Neutral Citation Number: [2012] EWCA Crim 2011
No: 201104887/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 19 September 2012

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE SAUNDERS

MR JUSTICE NICOL

R E G I N A

v

NICHOLAS PAUL STONE

Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr E N Burgess appeared on behalf of the **Appellant**

Mr M Mather-Lees QC appeared on behalf of the **Crown**

Judgment

As Approved by the Court

1. LORD JUSTICE ELIAS: On 11 March 2011 in the Crown Court at Exeter before His Honour Judge Cottle the appellant was convicted of one count of misconduct in a judicial or public office contrary to common law by a majority of ten to two. That was an amended count 1 on the indictment. On 25 March 2011 he was sentenced to 12 months' imprisonment, though subsequently, on 8 June 2011, this court upheld an appeal against sentence and substituted a sentence of five months. He was acquitted of two further counts of misconduct in a judicial or public office (counts 2 and 3) and one count of rape (count 4).
2. He now appeals against conviction on count 1 by leave of the single judge. The judge granted the necessary extension of time.
3. The background to this trial was as follows. The complainant, M, lived with her son. The appellant was a member of the Devon and Cornwall Constabulary stationed in Tiverton.
4. In late 1998 the complainant's son came to the attention of the police and the appellant was put in charge of the investigation. He met the complainant. The counts on which the appellant was tried arose out of their subsequent relationship, although the complainant did not make the allegations for some ten years after they had occurred.
5. The complainant's account of the incident, summarised in general terms, was as follows. She alleged that after meeting the appellant he "popped up", as she had put, from time to time. This led to an incident in May 1990 which became the subject of the original count 1. The appellant and a colleague gave her and her friend a lift home in a police vehicle despite the fact that they were on duty at that time. Later that evening the two officers returned to her house and she and the appellant had consensual sexual intercourse.
6. Thereafter she alleged that he had pursued her. He would follow her and park outside her house. On one particular occasion, after she had told another officer that she was having an affair with a police officer, without, she says, revealing the appellant's identity, the appellant visited her work place at a chip shop and told her to keep quiet about their relationship. He grabbed hold of her and slammed her into a wall. That gave rise to count 2. That caused her to write a letter of complaint.
7. In December 1999 she was out with a friend. The appellant pulled up in his car and told her that she was going to be called into the police station, which no doubt was as a result of the letter of complaint. He warned her that she if she wanted to avoid getting him into trouble she should say that what was alleged was untrue. He told her friend to move off. She did not move far enough away and he threatened to arrest her. The complainant walked away from him but he followed her and told her to get into the car. She did and he kept repeating "nothing happened". In fact, when interviewed, that is effectively what she said to the senior officer.
8. After that she had nothing to do with him until she saw some time in late June or July 2001. She alleged that had he was in his police motor car. They had a brief conversation. He told her to wait and that he would be back in five minutes. She thought she had better do as he said. He returned on his motorcycle. He said he wanted to speak to her and to stand near the side of the building as he did not want to be seen. There was a skip there. It was pretty dark. He spoke to her briefly. Then he grabbed her breast and she fell backwards into what seemed to be a garage door. She was unable to speak and he raped her. Later she discovered that she was pregnant.

9. The defence case was that the allegations were all false. The appellant admitted that he had had a relationship with the complainant between May and November 1999. They had had sexual relations on a number of occasions and not just the three which she said had occurred. The first occasion had been the subject of the original count 1, but his contention was that on all occasions when they had sexual intercourse it was consensual and always when he was off duty. In November or December 1999 he was given a telling off by his Chief Inspector and he ended the relationship. He denied that the events relied on in counts 2 or 3 had occurred at all.
10. The relationship had, however, started again when he had seen the complainant in the street in 2001. He was on duty at the time with another officer. He had seen her sitting on the pavement and had talked to her. She had encouraged him to see her later. H had done so after his shift ended and with her active enthusiasm they had gone down the alley together and had had consensual sexual intercourse. There were three other occasions after that when they had sex until the relationship came to an end. He did not see her after that.
11. As we say, the appeal is against the count on which he was convicted by a majority, that is count 1. However, he was not convicted on the original count on the indictment. The particulars of that count were as follows:

> "Nicholas Stone between the 1st day of May 1999 and the 31st day of May 1999 while acting as a public officer, namely a Police Officer in the Devon and Cornwall Constabulary wilfully misconducted yourself by engaging in sexual intercourse with a woman whilst upon duty."

12. It emerged during the complainant's own evidence that the count could not be sustained because she accepted that the officer was not on duty at the relevant time. He had returned to her house after his duty had ceased. However during the course of giving evidence she alleged that there had been another occasion in July when he had visited her and had intercourse with her when he was on duty.
13. The judge allowed prosecuting counsel to explore this incident with the complainant in re-examination, notwithstanding objections from the appellant's counsel. As a result, there was a detailed account of this different act of intercourse in July.
14. Following the re-examination, the prosecution predictably sought an amendment of the count to rely on this July incident in place of the incident that had occurred in May. Effectively, therefore, there was a substitution of new dates in the particulars in the count.
15. Defence counsel strongly objected to the amendment made so late in the day and alleged that it was changing the goal posts. He did, however, accept that his cross-examination would not have been any different had the amended version been in the original indictment.
16. The question for the court was whether it was fair to allow the application, and whether, if it was granted, the appellant would be in any way prejudiced.
17. The judge considered that it was perfectly fair. It reflected the evidence in the case and the appellant was in no way prejudiced because his position from the start had been that any sexual intercourse was consensual and always took place when he as off duty. He was perfectly able, therefore, to meet the allegation.
18. The grounds of appeal are essentially that the judge ought not to have allowed this alternative count to go to the jury, and that fresh evidence subsequently obtained cast serious doubt upon the reliability of the complainant's evidence with respect to this

amended count so as to render the verdict unsafe.

19. We should say a little more about the alleged incident which gave rise to this amended count.

20. As we have said, the complainant says that it occurred in July 1999 when the appellant saw her with flowers. It would have been approximately 10.30 or 11 in the morning. She normally went to her place of work to teach an activity. She became aware of a police car by the roundabout. Then he followed her home. She got home. She did not know it was the appellant until she had walked back to the police car. It would have been a Friday. This fact emerged during re-examination. This was when she taught the activity. She did not know the precise date. He interrogated her about the flowers and asked who gave them to her. She said it was the teacher. She said that he was "funny about it" and said he would give her a ticket. He followed her into the house. He apologised, they kissed and then had consensual sexual intercourse on the stairs. He received a call on his police radio shortly afterwards and left.

21. The appellant denied this version of events, although he did accept there was intercourse around this time with the complainant but always after his shift had finished.

22. The fresh evidence which is relied upon is for the purpose of demonstrating that the appellant could not have been on duty on any Friday morning relied upon by the complainant. The appellant had provided -- it is not entirely clear when but it seems virtually as he went into the witness box -- his own police notebooks to the Crown, and these police notebooks in their entries suggested that the only Friday in July when he was on duty in the morning was Friday 30 July. There is now fresh evidence which has been put before the court which suggests that this could not have been the Friday which is relied upon by the complainant in her account of events.

23. There are two statements. The first is from a MP, dated 21 July 2011. He is the duty manager at the place of work. He has been employed by the Mid-Devon District Council from 1998. The activity was taught to that set of children on Friday mornings. The complainant assisted the school staff. From records in his possession he was able to state that the school was billed for using the place of work on 2, 9 and 19 July 1999. There was no request for payment in respect of 23 or 30 July 1999. He had since been shown by Ian Calloway a copy of the Mid-Devon Gazette which stated that between Monday 26 July and Friday 3 September the place of work was advertised as "summer holidays".

24. The second statement was from JS, who is the head teacher responsible for the children. From records in his possession, he was able to say that the summer term in that year, 1999, ended on 21 July. The activity was taught on Fridays in term time. The complainant assisted with the activity and it was not unusual for regular helpers to be given flowers for their assistance but logically they would have been given on the last day of term.

25. These statements are supported by contemporaneous documents and the evidence in those statements has not been challenged by the Crown.

26. As we say, their significance, when read together with the entries in the police notebook, is that they suggest that the incident recounted by the complainant could not have occurred on a Friday in July as she alleges, Indeed, their seems to be inconsistent with any incident of that nature occurring around that time, a Friday in July, when she was assisting with an activity.

27. We first consider whether the judge ought to have allowed the substitution of the new count. It is understandable why the judge did allow that substitution. On its face the

effect of the change was simply to alter a date when an alleged act of intercourse on duty had occurred, and there was a detailed evidence from the complainant about the nature of the incident. Counsel for the defence accepted that he had not been prejudiced in his cross-examination and there was no request for an adjournment to deal with the new formulation of the particulars. Counsel submitted that it would have been, as he put it, "suicide" to have sought such an adjournment.

28. We confess we do not understand why he took that view. It seems to us -- though we have the advantage of hindsight -- that it was highly unfortunate, since the appellant knew from his own notebook that the only Friday in July when he was on duty in the morning was Friday 30th, that he had not sought an adjournment from the judge in order to explore matters more fully. Had he done so and been able to identify why further inquiries might prove fruitful, we have no reason to doubt that the judge would have granted the adjournment. Alternatively, if he had thought that it would delay matters too long he might at that point have refused to allow the amendment.
29. We accept that it adducing the evidence in the notebook on its own would not have advanced the appellant's case, but as the current evidence demonstrates, if an adjournment had been sought then this potentially highly relevant material could have been provided before the judge and the jury at the trial itself.
30. There is always, of course, a risk of unfairness in permitting an amendment so late in the day. The contention now is, in the light of the fresh evidence that has emerged, there must be real doubt about the reliability of the testimony.
31. Mr Mather-Lees QC has made submissions to us this morning which are cogent and very fair. He submits that an adjournment should have been sought, but properly says that he does not think it right that if this appellant has a good point that he should be prevented from relying on this evidence now because of a possible failure by his counsel to make the right judgment at the relevant time. But he also submits that, in any event, there is not sufficient doubt cast upon this conviction to warrant quashing it. The evidence given by the commplainant was very detailed and very precise. She could not be expected to remember necessarily in detail when an event occurred, particularly since it was some 13 years ago. He says that the jury had her detailed account and they had the response from the appellant, which was that this had not occurred. In all the circumstances, the conviction is safe.
32. We should add that he had the opportunity this morning to cross-examine the appellant on his notebook and he did explore the possibility that the entries in the notebook were fabricated in order to bolster the case.
33. We are satisfied, having heard the cross-examination, that these notebooks are genuine records of what occurred at the time. It is perhaps surprising that the officer was allowed to keep these notebooks but he says that he was and we have no reason to suggest that he is not telling the truth about that. If the notebook is accurate then it seems to us that the evidence of these two witnesses does cast doubt on whether the account given by the complainant was reliable.
34. We bear in mind that the verdict was reached only by a majority, and, furthermore, on other counts, which also were recounted in some detail by the complainant, the jury were not sure enough about her evidence to convict the appellant. Moreover, the jury's specifically posed a question in which they asked for information about the appellant's shift pattern on Fridays and the judge had to tell them that there was no evidence on the point.

It was a perfectly proper and accurate answer. Counsel for the appellant in fact suggested that the judge erred in failing to tell the jury that the Crown had access to information about the shift pattern. In our view that was misconceived criticism; it would not have assisted the jury, and it might simply have caused unhelpful speculation as to why the evidence had not been put before them.

35. However, we must now focus on whether in all the circumstances, and in the light of this fresh evidence which satisfies the criteria in section 23 of the Criminal Appeal Act, this verdict is safe. We are satisfied that it is not. We do not think that the jury had all the material evidence relevant to this count which they might have had if the count had been framed earlier in this way, or if time had been given for the appellant to explore further matters. In these circumstances we quash the conviction and the appeal succeeds.
36. MR MATHER-LEES: My Lord, I am instructed to ask your Lordships -- I anticipate the reply -- do you think it is in the public interest?
37. LORD JUSTICE ELIAS: It is not conceivably in the public interest. He has now served his sentence. It is not even actually an allegation of rape. It is consensual intercourse and the only issue is -- whether this kind of behaviour ought to constitute misconduct in a public office is itself another issue but we have chosen not to go into that.
38. MR BURGESS: My Lord, can I raise the question of costs? Pursuant to section 16 of the Prosecution of Offences Act 1985 subsection (4) and in light the court's decision, I invite your Lordships to make an order for costs from central funds in the appellant's favour.
39. LORD JUSTICE ELIAS: Yes. Thank you very much.