Neutral Citation Number: [2007] EWCA Crim 1471

Case No: 200701598c5

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM COURT MARTIAL AT HMS NELSON
HIS HONOUR JUDGE BLACKETT
JUDGE ADVOCATE GENERAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2007

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE PITCHFORD
and
MR JUSTICE FLAUX

- -

Between :

R
- and -
Phillip Coates

- -
- -

Mr A.M. Large for the **Appellant**
Mr A Bright QC, Mr P Glenser and Commander J Pheasant RN for the Prosecution

Hearing dates : 13th June 2007

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Judgment

President of the Queen's Bench Division :

1. On 9 March 2007 Phillip Coates was convicted of rape at a Court-Martial held at HMS Nelson (His Honour Judge Blackett, Judge Advocate General). We adjourned our decision at the close of the hearing to examine the transcripts of the evidence of the complainant and the appellant. This is our judgment on his appeal against conviction heard on 13 June.

2. The appellant is a senior naval rating. The complainant was a naval medical assistant. She worked aboard ship.

3. On 7 March 2006, the appellant and two other senior ratings joined the ship. During the period of his visit he worked closely with the complainant. There was no suggestion of any intimate contact. Their relationship appeared entirely professional. On 8th March a barbeque was held on the quarter deck. Both the appellant and the complainant were present. Alcohol was on sale. During the course of the evening the

complainant drank a bottle of rosé wine, two glasses of punch and a vodka. The appellant drank six cans of lager and a glass of wine. This event ended at about 22.30. Thereafter the complainant and two other females sought to enter the Senior Rates Mess. They were refused entry. The appellant was invited to the Junior Rates Mess. He took a bottle of rosé wine with him and presented it to the complainant. She gave him a brief kiss on the cheek. She did not drink any of this wine because she had had enough to drink. By now she was "tipsy", but not drunk. Some entertainment by way of a DVD quiz game then took place.

4. At about midnight the appellant and complainant had sexual intercourse in the sick bay. The Crown's case was that she was raped. His case was that after some familiarity which started on the quarter deck, they both went voluntarily to the sick bay where consensual intercourse took place.

5. To understand the issues in the appeal we must provide a short summary of the sequence of events after intercourse, before examining them in detail. The complainant made oral complaints to a number of individuals, and overnight, early on 9 March, she made a written statement. The complainant made a second written statement on 10 March. On 30 March she made a further written statement. After consultations and therapy with a doctor of clinical psychology, Dr McGowan, who was an accredited consultant in Eye Movement Desensitisation and Reprocessing (EMDR), on 19 May she made a fourth written statement.

6. The first witness who described the complainant after sexual intercourse had taken place, said that he saw her coming to the Junior Rates Mess between 0100 and 0130. She was crying. He tried to talk to her. She would not say what was wrong. She asked him to get hold of a LWEM Watts. Another witness who saw the complainant in the dining room said she was crying. It was "proper sobbing". About 15 minutes later, after LWEM Watts arrived, she said "he raped me". Another witness gave a similar description of the complainant's condition. Twice she heard the complainant say, "it wasn't my fault", and also, "he tried to kiss me and I kissed him back, but I didn't want to".

7. When LWEM Watts arrived, the complainant had her head in her hands. She was very red in the face and sobbing. He could smell alcohol on her breath, but she did not seem inebriated. Her first words were "he tried to rape me". She was not specific. He asked who was responsible. After a couple of attempts she said "it was a senior rate", and shortly afterwards she identified the appellant.

8. LWEM Watts then woke Lt Wooller. She went to the dining hall. She saw the complainant who was extremely distressed and sobbing. She could not recall the exact words of the allegation made by the complainant. She went to inform the CO.

9. Thereafter the complainant was seen by Coxswain Cox. The complainant was very distressed, crying in a stuttering sob, gently rocking backwards and forwards. She was taken to the wardroom. She was very upset. She said, "why is it always me? My boyfriend is not going to love me". Initially she appeared unable or unwilling to talk about the incident, but then she became quite forthright saying, "we had sex". She said that she had tried to say "no", but eventually she just gave up and thought "what's the point, its going to happen". She said that the appellant repulsed her and that he was repulsive. She said that it started with a kiss from him, and there was a

kiss back, and it got out of hand. The kissing took place in the sick bay, and although sex had happened, she did not want it. Eventually Coxswain Cox was able to persuade the complainant to write down what she had said. She was still upset, and could not write it down straight away. Although she smelled of alcohol, she seemed capable of making the statement. Had she been drunk he would not have allowed her to do so.

10. The statement itself is brief. After describing how she and the appellant had been chatting, they went to the sick bay together, where it ended up with him kissing her. "We kissed for a little while then we ended up having sex on the sick bay bed. I had tried saying no but in the end gave up. Sex happened on the sick bay bed. I felt repulsed throughout the whole experience. When it was over he got dressed and left the sick bay. I left soon after….I tried at first to deny anything was wrong but soon they saw through that. They took me to the Dining hall…". On this account she submitted to intercourse.

11. Coxswain Cox accepted, as the statement itself shows, that the word rape did not appear. He said that that word had not been used in his presence, otherwise it would have been recorded. If she had used the words "non consensual", they too would have been recorded. Those words were not used by the complainant.

12. The complainant was medically examined early on the 9th and in the afternoon of 9 March. Various marks on her were consistent with intercourse having taken place, but they were consistent with consensual intercourse as well as rape.

13. The appellant was arrested in the early hours of 9 March, and cautioned. When interviewed he admitted having intercourse with the complainant but denied the allegation of rape.

14. On 10 March a much more formal, service police witness statement was taken from the complainant. Among other observations the complainant said, "with regards to the alcohol, I said I had stopped drinking by the time I got into the Junior Rates mess but I didn't feel any worse through alcohol and I remained as I described earlier in a "happy" and "tipsy" condition. I didn't consider myself to be drunk or anything….. I can't remember whether there was any contact between me and CPO Coates whilst we were sat in close proximity to each other." However, her memory was disturbed. "Importantly I cannot even recall when I left the Junior Rates mess or who I left with or confirm where I went to. I have no distinct recollection of anything really until some time later that night when I remember being in the ships company dining hall. I was alone and remember being upset and distressed. I was crying and sat down and holding my hand across my face and sobbing. I remember now that in the state I was aware that CPO Coates had either tried or had had sex with me and that it had happened without me saying it could happen. I remember thinking this in a terribly distressed state but I don't recall thinking about how or where it had happened and cannot remember these details. I just recall being absolutely distraught that something really bad had happened to me."

15. In answer to a direct question she confirmed that she had "no distinct memory of what occurred between my being in the Jnr Rate Mess with the other people I mentioned to the point where I was alone and crying within ships company dining room".

16. The statement continues by referring to individuals to whom she spoke, and her meeting with LWEM Watts, and the narrative then resumes, "within the dining room at that time I remember feeling more sober than I had earlier. I felt totally devastated and in shock and I remember things started to happen quite quickly then. At some point I recall making a quick written statement for the coxswain but I can't remember what I wrote in it. I recall signing it as the coxswain asked me. I felt rushed to sign it and wasn't sure whether I should have taken more time over it but I signed it anyway".

17. Having read the statement over she added, "I can state that I do recall making the statement now but on reading it the content concerning the kissing and then having sex on the sick bay bed with CPO Coates doesn't jog my memory at all. Although I can picture those events in my mind now that I have read the content of (the statement), I cannot remember the sex taking place or details of anything that may have been said during it….I have still no doubt however that sex in some form has occurred and this is based upon my emotional state after the incident and the physical way I felt inside my vagina after it". She described her physical condition which in the past was associated with having had "rough or hurried sex". She repeated that she could only vaguely picture having sex. She recalled "kissing and fumbling around and I vaguely recall being in the sick bay. The only way I can describe it is that I am unable to say whether these almost "flash" images are remembered from actual memories in my mind or whether I have assembled them as imagined pictures based upon perceptions of what I believe occurred".

18. The statement addressed the issue of consent. "Even though I may be confused over what has occurred I believe that without doubt there is no way I would have consented to any kind of sexual activity taking place with CPO Coates and based upon my distressed state afterwards and the fact that I know I would never have consented to sex with CPO Coates, I believe that I was raped within the sick bay that night." The statement ended by stating that the complainant was menstruating. She had last used a sanitary pad on the morning of 8th March, and this pad was in place in her knickers at the time of her medical examination on the morning of 9th March.

19. The statement on 30 March enabled the complainant to consider the response of the appellant to her allegations. She appreciated he was asserting that intercourse had been consensual. She maintained her determination to pursue her complaint because she was "adamant" that although she was "unable to recall events as they unfolded that night" she was sure that she would not have consented to intercourse with the appellant because she was "so upset about it afterwards". She had no feelings for the appellant, intimate or otherwise, and certainly did not feel attracted to him. Collectively the facts left her "feeling adamant that she would not have consented to intercourse with the appellant under any circumstances". Addressing the appellant's assertion that they had kissed on the quarter deck before visiting the sick bay she responded that she had no recollection "whatsoever" of it.

20. Following her consultations with Dr McGowan, her fourth statement of 19 May asserted that she was now able to recall events between the time when she was in the Junior Rates Mess, and her later presence in the dining hall, in a distressed state. She remembered unlocking the sick bay and going into it. That could have been for a number of reasons. She went in alone. She did not invite anyone in. As soon as she entered the sick bay she realised that she had been followed by the appellant. Once in

the room the appellant closed the door. She could not recall any conversation at this stage. She was quite sure that he or she did not lock the door, but she was not 100% sure of it. She then provided a description of the incident. As soon as the appellant was in the sick bay, he put his arm round her waist, attempting to kiss her and pulled her close to him so that they were face to face and their bodies touching. She leaned back to move away. He kept his arm round her pulling her close to him. He kissed her on her lips. She struggled to get away from him and to push him away. However there was not enough space for her to get away.

21. She confirmed in the statement, "From my actions in trying to push CPO Coates away, and struggling to get out with his arm around my waist, he should have realised that I did not want what was happening. I certainly did not consent to him kissing me." She then described the clothes she was wearing, observing that her belt was easy to open. "CPO Coates managed to open my belt and get my trousers undone, and before I knew it, he had pulled them down to my knees. This was all done very fast, and I could not stop him doing it, even though I was still struggling and trying to back away. I can't remember if CPO Coates used both hands to remove my trousers or one. I don't remember anything being said at this point, nor did I scream, because I was just trying to get out of the situation. ….I was feeling sick in my stomach. Again, I did not want this to happen, and by my struggling and backing away, CPO Coates should have realised this."

22. The statement continued by describing how the appellant started to try and lift her top, but went on that as he did so, "I was able to pull my trousers up and get the two metal fasteners together but I don't think I managed to do up the zip fly. In bending slightly over to get my trousers I also stopped CPO Coates from lifting up my top".

23. She then described her next recollection, when she was "lying on the bed within the sick bay". She could not recall how she managed to end up on the bed, but most of her body was lying on the bottom end, while her legs, from the knees down, were hanging off the bed. "Events happened very fast, and before I knew it, CPO Coates had managed to undo my trousers and pull them down to my knees. At the same time, he pulled down my knickers to the same level". She then described the appellant on top of her, trying to push her top up, asserting that while he was doing this "I was still struggling and trying to get away". However she was unable to "get him off" her. At one point he grabbed hold of one of her arms to prevent her pushing him off. She believed that the only reason why the appellant "wasn't fully able to have sex with me, was because I was continually fighting to get him off me. I struggled throughout the whole incident and at no time gave CPO Coates any indication that I wanted to have sex with him". She described how she "finally managed to struggle free from CPO Coates and got off the bed".

24. On this account there was no kissing at all, and rather than going together to the sick bay, with the appellant following her into it, he took her by surprise. In summary the account which followed describes resistance by her throughout, with the appellant forcing her to have intercourse by overcoming her struggles.

25. The complainant said that she did not want the appellant to realise that he had upset her, so she would not have appeared "outwardly distressed". At that time she was not crying or upset, but "obviously" she would not have been acting in a friendly way towards him. After they were both dressed, they left the sick bay, and she followed

him out. Immediately outside he asked if she was going to be "OK", and she responded that she would.

26. The complainant added that when she was in the dining room she had telephoned her boyfriend. They had a brief conversation. She did not want to mention what had happened to her, as she did not want to tell him over the phone.

27. The problem with these four statements does not require any substantial analysis. In the first statement, made on the night in question, the essential allegation is that after kissing for a while the couple had intercourse on the sick bay bed because in the end she gave up trying to say "no". The second and third statements suggest the absence of any memory of the circumstances in which intercourse took place. The fourth statement conveys that intercourse took place notwithstanding the complainant's continuous struggling. Both the first and fourth statements involve allegations of rape, but there are significant differences in the circumstances in which it allegedly occurred.

28. From the outset the Crown's case was that the appellant should be convicted on the basis of the account given in the fourth statement. In fact the conviction was based on the first statement.

29. We must analyse the trial process. A pre-trial hearing took place on 1 March 2007. It was submitted that the evidence of the complainant after her visits to Dr McGowan should be excluded under section 78 of the Police and Criminal Evidence Act 1984. The Judge Advocate General addressed the circumstances in which the statement was prepared and obtained. He heard the evidence of Dr McGowan for the prosecution, then Dr Boakes for the defence, and then Dr Philip Dodgson for the prosecution. The details of the argument require no elaboration. Bad faith was not alleged. No criticism was made of the complainant herself. The essential submission was that the process undertaken by Dr McGowan resulted in the production of evidence which it would be unfair to admit. It was further suggested that if that application succeeded, the earlier evidence should be excluded on the basis that the original recollection by the complainant could not be properly tested in evidence.

30. In the course of the submission on the appellant's behalf the Judge Advocate General observed that if he ruled that the fourth statement was inadmissible "then the whole evidence must go because she is tainted. You do not need to develop that further, it is clearly a sequital, it all stays or it all goes clearly." Counsel for the appellant observed that all he was asking for at that time was a ruling that the post McGowan evidence should be excluded. If that ruling were made he hoped that everyone would agree that the case would come to a halt without the need to transform his submission into an abuse of process argument. Counsel for the Crown commented that if the evidence of the complainant were excluded the case would fall away. At the hearing before us there was some discussion about precisely what counsel had in mind. Although it is not clear that counsel was conceding that the exclusion of the fourth statement carried with it the consequence that the first and other statements should also be excluded, the language of the Judge Advocate General is unequivocal. Nevertheless he concluded that notwithstanding that the process undertaken by Dr McGowan had facilitated what was described as pre-memory recall in inappropriate circumstances, evidence based on the fourth statement should be admitted. Preparations were made for trial accordingly.

31. When the Court Martial convened, counsel for the Crown opened the case against the appellant by adopting the fourth statement as the basis for the Crown's case. He referred to the first statement in somewhat opaque terms saying, "it may be that you will hear quite a bit about what she said in that first written statement".

32. The complainant gave evidence, effectively repeating the account given in her fourth statement, explaining that it was after she had seen Dr McGowan that she remembered the events she described in her evidence. Inevitably she was cross examined on the basis of the inconsistencies between the fourth and the first statements. She ruled out consensual kissing at any time. She remembered resisting. She could not remember the events described in her first statement. She was also cross-examined about the absence of memory dealt with in her second and third statements. Effectively, she adhered to a memory of the incident described in the fourth statement. The first statement became an exhibit at the request of the defence. The only post intercourse complaint she could remember making was that she told LWEM Watts that a senior rate had tried to rape her.

33. The evidence of Dr McGowan, Dr Boakes, Dr Dodgson, and now of Dr Mason, a clinical psychiatrist, was called before the Board. The effect of the expert evidence was that, of the complainant's versions of the incident, the first was the more likely to be accurate. None of the experts said, nor could it have been said, that the first version was in fact accurate.

34. At the end of the prosecution case it was submitted that the proceedings should be stayed as an abuse of process on the basis that a fair trial could not take place. It was not argued that there was no case to answer. In his ruling the Judge Advocate General concluded that it was agreed between the experts that the memories described in the fourth statement could be fact or fiction, and together with the evidence of the alcohol consumed by the complainant, he was persuaded that the fourth statement was unreliable "as is her testimony relating to it". However he did not exclude it, nor indicate that he would direct the Board to ignore it. Neither he, nor counsel, reflected on the judicial observations during the pre-trial process that if the fourth statement were excluded, all the complainant's statements would be excluded. That, of course, may be because the evidence based on the fourth statement was not in fact excluded. Nevertheless the finding of "unreliability" in relation to both the fourth statement and the complainant's evidence is material to our decision.

35. The basis of the submission was that the defendant would have to persuade the Board to prefer the first statement to the fourth, when the first statement supported a charge of rape, which he would then have to suggest was wrong. The Judge Advocate General rejected the argument that the defendant was in an impossible position and concluded that counsel for the defendant could deal "simply" with the problems, by submitting that the fourth statement was too unreliable, and that the first statement was the product of an individual who consented to intercourse but immediately regretted it. He said that the fairness of the trial could be guaranteed by very careful directions, with particular emphasis on difficulties arising from the involvement of Dr McGowan with the complainant. We respectfully doubt whether the forensic problems facing counsel for the appellant were realistically described as simple, and the necessity for very careful directions was obvious. In the result, the evidence of her complaint as well as her first statement, together with all the expert evidence relating to the reliability of her post-therapy account, were left to the Board.

36. The appellant gave evidence. In essence, this was an act of consensual intercourse, in which the complainant took an active and encouraging part. In cross-examination this account was treated with some disdain, but the case put to the appellant was based at least in part on the complainant's "unreliable" evidence to the Board. This, it was suggested to him, was that the complainant was raped while she was trying to keep her clothes on and scrabbling to keep her trousers about her body. In other words the Crown adhered to the case that the rape followed resistance, not submission, at least until counsel addressed the Board after all the evidence was completed, when we are told that both possibilities were put to it.

37. The Judge Advocate General directed the Board to "exercise caution before they acted on the unsupported memories of the complainant after the therapeutic session with Dr McGowan". However he left open the possibility of a conviction for rape on that basis. He summarised the evidence of the experts in detail. He did not comment on the reliability, or otherwise, of the fourth statement, or the evidence based on it, or the consequences of the complainant's therapy with Dr McGowan. He did not remind the Board that the overall effect of all the expert evidence was that of the complainant's two versions of the incident, the first would be more likely to be accurate. He further directed that the oral complaints made by the complainant after intercourse could be taken into account as evidence of consistency, but directed that the complaints themselves did not prove that "what she said actually occurred". Proper directions were given in relation to distress. He addressed the issue of drink in the context of the complainant's capacity to consent to intercourse, pointing out that if through drink the complainant was so intoxicated that she lacked the capacity to consent, then there was no consent.

38. In due course the appellant was convicted. Unusually, and because this was a Court-Martial, we know the factual basis on which the conviction was returned. In his sentencing remarks the Judge Advocate said that the Board's view was "that the most reliable account of what occurred came from the first statement and the complaint made by the victim immediately afterwards, as well as her extreme distress". He further commented that the appellant's account of how the complainant moaned with pleasure and shouted encouraging profanities was a complete fabrication. In the result therefore this appellant was convicted of rape on the basis of an account of the incident which, the complainant herself disavowed in her evidence, and which did not represent the Crown's case against him. This is highly unusual.

39. A conviction for rape may, of course, be returned without the oral testimony of the complainant. As examples, after giving a detailed written statement of the incident, the complainant may suffer a justified fear of serious repercussions if she were to give evidence, or she may suffer an accident with head injury and loss of memory. The written statement would almost certainly be admitted. Again, the complainant may have been unconscious at the time of intercourse, or so inebriated as to have no memory of the precise circumstances, but others may have witnessed it. In other words a positive case may be mounted by the prosecution without the complainant giving oral evidence.

40. The present case is more problematic. The complainant was available to, and did give evidence. She effectively rejected her own first account of the incident. She advanced another, more serious scenario. In the final analysis the conviction was returned notwithstanding the Board's unsurprising rejection of the complainant's oral

evidence. Two additional features should be highlighted. Her first statement would have left open the possibility of inebriated misunderstandings about the complainant's attitude to sexual activity with the appellant, whereas the fourth statement and her evidence excluded the possibility that intercourse took place on the basis of some such misunderstanding. The second is that in the context of the first account, the alcohol consumed by the complainant may have had a possible impact on whether or not she may have consented to intercourse, and subsequently regretted it, whereas on the account she actually gave, the alcohol had no effect at all. However much she had consumed, she struggled, as best she could in the limited space, throughout the incident. These differences are not immaterial, and their significance is undiminished by the Board's rejection of the appellant's assertion of her enthusiastic participation.

41. In his careful submissions on behalf of the Crown Mr Bright QC sought to address the impact of section 119 and 120 of the Criminal Justice Act 2003 on the admissibility of the first statement, and indeed the account of the complaints made immediately after intercourse had taken place, suggesting that on one view the directions in relation to complaints were over-favourable to the appellant. The first statement was inconsistent with the complainant's testimony. Accordingly it was not admissible under section 120(4)(b) of the 2003 Act. The complainant did not confirm it. Rather she disowned it. The same considerations applied to the accounts given by the complainant to others on the night of the incident. That left the possible admission of the first statement under section 119 (1) of the Act. This provides

> "If in criminal proceedings a person gives oral evidence and –
>
> (a) he admits making a previous inconsistent statement,… the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible"."

42. On a strict application of the language of the section, the statutory conditions governing admissibility were fulfilled. However we emphasise that the overall discretion of the court under section 78 of the Police and Criminal Evidence Act 1984 in relation to the fairness of proceedings applies to evidence which falls within these statutory criteria. It is critical to the analysis that the complainant did not support any version of events which she had given before she saw Dr McGowan. Everything she said afterwards about the incident, whether in her statement or her testimony, was, as the judge found, "unreliable", and should have been treated as such. Although the section 78 issue was not addressed after the pre-trial hearing, it seems to us that from the forensic point of view, once the complainant was allowed to give evidence along the lines of her fourth statement, counsel for the defendant had no choice but to cross-examine her by reference to the first statement. In short, although counsel introduced the first statement, this was a direct consequence of the Crown proceeding on the basis of the fourth statement. As counsel said it was indeed inevitable that the Board would hear about it. His case made it so. It would have been remiss for the defence to fail to use the first statement to help demonstrate the unreliability of the complainant's oral testimony, and the danger of accepting the Crown's case against him. In these circumstances, notwithstanding the provisions of section 119, in our view, as a matter of discretion and overall fairness, the first statement should not have been treated as admissible evidence sufficient to form the basis for a conviction for rape disavowed by the complainant herself.

43. Apart from the pre trial hearing the Judge Advocate General was not invited to deal with the case on this basis. He was asked to consider an alleged abuse of process. In reality the application of section 119 of the Act, and the implications of section 78 of the 1984 Act were not fully addressed in argument before him. If they had he might well have withdrawn the case from the Board at the conclusion of the prosecution case, or if he considered that the case should be left to the Board to form its own view of the complainant's oral testimony, he might then have directed the Board that the contents of the first statement did not provide admissible evidence. In other words, unless the Board accepted her oral testimony, the defendant should not be convicted.

44. There is a further problem with this conviction. Assuming that it was right for the trial to continue on the basis that the first statement provided admissible evidence, in our judgment what had to follow was a careful analysis of the different possibilities available to the Board. The Board had to consider whether to convict the appellant either on the basis of the complainant's testimony or on the basis of her first statement. This required a careful analysis of the potential difficulties to the defence generated by what we shall describe as the McGowan process, and the deficiencies and unreliability of the evidence consequent upon it. We need not spend any time on this aspect of the case because, as we know, the Board rejected the post McGowan evidence. The Judge Advocate General, however, was also required to give extremely careful directions about the approach of the Board to the evidence, if they found, as they did, that the post McGowan evidence was unreliable. If the Board was allowed to treat the first statement as admissible evidence, it should have been directed that they had to be sure that the allegation in it was true notwithstanding the complainant's own direct testimony that it was not, and that, in any event, just because it was a very different account (submission rather than resistance) that could very well bear on the question of the defendant's state of mind, and it would also bring into question the complainant's consumption of alcohol and the possibility that it may have led her to behave differently from the way she would have done if entirely sober. Without laying down any formalised straitjacket for the directions which the Board should have been given, the directions which were given were not as full and complete as, in the very unusual circumstances of this case, they required to be.

45. In our judgment this conviction is unsafe, and must be quashed.