

Neutral Citation no. [2006] NICA 48

Ref: NICC5709

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 19/12/06

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ANTHONY DRAKE

Before: NICHOLSON LJ, CAMPBELL LJ and SHEIL LJ

NICHOLSON LJ

[1] This judgment has been anonymised in order to spare the victim. Steps must be taken by those who make this judgment public to ensure that her anonymity is preserved.

[2] On 11 June 2002 the appellant was convicted of the rape of K following a trial presided over by Higgins J. On 27 June 2002 he was sentenced to a term of imprisonment of 9 years.

[3] By order of the single judge of the Court of Appeal dated 27 November 2006 leave was granted to the appellant, then an applicant for leave to appeal, to appeal. An order was made for witnesses to be called on behalf of the appellant and for witnesses to be called by the Crown in rebuttal.

[4] The appeal was heard by this court on 1 December, 4 December and 6 December 2006. On 6 December we dismissed the appeal on the grounds that the conviction was safe in accordance with the principles laid down in R v Stafford [1974] AC 878, R v Pendleton [2001] UKHL 66, [2002] 1 Cr App R 441 and R v Ishtiaq Ahmed [2002] EWCA 2781. We stated that we would give our reasons in writing at a later date. We do so now.

[5] The case for the prosecution at trial was that the rape was committed against K when she was aged 7 years. It had happened in 1989. The appellant, who lived with K's aunt, asked K to go to the shop with him in the town where he lived. On the way he took her into the buildings of a school

and down steps into a boiler room. There he pulled down her trousers and pants and had intercourse with her. It was the only occasion on which this took place.

[6] K did not tell anyone at the time. As she matured she realised that what had happened was wrong but was afraid of getting anyone into trouble. She told her boyfriend, later her husband, about it around 1997. He wanted her to go to the police, but she would not do so. Then in January 2000 she told her sister, D, about the incident. D rang the Rape Crisis Centre and contacted the police, to whom K eventually made a statement of complaint.

[7] The appellant denied in interviews with the police and in evidence at the trial that the incident had ever occurred. He was unable to suggest any reason why K should have made the allegation against him.

[8] Affidavits were sworn by K's husband P and by Mr T which, if accepted by this court, would have established that K lied in her evidence at trial that she had been raped by the appellant. If this fresh evidence had been capable of belief the jury might have come to a different verdict.

[9] The statutory framework for the reception of fresh evidence is to be found in the Criminal Appeal (Northern Ireland) Act 1980:

"25.-(1) For the purposes of an appeal under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice -

- (a) ...
- (b) ...
- (c) receive any evidence which was not addressed at the trial.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) ...
- (c) ...
- (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[10] For reasons which will become apparent we were satisfied that there was a reasonable explanation for the failure to adduce the evidence at the trial.

[11] K's husband, P, gave evidence before this court. He said that their relationship began in 1996 and they married in 2001. They had a daughter B who is now 3 years of age. He attended the trial of the appellant in June 2002 and was aware of his conviction and the sentence which he received. He claimed that K received £45,000 in compensation as a result of the behaviour of the appellant. We are satisfied that in fact she received £35,000. He claimed that in April 2003 he and K were in the sitting-room of their home in the early evening. They had been sitting, watching TV and having a drink of beer. K told him that she had something to tell him. "Don't shout at me", she said. He asked her what it was. She replied: "I was never raped by Artie Drake". She went on to say that she was raped by her older brother, then aged 13 years. She and her brother were in a bedroom upstairs in her parents' house and were playing a game called 'Doctors and Nurses' and her brother raped her. P claimed that he asked her why this was not brought up at the trial and that she told him that she did not want to confuse the jury, that the jury would not believe her story and would be confused. She broke down in tears. At the time they did not discuss the matter any further. He did not ask her any questions. The matter was raised a week later. She told him that she had gone out for a drink with her sister, D, had broken down and told her sister what she had told him. Later she told him that her sister was going to tell her parents who were to question her brother at the weekend. Around the same time K told P that she had confided in two girlfriends. He had not said anything to anybody else about what she had told him until June 2005. She had put him under a lot of duress and stress. She had told him if anything ever came out into the open about her brother she would leave him and take their daughter with her. This was said by her in April 2003. She was approximately two months pregnant at the time. The child was born in November 2003.

[12] He was asked by a member of the court when had he and K learnt of the sex of their child. He stated that they learnt two or three months before the birth of the child. He was unable to explain how she could have said in April 2003 that she would take their daughter away if anything came out into the open about her brother. He admitted that their marriage had broken up in March 2005 and that he went to a solicitor to make a statement alleging that she had lied at the trial in June 2005.

[13] This court considers that he had made up the story about her brother because of the break-up of their marriage and that he made up a story that she felt guilty about taking compensation for the rape because the appellant was innocent. He never asked her why she picked on the appellant as the rapist. He claimed that it never entered his head. He agreed that he did not go to the

solicitor (who happened by coincidence to be the solicitor for the appellant, he said) until his wife had taken out a non-molestation order against him. He blamed the breakdown of the marriage on his wife's mother and sister. He said that her allegations in court (when she obtained the non-molestation order) that he was abusive and violent had been concocted by her family. He had given his story to the judge but was not believed. He wanted to have her back to live with him. At one stage she had gone to live in a Women's Aid hostel, he admitted. He said that he told his wife at Christmas 2005 what he had told the solicitor in June 2005.

[14] He admitted to the court that if she had agreed to come back to live with him he would withdraw his statement in which he alleged that she admitted that the appellant had not raped her. This court considers that he was trying to blackmail her into returning to live with him, promising to withdraw his statement to the solicitor if she would apply to have the non-molestation order revoked. He admitted that he was "holding on" to his affidavit until they got together again.

[15] When he left the witness-box all three members of the court were convinced that his allegations against her were incapable of belief.

[16] Mr T was then called to give evidence on behalf of the appellant. He said that he heard a rumour around September 2005 that K's family had wrongly obtained the appellant's conviction.

He claimed that one night in the middle of September 2005, the mother of K came to his house at about 1.30am to 2.00am. He knew that she had had a few drinks. She said that she raised the Drake case with him, saying she wanted to discuss it. She came into the house and he gave her a vodka and coke. She said: "What's this about the Artie Drake case?" He replied that he knew nothing about it. He claimed that she said that it was her son, naming him, who had sex with her daughter K, that they were or he was experimenting, that none of her family were going to jail and that was why Artie Drake got the blame. K had alleged that Artie Drake raped her because the family needed the money for two weddings.

He said that he eventually made a statement to the solicitor, who again by coincidence acted for the appellant, recounting the conversation that he had with her.

[17] The court is convinced that Mr T had invented this story because the mother of K and other members of her family were deeply concerned about his relationship with K's youngest brother, a teenager. Mr T was 51 years of age; the young man was 17. Mr T bought him expensive clothes and jewellery and took him on holiday to Germany and to Spain. The young man lived in his house and was his apprentice for a time. Around Christmas 2005 the

mother persuaded the young man to come home to his parents' house and to stop associating with Mr T. Non-molestation orders were taken out against Mr T. This court was convinced at the close of Mr T's evidence that he had gone to the solicitor and invented the story of the mother's visit to his house in order to get his revenge on the family for taking their son away from him.

We were convinced that the allegations of P and Mr T were incapable of belief. Nonetheless we decided that in view of the gravity of the allegations made against them we would hear the evidence of K and her mother. The court had given leave to the Crown to call them in rebuttal.

[18] We heard the evidence of K and then heard the evidence of her mother. We need not set out the details of their evidence. If we had entertained any concern about the allegations which had been made, those concerns would have been completely allayed by their evidence.

[19] They gave their evidence in a straightforward and honest way. They were cross-examined by very experienced senior counsel. We have not a shadow of doubt that K was telling the truth when she said that the appellant raped her. She was completely convincing in her account of her marriage and how it broke down. We were satisfied beyond doubt that she never said to her husband what he alleged and that his motive for inventing the story was to blackmail her, by attempting to get her to come back to him, promising that he would withdraw his false statement if she did so.

[20] In the same way we were convinced that her mother did not visit Mr T as he alleged and never said what he claimed that she said. We were equally convinced by the evidence which she and her daughter gave that they were deeply concerned for the welfare of K's youngest brother, were extremely worried with good reason about the relationship between him and Mr T and that Mr T made these false allegations about K's mother because she had persuaded her son to return home and to stop his association with him.

[21] For these reasons we dismissed the appeal on 6 December 2006. The fresh evidence tendered on behalf of the appellant had no impact upon the safety of the conviction. We add that in the context of the evidence as a whole any reasonable jury would be bound to reach the same conclusion.