



Neutral Citation Number: [2022] EWCA Crim 325

Case No: 202100520 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SHEFFIELD CROWN COURT

His Honour Judge Dixon

Ind. No. T20167333

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 March 2022

Before :

LORD JUSTICE DINGEMANS

MR JUSTICE HILLIARD

and

HIS HONOUR JUDGE ALTHAM

(Recorder of Preston)

Between :

Ferdos Rabani

- and -

Regina

Applicant

Respondent

Lee Sergent (instructed by **GT Stewart Solicitors & Advocates**) for the **Applicant**

Richard Thyne (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 4 March 2022

Approved Judgment

Lord Justice Dingemans :

Introduction

1.

This is the hearing of applications for an extension of time (of some 1,526 days) and for permission to appeal against conviction, which have been referred by the single judge to the full Court. The ground on which permission to appeal is sought is that there is fresh evidence from a witness, Timothy Doyle, who gave evidence at trial, which it is said makes the applicant's conviction unsafe.

2.

On 21 November 2016 in the Crown Court at Sheffield (following a trial before HHJ Dixon and a jury) the applicant was convicted of one count of rape. On 12 April 2017 the applicant, who had a relevant previous conviction for rape, was sentenced to a custodial term of 18 years and an extension period of 6 years, making an extended determinate sentence of 24 years pursuant to section 226A of the Criminal Justice Act 2003. A Sexual Harm Prevention order and a restraining order were imposed. The complainant has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences Amendment Act.

3.

There are two issues to be decided: (1) whether fresh evidence from Mr Doyle should be admitted pursuant to section 23 of the Criminal Appeal Act 1968; and (2) if so, whether the conviction is unsafe. Mr Doyle gave evidence to this Court at the hearing on Friday 4 March 2022.

4.

It is necessary to set out details of the case at trial and the evidence given by Mr Doyle at trial before turning to the fresh evidence.

The case at trial

5.

On 20 April 2016 the complainant, who was at the time living in a hostel in Sheffield and aged between 30 and 40 years, said that she went out drinking on a local green. She had consumed a lot of alcohol. Shortly after 2100 hours, after meeting a friend, she was walking home when a silver car pulled up. The occupant asked her to get in. He asked if she smoked weed, spice or tobacco. She said that she did not smoke weed or spice, but as she had no tobacco left she got into the car. The occupant told her he was "legit" and did not expect anything from her. He gave her his registration number and phone number, and told her she could put it in her phone, under the name Joshua. She did so and texted, at 2130 hours, the registration number to a friend.

6.

They stopped at a petrol station and he purchased some drinks. He said he was going to drive to Dore to ask a friend for some money. They pulled onto the driveway of a large house, but it was in darkness and so he drove away.

7.

He proceeded to drive up a country road and pulled up at what appeared to be a farm gate. He told her to "chill" when she asked where they were going. He offered her a roll up cigarette, which she accepted. A few minutes later she felt very strange, and she challenged him as to what was in it. He told her it was spice. Whilst they were at the farm gate he started kissing her, telling her to relax and that she would start to feel horny. He then engaged in vaginal intercourse. She said it felt "surreal". Afterwards he was angry telling her that she had rushed him to ejaculate.

8.

He then drove them back into Sheffield. He stopped the car at what she recognised to be Millhouses Park and then drove her into town. She kept telling him she needed to be home for a 12 midnight curfew. He dropped her off close to the Salvation Army hostel where she was then staying. He asked for a kiss which she gave him although she felt repulsed, and he gave her a pouch of tobacco. He asked her if she would be able to come out after her curfew.

9.

The complainant said that she had told her friend Kevin on the evening in question, texting him the registration number of the car, telling him that it was an Asian man called Joshua, and that she had had spice. The complainant messaged the applicant at 2303 hours saying that she was not coming back out now. At 2308 hours she texted Kevin saying "Had spice".

10.

The applicant messaged the complainant at 2313 hours saying "Thank you for a lovely and special evening, you sexy bitch. I adore your smell. Love Josh. Thank you again for the chill."

11.

At 0959 hours on 21 April 2016 the complainant texted her friend Kevin in which she complained of losing some money (she texted the applicant about that who had denied taking any money). The text to Kevin read: "OMG, what the fuck has happened to me? He stole a tenner from me as I'd just sold my stubbies. Feel dirty."

12.

The complainant said that she disclosed the rape to her boyfriend Mr Doyle. Mr Doyle said that he received a call from her on 21 April 2016 (the day after the incident). She told him what had happened and Mr Doyle told her to text him the registration number of the car so he could keep a look out for it in the area, and he walked to meet her and take her back home. They discussed what to do, but she was unsure of who to tell. A couple of days later she was at his house when her phone rang, and the person on the other end of the phone said "it's Joshua do you want to meet up". She said she froze and Mr Doyle took the phone and told him to "fuck off". He also sent a text message warning "Joshua" not to go near the complainant or he would call the police. The man called on a different number on 12 and 13 May 2016 and Mr Doyle warned him to stop ringing.

13.

The evidence from Mr Doyle was that the complainant had spoken to him. She described to him how she got the registration number, the mobile number and that sort of allayed any fears she had. She felt safe. She told him that she'd had some spice, was unaware of her surroundings. She was aware, at one stage, of him being on top of her and having sex. She told Mr Doyle about the condom and about going to Millhouses Park. Mr Doyle described how, from the conversations they'd had, she seemed between a rock and a hard place about getting out at Millhouses and why she'd stayed in the car then, saying it had been dark and, really, she had no way of getting back to the hostel if she'd got out at that stage. He said they'd had a few conversations. She felt foolish, he said, like it was her fault. That she thought the police would blame her. Initially, she wasn't for going to the police but, over time, she decided she might be willing to tell the police that at least something had happened as a warning that that sort of thing might be happening in the area. Eventually, she decided to go on and make the full report. Mr Doyle said that he'd intercepted some calls from the applicant and accepted that he had been abusive on the phone to the applicant. He denied that he'd been racist or had made any comments about the applicant's mum. He also denied that he was using drugs because he said that he

was a drugs worker. He said he was aware that the complainant had used drugs, but was not doing so at that particular point in time.

14.

The complainant spoke to Lucy Mann, the Chaplain at the Salvation Army hostel. Ms Mann said that the complainant reported to her that she had got into a car, was frustrated with herself for getting in the car, and mentioned Joshua, a roll-up with spice, that things became blurry, that she thought that oral sex on him would be enough to get her out of the situation but it had not been. Ms Mann said that the complainant had mentioned or indicated that sex had taken place.

15.

On 14 May 2016 the complainant reported to police that she had been raped. An ABE interview was conducted on 19 May 2016. The complainant said that she did not report the rape to anyone in authority immediately as she blamed herself for being stupid, getting in the car, and doubted whether anyone would believe her.

16.

On 21 May 2016 the applicant contacted the police as he had learned he was wanted for questioning in relation to this allegation. He was arrested and in interview he answered "no comment" to all questions.

17.

On 22 May 2016 the complainant attended a DVD identification procedure. She identified the applicant as the man whom she met on 20 April 2016 and who had driven her out of town in his car, and who had had sex with her against her will.

18.

On 22 May 2016 Mr Doyle made a witness statement to the police. This was not before the jury but it is relevant, given Mr Doyle's evidence to this court, to summarise it briefly. He said that the complainant had telephoned him on 21 April 2016 and told him details of the incident which had occurred the previous evening. Those details included the following: A guy had offered her a lift. He told her he had just got out of prison. He told her he could have chopped her up. He gave her a roll up cigarette. When she 'came to' he was having sex with her. She panicked that he was wearing a condom and she said that the applicant confirmed that he was wearing a condom. The complainant had texted a friend the details of the car. The friend had told the complainant that she should contact the police, but she was unsure what to do. A couple of days later the applicant telephoned the complainant who "froze and looked panicked". Mr Doyle said "Since this has happened [the complainant] has been nervous and anxious. She doesn't want to walk down London Road on her own. She sees cars and freezes thinking that that is the car. She panicked in the chemist on London Road thinking that she had seen him, this was roughly a week ago, just before she phoned the police to make a statement."

19.

The applicant was interviewed again on 22 May 2016. He said he was homeless but was in his car dressed to kill and looking good when a girl came over and opened his door and asked for a roll up, she was not heavily intoxicated. He said she looked like a "fucking tramp and smelled of body odour" and absolutely reeked, but she got in the car with him and he drove up and down Abbeydale Road, telling her of his problems. He denied giving her Spice and denied having sex with her.

20.

In evidence at trial the applicant accepted that he met the complainant and that they spent time “chilling” together but he denied that any sexual intercourse or any sexual contact took place during the time they were “chilling” together.

21.

The applicant said in evidence that the complainant was not heavily intoxicated when he met her and the complainant had in fact approached him whilst he was sat in his vehicle. The complainant asked him for a “roll up” and thereafter sat in his vehicle. The complainant made a “roll up” and asked the applicant for a lift to the Salvation Army which the applicant initially refused. The applicant said the complainant wanted to “chill” with him. The applicant accepted that he went for a drive with the complainant, but said she was free to leave at any time. They had discussed his previous convictions for rape, for harassment and for making threats to kill when they were chilling and sharing life’s problems with each other. The applicant suggested that the complaint of rape was being fabricated to make money as he had told her that the complainant in his rape case had received compensation. The applicant denied that he gave spice to the complainant or had any sexual contact with her.

22.

The applicant dropped off the complainant at the Salvation Army hostel. Before leaving the applicant gave the complainant some tobacco to the value of £4.50- £5.00. The complainant stated that she would pay for the tobacco and told the applicant to wait outside whilst she went inside to get the money but she did not return even though the applicant waited for some 20 minutes. Thereafter some text messages were exchanged. The following day the applicant received a further text message from the complainant accusing him of stealing her money.

The summing up and the conviction

23.

The judge summed up to the jury and set out the respective cases for the prosecution and applicant. The jury returned and convicted the applicant.

The post trial statements from Mr Doyle

24.

Mr Doyle wrote a letter to the applicant when he was in prison dated 11 March 2020. This stated that he was the complainant’s boyfriend at the time of the incident. He wrote “After the trial...she told me she lied and there was no sex involved at all and she made that part of the story up due to police presher, financial gain and feeling stupid”.

25.

Mr Doyle made a witness statement dated 12 November 2020. He made it clear that he did not know the applicant personally. He had convictions from 20 years ago for burglary and fraud and was currently in receipt of benefits because of his epilepsy, mobility problems and other medical issues. He had had previous issues with drug abuse and had been in a residential unit in Sheffield. After he left the unit he had volunteered to assist and had met the complainant who also had drug and alcohol issues.

26.

In his statement he said that the complainant told him over the course of a few days that she had been sexually assaulted, and then she said she had been raped. The complainant was not upset or crying and did not appear to have any urgency about contacting the police. He did not recall a number of

details including that the applicant said that he would chop her or that the complainant was frightened. He said "Between the verdict and the sentencing hearing [the complainant] and I were in my flat drinking.... She just blurted out something along the lines of 'That's done now. He'll get found guilty and we didn't even have sex.' She was quite flippant about it. I would have asked her why she lied...I cannot remember her response. I think she had told the original account so in her mind she had to stick to it." Mr Doyle said that it weighed on his mind. The relationship then deteriorated and she accused him of seeing other people. They split up eventually and she moved out of the area. He said he knew he had to tell the truth so he had gone to a local police station and he had given details over an intercom. They had told him that someone would get in contact with him but they never did.

27.

In a further witness statement dated 15 February 2021 Mr Doyle said that it was about a week after the trial that the complainant told him they had not had sex. He did not contact the police immediately as he did not know what to think. It was not until seeing the report of the sentence in the newspaper (which would have been around April 2017) that it started affecting his sleep and he knew he had to tell someone. He had first contacted the police in the middle of 2019 when he went to Woodseat police station and spoke to the officer over the intercom. Mr Doyle said he called the applicant's previous solicitors on numerous occasions and was told to write to them with the information. He wrote to them but they then told him that they needed an email so he emailed them. He finally spoke to the solicitor concerned but she told Mr Doyle that she was no longer representing the applicant and that he should contact Mr Rabani directly.

28.

In his evidence to this court on Friday 4 March 2022 Mr Doyle confirmed that he had written the letter dated 11 March 2020 and had made further witness statements. He said that he became the complainant's boyfriend about a week or two weeks after the incident. At the time of the incident in April 2016 he said that he vaguely knew her for about four to five months, but did not spend any time with her and she did not know where he was living. They met up a couple of weeks after and began going out.

29.

Mr Doyle confirmed that what he said in the letter dated 11 March 2020 was what the complainant had told him. He said that this conversation that there had been no sex took place after he gave evidence at the trial, but while the trial was going on, before the verdict. It was in the gap between him giving evidence and the rest of the proceedings. In further questions he said that this was before the jury came back and said that the applicant was guilty. The conversation happened when he was in his flat in Sheffield. The complainant was living with him at the time, although she was also still staying at the hostel or her own accommodation on occasions. They had been to the shops and were cooking dinner. They had both had some drinks, about 3-4 cans of strong lager each or a bottle of wine. He did not recall taking any drugs that day but was taking cannabis at the time so he might have done, but he was not a heavy user. She was tipsy and they were regular drinkers at that time.

30.

Mr Doyle said that the complainant was talking about what happened that day she was sexually assaulted. They were talking about that incident and that she had given evidence in court, and going over what happened and what she had said in court. Mr Doyle said that the complainant said to him that they had not had intercourse in the car. Mr Doyle said the words she used were "they hadn't had sex - in the back of the car they had not had sex". Mr Doyle said that he replied that that is not what you had been saying, and I said that is not what I said when I gave evidence. Mr Doyle said that the

complainant's reaction was an impression of being guilty, she was angry, she was raising her voice a bit and she did not like the fact that Mr Doyle had challenged her on that. It was a negative experience for her. He said she had spoken as if it was a bit kind of that she knew that she had not done the right thing in saying something when it was not true, but did not care.

31.

Mr Doyle said that he thought she was trying to walk down an avenue with a story about what she said to the police and the ball had got momentum and he did not know and he was not there. Mr Doyle said she had reported that she had gone down this line of how she saw things, and now she had said it she had to stick to it, not exact words but those kind of words. Mr Doyle said he was not happy about it, and felt that he had been dragged in. The complainant had said that Mr Doyle was her boyfriend and supposed to back her up whatever. Mr Doyle said he couldn't remember what else was said, there was a bit of arguing, and he didn't want to speculate.

32.

Mr Doyle said that the conversation took place in late afternoon. The day had ended up ok. He was not a confrontational person, and tried to be diplomatic. Mr Doyle said that they remained in a relationship for about 2-3 months after this conversation. The relationship fizzled out, he chose to spend less time with her, and she stayed at her own place more. He said that they had different wants in the future, and he had a different idea of who she was.

33.

Mr Doyle said that the issue was discussed again over the following two to three months. These were more the type of conversations where he was saying that he was not happy with what had happened. Mr Doyle said that there was a lack of trust, and trust is one of the most important things. Mr Doyle said that the last time he saw the complainant was in Christmas 2016. Mr Doyle's feelings were that he was upset and angry, glad to be out of the relationship and wanted to get some distance.

34.

Mr Doyle said that before he sent the letter in March 2020, he had tried lots of times to get hold of the applicant's solicitor who had represented the applicant when the applicant was on trial. Mr Doyle had got the solicitors' details from newspaper reports.

35.

Mr Doyle said in evidence in chief in Court that it was months after the conversation with the complainant that he had tried to get hold of the solicitors but agreed in cross examination that the first time he had made contact with anyone was in mid 2019. Mr Doyle's explanation for the delay was that he waited so long because life gets in the way, it was a lot harder to get solicitors' names, and make contact with the solicitors. It was playing on his mind for a long time, and he wanted to get it done. He said he knew that the applicant had got 26 years and that did not feel right and it needed to be addressed. He said he went to Woodseat police station. It was half closed down and he had spoken to someone on the intercom.

36.

Mr Doyle accepted that he had made a witness statement on 22 May 2016 and on 17 November 2016 before trial and he was doing his best to tell the truth. He was trying to be supportive of her, and he was trying to give honest and accurate evidence. He did not remember saying in the witness statement that he had been told by the complainant that she came to and the guy was on top of her having sex with her. Mr Doyle accepted that this was long before any police involvement and that she was reluctant to go to the police. He accepted that he had said at trial that they had had a few

conversations, that she had felt foolish like it was her fault, and that she was concerned that the police would blame her. Mr Doyle was unaware of any details of conversations between the complainant and Lucy Mann, the Salvation Army Chaplain.

37.

Mr Doyle accepted that in his new witness statement he had said that he did not recall her being frightened following the incident, and also accepted that his memory would have been better in 2016. He had said in 2016 after the incident she was nervous and anxious, and froze when she saw cars. Mr Doyle said he was sure she was frightened about what had happened as she had got in a stranger's car and on her own. When asked why he said he did not recall her being frightened he said he did not know, it is not what he remembered.

38.

Mr Doyle accepted that it was two years after he had been told by the complainant that in fact there had been no sex that he had done anything. He said life gets in the way. His daughter had died in March 2017 aged 20 years, which had put him into depression and stopped him doing anything.

39.

Mr Doyle said he had attended a police station and waited for someone to come but no one did. He said he wanted someone to come to take a statement but no one did. He said that he did not remember that on 9 June 2020 DC Jessica Hawley, the Officer in the Case ("OIC") came to his home. Mr Doyle accepted that he had said that he had made statement in a police station in the past, but he had not done. He said that a visit on 9 June 2020 "rings a bell" but he said that it was not a good time to talk. He had his own things on my plate, and he didn't feel engaged in the process, he felt collared. He did say it had been weighing on his mind, but he chose not to engage with them. It was just at that moment it was a bad moment. He was out of order, but he was in a really bad place when officer came round. He could understand when the police came back.

40.

Mr Doyle accepted that when he split up with the complainant, it was not on good terms. He was angry at her. He did not try and get back in contact. It was suggested to Mr Doyle that his evidence was untrue or he had got things badly wrong with his recollection. He said he did not have memory problems as such. He didn't remember the police coming to ask to speak to me about that case. He said he would have marked it and would have written down. He didn't write anything about what was said by the complainant.

41.

After he had been released from the witness box, but before he had finished walking down the steps from the witness box to the well of the Court, Mr Doyle asked if he could come back to say something. He was sworn in again and said he didn't understand why it had been suggested he was wrong and misremembering, he had a lot of feelings about it.

Circumstances in which further statement from Mr Doyle was made

42.

The circumstances in which Mr Doyle came to make a further statement are set out in a statement made by Julie Boyle of GT Stewart Solicitors & Advocates. The statement was made in accordance with the guidance set out in R v Gogana Times 12 July 1999 and the requirements of the Criminal Procedure Rules.

43.

Ms Boyle said that the applicant contacted GT Stewart on 31 March 2020 enclosing a copy of a letter that he had received from Mr Doyle. In the letter he stated that the complainant had told him between the trial and the sentencing hearing that she actually had not had sexual intercourse with the applicant. He stated that he had informed the police and his previous solicitors. Timothy Doyle then sent the Applicant a further letter received on 2 April 2020 confirming that the complainant had told him that they had not had sexual intercourse.

44.

GT Stewart contacted Mr Doyle by telephone on 20 April 2020 and he confirmed that he had sent the letters to the Applicant. On 22 April 2020 GT Stewart e-mailed the police requesting the e-mail address of the OIC. This was received on the same date. On 23 April 2020 GT Stewart e-mailed the OIC to enquire whether Mr Doyle had made contact with the police and if so, whether he had made a statement. She responded on the same date confirming that she was not aware and asking why we thought this to be the case.

45.

On 27 April 2020 GT Stewart e-mailed South Yorkshire police to enquire whether they had any records of Mr Doyle contacting police to make a new statement. They e-mailed a GDPR application form to us on 29 April 2020 which we returned on the same date.

46.

On 18 May 2020 GT Stewart wrote to Mr Doyle as we had not been able to make contact with him again via telephone. Mr Doyle made contact on 21 May 2020 providing his contact details. GT Stewart e-mailed him on the same date enquiring whether he would be willing to provide a statement concerning the fresh evidence he had provided in his letters to the Applicant. He replied by email on 22 May 2020 confirming that the complainant had informed him that she had lied.

47.

On 28 May 2020 GT Stewart e-mailed the OIC advising her of the police station and date when Mr Doyle attended to provide his new account. GT Stewart also informed the CPS of the same by e-mail. The OIC informed GT Stewart by e-mail on 29 May 2020 that she was not aware of Mr Doyle giving a new statement.

48.

On 9 June 2020 GT Stewart received an e-mail from the OIC who advised that she had attended Timothy Doyle's address and Mr Doyle had confirmed to her that he had given a statement, but that she could find no record of this. On 15 June 2020 the OIC confirmed that she had not taken a statement from Mr Doyle and that if one had been taken then she could find no record of it.

49.

On 10 August 2020 GT Stewart e-mailed Mr Doyle to enquire whether he would be willing to attend a virtual meeting in order to give a statement. An appointment was subsequently arranged for 24 August 2020. That appointment was then re-arranged until 1 September 2020. A transcript of the evidence at trial was obtained. A further virtual conference took place on 9 November 2020 during which a statement was taken from Timothy Doyle which he signed and dated.

50.

Counsel was instructed and his preliminary advice was received on 8 January 2021. Counsel requested that a further statement be taken from Timothy Doyle in order to clarify some issues, and this was then taken.

Other fresh evidence

51.

There was a witness statement from the OIC confirming that after contact had been made by GT Stewart she had made inquiries and had attended his house to speak to Mr Doyle, but Mr Doyle had not provided a statement to the OIC.

52.

There was a witness statement from the complainant denying that she had said to Mr Doyle that she had not had sex with the applicant.

53.

It had been decided at an earlier directions hearing that the complainant need not give evidence again. It became common ground that there were no issues with the evidence of Ms Boyle and the OIC and so there was no oral evidence from Ms Boyle or the OIC.

Section 23 Criminal Appeal Act 1968

54.

So far as is material, section 23 of the Criminal Appeal Act 1968 provides:

“(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice -

...

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

...

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.”

55.

In *R v. Ahmed* [2010] EWCA Crim 2899 the Court explained the approach of this court in appeals based on fresh evidence as follows: “The responsibility for deciding whether fresh material renders a conviction unsafe is laid inescapably on this court, which must make up its own mind. Of course it must consider the nature of the issue before the jury and such information as it can gather as to the reasoning process through which the jury will have been passing. It is likely to ask itself by way of check what impact the fresh material might have had on the jury. But in most cases of arguably

relevant fresh evidence it will be impossible to be 100% sure that it might not possibly have had some impact on the jury's deliberations, since *ex hypothesi* the jury has not seen the fresh material. The question which matters is whether the fresh material causes this court to doubt the safety of the verdict of guilty. We have had the advantage of seeing the analysis of Pendleton [2001] UKHL 66 ; [2002] 1 Cr App R 34 and Dial [2005] UKPC 4 ; [2005] 1 WLR 1660 made recently by this court in Burridge [\[2010\] EWCA Crim 2847](#) (see paragraphs 99-101) and we entirely agree with it. Where fresh evidence is under consideration the primary question "is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury." (Dial). Both in *Stafford v DPP* [1974] AC 878 at 906 and in *Pendleton* the House of Lords rejected the proposition that the jury impact test was determinative, explaining that it was only a mechanism in a difficult case for the Court of Appeal to "test its view" as to the safety of a conviction. Lord Bingham, who gave the leading speech in *Pendleton*, was a party to *Dial*".

56.

This approach has been followed in other cases. This means that the question for this court is whether, having regard to the fresh evidence, we think that the conviction is unsafe, see section 2 of the 1968 Act.

Extension of time

57.

It appears that GT Stewart were not instructed until 20 March 2020. Thereafter, instructions were taken and the further evidence of Mr Doyle was considered and the application made. It is apparent that GT Stewart acted speedily since they became aware of the new evidence.

Whether Mr Doyle's further evidence is capable of belief

58.

Mr Sergent submitted that Mr Doyle's evidence was capable of belief, and if it was it meant that the applicant's conviction had to be quashed. This is because if there was credible evidence that the complainant had admitted that her evidence that she had been raped was false, the conviction would be unsafe. It would then be necessary to address whether a retrial should be ordered. Mr Sergent stressed the absence of any link between Mr Doyle and the applicant, and the fact that Mr Doyle had travelled from Sheffield to London to give evidence to this Court, and submitted that these were powerful factors indicating that his evidence was capable of belief because he had no reason to lie. Mr Sergent said issues about when the conversation had happened, and differences between whether the complainant had been in fear or not were minor inconsistencies which were all on the edges of Mr Doyle's account and did not undermine the central point that the complainant had admitted to Mr Doyle that there had been no sex, meaning that there could not have been any rape. The delay in coming forward was a common feature in many cases, with witnesses not willing to become involved. It was understandable given the issues in Mr Doyle's life.

59.

Mr Thyne submitted that Mr Doyle's evidence was not capable of belief. He was either lying or he had convinced himself that there was a conversation with the complainant in which she had admitted that she did not have sex but he was unreliable and mistaken. Mr Thyne relied on the fact that the reasons given by Mr Doyle for the false evidence (police pressure or financial pressure) did not make sense with the timings and other evidence. The evidence showed that the complainant had blamed herself. The applicant's no comment interview and varying comments about the complainant's smell, his

previous conviction for rape and the text messages, all showed that the conviction was safe. We are grateful to Mr Sergent and Mr Thyne for their helpful written and oral submissions.

60.

We have considered very carefully the further evidence from Mr Doyle. We accept that if the evidence was or might be true it would afford a ground for allowing the appeal. This was because the complainant would have admitted that there was no sexual intercourse meaning that there could be no rape. We accept that the evidence from Mr Doyle would have been admissible in the proceedings below as part of his evidence to the court. We accept that there was a reasonable explanation for failing to adduce the evidence in the proceedings below, and this was because the applicant did not know about the conversation said to have taken place between the complainant and Mr Doyle after Mr Doyle had given evidence at trial. However we do not find that Mr Doyle's evidence is capable of belief for the reasons set out below, and we will therefore not admit it as fresh evidence pursuant to section 23 of the Criminal Evidence Act 1968.

61.

First we were very concerned by Mr Doyle's evidence to this court that he could not remember the visit of the OIC in June 2019. It was apparent that his failure to remember this visit was honest, but it was mistaken. It was very surprising in circumstances where Mr Doyle had decided that he wanted to help the applicant, had written to the applicant, and had asked for the police to come to see him. We accept that Mr Doyle has had mental health and addiction issues, and this may explain why he could not remember the visit of the OIC, but the fact that he cannot remember a visit in 2019 by the OIC to take a statement about his conversation with the complainant, does not give the court much confidence in his recollection of the conversation which was said to have taken place in November 2016.

62.

Secondly the court's lack of confidence in Mr Doyle's recollection of the conversation is underlined by the fact that he gave clear oral evidence to this court that the conversation with the complainant had occurred after he had given evidence at the trial, but before the verdict. Mr Doyle's evidence to this court admitted no possibility of error about this, but in the letter dated 11 March 2019 he had said "after the trial ... she told me she lied", and in the statement dated 12 November 2020 Mr Doyle had said the conversation had been "between the verdict and the sentencing hearing", although it is only fair to Mr Doyle to point out that he reported the complainant to have said "he'll get found guilty" suggesting that it was before the verdict. We appreciate Mr Sergent's point that it is easy to get confused about dates on which something occurred, but to give truthful and reliable evidence about what had occurred. However where the court is being asked to accept Mr Doyle as both truthful and reliable the apparently emphatic insistence that the conversation took place before the verdict, when that had not been his earlier evidence, shows that his evidence, at least on this point, is inconsistent and unreliable.

63.

Thirdly there was a substantial delay in reporting this conversation to anyone. Although in his evidence in chief to this court Mr Doyle had suggested that he had taken steps to contact the applicant's former solicitors shortly after the applicant was sentenced, he confirmed that there was at least a two year delay. We accept Mr Sergent's point that not every witness to something will cooperate with the police or make reports, but Mr Doyle was in a different category. According to his evidence, he had given evidence to a Court which he knew supported the prosecution case which, before the verdict, he knew to be a fiction. We also accept Mr Sergent's point that there were things

going on in Mr Doyle's life, but it appears that the sad loss of Mr Doyle's daughter happened six months after the conversation with the complainant. It seems extraordinary that Mr Doyle should delay so long about something which he said was weighing so heavily on his mind. We also note that Mr Doyle said that he had attempted to make contact with the applicant's former trial solicitors and that they had asked for a letter and then an email. This seems an unusual way of requesting information and we note that none of these documents have been located. None of this gives us any cause for confidence that Mr Doyle's evidence is reliable.

64.

Fourthly Mr Doyle gave inconsistent evidence about whether the complainant was in fear after meeting the applicant. His evidence at trial was clear that she was in fear and that was consistent with his earlier statements to the police. His evidence in his witness statement dated 12 November 2020 was that the complainant was not upset and he could not recall earlier details about what had been said. In the hearing before this court he confirmed in cross examination that the complainant had been in fear. These internal inconsistencies about what he remembers makes it very difficult to consider his evidence about a conversation in November 2016 to be reliable.

65.

Fifthly Mr Doyle's explanation in his letter dated 11 March 2020 for the complainant's alleged lies about the rape was "she made that part of the story up due to police pressure, financial gain and feeling stupid". This purported report of what the complainant said makes no sense in circumstances where the complainant had reported the rape to Mr Doyle and the Salvation Army Chaplain before any police involvement. This meant that there could be no police pressure which caused the first report of the rape. Further the complainant's reaction after the event had been to blame herself and there had been no evidence of any financial motivation on her part. In fact the complainant had given feeling stupid as a reason for not reporting the matter to the police. It should also be recorded that the alleged admission by the complainant that there was no sex with the applicant appears to be inconsistent with the applicant's text thanking the complainant "for a lovely and special evening, you sexy bitch. I adore your smell" and the complainant's text the next morning "I feel dirty". This is without taking account of the other evidence supporting the applicant's account including her complaint that she had taken spice, the applicant's contacts with spice, the applicant's initial no comment interview and the applicant's previous conviction for rape in similar circumstances.

66.

On the basis of all the evidence before us we find that Mr Doyle has now convinced himself that there was a conversation with the complainant to the effect that he set out in his letter dated 11 March 2020, but we do not consider his evidence about the conversation with the complainant to be reliable for all the reasons set out above. We do not accept that such a conversation took place. As has been said on many occasions "the human capacity for honestly believing something which bears no relation to what actually happened is unlimited", compare *Local Authority v SE* [2021] EWCOP 44; (2021) 182 BMLR 96 at paragraph 25. It is impossible to know on the evidence before this Court what actual conversation between the complainant and Mr Doyle has led him to develop that inaccurate recollection.

67.

We have considered the point made about the evidence of the timing of the start of the relationship between complainant and Mr Doyle. Both the complainant and Mr Doyle have given inconsistent evidence about when the relationship started (whether it was shortly before or after rape) but none of that causes us to doubt the safety of the conviction. This is because the jury were fully able to assess

the complainant and Mr Doyle and the reliability of their recollections at the trial, and there was evidence of another recent complaint by the complainant to the Salvation Army chaplain. Further the fact that the complainant disclosed that she was so annoyed to hear that the applicant was appealing that she was going to sell her story anonymously to the press does not cause us to doubt the safety of the conviction because it demonstrates only an understandable animus against the applicant.

Conclusion

68.

For the detailed reason set out above we do not admit the further evidence from Mr Doyle, because we do not consider that his evidence is reliable. We therefore dismiss the application for an extension of time to appeal and the application for permission to appeal.