensure that all reasonable

lines of enquiry were undertaken and to investigate both the guilt and innocence of the suspect. She was cross-examined to the effect that she had failed to fulfil that duty. It was put to her that she had been trying to build a case against the accused rather than investigating it, an allegation which she denied. She agreed that she had referred to "building a case" but said that that was a use of police jargon. She did not say at any point that she saw it as her role to build a case against the accused. It was alleged that she had failed to act promptly to recover the mobile phones, had failed to follow up lines of inquiry which could have assisted the accused and had failed to record matters properly.

14. The transcript of one of the ABE interviews was provided to the jury so that they could follow cross-examination to the effect that the officer had asked leading questions and questions which inaccurately summarised what the complainant had said. In her answer the officer referred amongst other things to the pressures of work upon her and the fact that she did not have assistance. She denied the allegation that the failures suggested had been deliberate on her part, saying that she had not done anything untoward on purpose.

The application to stay proceedings

15. At the conclusion of the prosecution evidence, defence counsel applied to stay the proceedings as an abuse of the process of the court under both of the categories recognised in decided cases such as R v Maxwell [2010] UKSC 48: namely, cases in which it is not possible for the accused to have a fair trial and cases in which it would offend the court's sense of propriety and justice to be asked to try the accused.

16. As to the first of those categories, it was submitted on behalf of the accused that he could not have a fair trial because the police had failed to secure and preserve evidence which may have been recovered from the phones of the complainants, thereby giving the

complainants an opportunity to delete material which could have supported the defence allegation of collusion. We should note that one of the criticisms made of the officer was that she had alerted the complainants to the prospect that their phones might at some future date be required by the police, thus (it is alleged) in effect 'tipping them off'.

17. As to the second category, it was submitted that a stay of proceedings was necessary to protect the integrity of the criminal justice system and fairness to the accused. It was suggested that there was real concern as to the behaviour of the officer and whether the delay in collecting the phones was deliberate on her part.

18. The prosecution opposed the application. They drew attention to rule 3.28(2) of the Criminal Procedure Rules which requires an accused who wishes to apply for a stay to do so:

> "(i) as soon as practicable after becoming aware of the grounds for doing so
> (ii) at a pre-trial hearing, unless the grounds for the application do not arise until trial, and
> (iii) in any event, before the defendant pleads guilty or the jury (if there is one) retires to consider its verdict at trial ..."

19. In relation to the allegation of a category 1 abuse of process, the prosecution referred to familiar case law: <u>R (on the application of Ebrahim) v Feltham Magistrates' Court</u> [2001] 1 All ER 831, <u>R v ANP</u> [2022] EWCA Crim 1111 and <u>R v Watson</u> [2023] EWCA Crim 1016.

<u>The judge's ruling</u>

20. The judge accepted that there had been good reason to delay the application. That was a generous decision. True it is that part of the accused's argument related to evidence which had been given in cross-examination of the officer. But the complaint that a fair trial was not possible could have been made well before the trial began.

21. In his extempore ruling the judge referred to the two categories of abuse of process. In relation to the second category, he said:

> "The other limb requires a balance between the matters said to have taken place in the present trial, again to be established on the balance of probabilities by the Applicant, and the interests of justice in securing that in a properly run system, the complainants can bring their cases to the investigating authorities, and that the system is set up to secure the conviction of the guilty as well as the acquittal of those who are not guilty."

22. The judge rejected the submission under category 1 that a fair trial was not possible. He was right to do so. In the light of the principles stated in the case law, the submission was untenable.

23. The judge then turned to the submission that the officer had behaved in a way which was not that of an impartial investigator. He referred to the following features of the officer's evidence: her reference to "building a case"; her failure to keep full records; her telling one of the complainants that the police would need to see messages passing between the complainants because the defence would no doubt raise the question of collusion; an example of a leading question in an ABE interview; an example of a failure to follow up an answer by one complainant which might have suggested a line of defence; a failure to question the accuracy of recollection of a complainant who described herself as being very drunk at the material time; and the failure to take any steps to obtain C2's phone when she initially declined to provide it.

24. The judge concluded that the defence had shown that the officer was more interested in building a case than in following up all reasonable lines of inquiry. He said, however, that the points made by counsel for the accused did not suggest misconduct by the officer but rather an emotional response by her. He went on to say that some of the difficulties

relating to the way the ABE interviews were conducted arose because of apparent partiality rather than as a result of a mistake or lack of concentration by the officer. He added in respect of one passage in one of the interviews that the fact that the officer had given an incorrect summary of the answers in a loud voice, in contrast to the complainant who had spoken in a soft voice, "raises difficulties of its own". He did not further identify what those difficulties were.

25. The judge concluded as follows:

> "As I have said, if I was concerned solely with the absence of the phone evidence, and even if there were an unsatisfactory or feeble excuse for the failure to gather it speedily, I should've responded that the matter could be dealt with by carefully crafted directions to the jury in due course. However, in view of the matters to which I have referred, it appears to me that this is an example of the very rare case where all the factors taken together cause the courts to consider that the integrity of the criminal justice system in allowing a matter to proceed to verdict, given the particular difficulties in investigation, it should result in a finding that the continuation of the trial would be, to that extent, an abuse of process."

26. Although there appears to have been some uncertainty in expressing the consequences of that decision, its effect was to stay the proceedings.

<u>The prosecution application to the judge</u>

27. The prosecution asked for time to consider their position. It was granted. Notice of appeal to this court was then given. At a hearing on the following day there was a rather unstructured discussion of the grounds of appeal and whether any appeal should be expedited. The judge refused leave to appeal and concluded that the jury should be discharged. There was then the following exchange between the judge and prosecuting counsel:

> "THE JUDGE: Of course, you will need to give the normal undertaking to the Court of Appeal that if that appeal is

> unsuccessful that the ---
>
> COUNSEL: Yes.
>
> THE JUDGE: Well, if the appeal is unsuccessful, if there has been only an adjournment, the jury would be directed to acquit, but if the appeal is unsuccessful and the jury have been discharged then the prosecution simply undertake not to seek a further trial.
>
> COUNSEL: Yes."

The application to this court

28. In support of the application to this court for leave to appeal, the prosecution submit that the judge made an error of law or principle and that his decision was unreasonable. The accused submits that there has been a procedural failing by the prosecution which deprives this court of jurisdiction to hear this application for leave. In the alternative, the accused opposes the application on the grounds that the judge correctly identified and applied the relevant legal principles and made a decision which he was entitled to reach.
29. The submissions of counsel have substantially relied upon the arguments addressed to the judge. We have considered all the points made on each side.

The legal framework

30. We begin by outlining the relevant statutory provisions. Section 58 of the Criminal Justice Act 2003 gives a right of appeal in respect of rulings made in relation to a trial on indictment. Section 58(4) specifies the time within which the prosecution may give notice of intention to appeal. By section 58(8) the prosecution may not give notice in accordance with subsection (4) "unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled." Subsection (9) relates to leave to

appeal being refused by this court or the appeal being abandoned before determination by this court.

31. By section 61(1) of the 2003 Act, this court has power to confirm, reverse or vary the ruling to which the appeal relates. Section 61(4) states what this court must do if it reverses or varies the ruling. By section 67:

> "67 Reversal of rulings.
> The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied—
>
> (a) that the ruling was wrong in law
> (b) that the ruling involved an error of law or principle, or
> (c) that the ruling was a ruling that it was not reasonable for the judge to have made."

32. Turning to case law, it is well-established that a stay of criminal proceedings as an abuse of the process is an exceptional remedy to be exercised with care and restraint and a measure of last resort: see, for example, the recent decision in R v Ng and O'Reilly [2024] EWCA Crim 493, [2024] 1 WLR 3221 at paragraph 21.

33. We should quote in full paragraphs 23 to 25 of the judgment of the court given by the Lady Chief Justice in that case:

> "23. Within the second category fall cases where the police or prosecuting authorities have engaged in misconduct. Category 2 abuse is by its nature very rarely found - such cases will be 'very exceptional'. As it was put in R v BKR at [34], the second limb does not arise 'unless the defendant, charged with a criminal Offence, will receive a fair trial ... it seems clear that something out of the ordinary must have occurred before a criminal court may refuse to try a defendant charged with a criminal offence when that trial will be fair'.
>
> 24. There is a two-stage approach when considering limb 2 abuse. First, it must be determined whether and in what respect the prosecutorial authorities have been guilty of misconduct, such as

> very serious examples of malpractice and unlawfulness (as opposed to state incompetence or negligence). Secondly, it must be determined whether such misconduct justifies a stay on the ground of abuse of process. This requires an evaluation on the particular facts and circumstances of each case, weighing in the balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system.
>
> 25. Unfairness to the defendant is not required; rather the focus should be on whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined. Equally, a stay should not be imposed for the purpose of punishing or disciplining prosecutorial misconduct. The focus must be on whether a stay is appropriate in order to safeguard the integrity of the criminal justice system."

<u>Analysis</u>

34. We must first address the submission on behalf of the accused that the prosecution failed to give the "acquittal undertaking" required by section 58(8). We have quoted the exchange between the judge and counsel for the prosecution. It would of course have been better if the giving of the undertaking had been more clearly articulated. We are however satisfied that against the background of the previous written and oral submissions, prosecuting counsel did in that exchange sufficiently state that the prosecution gave the agreement required by the subsection. We are accordingly satisfied that this court does have jurisdiction to hear and determine this application for leave to appeal.

35. The judge in the present case rightly reminded himself that the court, when considering a submission of category 2 abuse, is not exercising a punitive jurisdiction against the prosecution. He did not make any finding that the officer had been guilty of misconduct and he had already ruled that the conduct of the officer and of the police generally had not rendered a fair trial impossible. We accept that category 2 abuse is not confined

exclusively to cases involving prosecutorial misconduct. But given that cases are very rare in which a clear finding of misconduct leads to a conclusion that criminal proceedings offend the court's sense of justice and propriety, we think it inevitable that cases will be still more rare in which such a conclusion is reached in the absence of any misconduct.

36. With all respect to the judge, we have no doubt that he fell into serious error. The burden was on the accused to establish some compelling reason why it would be an abuse of the process for the trial to continue. The criticisms of the officer, vigorously made by defence counsel, were points which the jury might or might not regard as lending support to the defence case of collusion between the complainants to make false allegations. But they were no more than points for the jury's consideration. They were emphatically not reasons for granting the exceptional and very rare remedy of a stay. It was for the jury, not with respect the judge, to evaluate factors such as the comparatively small number of failings alleged in the course of lengthy ABE interviews; the reasons for the delay in obtaining the complainant's phones; the officer's explanations of pressure of work, lack of assistance and aspects of police procedure; and her denial that she had deliberately adopted an incorrect approach as investigator. It must be remembered that the key issues in this case relate to the truthfulness and reliability of the complainants, not the attitude of the officer.

37. Speaking generally, it may be expected that conduct which justifies a stay of proceedings as a category 2 abuse of the process will be clear and obvious. That will be why it would undermine the integrity of the criminal justice system to require an accused to face trial. Here, there was no such feature. It is unfortunate that the judge in his ruling did not precisely identify the matters which he considered important. But even if all the

criticisms are accepted in full and taken at their highest, they were matters to be taken into account by the jury when assessing the reliability of the complainants, when considering whether the complainants may have colluded to make false allegations, and when considering any evidence which the accused may choose to give. The criticisms did not amount to misconduct and they did not prevent the accused from having a fair trial. Having made those two important findings, the judge in his ruling did not identify any factor or combination of factors which could even arguably be capable of leading to the conclusion that to continue the proceedings would offend the court's sense of justice and propriety. In her submissions today to this court, counsel for the accused has not been able to persuade us that there was any basis on which such a conclusion could properly be open to the judge.

38. Furthermore, and again with all respect to the judge, it does not appear to us that he explicitly balanced the complaints made by the defence against the public interest in the prosecution of crime. The passage which we have quoted from the ruling, in which the judge makes a reference to a balance, seems to us to be concerned with a somewhat different point. He did not specifically address the important issue of how the public interest in the prosecution of allegations of serious sexual offences could be said to be outweighed by concern that the public would lose confidence in the criminal justice system if the case proceeded.

39. We are therefore satisfied that, in the terms of section 67(b) and (c) of the 2003 Act, the judge's ruling involved an error of law or principle and was one which it was not reasonable for him to have made. We grant leave to appeal. Pursuant to our powers under section 61 of the Act, we reverse the ruling and we order that a fresh trial may take place in the Crown Court.

40. The effect of our decision is that there will be a fresh trial of the accused on all the charges contained in the indictment. Meaning no disrespect, we think it would be better for the fresh trial to be heard by a different judge and we invite the Resident Judge of the Crown Court centre concerned to nominate a judge accordingly. We direct that the prosecution must forthwith apply to the Crown Court to have the case listed for mention and to fix a date for a fresh trial. We recognise of course the difficulties currently faced by the Crown Court, but we are confident that every effort will be made to fix as date as soon as possible.
41. The judge granted the accused bail pending the hearing in this court. He will remain subject to that bail. Any further consideration of it may be dealt with by the Crown Court at the mention hearing.

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

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk