Carl Butler v The Queen

Court
Court of Appeal (Criminal Division)

Judgment Date
20 May 2015

Case No: 201305030C1

Court of Appeal (Criminal Division)

[2015] EWCA Crim 854, 2015 WL 2369962

Before: The President of the Queen's Bench Divison (Sir Brian Leveson) Mr Justice Hickinbottom and Mrs Justice Thirlwall D.B.E

Date: 20/05/2015

On Appeal from the Crown Court At Sheffield

The Hon. Mr Justice Scott Baker

T980066

Hearing dates: 6 May 2015

Representation

Stephen Field for the Appellant.
Eleanor Laws QC for the Crown.

Judgment

Sir Brian Leveson P:

1. This reference concerns the historical judgements that have been made about a girl who has complained of sexual abuse, the extent to which those judgements should inform decisions about disclosure in a subsequent criminal prosecution, the significance and likely impact of whatever material is available on the course of that criminal trial and, finally, the critical importance of combining fair treatment of those who complain of sexual crime with avoiding miscarriages of justice. It requires careful analysis rather than uncritical assumption, along with a proper reflection both of that which the courts have learnt about those who complain about sexual crime and the absolute requirement of a fair trial for those against whom complaints are made and pursued.

2. As long ago as 21 May 1998, in the Crown Court at Sheffield, before Scott Baker J (as he then was) and a jury, the appellant, then aged 43 years, was convicted by majority verdict of rape of AB, then 19 years old; at the same trial, he was acquitted of false imprisonment. On the basis that the appellant had previously been convicted of rape, he was then sentenced to life imprisonment with a specified period to be served prior to parole eligibility of 6 years. On 20 April 1999, his renewed

application for leave to appeal against conviction (following the refusal of leave by Rougier J) was refused by the full court (Laws LJ and Garland J).

3. The appellant subsequently applied to the Criminal Cases Review Commission ("CCRC") based on fresh evidence. These grounds have not been pursued but, in the course of utilising statutory powers to check for any undisclosed or new information which might be relevant to the credibility of the complainant, the CCRC discovered material from the police and social services which it is now contended gives rise to important concerns about her credibility. As a result, the conviction has been referred to this court on the basis that these concerns give rise to a real possibility that the Court of Appeal would overturn the conviction.

The Facts

4. On 20 October 1997, the appellant met AB at or near a social security office in Bridlington. At the time she had split up from her former boy friend (by whom she had two children) and was living in bed and breakfast accommodation. The judge observed that the jury may conclude that she was a young and vulnerable young woman. The appellant chatted to her and invited her for a drink to a flat that he had just obtained and which was still virtually unfurnished. He also invited some of her friends but they were unable to come. The two bought some drink and the appellant may have accompanied her back to her bed and breakfast and then to a medical appointment; in any event, they ended up at the flat where she claimed that he made advances to her. She said that she resisted whereupon he raped her on a mattress. She was not sure if he ejaculated. The appellant told her to shut up and threatened her.

5. After the rape, AM said that she told the appellant that she was hungry as she thought this was a way of getting out of the flat. He went out to get a pizza and she tried the door and windows but they were locked. Some 15 minutes after he returned, a delivery man arrived with the pizza; she did not speak to him because she had been warned not to. By then, she had put her clothes on and the appellant made her look for some money for the food. Interpolating the evidence of the pizza delivery man, he said that AB did not speak to him but gave him "a really funny stare as if she was not comfortable, a frightened, sad expression". The pizza delivery man also said that the appellant gave AB "a funny look, more or less telling her" not to say anything.

6. AB said that she ate a piece of the pizza to try and show the appellant that she was acting normally. He finished it and she pretended to sleep. At about 1.20 am, however, when the appellant was asleep, finding the keys in the door, she made her escape without disturbing him and went to the home of a friend around the corner. She was crying and distressed and immediately made a complaint that she had been raped.

7. The following morning, 21 October, the appellant was arrested in the presence of his girlfriend, Mandy Nicholson. When made aware of the allegation, the appellant initially claimed that, on the night in question, he had slept in his flat with his girlfriend. Ms Nicholson also made what was later conceded to be a false statement to the police to the like effect. In a later interview, when the extent of some of the other evidence became apparent, he admitted that he had been with AB and that sex was consensual, ending when she indicated 'no', as a result of which he stopped. He said that he did not ejaculate at any stage, saying:

> "I never … I never at all in any circumstances ejaculated … as soon as she said no, I want to make this clear, as soon as she sez no, I lifted off her, I put me clothes on."

8. The appellant said that if there was a semen stain on his mattress that would have been caused by his having had sex the previous weekend with his girlfriend. He had not locked the door when he went to buy a pizza; the keys were in the door at

all times and AB could have let herself out. She left when he told her that she could not have a lift. He said that afterwards, he had taken a bus home, wearing the same clothes that he had been wearing when he met AB (which were different to the description of the clothing provided by AB).

9. Aspects of this account were later contradicted. Thus, two days after the appellant's arrest, on 23 October, Ms Nicholson made a second statement stating that she had not been with the appellant that night having spent the night at their house in Withernsea; she said that she had never had sex with the appellant on the mattress in the flat to which AB had gone. She went to say that when the appellant saw her at 8.00 am on 21 October, he said to her:

> "I'm not gonna' tell you no lies. Me and me mate went into this club and we picked these two girls up. We took them back to my flat and I was in bed with one and my mate was in bed with the other…. If the coppers come I've been here all night because they might do me for rape."

10. Ms Nicholson did not attend the trial but, after argument, Scott Baker J permitted this second witness statement to be read. The first judgment of this court was concerned with an unsuccessful challenge to that decision and the manner in which her evidence was left to the jury.

11. In addition, further scientific evidence was to the effect that seminal stains were present on the clothing of AB with heavy seminal staining on the appellant's mattress. Profiling concluded that the analysis provided "extremely strong support for the view that semen tested from [AB]'s T shirt … was deposited by [the appellant]". In the event, it was formally admitted that the semen was deposited by the appellant. A final contradiction to the appellant's account was clear from admitted evidence that the last bus left Bridlington at 8.40 pm, but the pizza was only delivered at 10.15 pm.

12. The appellant gave evidence in his own defence. He stated that it was AB who had approached him in the social security office and that when they were at his flat, it was she who had initiated physical contact and kissing. She had taken her clothes off and sexual intercourse had occurred with her consent: at no point did she shout or scream. When, mid-way through the act of intercourse, AB asked him to 'lift off', he did. He did not threaten her and they continued kissing, cuddling and drinking until he went out to order a pizza. Nothing untoward occurred when the pizza arrived. He then went to the bathroom to shower and when he returned, she had gone.

13. The appellant's evidence contrasted in other ways with what had been said previously. He then said that he had ejaculated, but not during intercourse; the semen must have been deposited on the T shirt after intercourse had taken place. He claimed that he had never denied ejaculating to the police and that the agreed interview transcript was wrong (although no request appears to have been made to play the tape or seek an agreement to that effect). He accepted that Mandy Nicholson's account of meeting her the following morning was true and that he had met her in the street and had been lying when he said that he had slept with her on the mattress the previous week. He went on to say that she was wrong to state that he had asked her to lie or that he had anticipated an allegation of rape. He agreed that he had not got a bus from Bridlington but said that he had hitch hiked. Finally, he admitted, contrary to what he had previously said, that he had been wearing the clothes that AB had described: he said that he had changed because he had smelt.

Disclosure

14. We were told that the Defence Case Statement made no request for disclosure of specific information concerning AB although the appellant informed the CCRC that, prior to the trial, he had disclosed to his legal advisers that AB had told him that she had previously made a complaint of rape against another man. It is also clear from his police interview that he knew

that AB's two children had been removed from her by social services. Either could have led to enquiries as to the background and antecedents of AB, had the defence wished to pursue that line.

15. There was, however, a good reason for not seeking to attack AB's character. Entirely accurately, the appellant was advised that if AB was cross examined about the previous allegation of rape or otherwise asked questions so as to involve imputations on her character, s. 1(f)(ii) of the Criminal Evidence Act 1898 (being the precursor to s.101(1)(g) of the Criminal Justice Act 2003) would bite and the prosecution would be permitted to cross examine him about his previous convictions for sexual offences. The potential impact of those convictions cannot be understated because on, 8 March 1982, he had been convicted of rape and sentenced to 3 years' imprisonment; on 20 March 1986, he had again been convicted of rape and sentenced to 8 years' imprisonment; finally, on 13 November 1992, he had been convicted of two counts of indecent assault and one count of unlawful sexual intercourse with a girl under 16 and then sentenced to 2 years' imprisonment. It is thus not in the least surprising that this approach was not adopted in his defence; furthermore, the CCRC also consider the advice "entirely appropriate".

16. Even if particulars were not sought, there remained an obligation on the prosecution pursuant to s. 3 of the Criminal Procedure and Investigations Act 1996 to disclose unused material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused. This topic was discussed by the prosecution team and although Crown Court, police investigation and defence files are no longer in existence, the CPS file is available. On the police schedule of unused material, there is a note containing limited details of AB's previous sexual allegations against members of her family. These are extracted by the CCRC in these terms:

> "Been raped in the past by 'Geordie' mum's boyfriend (now ex-boyfriend) [name redacted]. Aged 9–14 at the time.
>
> Been raped in the past by uncle [name redacted] aged 14.
>
> Been raped by father [name redacted]. Rape reported to police aged about 8.
>
> Indecent assault by grandfather [name redacted] … None reported to police."

There follows a reference in the note to social workers, the fact that the children were taken into care and that a doctor "tried to put her in a mental hospital".

17. At a conference on 27 April 1998, attended by prosecuting counsel, it was recorded that the note regarding previous rape allegations was not to be disclosed save by way of information in a letter as sensitive unused material on the basis that the material did not undermine the case for the prosecution, it being a "consent case". The police were charged with checking how many of the previous allegations were reported to the police.

18. The CPS file reveals that further limited information was reported to the CPS two days later (not as extensive as that which is now available). That included the detail that apart from one allegation, the other alleged sexual abuse had been reported but that records would have been archived or destroyed in the ten years that had elapsed. Although it was said that verification would be sought from the victim, no other information is available. Suffice to say that there is no evidence of any letter having been written to the defence and no suggestion that the question of disclosure (let alone application for Social Service files) was ever raised with the court. Enquiries by the CCRC with prosecuting counsel, defence counsel and solicitors and the trial judge revealed that none had any note or recollection of the issue being discussed.

19. On the basis that the contrary cannot be proved, it may well be that the defence were not provided even with disclosure of the limited information available. In any event, however, the CCRC did not consider that had the material which was available to the police been provided to the appellant's legal team, it would have made a difference on the basis that the disclosures

were not capable of making a significant impact on AB's credibility. In particular, based upon what was later discovered from records, the CCRC observe that the notes contain limited detail in relation to previous sexual allegations and "for example, no reference to any sexual allegation against individuals who were not family members", no reference to retractions, or to the fact that the complainant's allegations had been "found" to be untrue, or to what are described as "previous findings by Police and Social Services that the complainant had problems distinguishing between fact and fantasy". Mr Stephen Field, now appearing for the appellant but who had not previously done so, does not seek to challenge that conclusion and neither do we.

20. The CCRC went on to consider the position had the defence team had access to the full extent of the information which has subsequently come to light as a result of its own investigations and conclude that this "may well" have led to an alteration of the advice in relation to cross examination. It is thus necessary to consider that information in some detail.

AB's History

21. The findings made by the CCRC based upon police and social services material in relation to the past history of AB are summarised in these terms (at para. 19 of the Reference):

"i. Prior to trial in 1998, the complainant had made a substantial number of sexual allegations against different men. Some of those allegations she subsequently formally retracted. Other allegations were found to be untrue, or were found to be unsubstantiated;

ii. Prior to trial in 1998, there were a number of findings by Police and Social Services that the complainant had problems distinguishing between fact and fantasy. It is clear from the relevant records that a number of her sexual allegations were not believed by professionals who dealt with the complainant;

iii. Subsequent to trial in 1998, the complainant has approached the police with further sexual allegations, in particular in 2008 and 2010. None of those allegations has been proceeded with, and at least some of the allegations have not been believed by the police."

22. It is important to underline that these findings are based in no small measure on the opinion of social workers, police officers and, in at least one case, a doctor drawn in part from previous opinions. They require detailed analysis of the facts as revealed by such reports as are now available and, in addition, an appreciation of the way in which the authorities then approached allegations of sexual abuse. Further, given the absence of contemporaneous statements, a note of caution has to be sounded about the room for inaccuracy in summaries or reports. In that regard, we do not identify each incident or allegation but focus on the most significant or relevant.

23. The material now amassed appears to start in April 1988 (when AB was just over 9½ years old) and emanates from what are described as police systems. AB was then living with her father and a lodger; AB's mother reported that the lodger (CB) had said that he believed AB's father was sexually assaulting her; CB was interviewed and denied making such a complaint. Seven months later, however, AB's step sister accused CB of abusing her and her sister; a half sister had said CB had been in AB's bed. None of this appears to emanate from AB herself although on 20 January 1989, when living with her mother, she made an allegation to her school which was investigated later that day. A police officer spoke to her and she said that her father, whilst under the influence of drink, went to school to pick her up. She became frightened in case he took her away and made an allegation that he tried to touch her. That was processed by the police as a false complaint.

24. The following month, AB (then 11) alleged that CB had assaulted her including digital vaginal penetration and anal penetration. This appears to have emerged after she was found with some money at school. A social services note records that AB's mother said that AB had told the truth about CB and AB's brother also complained that CB and his father had been "rude" and got on top of him, his brother and AB in bed but that "we didn't let them do anything". It is critical to note

that on examination of AB, a police surgeon found evidence of digital insertion on a regular basis and slackness to the anus. Nevertheless, AB was described in the police summary as a liar because she had made a previous allegation of sexual abuse against her father which she had retracted (this presumably being the allegation of 20 January). That conclusion not only ignores the medical evidence and the other material but fails to consider that there might be other reasons (connected with family loyalty) for retraction. It also ignores the conclusion of Social Services on 22 February 1989 that the children should be placed on the Child Abuse Register "because it is not certain who has actually committed an offence". Nevertheless, the label 'liar' was fixed on AB and returns later in the records.

25. In 1991, AB's mother, step father NR and the school were concerned that she was having sex and she was given contraception injections. In January 1992 (when she was 13), she alleged that her step father was sexually interfering with her and she was placed with her brothers and then in foster care: the police apparently believed that this was a cry for help as she did not want to remain in the home. Thereafter, she made overtures to return home and she did so, retracting her original allegations in a statement (which is not available).

26. In January 1993, a social worker highlights AB's "ability to discern between fact and fiction" relying on her incorrectly telling a doctor in 1992 that she was pregnant, the doctor (who apparently did not examine her) later asserting that AB had not had any sexual experience. In truth, whatever might have been the background for AB's claim to pregnancy, the conclusion that she could not discern fact from fiction (which is thereafter repeated in the papers) based upon absence of sexual experience is clearly unsupportable.

27. The next incident is important because it is relied upon by Mr Field as providing the high water mark of the material that could have been used to cross examine AB had it been disclosed. One of the critical features to which he refers is the fact that this was not a family member but a stranger. The incident is set out only in a short entry in what is described as "police systems" in these terms:

> "13.7.93– [AB] made an allegation that she had been raped on several occasions by the family lodger [RC], she later changed her account and stated that the intercourse had been consensual. [RC] was interviewed and denied the offence and stated that [AB] was infatuated by him. He denied having sexual intercourse with her. No further police action was taken."

This entry comes from an Advance Warning from the South Yorkshire Police to Social Services which identifies the circumstances as "Initially alleges rape but then claims USI against … a lodger at the time of the alleged offences". Given the date and time of offence ("May to 13.7.93") and the date of the entry (13th July), it is clear that the allegation of rape (as opposed to that of unlawful sexual intercourse) was extremely short lived and probably modified during the first interview. Further, although RC was not a family member, it was an allegation against someone with whom she was sharing living accommodation.

28. On 29 August (when just 15 years of age), she made another allegation of rape on the previous day against her step father NR (who had been the subject of her retracted complaint the previous year). There was an ABE interview and NR was interviewed: he denied the offence. There was, however, real support for the allegation on the basis that what was described as 'his' semen was recovered from her underwear. In the event, the matter went to the Crown Court and he was acquitted when AB did not attend. There was an unexplained note to the effect that she would have been a hostile witness.

29. Some additional material comes from AB's attempt in 2008 to pursue the case. She said that she moved away from her family home after she had made the allegation and lived with friends; her mother (who was standing by her partner and did not want him to get into trouble) had withheld information about the hearing from her so that she did not know when the case was due to be heard. She also provided the police with considerable further detail and it is appropriate to record that, when

this complaint was repeated, NR was serving a custodial sentence for two offences of rape and a further indecent assault of a girl under 16, which the police note records "(identical circumstances to [AB's] allegation of rape)".

30. Finally, in June 2010, AB reported to the police that CB had recently admitted sexually abusing her as a child: CB was then suffering from alcohol and mental health problems (having been compulsorily detained in August 2009) and so could not be interviewed. She also made an allegation of rape against a man whom she had met in circumstances that were not the subject of dispute. Neither was it disputed that sexual touching took place: what was in issue was the element of consent surrounding digital penetration. The police then had concerns about AB's mental capacity and her assertion that she could not recall things that had happened only an hour previously. It is noted that she had made allegations in the past.

Conclusions about AB

31. Summarising, Miss Eleanor Laws Q.C. for the Crown (who similarly had not previously appeared in the case) submits that, on any showing, AB had suffered a difficult and turbulent family life involving sexual abuse. Her first sexual allegation is made and retracted against her father when she was 10 amidst concerns that he had been doing just that. Although the allegation was withdrawn, she reported further sexual abuse which appears to have been corroborated by medical examination; her sexualised behaviour at school was noted yet she was said to be a liar because she did not pursue her allegation. Allegations against NR (whose semen was found in her knickers) may not have been pursued because AB's mother had withheld the date of the trial from her although the accused in that case was convicted of similar allegations in relation to another under age girl.

32. Miss Laws argues that the relevant public authorities may not have been as robust and skilled in investigating these offences as they are now, sexual allegations then perhaps being treated with a degree of suspicion. With force and justification, she challenges the description of a 10 year old girl as a liar (which label was repeated from then on) in the circumstances in which she made and retracted a claim that her father had tried to touch her, or as unreliable in the face of clear physical signs supportive of abuse when she was 11. She advances the same submission in relation to the conclusion of a doctor that she has an "ability to mix fact and fantasy and being able to distinguish between the two" because she had never had sexual relations (notwithstanding the abuse).

33. In one sense, none of this matters, because the opinion of a social worker, of a police officer or of a doctor as to the truthfulness of a complaint is not admissible as a basis for challenging the veracity of this complaint. It is no more appropriate to put to a witness that the police officer did not believe her complaint as it would be to put to a defendant that the police officer did not believe answers which he provided in interview. As a result, we do not accept that the CCRC was correct to characterise AB as found to be untruthful, not believed or unable to distinguish fact from fantasy based upon the opinion of those who dealt with her. It is because of the CCRC analysis that we have considered this aspect of the evidence: Mr Field does not address his arguments to the opinions of those that dealt with AB or seek to suggest that they would have been admissible.

The Impact of AB's History on the Defence

34. It is important to underline that it is not suggested by Mr Field that any cross examination would have been directed to AB's prior sexual activity based upon leave following application pursuant to what was then s. 2 of the Sexual Offences (Amendment) Act 1976 ; rather the point to be advanced related to her credibility. Thus, as was subsequently made clear in *R v R.D. [2009] EWCA Crim 2137* (at para. 16), following R v T and *R v H [2002] 1 WLR 632, [2002] 1 Cr App R 254* , there has to be:

> "…a 'proper evidential basis' for asserting that the previous complaint had been made and had been false. In the absence of such a basis the questions would become ones about previous sexual behaviour: see *E [2004] EWCA Crim 1313, [2005] Crim LR 229* ."

35. Giving the judgment of the court, referring also to *R v Cox (1986) 84 Cr App R 132* , and *R v V [2006] EWCA Crim 1901* , Keene LJ went on (at para. 18):

> "In the case of V as pointed out earlier, this court held that it was only in the instance where again there was evidence of an admission by the complainant that her earlier allegation had been false that cross-examination about it was allowable. This line of cases is not to be regarded as authorising the use of a trial as a vehicle for investigating the truth or falsity of an earlier allegation merely because there is some material which could be used to try and persuade a jury that it was in fact false. As was pointed out in the case of E , if the cross-examination elicited assertions that the allegation had been true, the trial court would have been faced with the dilemma of either letting those assertions of criminal conduct on the part of a named third party stand unanswered, or "descending into factual enquiries with no obvious limit and wholly collateral to the issues in the case". We agree with those comments. Nor does the mere fact that the police decided that there was insufficient evidence to prosecute on the past complaint amount to evidence that the complaint was false."

36. The result is that Mr Field focused on retracted complaints but the reason for retraction then becomes important, if not to strict admissibility but to any consideration of the tactics to be adopted by the defence. The difficulty facing the appellant's advisers would have been the risk of evidence not that the complaint was made up but that it was true, albeit withdrawn on the basis that AB, then a child, was seeking to consider the problems that would be caused for the family or her wish to be re-united with her family and believed withdrawal was the better approach. That difficulty is compounded because once the questions were asked, absent the appellant's failure to give evidence (to which we shall return), his extremely serious (and relevant) criminal record would be admitted.

37. In relation to her complaints as a child, in our judgment, there was no prospect of establishing the basis for an attack on AB's credibility as an adult in the light of the evidential support for some of the allegations that she made, whether or not she sought to pursue them. The fact is that the allegations about her father and CB were supported both by what her brother had said and by medical evidence. The underlying allegation about NR which first surfaced in January 1992 (when AB was 13) although then withdrawn in circumstances when the inference that she wished to leave local authority care arrangements behind and return home is strong, came back 18 months later when there was strong evidential support in the form of NR's semen in her underwear. Although she did not attend the trial, her subsequent account of the circumstances and the fact that she later wished to pursue the allegation undermines the suggestion that it was fabricated. NR's subsequent convictions for child sexual offences also have relevance to this issue.

38. Furthermore, there was no question of AB being diffident in the pursuit of her allegation of rape against the appellant: she made an immediate complaint, which she pursued in a consistent fashion, making a detailed 20 page statement to the police which she maintained when giving evidence, supplemented by a further statement in which revealed not only that he had told the appellant that her children were up for adoption (which was sufficient to alert him and the defence team to potential difficulties in her personal life and history) but also identifying further detail of the incident, which was confirmed by forensic analysis.

39. Doubtless for these reasons, Mr Field focused, as the high water mark of the case he wished to advance, on the replacement of the complaint of rape (requiring, as it does, absence of consent and belief in consent) with one of unlawful sexual intercourse (which is grounded solely in the fact of intercourse with a girl under the age of 16). He underlined that this was not an allegation against a family member and thus was a better fit to the present case. In those circumstances, even accepting that RC's denial does not demonstrate its falsity (following the approach in RD to which we have referred), it is said that there was a reasonable ground of the suggestion that the allegation of rape was false. On that basis, counsel would have cross examined on this issue of credibility because if the jury had doubts about AB, the case never got off the ground. Alternatively,

Mr Field submitted, counsel should have had the opportunity to consider whether to cross examine so that the failure of disclosure renders the verdict unsafe.

40. Detailed analysis of the facts simply does not bear out this submission. First, this was not an allegation against a stranger but a lodger. Second, the note of the complaint is compiled as one piece, dated 13 July, and, in our judgment, the change to an allegation of unlawful sexual intercourse, inferentially within the same conversation, must be seen in context. Having regard to AB's prior involvement in sexual activity, if (as to which there is RC's assertion that she was infatuated with him) any acknowledgement of his possible belief in consent and police perceptions of her would make an alteration to the nature of the allegation entirely understandable without supporting an assertion of deliberate fabrication, let alone one that would or could undermine her integrity over four years later.

41. In the circumstances, we are not satisfied that this new information significantly undermined AB's credibility specifically because deliberate falsification was either difficult to allege or easy to refute either by AB or by the prosecution providing the evidence of context. In any event, given the view that counsel took in relation to what the appellant was able to reveal about her having previously made an allegation of rape, a similar tactical conclusion was inevitable. The disadvantages in relation to the appellant's credibility that flowed from the admission into evidence of his own previous convictions far outweighed the potential advantage and the case was far better argued on the basis of the admitted circumstances.

42. The CCRC mention the possibility that the appellant might not have been called to give evidence, so that his convictions would not have been admitted and Mr Field submits that if the jury had doubt about the credibility of AB, the prosecution would have failed *in limine* and there would have been no basis or need for them to have considered the credibility of the appellant. Both points ignore the true dynamics of the criminal trial. There is no question but that there was a case for the appellant to answer, even if AB had admitted that her initial complaint against RC was false and thus impacted on her credibility. The credibility of AB could not be considered in a vacuum apart from the other evidence in the case and, given the extent and number of lies that the appellant told and the fact that without his evidence, there was no real basis for asserting consensual intercourse, it is simply not plausible to say that he would not have had to give evidence. The appellant also had to undermine the evidence which the Court of Appeal on the last occasion concluded was properly admitted emanated from Mandy Nicholson that he had said that “they might do me for rape”.

43. As for the third limb of the concern expressed by the CCRC relating to events in 2010, there is no question of a failure to disclose this material which did not exist at the time of the trial. In relation to the attempt to resurrect the case against NR, although doubts were raised by the police on the basis of inconsistency and her history of complaints, far from acknowledging their fabrication, AB was seeking to pursue that which she had previously complained about: there is no evidence to suggest that these allegations were false.

44. The same is so for the other allegations that emerged in 2010 concerning CB (which appear not to have been pursued having regard to AB's loss of memory and his ill health). As for the final allegation of rape, as we have recorded, the only issue was the element of consent surrounding digital penetration. Concerns about AB's mental health and her history may well have persuaded the police not to pursue the case: there is no admissible finding that it was false and insufficient to base a positive assertion to that effect; in any event, it postdates this conviction by some 13 years.

45. The newly disclosed material has to be considered against the test whether the conviction is safe (*Pendleton [2001] UKHL 66, [2002] 1 Cr App R 34*) or raises a reasonable doubt as to the guilt of the accused (*Dial [2005] UKPC 4, [2005] 1 WLR 1660*). Each case is fact sensitive and has to be considered in the light of what was known at the time and all the circumstances. Suffice to say that we do not believe that the material now disclosed by the records search reasonably would

have altered the strategy adopted by the defence team which, in any event, knew enough about AB to put it on notice to make further enquiries had it been thought that such would have been profitable.

Other Potential Grounds

46. The CCRC also discuss other features of the case which have raised questions. The first concerns the difference of approach to lies consequent upon *R v Woodward [2001] EWCA Crim 2051* (at para. 24-5) which supports a direction to the effect that "a lie can never by itself prove guilt", reflected in the current Crown Court Bench Book: the CCRC recognise that this decision post-dates the conviction. In fact, the judge provided a standard Lucas direction and made it clear that "a defendant may lie for many reasons and they may possibly be innocent ones in the sense that they do not denote guilt". The judge specifically provided the examples of lies out of panic and confusion. In the circumstances, there was no mis-direction.

47. Finally, the CCRC note that "the trial judge's view was that that 'the two charges stood or fell together'" (see footnote 9 to para. 53). That is not quite what Scott Baker J said. He put it this way:

> "You must consider each charge separately and bring in a separate verdict on each. However, in practice, although this is entirely a matter for you, [you] may think that the two charges stand or fall together."

It has never been suggested (nor could it be) that the verdicts returned were inconsistent: the judge specifically required separate verdicts and the fact that the jury were unsure of the allegation of false imprisonment does not undermine the safety of the conviction for rape. In the circumstances, there is nothing in this point and neither is there any conclusion to be derived from the fact that the jury only convicted of rape after a lengthy retirement.

Conclusion

48. Although this allegation of rape turned on a direct conflict of evidence between AB and the appellant, there was substantial support for the general credibility of AB and her account, based on the evidence of the pizza delivery man, the immediate complaint, the consistent forensic evidence, the many lies told by the appellant (e.g whether he had slept with his girlfriend on the mattress, how he had got home and the clothing he was wearing), to say nothing of the false alibi that he presented, initially supported but then retracted by his girlfriend and the contested hearsay evidence from her that he had said "coppers might do me for rape". In the circumstances, it was a strong case.

49. In relation to the disclosed information concerning AB, this case turns on the question whether the failure to do so undermines the safety of the conviction. The views of the police at the time about the capacity of AB truthfully to report allegations of sexual abuse are irrelevant and, on examination, the evidence more than supports the broad nature of her complaints: it certainly does not demonstrate falsity. Further, in the unusual circumstances of the case, it is far from clear that the allegation of rape, immediately altered to unlawful sexual intercourse would justify cross examination as to credit but, even if it did, because of the appellant's appalling record for sexual offending (with the consequences on his credibility), the general tactic adopted by the defence in relation to what they did know, would, in our judgment, have prevailed and rightly so. Neither this, nor the other concerns set out in the CCRC reference causes us to doubt that this conviction was safe and the appeal consequent upon the reference is dismissed.

50. We add two final observations. The first concerns the appellant's position within the prison system. It is, of course, for others to determine what prison courses should be made available to prisoners to enable them to demonstrate that they have addressed their offending behaviour and do not pose a risk to the public. In the skeleton submissions, we were told that because the appellant maintained his innocence, he had been unable to participate in courses and had thus been deprived of the opportunity "to lower his risk in the eyes of the Parole Board". The Board is rightly concerned with the safety of the public but, to such extent as our views matter, if that is correct, it provides an inappropriate fetter on the ability of long term

prisoners to progress through the system. Without admitting his guilt, the fact of this appellant's history and the fact that he had been the subject of so many allegations (including an allegation that was left on the file following this conviction) demonstrates that he needed to address the way in which he related to women and his interpersonal skills. To show that he had done that must go some way to reducing the risk that he poses to the public. We were pleased to be told that the refusal to allow him to participate had since been modified and, in the circumstances, we consider it right to support that decision and to hope that the appellant can demonstrate that the risk that he has clearly posed is reduced.

51. The second observation is to underline that the CCRC was absolutely right to investigate the history of AB and to analyse her background, even having regard to the fact that the appellant had known sufficient facts to put his own solicitors on notice that there was room to investigate her background with the police and social services (because of what she had told him). It is, of course, critical to the focus of its work to redress potential miscarriages of justice. On the other hand, it is also important to examine police and social services records from 25 years ago with an eye on the very different approach to victims of sexual abuse (as AB certainly was) and the likely impact on their lives. Whatever comments the professionals of the time made, that fact and the vulnerability that results both from the clear evidence of sexual abuse and the approach of the police and others does not undermine their ability to tell the truth; that is no different from saying that previous convictions do not establish guilt.