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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN
-v-
JOHN BRANNIGAN

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (giving the judgment of the court)

[1] The applicant was convicted at Downpatrick Crown Court on 2 May 2012 on a single count of rape and sentenced to a determinate custodial term of 7 years comprising 3 ½ years in custody and the same period on licence. He renews his application for leave to appeal against conviction and sentence, leave having been refused by the Single Judge. This judgment deals only with the appeal against conviction.

Background

[2] The complainant, who was just about to turn 19, had arranged to go on a night out with her cousin on Friday 7 August 2009. Prior to going out that evening the two of them drank most of a ten shot bottle of vodka. At about 10:40pm the two went to a pub and disco. There the complainant had three further vodkas before beginning to drink water as she was feeling a bit drunk. At the pub she met other friends and, when the pub closed at about 2:30am, she accompanied them in a taxi to a house party. When they arrived at the house it was in darkness so they went to another party which was being held in a nearby house. This belonged to A with whom the complainant had previously had a relationship.

[3] The complainant knew several people who were at the party. She said she was given a glass of rose wine but only took a sip before disposing of it as she didn't like wine. She went out to the front of the house to smoke and was given a bottle of beer by A of which she said she only consumed a tiny portion because it disappeared when she went to the toilet. Later, A gave her another bottle of beer which she consumed.

[4] While at the party the complainant used the toilet in the en suite in A's bedroom. When she came out of the en suite her friend was in the bedroom with her boyfriend, B, and A. A game of truth or dare ensued at the suggestion of one of the males. During this game the complainant was given two dares. The first was to kiss someone in the room and, for a joke, she gave her friend a "quick peck on the lips". The second was to perform oral sex on A. She agreed to this dare because, as she candidly admitted in evidence, she wanted to have sex with A that night. B and her friend left the room and the complainant performed oral sex on A. When the complainant stopped, she said that she lay down on the pillow and that was the last thing she remembered until waking up to find someone having sexual intercourse with her. She described how she was aware someone was on top of her but she couldn't move or open her eyes. She initially thought it was A but then the person said something and she realised it was not. At this point she said she started screaming and became hysterical.

[5] A then entered the room with C and D. The complainant said the person who had been on top of her was sitting at the bottom of the bed and then left the room. She claimed she had never seen him before. The complainant went into the en suite where she used a razor to cut her arms. She then went back to the bed and fell asleep. When she woke up she got a taxi home and lay on her bed until a friend called round at between 4:00pm and 5:00pm. She told her friend that she had gone to bed with A but had woken up with someone else. Over the next two days the complainant said nothing further about what had occurred and made no complaint to anyone in authority. In evidence she admitted that on the following Sunday evening she had attended a music event and drank a considerable amount. It was at this event that she fell and hurt her arm. It was this injury which caused her mother to notice the other injuries to her arms the following day and led her to visit, first, the Downe hospital and then the police in the early hours of Tuesday 11 August 2009.

[6] C gave evidence that when he was upstairs he had seen the applicant enter A's bedroom while A was sitting in the other bedroom. C then went downstairs. He said he heard A open a door upstairs and shout, "Keep the noise down, keep the noise down." He then heard the complainant's voice shout "Get him out, get him out". C ran upstairs and saw the complainant in bed and the applicant standing naked beside the bed. The complainant continued shouting so he pushed the applicant out of the room and down the stairs.

[7] The applicant, who was 24 years old at the time of the incident, gave evidence that the complainant had spoken to him very briefly in the pub during the evening. This was denied by the complainant. He went to the party at A's house but spent most of the time in the back garden playing with the dog. At about 4:30am/5:00am he was tired and went to find A to see if he could stay the night. A was in one of the bedrooms and the applicant was told that all the beds were free. He went into a

bedroom but found the complainant, whom he did not know, lying in the bed. He asked if he could get into the bed and she replied, "Yes, there's plenty of room". He took off his clothes down to his boxer shorts and got into bed. He claims that the two of them chatted for a while before starting to kiss. While they were kissing the complainant put her hands down inside his boxer shorts before removing her own leggings. They then began to have sexual intercourse with both of them making groaning and moaning noises. The applicant claims he asked the complainant if she was on the pill because he didn't have any protection, and she replied yes. A then came into the room, told them to keep the noise down and left again. The applicant claimed he was embarrassed because he had been caught by A having sex, but, when the door closed, he and the complainant resumed having sex in various positions. A came in a second time to complain about the noise and this time the complainant shouted, "Get him out, get him out". The applicant claimed he was very embarrassed now so got off the bed and started getting dressed. He said A closed the door briefly but then both A and C came in and the complainant became hysterical again. The applicant then left the house and went to the house of a friend.

Abuse of process

[8] The principal ground advanced on behalf of the applicant was that the learned trial judge erred in not staying the proceedings as an abuse of process. A full investigation file was received from the PSNI by the PPS on 15 December 2009. The file was allocated to a senior public prosecutor on 18 January 2010 and a decision not to prosecute was made on 3 February 2010. The following day the PPS sent a letter to the defendant advising him that the prosecution service had decided, having considered the evidence then available, not to prosecute. The solicitor for the complainant sought a review of that decision by letter dated 14 May 2010. On 15 June 2010 independent counsel was instructed to provide an opinion on the case. She read all of the papers and listened to the after caution interviews. She requested additional notes and consulted with the complainant on 26 August 2010. The applicant complained that no note of the interview had been taken by the investigating officer who was present and the note maintained by prosecuting counsel had been lost. Prosecuting counsel gave an opinion on 18 September 2010 that there was a reasonable prospect of conviction in the case.

[9] In coming to her view counsel considered a large number of witness statements taken from those present at the home of A on the morning in question. Those statements included a written statement from A as well as many other members of the applicant's family. Counsel considered that there were inconsistencies between A's statement and those of others who had been present that morning. A was invited to attend a consultation with counsel. He did not do so and counsel was informed by police that he was unlikely to assist in any way as he was a relation of the applicant. The prosecution maintained that the decision not to call A as a prosecution witness was based on the inconsistencies in his evidence, the self-serving nature of aspects of his statement, his failure or unwillingness to attend for

consultation and counsel's assessment that he could not be regarded as a witness of truth.

[10] The complainant said that after she had oral sex with A she then blacked out. A's statement alleged that he subsequently had fully consensual sexual intercourse with her after which he spoke to her for about 10 minutes and then agreed that she could stay over that night. These accounts are contradictory. Mr McCann BL for the applicant submitted that the contradiction undermined the complainant's evidence.

[11] Secondly, A initially acknowledged that it was his idea to send his cousin downstairs to tell the applicant to go to A's bedroom. It appears that the motive for this was to expose the fact that the applicant's father was in the room with the complainant. A subsequently appeared to place the responsibility for this with his cousin. Thirdly, there was evidence from some of those present that A had been responsible for directly encouraging the applicant to go into the room where the complainant was in bed. A's account denied any conversation with the applicant in respect of that. Fourthly, initially A suggested that the complainant was in an awful state and hysterical when he entered the room. Subsequently he suggested that the complainant might have been with 2 or 3 people but it did not look as though there was anything wrong until she saw him and started panicking.

[12] These matters directly bore on the circumstances in which the applicant entered the room in which the complainant was in bed and her state of consciousness at that time. The prosecution case was that the events described by A when he was in the bedroom with the complainant were materially inaccurate from the moment when she alleged that she blacked out. In light of that and the other contradictions in A's account the prosecution were entitled to come to the view that A was not a credible witness. We do not accept, therefore, the submission that this judgment was not open to the prosecution and there is in our view no basis for the proposition that the decision not to rely on A as a prosecution witness was made in bad faith.

[13] In R v Russell-Jones [1995] 3 All ER 239 the English Court of Appeal considered the obligation on the prosecution to call witnesses. The court reviewed the authorities and stated that generally speaking the prosecution must have at court all the witnesses named on the back of the indictment or on whose statements they have relied at committal if the defence want those witnesses to attend. In deciding which statements to serve the prosecution has an unfettered discretion but must normally disclose material statements not served. That reflects the earlier decision of the same court in R v Richardson [1994] 98 Cr App R 174 where it was held that the prosecution were under no duty to call witnesses to give evidence in respect of witness statements which had never formed part of the prosecution case but had been served on the defence as unused material.

[14] A was not named on the back of the indictment nor was his statement relied upon as part of the prosecution case at committal or otherwise. His statement had been served as unused material. He was available to be called by the defence if they wished to do so. There was no obligation on the prosecution to call the witness so that he could be cross examined by the applicant's counsel. The applicant relied on the fourth principle in R v Russell-Jones in which the court said that the prosecution should call all the witnesses who give direct evidence of the primary facts of the case. That only applies, however, to those witnesses upon whom the prosecution rely. The principle does not require the prosecution to call witnesses on the basis that they might assist the defence. Mr McCann BL submitted that the matter was affected by the fact that the police became aware of threats to A shortly after 7 August 2009 and around that time his car was damaged. He also reported having been followed home after a court appearance by a member of the complainant's family who subsequently accepted a caution in relation to this. If A was in fear an application could have been made to introduce his evidence as hearsay. No such application was in fact made. If that application had failed a summons could have been sought to require his attendance.

[15] We do not accept that any of these circumstances gave rise to any unfairness in the trial. For that reason this case is to be distinguished from the Australian case of Whitehorn v R 49 ALR 448. In that case the defendant was charged with indecent assault. The complainant was not called but the prosecution relied on an account related by her to a police officer which was put to the defendant in interview. The identity of the alleged offender was ambiguous. The court was not satisfied about the circumstances of the alleged confession which was the principal evidence against the defendant. It is unsurprising that the court considered the conviction unsafe in the absence of direct evidence from the alleged victim. That case has no bearing on these circumstances.

[16] The remaining matter in relation to abuse of process concerned the representation by the prosecuting authorities in February 2010 that the applicant would not be prosecuted. This issue was dealt with by the learned trial judge who correctly relied on observations by Lord Phillips in R v Abu Hamza [2007] QB 659 at paragraph 54.

> "… it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."

There was no evidence that the applicant had acted to his detriment on foot of the representation contained in the letter of 4 February 2010 and the PPS Code for Prosecutors clearly contemplates a review of such a prosecution decision on the request of the complainant as happened here.

[17] For these reasons we reject the submission that there was any conduct by the police or prosecuting authorities which rendered it unfair to try the applicant or which caused any unfairness in the trial of the applicant.

Other matters

[18] There were two further related matters which Mr McCann pursued at the hearing. The first concerned a portion of the cross-examination of the complainant. Senior counsel instructed at the trial cross examined the complainant about the amount of alcohol that she had consumed and whether it was sufficient to explain her case that she had blacked out. In the course of that cross-examination she indicated that she did not think that she was so drunk that the alcohol could have caused the blackout. When pressed on this she said that she could not say for certain whether the alcohol may have been responsible. When pressed further she repeated that she was not certain but said that there was always a possibility that something could have been put in the alcohol.

[19] At that point senior counsel applied to discharge the jury on the basis that it was never part of the Crown case that the complainant's drink had been spiked and that further medical enquiries may be required in respect of that. It was submitted that the questioning of the complainant was only directed at whether alcohol may have caused the blackout rather than questioning directed to what the cause of the blackout may have been.

[20] The learned trial judge noted that the complainant had been subject to persistent questions on the theme of blacking out and the influence of alcohol as a cause. In those circumstances he considered that the question was elicited in response to the persistent line of cross-examination and that he would direct the jury that they should not speculate in respect of matters on which there was no evidence. We are satisfied that the approach of the learned trial judge was correct.

[21] In his charge to the jury the learned trial judge noted that the complainant could not explain why she had blacked out and no evidence had been placed before the jury to assist them on this point. He advised them that they should not speculate on matters not in evidence before them but decide whether they were satisfied beyond reasonable doubt that she did blackout. No criticism is made of that direction.

[22] At the end of the judge's charge senior counsel requisitioned the judge on the basis that the absence of an explanation for the blackout is a relevant matter in considering whether the jury were satisfied that she did in fact blackout. The learned trial judge did not accept that there was necessarily a misdirection but at the request of senior counsel recalled the jury and indicated to them that the absence of an explanation for the blackout was a matter which was a relevant consideration for them to bear in mind when coming to consider whether in fact they were satisfied that she did blackout.

[23] It was submitted that this further direction raised with the jury the issue of an explanation for the blackout and necessarily encouraged them to speculate. We do not agree. It is perfectly clear that the learned trial judge directed the jury that the issue for them was whether she did or did not blackout.

Conclusion

[24] For the reasons given we do not consider that the conviction is unsafe. The appeal against conviction is dismissed.