

Judgments

**CA, CRIMINAL DIVISION**

Neutral Citation Number: [2009] EWCA Crim 2445

No. 2009/04411/A8

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Friday 30 October 2009

B e f o r e:

MRS JUSTICE RAFFERTY DBE

and

MR JUSTICE HENRIQUES

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**REGINA**

- v -

**JENNIFER SYLVIA DAY**

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(Official Shorthand Writers to the Court)

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**Miss R Lee** appeared on behalf of the Appellant

**Mr N Casey** appeared on behalf of the Crown

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**J U D G M E N T**

**(As Approved by the Court)**

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Friday 30 October 2009

**MRS JUSTICE RAFFERTY:** Mr Justice Henriques will give the judgment of the court.

**MR JUSTICE HENRIQUES:**

1. On 19 June 2009, at Basildon Crown Court, before His Honour Judge Graham and a jury, the appellant, who is aged 34 and of previous good character, was convicted of perverting the course of justice by making a false complaint of rape. On 21 July 2009 she was sentenced to two years' imprisonment. She appeals against sentence by leave of the

single judge.

2. In the early hours of 8 January 2009 the appellant rang 999. When the police arrived she appeared to be extremely upset. She was crying and shaking. When given a glass of water she shook too violently to hold it. She had a large swelling and bruising to the top of her head and was crying uncontrollably. When asked if she had been attacked, she said "Yes". When asked if she had been hit, she said "No". When asked if someone had raped her, she said, "Yes". She then curled up in a ball and continued to cry uncontrollably. Further questions followed and she named her attacker as someone called Andy who lived in Brentwood. When helped out of the house she collapsed. She had to be helped to the police car. She gripped the officer's hand throughout the journey. At the police station she complained of dizziness and headaches and a decision was made to take her to hospital. Before leaving she apparently vomited into a toilet. Accordingly paramedics were called to the police station. She was taken to hospital and seen by a doctor. She was then taken to a neighbour's and when the police visited she collapsed onto the floor. She was breathing very fast and said that she was dizzy. Later that day the police interviewed her. She was very upset throughout. She said that her boyfriend, Andrew Saxby, was responsible for raping her.

3. On 9 January 2009 Mr Saxby was arrested. When interviewed he denied raping her. He told police that they were in a relationship together. He had visited her house on the day of the alleged rape and had spent a long time knocking, telephoning and trying to attract her attention. When she eventually opened the door they had had a row and he left without entering the property.

4. Fortunately, the police had received information from a neighbour of the appellant who confirmed exactly what Andrew Saxby had said, in particular that he had never entered the house.

5. That evening police officers went to the appellant's home. Whilst there one of the officers received information to the effect that the appellant had previously made a false allegation. It appears that in 2003 she had reported to the police an alleged assault by an unknown male. In 2007 she had made a virtually identical allegation to another male with whom she had been associating simultaneously with her association with Andrew Saxby. She had also told that man that she was suffering from a brain tumour when in fact she had merely had an appointment for a brain scan. The essence of what the officers were told was that the appellant was not a credible and reliable witness. When this was put to her the appellant admitted that the allegation of rape was untrue. Accordingly, Mr Saxby was released from custody after having been detained for ten hours.

6. At trial the appellant pleaded not guilty. The essence of her defence was that at the time she made the complaint she believed it to be true. That was a fanciful suggestion. We now hear that she challenged Mr Saxby on a number of details as to movements on that particular day. How it could be that she remembered exactly what happened when Mr Saxby came to the house, whether they spoke through the window, when she came to the door, the contents of the conversation, and yet believe that the allegation of rape was true when Andrew Saxby never entered the house must have caused the jury little difficulty in reaching their verdict.

7. The appellant called a neurologist, Dr Garrard, to give evidence. He said that it was likely that she was suffering from concussion on the evening of the incident by reason of a blow to the head causing confabulation, whereby the individual can not only fail to remember things, but can say things which are not true. The jury rejected this explanation for the inaccuracy of the appellant's information to the police. The point, however, is properly made that the appellant did not assert by way of defence that Mr Saxby had raped her. It is established as a certain fact that Andrew Saxby did not rape the appellant. Indeed, he never entered her house that night.

8. An immediate prison sentence was inevitable. The appellant has no previous convictions. She achieved ten GCSEs at school and a BTEC Diploma in Childcare. Following a number of nursing jobs and a position in catering, she became a medical representative. She has worked continuously and can rely upon a good work record. She is a single mother of a 5 year old daughter. References describe the appellant as an excellent, loving mother, devoted to her daughter. The daughter is presently in the care of the appellant's mother. The appellant's relationship with the father of her daughter ended unhappily in 2007. She became upset and took to drinking and internet dating. Subsequent to the present offence, and whilst on bail for it, she attended Alcoholics Anonymous. She produced nine excellent character references. She no longer drinks alcohol. Reliance is placed upon the fact that she raised money for charity by running in two London Marathons and arranging to run in a part marathon.

9. Amongst our papers there are two reports. Little or no reliance was placed upon them by Miss Lee in addressing us. That may be because Dr Peter Garrard, Consultant Neurologist, gave evidence which, at least in part, was rejected by the jury. There is also a report from Dr Sarah Maggin, Consultant Psychiatrist. Dr Garrard's opinion was that the appellant may suffer from a form of epilepsy. The problem with that opinion is that both the EEG and the MRI are normal, although the EEG returns to normal pattern in between attacks. He concluded that the appellant undoubtedly suffered some form of trauma to her head around the time of the alleged incident. She had bruising across the right eye and swelling and bruising to the right side of her head. There is no question of Mr Saxby having inflicted any such injury. It may be that the appellant accidentally struck her head on the wall of the house. There appears to be no truth in the suggestion that she was attacked by some other, as yet unidentified, individual, although such a version was advanced by the appellant to her next door neighbour. Dr Garrard expressed the view that the appellant may have been suffering from concussion when she made the false allegation. It may have involved or caused amnesia. The jury rejected that proposition. Both reports state that the appellant asserts that she was raped in October 2007 by a man whom she did not know who came to her house. That rape was never reported to the police. Dr Maggin is of the opinion that the appellant has personality difficulties. She has recurrent depressive episodes characterised by periods of low mood, loss of interest and enjoyment, poor sleep and loss of appetite. There has been alcohol abuse, an eating disorder and post-traumatic stress referable to the October 2007 rape. We are told that problems with her health continue whilst in custody, particularly in relation to weight loss and depression.

10. We have been referred to a number of authorities. None of them is a guideline case but each involves a false allegation of rape. They are: R v Goodwin (1989) 11 Cr App R(S) 194; R v Kyriakai (1990) 12 Cr App R(S) 603; R v Gregson (1993) 14 Cr App R(S) 85; R v Merritt [2006] 1 Cr App R(S) 105; R v Nazifi [2007] 1 Cr App R(S) 66; R v Thomas [2008] 2 Cr App R(S) 434; R v Beaton [2009] 1 Cr App R(S) 46; and R v McKenning [2008] EWCA Crim 2301 (Lord Judge CJ, Owen and Christopher Clarke JJ), a transcript of which was provided to us this morning by the Crown. Sentences substituted by this court range from three years' imprisonment in Beaton, where false complaints were made against two men, as they were in Thomas, where the sentence was one of 18 months' imprisonment, down to four months' imprisonment in Gregson, where rough consensual sexual intercourse had taken place, and Merritt, also four months' imprisonment, where the false allegation was made against the appellant's husband, who had, in fact, assaulted her. Those latter cases are of no assistance.

11. The seven cases cited by Miss Lee on behalf of the appellant have two features in common. Every appellant had pleaded guilty and this court in every case reduced the sentence passed in the Crown Court. The judgment in McKenning makes a critical and important point. It reads:

"15. Our attention has been drawn to a number of cases. .... There had been ample opportunity for the applicant to tell the truth and bring the ordeal to an end. [The judge] referred to the so-called 'low conviction rate' for rape, much of which, the judge said, was ill-informed, but he pointed out that when the public knew that people like the applicant were wicked enough falsely to cry rape, that would affect the minds of juries assessing the evidence of genuine victims.

....

17. However, quite apart from the consequences to Mr Holling, this allegation involves more than the individual victim. Every false allegation of rape increases the plight of those women who have been victims of this dreadful crime. It makes the offence harder to prove and, rightly concerned to avoid the conviction of an innocent man, a jury may find itself unable to be sufficiently sure to return a guilty verdict.

18. This offence caused great problems for the victim; but it also damaged the administration of justice in general in this extremely sensitive area. In our judgment the sentence imposed by the judge fell within the appropriate range. ...."

Accordingly the application for leave to appeal against sentence was refused.

12. That judgment was not available to the sentencing judge in the present case, although the judgment in Beaton, in which a very similar point was made, was available to him.

13. We have not found this an easy case, but we have reached the following conclusions. First, an immediate custodial sentence is inevitable when a false allegation of rape is made. Secondly, a plea of guilty is of considerable significance in these cases, demonstrating not only remorse but an acceptance of full responsibility for the false allegation. Thirdly, whilst no credit is available for a plea of guilty, we accept that on any view the appellant was far from well when she made this complaint. Whether she was depressed, suffering from a personality disorder, epilepsy or concussion, we know not. There is a plain indication throughout the papers that over a period of time she was abusing alcohol to a very serious degree. It appears that she had reached a stage when she had difficulty discerning the difference between truth and falsity. There can be no doubt that her accounts of various incidents which she states occurred were not true.

14. We acknowledge the personal difficulties that the appellant has faced. We have noted the problems with her health. We note that she lost her hair, that she lost weight and became very distressed. We note her good work record and the breakdown of her relationship with her partner, Stuart. We bear in mind the apology made in open court to Andrew Saxby. He indicated in his statement that he did not necessarily want her to go to prison, but an apology would be nice. Sentence is, of course, a matter for the courts and not the victim. We have in mind that the appellant is the mother of a young child and a woman of previous good character. However, this was an offence not only against Andrew Saxby, as the sentencing judge said; it attacks the criminal justice system. It diverts scarce and expensive police resources: 270 police hours were spent; £4,000 of public funds were thrown away. Andrew Saxby is plainly a most decent, respectable and kind man who certainly at one time hoped for a future with the appellant. As it turned out, he faced a terrifying allegation. He spent ten hours in custody and he found his examination in custody degrading and upsetting.

15. The sentencing judge had that further aspect in mind, referred to both in McKenning and in Beaton, that the conviction rate for rape is low when compared to other offences. False complaints of rape necessarily impact upon the minds of jurors trying rape cases. Every time a defendant stands trial for rape, defence counsel necessarily point out to jurors that false allegations are made. Allegations such as this drive yet another nail into the conviction rate.

16. In our judgment this sentence was well-measured and was entirely appropriate. Had the sentencing judge had before him the judgment of McKenning the sentence might indeed have been longer bearing in mind the fact that there was no credit here for a guilty plea. Accordingly, this appeal is dismissed.