Neutral Citation Number: [2013] EWHC 945 (Admin)

Case No: CO/3845/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2013

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE FULFORD
MR JUSTICE SWEENEY

- -

Between :

THE QUEEN (ON THE APPLICATION OF F)	**Claimant**
- and -	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**
- and -	
"A"	**Interested Party**

- -
- -

Helen Mountfield QC for the **Claimant**
Andrew Edis QC for the **Defendant**

Hearing dates: 19th March 2013

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Approved Judgment

The Lord Chief Justice of England and Wales:

This is the judgment of the Court.

1. This is an unusual, but not unique, application for judicial review of the refusal of the Director of Public Prosecutions ("the defendant") to initiate a prosecution for rape and/or sexual assault of the claimant by her former partner, ("the intervener"). The first claim in these proceedings was filed on 28 June 2011, but shortly thereafter the defendant agreed on 14 July 2011 to make a fresh decision. The review was conducted by his principal legal advisor, Alison Levitt QC. She approached the decision on the basis that the claimant's credibility was secure. Nevertheless she concluded that even if a jury were to believe every word of her evidence, it would be insufficient to establish a realistic prospect of conviction for any offence: this decision is the subject of the present application.

2. It is perhaps worth underlining at the outset that judges are not involved in police investigations or prosecutorial decisions about whether and when prosecutions should take place. Their involvement in the administration of criminal justice in relation to serious offences normally begins after the investigations are largely complete and the relevant decisions relating to the prosecution have been made by the Crown Prosecution Service, and the case arrives at the Crown Court. Thereafter they may, on well known principles, conclude that the prosecution constitutes an abuse of process: if they do, the process then comes to an end. Again, at the end of the evidence for the prosecution, applying what we shall describe as Galbraith principles, they may conclude that there is insufficient evidence to justify the case proceeding further. These processes exemplify the principle that judicial control over the prosecutorial process arises not before but after the case has reached a court vested with jurisdiction to hear and conduct the trial. The decision whether it should do so has been made by the independent Crown Prosecution Service for which the defendant is responsible.

3. By contrast with a flawed decision to prosecute, where the individual facing trial is provided with ample alternative remedies in the Crown Court (or Magistrates' Court), by definition when it is contended that the decision that there should be no prosecution itself constitutes a miscarriage of justice, the only judicial remedy would be a judicial review. The order sought by the current application would require the defendant to reconsider and review the decision that a prosecution should not take place.

4. Where a decision not to prosecute has followed a painstaking review of the kind which occurred here, and which will be expected hereafter following the implementation of the Crown Prosecution Service's offer to the victim of a Right of Review (VRR) which, we understand will become effective in May 2013, it will be a very rare case indeed when the court can properly decide that it should interfere with the decision not to prosecute. On the evidential question whether the prosecution has a

realistic prospect of success, the responsibility for the decision requires the CPS to make an informed judgment

> ".. of how a case against a particular defendant if brought, would be likely to fare in the context of a criminal trial before (a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere".

(See, per Lord Bingham CJ in R v Director of Public Prosecutions ex parte Manning [2001] 1 QB 330).

5. Lord Bingham went on to underline that the test should not be so exacting that "an effective remedy would be denied" when judicial review constitutes the only way in which "the citizen can seek redress against a decision not to prosecute". However the court examining the decision not to prosecute is not vested with a broad jurisdiction to exercise its own judgment, and second guess the defendant's decision, and direct reconsideration of the decision simply because the court itself would have reached a different conclusion. The remedy is carefully circumscribed. In the decided cases different epithets have been applied to highlight how sparingly this jurisdiction should be exercised. The remedy is "highly exceptional", "rare in the extreme", and "very rare indeed".

6. Without suggesting a comprehensive list, the decision not to prosecute may be shown to follow a perverse decision to disregard compelling evidence or inexplicably to ignore the relevant prosecutorial policy or policies, or a combination of both. It may, although as far as we know there have never been any such examples, follow some impropriety or abuse of power by those entrusted by the defendant with the relevant responsibility. It may also be based on an error of law. If so it would be open to this court to require the decision to be reconsidered and the law correctly applied.

7. The Levitt Review provides a careful, detailed analysis of the evidence and the relevant prosecutorial policies. It has been subjected to critical analysis of the kind which is sometimes made in an appeal against a judgment in a civil case where the appeal is founded on the submission that the judge's findings of fact were erroneous. Although numerous issues and sub-issues are raised, for the reasons we have explained, our consideration is limited to answering the questions whether the Levitt review is flawed so that, on judicial review grounds, it should be set aside.

8. The essential evidence of the claimant is that after her Islamic marriage to the intervener in November 2009 their relationship was marred by his abusive dominance. Miss Levitt summarises the relationship after the marriage: (the claimant) says that

after their Islamic marriage, although they never lived together (the intervener) always treated her as his wife. She plainly does not mean this as a compliment; the fact that they were married in the religious sense gave him a further sense of control over her. She describes too the sexual side of their relationship as continuing in the same unsatisfactory way (to use a neutral term)after or before the marriage. Amongst other things, the intervener would put his hand on her throat during intercourse and call her his "bitch". Miss Levitt quotes the claimant directly: "almost all sex with (the intervener) involved him displaying dominance, control and emotional detachment or aggression … occasionally sex would begin intimately but then (the intervener's) demeanour would suddenly change and he would become detached and domineering, often pinning me by my throat … as the relationship progressed I felt less and less like I had the right to say no to his sexual demands. He impressed upon me verbally that as his Muslim wife I should fulfil his sexual needs unquestionably. I felt it was not acceptable to him for me to refuse to be intimate for any reason and as time went on, due to reactions I encountered in him, I became increasingly fearful about saying no to him because of the potential consequences of doing so". Miss Levitt observes: "I have taken it that she means that she was fearful that he would leave her if she did not go along with his demands". He would taunt her by telling her (using the claimant's own language): "we both know you are not strong enough to get rid of me". (The claimant) acknowledges that although she would tell him to go, often she would end up begging him to stay.

In her assessment Miss Levitt describes how:

> "I have treated her as a vulnerable young woman who was (arguably) emotionally manipulated into entering into, and then remaining in, a relationship about which she had considerable reservations at the time and, it would appear she now regrets. Much of what she describes fits squarely within the Government definition of domestic violence, and would no doubt resonate with other victims. I have in mind particularly her hope and expectation that he would change."

Miss Levitt worked throughout on the assumption that the claimant's evidence was "entirely truthful and reliable", and notwithstanding some minor discrepancies which were entirely consistent with the passage of time since the relevant events. The discrepancies did not cause her concern about the claimant's credibility.

9. Without repeating the entire history of the relationship, three particular incidents in the claimant's narrative account assume prominence. The first took place on 2 May 2009 (that is before the Muslim marriage). The intervener wanted the claimant to return to her flat, by implication to have sexual intercourse. Miss Levitt's summary continues:

> "She says that she did not want to do that because she was revising for her exams. Once it became clear that they were both in the (university) building, he told her he was in the gym in the basement. She thought that his texts seemed strange and

> she was worried about him as he was prone to bouts of depression, so she went down to the gym. There she found him sitting in the dark. She went and sat next to him, put her arm around him and asked him if he was all right, but he began to make aggressive sexual advances to her. She told the police that "in one sense that wouldn't have been a problem, because we were together", but she did not like how aggressive he was being. He kissed her very roughly, pulled open her belt and trousers and grabbed at her face and hair. At one point he pushed her onto the floor and had hold of her by her hair. He opened her trousers, pulled her head down by her hair and demanded that she perform oral sex on him but she refused. He then began to masturbate in front of her (which she described as being a form of assault in and of itself). It appears that at some point, she asked him to stop and he would then do so and push her away, telling her to leave, but she did not do so because she was worried about him. At some other point "he had her by the throat", not hard enough to hurt her, but enough to scare her".

Although the intervener did not force the claimant to perform oral sex on him, nor indeed have sexual intercourse with him, she "feared he was going to rape her".

10. On the following day the claimant rang the Rape Crisis Line. As she was making the telephone call, the intervener came and sat next to her and said that the relationship was over because of what he had done and because he had crossed the line. In response she said that although his behaviour had been unacceptable, she still wanted the relationship to continue. They went down to the gym and she agreed to do all the things he had wanted to do the night before. She performed oral sex on him and they had full intercourse. He asked her whether she would ever refuse him again, and she said that she would not, and she was later to tell the police that she complied with his demands in order to please him. She made a statement to the police about this time, complaining about the intervener's violence, but indicated that she did not wish to press charges. She said that she went to the police so that the intervener's behaviour would be recorded in case he behaved in a similar way in the future.

11. Miss Levitt approached the first incident on the basis that the claimant did not consent. The only issue which might be anticipated (assuming she was telling the truth) was whether the intervener may have had a reasonable belief in her consent. She thought that a jury would struggle to be sure that <u>at the time</u> (her emphasis) he realised that she was not consenting to what he did, and that it was only later that he came to understand how distressed she had been and how betrayed she felt, and that his subsequent expressions of remorse reflected a level of understanding which may not have existed at the time.

12. The next specific incident occurred in November 2009. There was a verbal altercation during which the intervener accused the claimant of forcing him to

suppress many aspects of his sexuality and asserted that he did not find the relationship sexually satisfying, as she no longer aroused him. As a result she became very upset and turned away from him. He became "aggressive", and "pulled off her pyjama bottoms, tore her underwear and took her by the throat. He was then disturbed when her son awoke, and nothing further untoward occurred".

13. Miss Levitt concluded that a jury would be justified in concluding that a "pattern of sexual force or roughness had developed between them, to which there was at least a degree of acceptance on her part, and which he understood that she agreed to, even if reluctantly. Accordingly there was no realistic prospect that the jury would conclude that she did not consent to this incident or that the intervener did not believe that she was consenting. There was insufficient evidence both as to consent and belief in consent to justify the issue being left to the jury".

14. The third specific incident occurred in the bathroom of the home on 22 February 2010. By now, as the intervener knew, the claimant was adamant that she did not want another child. For medical reasons the contraceptive pill was unsuitable for her, and although he used a condom, he did not like doing so. Their agreed method of avoiding conception was withdrawal.

15. After a disagreement but following an apology from the intervener, the claimant put her arms around him. When she did so, Miss Levitt describes how the intervener: "turned her around over the basin and pulled her pyjamas down, penetrating her vagina with his penis". Although this form of sexual intercourse was disappointing to the claimant, she did not object, provided he withdrew before ejaculation. Miss Levitt accepts that the claimant did not consent to the intervener ejaculating inside her, and further, that he was aware that she did not want him to do so. However shortly after penetration, and without allowing her any chance to object, the intervener told the claimant that he would be coming inside her "because you are my wife and I'll do it if I want". He ejaculated before she could say or do anything about it. As a result she became pregnant.

16. Something of the dominant way in which she felt he treated her can be seen from an email she sent to him in March 2010. "I've tried and cried and cried and begged and pleaded but you will still drag me out of bed at 1 in the morning from a deep sleep when I am sick and expect me to get completely undressed, put on heels and allow you to handcuff me in the freezing cold". Towards the time when the relationship was coming to an end she wrote an email asking the intervener to "note that the day has gone when I will get intimate with you because I feel I have to with someone who is behaving hatefully, if I am ill or emotionally distraught". On another occasion she wrote that she "I did everything I could that was remotely allowed to please you, but none of it worked because it's never about sex with you, it's about control", and again, "let it not be said I haven't tried to satisfy your base and nature".

17. According to an email sent by her to the intervener, after she realised that she was pregnant, referring to this incident she wrote:

> "The night you came and said you were going to do it because I was your woman and you would do what you wanted with me and left me feeling very lost and very alone not to mention completely powerless and enslaved. I honestly felt that I was going to leave you. The fact that you had been so caring when you said to come off the pill and had assured me you would use condoms and later assured me you would use azi but then switched in a moment left me feeling really betrayed. I trusted you to keep your word and that night I just felt like something snapped in me."

18. The intervener also sent a number of text messages to the claimant, at a time when Miss Levitt noted that he was seeking a reconciliation. Thus, on 3 May 2010 he apologised, saying "I am sorry for raping you. I can think of no other word." On the same day he sent another text message, speaking of "the image of your face in fear, of when I ripped your underwear off". A few days later he wrote that he had changed, accepting "I degraded you, humiliated you from the first day and you played along because you felt you had to. I know you now and not once did you enjoy it. It was degrading from the first. I am ready to be wholly supporting without the oppressive sexuality. There is no more oppressive sexuality."

19. At the end of May 2010 the claimant made a formal complaint to the police about rape and sexual assault. The intervener was arrested and interviewed in late July. He made no comment, save to provide a prepared statement asserting that he had never forced the claimant. He was reinterviewed in January 2011, but made no comment.

20. In relation to the incident in February 2010, the question Miss Levitt asked herself was whether ejaculation without consent could transform an incident of consensual intercourse into rape. She could find no authority that dealt directly with this problem. She noted that as a matter of law a person could withdraw consent to intercourse even after penetration had begun, but she was "not clear at which point it could be argued that (the intervener) should have ceased to have intercourse with her". She suggested "were it possible to prove that he had embarked on the act intending to ejaculate it is arguable that he knew that she would not have consented to it, but as a matter of evidence it would be in my view be impossible to prove that it was not a spontaneous decision made at the point of ejaculation".

21. We are all sadly familiar with the offence of rape. It is salutary to remind ourselves from time to time of its precise ingredients. S.1(1) of the Sexual Offences Act 2003 provides:

> "A person (A) commits an offence if –
>
> (a) he intentionally penetrates the vagina … of another person with his penis,
>
> (b) (B) does not consent to the penetration, and

(c) (A) does not reasonably believe that (B) consents".

Ejaculation is irrelevant to this definition: so is pregnancy. If ejaculation occurs it may be an aggravating feature relevant to sentence: it is irrelevant to proof of the offence itself.

22. At the time when the review was written Miss Levitt did not have the advantage of the judgment of the Divisional Court in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849. It was submitted to the Divisional Court that as the complainant had consented to sexual intercourse only on the basis that Assange would use a condom, even if he did not, that fact was or would be irrelevant. She had consented to intercourse. Sir John Thomas, President of the Queen's Bench Division, explained, at para 86:

> "The question of consent in the present case is to be determined by reference to s.74. The allegation is clear and covers the alternative; it is not an allegation that the condom came off accidentally or was damaged accidentally. It would plainly be open to a jury to hold that, if (the complainant) had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount to an offence under the Sexual Offences Act 2003, whatever the position may have been prior to that Act."

23. Having reached that conclusion, the Divisional Court addressed the question whether Mr Assange's conduct in having sexual intercourse without a condom, or in continuing with it after removing, damaging or tearing the condom was "deceptive". The point did not require a firm conclusion, but it was accepted that "it could be argued that sexual intercourse without a condom was different to sexual intercourse with a condom, given the presence of a physical barrier, a perceived difference in the threat in the degree of intimacy, the risks of disease and the prevention of a pregnancy; moreover the editors of *Smith and Hogan* (*12th Edition* at p.866) commented that it had been argued that unprotected sexual intercourse should be treated as being different in nature to protected sexual intercourse". However, the court was not inclined to accept this approach, noting that the editors of *Smith and Hogan* approached the possible deception in relation to the use of a condom as "likely to be held to remove any purported free agreement by the complainant under s.74". The court further noted a view to similar effect expressed in the well known text book *Rook and Ward on Sexual Offences* (4th edition at paragraph 1.216.)

24. We must emphasise that we are not addressing the situation in which sexual intercourse occurs consensually when the man, intending to withdraw in accordance

with his partner's wishes, or their understanding, nevertheless ejaculates prematurely, or accidentally, within rather than outside his partner's vagina. These things happen. They always have and they always will, and no offence is committed when they do. They underline why withdrawal is not a safe method of contraception. Equally we are not addressing the many fluctuating ways in which sexual relationships may develop, as couples discover and renew their own levels of understanding and tolerance, their codes of communication, express or understood, and mutual give and take, experimentation and excitement. These are intensely private matters, personal to the couple in question.

25. The facts suggested by the evidence in this case are quite different. It is inappropriate to examine the incident of sexual intercourse in February 2010 in isolation from the well evidenced history (including his own admissions) of the intervener's sexual dominance of the claimant and her unenthusiastic acquiescence to his demands. Given that essential background, the evidence about the incident in February 2010 is reasonably open to this analysis. Consensual penetration occurred. The claimant consented on the clear understanding that the intervener would not ejaculate within her vagina. She believed that he intended and agreed to withdraw before ejaculation. The intervener knew and understood that this was the only basis on which she was prepared to have sexual intercourse with him. There is evidence from the history of the relationship, as well as what he said when sexual intercourse was taking place, and his observations to the claimant afterwards, that although he never disclosed his intention to her (because if she had known he knew that she would have never have consented), either from the outset of penetration, or after penetration had begun, he intended that this occasion of sexual intercourse would culminate in ejaculation within her vagina, whatever her wishes and their understanding. In short, there is evidence that he deliberately ignored the basis of her consent to penetration as a manifestation of his control over her.

26. In law, the question which arises is whether this factual structure can give rise to a conviction for rape. Did the claimant consent to this penetration? She did so, provided, in the language of s.74 of the 2003 Act, she agreed by choice, when she had the freedom and capacity to make the choice. What *Assange* underlines is that "choice" is crucial to the issue of "consent", and indeed we underline that the statutory definition of consent provided in s.74 applies equally to s.1(1)(c) as it does to s.1(1)(b). The evidence relating to "choice" and the "freedom" to make any particular choice must be approached in a broad commonsense way. If before penetration began the intervener had made up his mind that he would penetrate and ejaculate within the claimant's vagina, or even, because "penetration is a continuing act from entry to withdrawal" (see s.79(2) of the 2003 Act) he decided that he would not withdraw at all, just because he deemed the claimant subservient to his control, she was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based. Accordingly her consent was negated. Contrary to her wishes, and knowing that she would not have consented, and did not consent to penetration or the continuation of penetration if she had any inkling of his intention, he deliberately ejaculated within her vagina. In law, this combination of circumstances falls within the statutory definition of rape.

27. The entire body of evidence, both in relation to the nature and history of the relationship between these two people, and as it applies to each of the individual, specific occasions of complaint, requires re-examination in the light of these observations. This decision should be reviewed in the light of the legal principles explained in this judgment. This is an appropriate case in which to order a judicial review.