Neutral Citation Number: [2012] EWCA Crim 434

Case No: 2011/04321/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM MOLD CROWN COURT
HIS HONOUR JUDGE ROGERS
T2010/7167

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2012

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE SILBER
and
MR JUSTICE MADDISON

- -

Between :

A	**Appellant**
- and -	
R	**Respondent**

- -
- -

N Quinn QC and D Malone (instructed by **Woodfines LLP**) for the **Appellant**
A Levitt QC and Iain Wicks (instructed by **CPS**) for the **Crown**

Hearing date: 15th February 2012

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Judgment

The Lord Chief Justice of England and Wales:

1. This is an appeal against conviction by A following her plea of guilty at Mold Crown Court on 15th October 2010, to doing acts tending and intended to pervert the course of public justice, contrary to common law. For the sake of preserving her anonymity she has been identified by the media during these proceedings as "Sarah". The particulars of offence alleged that between 7th February 2010 and 30th July 2010, with the necessary intent, she did a series of acts which had a tendency to pervert the course of public justice by making and pursuing false retractions of her complaints of rape against her husband. She was sentenced to 8 months imprisonment. The sentence was quashed in this court on 23rd November 2010, and replaced with a non-custodial sentence. The judgment of the court is set out at [2010] EWCA Crim. 2913. By the time the sentence was quashed, the appellant had already been in custody for 3 weeks, and her own personal position, as well as that of her four children, had become so uncertain and problematic that the court, as then constituted, believed that it would be of positive assistance to all of them to make a community based order, taking immediate effect. If the situation had been different, the likely order, given that the appellant had already been in custody for 3 weeks, would have been an order for conditional discharge.

The appeal against sentence

2. Dealing with it very briefly at this stage, the prosecution of the appellant began with her complaint that her husband had raped her. In due course she withdrew that complaint. She then proceeded to assert and reassert that her complaint had been false. Proceedings against him were stopped. She was prosecuted for perverting the course of justice by making a false complaint of rape. In due course, having seen counsel and solicitor, she reasserted the truth of the original complaint. In due course, on 15th October 2010, she faced two indictments at Mold Crown Court, both of which alleged that she had perverted the course of public justice. Although the statement of offence in each indictment was identical, the particulars of offence were mutually contradictory. The first indictment alleged that she had made and pursued false allegations of rape against her husband, the second that she had made and pursued a false retraction of these allegations. She pleaded not guilty to the first indictment, and guilty to the second. The Crown offered no evidence on the first indictment. She was acquitted by order of the judge and a "not guilty" verdict was entered. On 5th November she was sentenced and shortly afterwards the sentence was quashed

3. The appellant was therefore convicted of making false retractions of a most serious allegation of sexual crime when she would otherwise have been in a position to assist the Crown to prosecute the perpetrator to conviction. On this basis she deliberately enabled her husband to escape justice for the crime of rape for which she was the victim. On both occasions when the case has been before this court, the prosecution has proceeded on the basis that the allegations of rape and domestic abuse suffered by the appellant at the hands of her husband were true. We shall proceed on the same basis. Nevertheless it is only fair to the appellant's husband to record that he has consistently denied the allegations and has not had any opportunity publicly to challenge or refute them.

4. During the course of the judgment on her appeal against sentence, a number of observations were made in this court:

> "… a complaint that an individual has been the victim of crime is not, and never has been, merely a private matter between the complainant and the alleged perpetrator of the crime. Every crime engages the community at large. There is a distinct public interest in the investigation and, if appropriate, the prosecution and conviction of those who have committed crimes. … an unconvicted criminal is free to continue to commit crime and to add to the list of his victims, as well as to escape justice. Therefore, perverting the course of justice is not confined to making and pursuing false allegations or giving false evidence, which is always a very serious offence. It extends to the retraction of truthful allegations or the retraction of truthful evidence. …".

5. Critical features of mitigation were then addressed:

> "The different between the culpability of the individual who instigates a false complaint against an innocent man and the complainant who retracts a truthful allegation against a guilty man will often be very marked. Experience shows that the withdrawal of a truthful complaint of crime committed in a domestic environment usually stems from pressures, sometimes direct, sometimes indirect, sometimes immensely subtle, which are consequent on the nature of the individual relationship and the characters of the people who are involved in it. Where a woman has been raped, and raped more than once by her husband or partner, the father of her children, the man in whom she is entitled to repose her trust, those very actions reflect, and are often meant to reflect, manifestations of dominance, power and control over her. When these features of a relationship between a man and a woman are established, it is an inevitable consequence that the woman who has been so ill-treated becomes extremely vulnerable.
>
> Of course it is better for a truthful complaint to be pursued, but if the proposal that it should be withdrawn is not accepted, leading to a positive retraction and admission that the original truthful complaint was untrue, and the complainant is then prosecuted to conviction, the sentencing court, when assessing culpability, should recognise and allow for the pressures to which the truthful complainant in such a relationship has been exposed, and should be guided by a broad measure of compassion for a woman who has already been victimised."

6. The case attracted a good deal of understandable public interest, and indeed concern. It was reported in *The Guardian* newspaper on 16 December 2010 that the Director of Public Prosecutions, referring to the need of the Crown Prosecution Service to organise an improvement in their handling of retraction cases, and plainly referring to this particular case, said that he did not consider "justice was done or seen to be done". Unsurprisingly Mr Niall Quinn QC on behalf of the appellant highlighted this

comment, and used it to develop his submission that the conviction should be regarded as unsafe.

7. Thereafter, following a detailed consultation exercise, fresh Guidance was published by the Crown Prosecution Service. If this Guidance had been in force at the date of the appellant's conviction, on the basis of the evidence that she had been raped and subjected to other domestic violence over a long period and that this had had a damaging effect on her health, she would, as Miss Alison Levitt QC for the Crown accepted, in all likelihood, not have been prosecuted. Mr Quinn suggested that it was not simply that a prosecution to conviction would have been unlikely, but rather, the appeal should be approached on the basis that she would not have been prosecuted at all.

The appeal against conviction

8. The entire case has now been re-examined. The solicitors and counsel who acted on behalf of the appellant have provided the appellant's new legal advisors with all the material available to them, and commented on the facts which confronted them. Further detailed instructions have been obtained from the appellant. A number of witnesses who support her account of the ill treatment to which she was subjected have provided statements. Recently she was examined by Roger Hutchinson, a consultant forensic clinical psychologist. Based on a rather developed account of events provided to him by the appellant herself, and, as far as we can see, without dealing with all the material available to us, he concluded that during the latter part of her relationship with her husband the appellant was experiencing post traumatic stress disorder, and that this condition persisted at the time when she retracted the allegations of rape, and indeed still continue. Based on this material Mr Quinn submitted that crucial evidence was not properly examined or considered before the appellant pleaded guilty, and that if it had been, she had a viable defence to the charge, in the form of duress and, initially at any rate, although it was rightly abandoned at the hearing of the appeal, marital coercion. The issue of duress in the form of the physical, sexual and mental abuse inflicted on her is at the heart of the appeal, and we shall examine the evidence closely, omitting a degree of Mr Quinn's forensic overstatement from our analysis. Mr Quinn further suggested that all this material revealed that the decision to prosecute the appellant followed failings by everyone concerned in the process which culminated in the sentence imposed at Mold Crown Court, and constituted an inexplicable and inappropriate exercise of the well established prosecutorial discretion which required that she should not be prosecuted at all. In short, he submitted that if all the relevant facts had been properly considered the prosecution would not have gone ahead, or would have been stayed on application to the court.

9. For present purposes, we shall not distinguish between evidence which was available prior to conviction, and material relating to the period before conviction which has emerged subsequently, which we considered de bene esse. In the end, subject to the reservations expressed in the course of the judgment, we admitted the evidence.

The facts

10. The narrative begins on 28th November 2009 when the appellant reported that she had just been raped by her husband and had been raped by him on two earlier occasions.

She was quickly relocated to the Women's Refuge with her four children and he was immediately arrested. He denied the offence. On the following day she was video interviewed. She gave a detailed account of rape. He was interviewed and maintained his denials. He was then charged with rape and remanded in custody. On the following day she was video interviewed. She made detailed complaints. He, too, was further interviewed and maintained his denials.

11. On 30th November the husband was remanded in custody by the Magistrates Court and the case was sent to the Crown Court. A few days later he made an application for bail to the Crown Court. This was refused.

12. On 10th December a preliminary hearing took place at Mold Crown Court. Mr A was released on conditional bail, with a specific condition that he should not directly or indirectly contact any prosecution witness.

13. During the course of the police investigations the appellant was provided with support and assistance. She was assisted by the Montgomeryshire Family Crisis Centre and referred to Powys Social Services. She was in telephone contact with Victim Support. In connection with possible counselling, she was advised to seek assistance from her medical practice.

14. On 21st December it was reported that the appellant wished to withdraw her allegation of rape against her husband. The police contacted Victim Support Service to establish whether any problems had been reported to them. The investigating officer was told that none had been mentioned. During the Christmas period there was something of a reconciliation. Sexual intercourse took place between the husband and wife. This was not rape, nor even reluctant acquiescence, but consensual sexual intercourse. It happened because, in her reported words, she "wanted" to. Throughout this period she must have been aware that her husband was in breach of the bail condition that he should have no communication or contact with her. The only realistic conclusion is that she connived at it. She now finds it difficult to explain her behaviour at this time. It does however provide the contextual background to the submission by Mr Quinn that there was a viable defence of duress open to the appellant.

15. On 7th January 2010, the appellant contacted the police to withdraw her complaint. A further video interview was conducted with her. She made clear that she wished to withdraw her complaint of rape against her husband and that she did not want to attend court. She indicated that she wanted to put everything behind her and move forward for her own sake and the sake of her children. She did however confirm that her relationship with her husband had ended, and she confirmed that all of her allegations were true. It was explained to her that, even if she wished to withdraw the complaint, the case might still proceed and that if it did she might be required to give evidence. In answer to the specific question why she was withdrawing the complaint, the contemporaneous notes record that "(she) states that nobody has put any pressure on her". She confirmed that she had "engaged with Victim Support and received emotional support. The Montgomery Family Crisis Centre has also been involved".

16. On 14th January, following a case conference to assess this development, the appellant was informed that the prosecution would proceed. She was invited to a meeting at Mold Crown Court on 18th January when a plea and case management hearing was due to take place. The husband pleaded not guilty to the counts of rape and the trial

was fixed for the week of 4th May. In the meantime the appellant met the prosecution team at Mold Crown Court. She admitted to them that she had been in contact with her husband over the Christmas period. A signed statement outlining the contact which had taken place was obtained from her. She admitted that she had had sexual intercourse with him, consensually, on a number of occasions during the Christmas period, and she pleaded with the police not to arrest her husband, notwithstanding that he was in breach of his bail conditions, as this would make the situation worse. She said that everything had been done for her children so they could enjoy their Christmas. Her husband's solicitor was informed of the breach of bail and told that in the circumstances, instead of arresting him, he would receive a warning.

17. On 23rd January the appellant telephoned DS Whitgreave and said that she had received a series of abusive text messages from her husband. Later that day she sent the police officer a text message to the effect that she had had a very low day, having found out that her husband had been seen out with another woman. She went on that she had complained about her husband's texting in order to "spite him". There was no excuse for what she had done but it had been a "very tough few days" for her. She had calmed down and had time to think about it. She was sorry for having done something so stupid. When this text message was followed up by the police the appellant admitted that she had not received any text messages from her husband and that she had made up the story to get back at him. There were understandable police concerns about her reliability as a potential witness.

18. On 1st February the husband was involved in a road traffic collision. It was believed that his front seat passenger was his wife. The collision occurred in an area from which he was excluded by his bail conditions, and obviously, his contact with his wife constituted a further breach. In view of the earlier warning, on 5th February he was arrested and remanded in custody.

19. On 7th February, while he was in custody, the appellant made her first false retraction. She telephoned the police asking to speak to the investigating officer, and when the officer telephoned her back, the first thing she said was "that's it, it's over what is going to happen if I now say I made it all up, I have lied about the rapes. I lied because Terry would not let me go and work in the place again, I wanted to work there as I liked the money". She was referring to work in a massage parlour.

20. During this conversation the appellant was aggressive in her manner. The officer explained in clear terms that she needed to think very carefully about what she was saying. She had to be sure that what she was saying was in fact the truth. She said that she was not bothered about what happened to her and didn't care if she was charged or dealt with for "whatever offence". It was made clear to her that she could not get her own way. She was told that the CPS would have to be consulted and that when a decision had been made she would be told. She was informed that her husband would be at the Mold Crown Court on 9th February in connection with his breach of bail conditions.

21. On 9th February the husband's application for bail was refused. On 11th February the appellant attended the police station voluntarily, to tell the "truth" about the allegation. She said that the rape allegations were lies which she had made up. The police warned her of the potential seriousness having made false allegations of rape. She was given legal advice and cautioned. A solicitor attended the police station to

represent and advise her. The appellant provided a written statement to the police. She maintained that her allegations were false. She explained her lies on the basis that her husband would not let her return to work in the massage parlour. There were financial pressures, and she felt she had to get back to work quickly and earn some easy money to try and sort out the debts.

22. Mr Quinn suggested that the explanation given by the appellant for her false story was such nonsense that an investigation by the police would have demonstrated that what she was saying was untrue. With respect, that is a little too easy: the entire prosecution case depended on the credibility of the appellant. Notwithstanding the clear warning she had received about the seriousness of her position this was the explanation that she chose to provide for her false allegations against her husband. She was later to repeat and amplify it.

23. On 12th February the husband appeared at Mold Crown Court. The Crown offered no evidence against him. In the circumstances there was no alternative. Effectively that was the end of the rape allegation against him. There was no possible justification for remanding him in custody.

24. An investigation was now conducted into the offence admitted by the appellant, namely that she had made a false allegation of rape against her husband. On 16th April she was arrested on suspicion of perverting the course of justice. A tape recorded interview in the presence of her solicitor took place.

25. The appellant said in categoric terms that she was never raped by her husband. She was asked to explain why she made the false allegations, and it is clear from the record of the interview which we have studied, that the police were sympathetic, and offered her every opportunity to deny that she had made a false allegation. They discussed whether her husband had put emotional pressure on her, whether she was concerned about the position of the children, and whether her support network was limited. She was questioned whether he had convinced her to go to the police and withdraw the allegation, and whether he had an emotional hold over her. She was asked whether she had received sufficient support from outside agencies. Even at that stage the police pointed out that if the allegations were true and what she was telling the police now, that is, that the retraction was the lie, she could still tell them about it. She was adamant. The allegations were untrue. She was responsible for them. She denied that she was withdrawing the complaint because of lack of support.

26. On 23rd June the appellant was charged with perverting the course of justice on the basis of her false allegation against her husband. She was bailed. Her solicitor, Mr Sherrard, prepared her case. On 13th July the case was sent to the Crown Court. It was listed for a preliminary hearing on 23rd July.

27. Mr Sherrard, reflecting his own personal concern, said directly to his client that the police remained "unconvinced" that her original complaint was a false one. He believed that the police had charged her with the offence with some reluctance. In his letter to her, he noted that she appeared to be in full command of her faculties, and he advised her that the police were "supposed to work hard to punish those who make false allegations", but they may also consider that they were "unfairly treating someone who was in fact a victim". She was later advised in writing, that a custodial penalty would normally follow conviction for perverting the course of justice, but the

ongoing relationship with her husband and children would be a significant factor in the sentencing decision. Shortly before her appearance on 23rd July her solicitors wrote to the Crown Court to inform the court that they might be in difficulty on that date because she had failed to respond to letters. In explanation, they said that she was "extremely distracted by the turbulence in her life, to a very unusual degree, and she previously failed to keep in contact whilst on police bail, but nevertheless answered bail". Mr Sherrard briefed Mr Gordon Hennell of Counsel.

28. The brief to Mr Hennell suggested that the officers involved in the case clearly believed that the allegations made by the appellant in November 2009 were true, and that they were guessing at the motive for her subsequent assertion that she had told lies. He was expressly instructed that it did however appear to be accepted "at least that there is no improper pressure from (the husband) upon her".

29. Mr Hennell met the appellant for the first time on 30th July. At first she told him that she planned to plead guilty to having made the false allegation of rape. Those were her instructions to him. If he had accepted them at face value she would have pleaded guilty to that charge. Mr Hennell was sceptical and advised her in detail and without equivocation. On direct questioning she admitted that she had indeed been raped. The allegations were true. The case was relisted for a preliminary hearing on 30th July. Again Mr Hennell advised that if the allegation of rape was true, it would not be right to plead guilty, even if the appellant was under pressure to withdraw the allegations because she wanted to be with her husband. She needed to think about the position. She did not need to make any decision on that day. The advice that she should tell the truth was repeated in stark terms: "stick with the truth".

30. Mr Hennell also advised her that a family lawyer should be instructed to consider a non-molestation order to prevent her husband contacting her and the children.

31. On 5th August the appellant contacted the police. She said that she had come to her senses and that she had in fact been raped. In the meantime she consulted family lawyers and they prepared her sworn statement dated 16th August in proposed proceedings for a non-molestation and occupation order at Welshpool County Court. In the statement the appellant asserted that she had been subjected to domestic abuse and had indeed been raped on three occasions. As to her reason for retracting her allegations to this effect, she said that her husband "persuaded" her to do so on the basis that if she did "any punishment (she) would suffer would be considerably less than that he would be subject to." She added that her husband was able to control her.

32. On 31st August she was arrested and, with her solicitor present, interviewed. Her account in this interview is not consistent with any possible defence of duress. She said that she had been told by someone, probably her husband's sister, that if she said she had lied about the rape she would not go to prison, but as a single parent, would receive a suspended sentence. However she said that when she spoke to the barrister at court he had told her that she would receive a sentence of 12 to 18 months imprisonment. The significance of this became clear. She had decided to be truthful and to accept that she had lied when she had said that the rapes had not happened. She was asked why she had not turned to Victim Support. She said that she had, and that when she said to the lady in Victim Support that her husband had changed and was being very good with her, that he had altered and he was behaving very loving, she was advised to be very careful because he would revert to his old ways. She was

asked the direct question why she felt she could not speak to the police, and she responded that she did not know.

33. In this interview she said:

> "the only reason why I said I'd lied and make it all up was because I had pressure put on me and I'd been advised by somebody that if I said I was lying, I wouldn't be sent to prison because I am a single mum and I've got 4 children. That's the reason why I said I was lying, because that's what I presumed would happen. I was told I would get a suspended sentence as they wouldn't put the kids in care".

34. She was asked:

> "When Terry's sister came up to the house, whose idea, who first started sort of suggesting things to try and help with the situation, because as you admitted, you weren't sort of coping …"

35. The appellant replied

> "Well I thought about it, and I mentioned it to her on that day, and I said that the only thing that was holding me back is the fact that I am scared that if they arrest me, the kids and that's when she said "don't worry about the kids" …".

36. She was asked whether anybody put her under pressure to phone that day and say that she had lied. She responded:

> "I don't know whether it was pressure or not. Put it this way, Tracey wasn't a regular visitor to the house and that visit was almost a bit out of the blue and I haven't spoken or haven't seen her since".

37. She was asked directly whether her husband had put her under pressure to withdraw her allegations when she first did so. She responded:

> "We discussed it and our thinking was that if, because I had asked my solicitor how long do you think Terry would get inside and they said and I know Terry has told me this since, that his solicitor had said more or less, he's get about 10 years, and serve half. Then we discussed about me ringing up and saying that I was lying and like he'd said and Tracey said as well, that it would be a suspended sentence for just like 2 or 3 months. And then me sitting there stupidly thinking right, what's best for the kids, Daddy missing for 5 years or Mummy missing for 3 months and that's where them, yeh, …".

38. At this the interviewing officer interrupted and made an extremely pertinent observation:

> "So you say, "our thinking",… "

39. And she responded:

> "Sorry, me and Terry would sit down and discuss this and I remember saying to him "look, Mummy disappearing for 2 or 3 months is better than Daddy disappearing for 5 or 6 years". And yeh, he wasn't happy with the idea, but he didn't stop me."

40. At the same time, with her consent, her solicitor provided the police with a copy of the statement made by her in support of her non-molestation application, proceedings which had not yet been started. He believed that this account of the incidents of domestic violence would greatly mitigate her culpability. He suggested to the police that as everything they did was designed to assist victims and prevent what had actually happened (that is, the withdrawal of a true complaint)her personal circumstances made her "particularly vulnerable".

41. On 16th September the appellant was charged with an additional offence of perverting the course of justice by falsely retracting a true allegation of rape. Her solicitors obtained her authorisation to be provided with her medical records with a view to obtaining a psychiatric or psychological report for her at the Crown Court.

42. On 20th September the appellant's husband was arrested following an incident in which he, in effect, forced entry into her home at about 5.30 – 6.00a.m. She told her solicitors that she was not assaulted, but the "whole process put her in fear". She called the police. He was arrested. The incident made her keen to pursue an application for a non-molestation order. She agreed to make a witness statement about the incident to the police. She was now very keen to stop him ever going back to the home. Thereafter her husband was remanded on bail, with conditions that he should not contact her, whether directly or indirectly.

43. In due course the appellant's medical records were received from her doctor. Apart from a brief mention of post-natal depression some 7 or 8 years earlier, the solicitor could find no reference to depression or any other psychological or psychiatric problems, therefore he did not, as he put it "progress a medical report" into the appellant's thinking during the relevant periods, at any rate until the issues had been discussed further with counsel.

44. On 14th October a conference took place with counsel in his chambers. Advanced Disclosure made no mention of any investigation into pressure put upon the appellant by her husband and his sister. However on the basis of her own instructions, the appellant decided to plead not guilty to making a false allegation of rape, but guilty to making a false retraction of the allegation. Mr Hennell advised that this meant that there would be a much greater chance that a custodial sentence would be avoided. The proposed plea would be acceptable to the Crown. He advised on the evidence to be put together for the purposes of the Pre-Sentence Report.

45. On 15th October at Mold Crown Court, in accordance with her decision on the previous day, the appellant pleaded not guilty to the first indictment and guilty to the second indictment. The prosecution offered no further evidence on the first indictment. A Pre-Sentence Report was ordered. The appellant's solicitors sought

information from the Crown Prosecution Service whether there had been any investigation of pressure placed on the appellant to retract the original allegation, and the state of the investigation into his actions when he forced entry into her home, that is, the incident on 20th September.

46. On 28th October the husband came to the appellant's home. During his visit he attacked her. According to her report he dragged her outside by her hair and began to tear her clothes off. Much later she was to tell Mr Hutchinson that according to her husband she had ripped her own clothes off and caused some injury, and that when the incident was investigated the police told her that her husband would not be arrested as there were not enough physical injuries to her body.

47. The Pre-Sentence Report was completed on 4th November 2010. This gives the appellant's account of her marriage which was, from the outset, "turbulent". The appellant described her husband as "controlling" and "violent", and the relationship was marred by a history of abuse. Although she felt intimidated by her husband, she tried to keep up a normal façade for the sake of the children. According to her account she talked of extreme financial difficulties and gaining employment at a massage parlour to alleviate them. In order to deal with Mr Quinn's contentions about the absurdity of accepting the "massage parlour" explanation she gave to the police, we must note that she told the writer of the report that her husband had "initially agreed to transport her to the employment; however the nature of the work caused immense difficulties between the couple … her husband's attitude to her worsened and at every opportunity he degraded and tormented her in relation to the employment she had undertaken. He had also, against her will, informed her parents of the work she had ventured in to. … she left the employment after 2 days work." Although she wished to escape from the marriage, she felt compelled to stay due to threats by him to harm himself if she left, the emotional strain and lack of finances and isolation.

48. The appellant's explanation for the retraction of the allegation of rape was that after her husband had been arrested and remanded in custody she felt "immense guilt". She decided that taking divorce proceedings would be "punishment enough for him" and so she withdrew the complaint. She was in an emotional state and very confused at the time. Although she had suffered years of abuse by her husband and was frightened of him she reported that "due to her feelings of guilt, low self esteem and wanting her children to have a family Christmas, she continued communicating with him". She felt under "immense pressure" from her husband to retract her original statement and she had agreed to do so "due to fear of repercussions from him". The reasons for the retraction were developed later in the report. The decision arose from "immense pressure" placed upon her by her husband. She also "felt the children should have regular contact with their father especially at Christmas". This coupled with financial difficulties, lack of family support and isolation appeared to have contributed to "the retraction of the complaint". She decided to lie to the police "without thinking of the consequences".

49. This unprompted contemporaneous account by the appellant to the writer of the Pre-Sentence Report about the circumstances in which she came to make the false retractions of which she was subsequently convicted are, again, inconsistent with a defence of duress.

50. On 5th November at Mold Crown Court the Pre-sentence Report and careful submissions on behalf of the appellant by Mr Hennell were considered before the appellant was sentenced to an immediate prison sentence.

51. In the context of the submission that the appellant was acting under duress when she retracted her allegations against her husband it is perhaps worth underlining what she herself has said in her recent sworn statement prepared for the purposes of the present appeal.

52. She reflected on the period between her husband's release from prison on bail and her first lie to the police that

> "Sometimes he would be so upset that he appeared to be having a nervous breakdown. Thinking of it now it was all a bit over the top, but at the time it made me feel all the more sorry for him. Although he had done what he had done to me, by this time I was feeling responsible for all the upset and worries that he had about missing his children and being frightened of going to prison. The children were upset because they couldn't see their father and it was basically all my fault".

53. Later she said

> "… I had tried to withdraw the complaint but that the Prosecution wouldn't drop the case. Tracey (her sister-in-law) asked quite calmly what would happen to me if I told the police it was all a pack of lies. I told her I wouldn't do it because it would mean me going to prison and leaving my children, but Tracey said they wouldn't put me in prison because I had 4 children … She was present when I made the telephone call to (the police)"

54. Later still, referring to events on 11th February, she said:

> "I can only say that when I was in that mental state I didn't think about what would happen to me but only if the case didn't proceed Terry wouldn't have to be in prison, my children would have their father back and I would have some help".

55. She had said earlier that when he was away she had "simply felt lost without him". She went on:

> "All I can say now is that I would have said anything at that time to make it all go away. I know it makes me sound quite calculating but I was really saying whatever I could to produce the result I wanted".

Miss Levitt suggested that on the appellant's own present account, plainly she was under pressure, but the pressures were far removed from constituent elements of the defence of duress. We agree.

56. As we have noted, we were pressed with the contents of the appellant's evidence in the non-molestation proceedings at Welshpool County Court. We shall simply record that in answer to her application, her husband produced a letter which he says was received by him while he was in custody, and therefore written before 12th February, in which the appellant wrote to him:

> "I have done the one thing that you said not to do. I told you I would make it all go away and I will by doing what you said not to do. I want you home babe, we all miss you so much. I cry every night and every morning coz your not here".

The letter continues in affectionate terms.

57. We can now turn from the lengthy summary of the facts to the submissions advanced in support of the conclusion that the conviction is unsafe.

Discussion

The offence

Perverting the course of public justice

58. Before the hearing of the appeal we invited submissions from both sides on the broad question whether the retraction of a true complaint could constitute the offence of perverting the course of justice. It was agreed that given proof of the necessary intention and the ingredients of the offence governed by the long standing decision in *R v Vreones* [1891] 1 QB 360 such conduct could indeed fall within the ambit of the offence. The conduct alleged and admitted went very much further than a witness withdrawing a complaint or withholding evidence of rape. Rather it involved repeated assertions which led directly to the acquittal of the man who had committed rape on more than one occasion. It was not suggested, and we can see no reason for concluding that in the context of the ingredients of this offence, the victim of a crime is entitled to be treated differently from any other witness to a serious offence who falsely retracts truthful evidence. In this context Miss Levitt emphasised that the issue was the defendant's intention, not her motive, and that if the necessary intent was present the defendant's motivation, particularly if she was a victim of the crime, was relevant and should be taken into account when the court was considering sentence, assuming that in the light of current CPS policy she was prosecuted at all.

59. In our judgment, it is plain that this conviction cannot be quashed on the basis that the appellant's conduct did not fall within the ambit of the offence of perverting the course of public justice.

The defence

Duress

60. On the facts here the appellant had a complete defence to the charge based on the allegation that she had made a false complaint of rape against her husband. That defence was that the complaint was true. Mr Quinn submitted that it has now become apparent, and if the issue had been properly addressed before the appellant pleaded guilty, it would then have been apparent, that she also had a viable defence to the

second indictment in the form of "duress", and that she should have been advised accordingly.

61. Mr Quinn's argument took as its starting point the observations in this court, when dealing with the appeal against sentence, which had underlined the specific problems which faced an abused partner. This was lent significant support, he submitted, by the vulnerability of the appellant as now revealed by the post conviction psychiatric evidence that she was at all material times suffering from post traumatic stress disorder at all relevant times. In this context care however is needed to avoid any juxtaposition between the former law of provocation in the context of section 3 of the Homicide Act 1957, which provided Mr Quinn with a number of authorities to which he directed our attention, and the now seemingly endless debate about the true constituents of the characteristics appropriate to a defendant advancing that defence, and the defence of duress.

62. Duress is subject to clear limitations, and the thrust of recent decisions in the House of Lords has been that these limitations should not be further eroded. (See *R v Hasan* [2005] 2 AC 467). Although not directly relevant to the outcome of this appeal, in the context of duress, the situation of women who have been subjected to domestic abuse and are coerced into committing crimes against third parties has been valuably illuminated in the article by Janet Loveless, *Domestic Violence, Coercion and Duress* [2010] CLR 93, where the writer observes:

> "Leaving aside for the moment the contentious issue of whether an abused woman, even one suffering from BWS, remains a reasonable person or not, the problem of the law is how to translate the medical language of "learned helplessness, passivity and paralysis" into the legal discourse of duress. It is not simply that there is automatic equivalence between "learned helplessness" and "overpowerment of will"; the two are not the same".

The writer analyses the decisions of this court in *R v Emery* [1992] 14 Cr. App. R(S) 394 and *Bowen* [1996] 2 Cr. App R 157. She suggests that reference to characteristics such as post traumatic stress disorder or battered women syndrome "merely reinforces the inconsistency and reveals the incompleteness of the test which requires that the defendant shall have displayed "reasonable fortitude"".

63. All these considerations acknowledged, the question nevertheless remains whether on the facts here, and making the most generous allowance for the appellant's psychiatric condition, duress might have provided a realistic potential defence. Miss Levitt emphasised, and we agree, that duress should not and cannot be confused with pressure. The circumstances in which different individuals are subject to pressures, or perceive that they are under pressure are virtually infinite. Such pressures may indeed provide powerful mitigation, as this court recognised when dealing with the appeal against sentence. Dealing with it very broadly, duress involves pressure which arises in extreme circumstances, the threat of death or serious injury, which for the avoidance of any misunderstanding, we have no doubt would also include rape, and which cannot reasonably be evaded. (See, for example, the approval of *Graham* [1982] 74 Cr. App. R 235 in *Howe* [1987] AC 417 in the House of Lords, and the restricted approach to this problem intimated in the House of Lords in *Hasan*, where

Lord Bingham warned against drawing comparisons between the duress defence and any other defences which might widen the scope of duress.)

64. The contemporaneous evidence available to the appellant's legal advisers, once she had decided to tell the truth provided a great deal of mitigation, but no viable defence of duress. That was not the case that she was advancing in her instructions to them, or for that matter in her accounts to the police, who were undoubtedly sympathetic to her situation, and did their best to dissuade her from withdrawing the allegation and then to find an explanation for her doing so. She did not suggest to any of them that when she falsely retracted her truthful complaints she was acting under the threat of serious ill treatment or violence at the hands of her husband or anyone else. The police interview on 16th August is one of the crucial features of this case. By now, it must be remembered, the appellant was asserting that her husband had raped her more than once, and had treated her with violence, and that she was confirming the truth of her allegations against him. If she had been threatened by him with violence if she did not withdraw the complaint, as it seems to us, it is unconceivable that she would not have said so at the time. If she was asserting that he forced a retraction by raping her or threatening to rape her, there was no reason why she should not also have explained her retraction of the rapes by reference to any such threats.

65. We have recorded and shall not repeat the account given by the appellant of the history of her marriage narrated to the writer of the Pre-Sentence Report, prepared after she had already pleaded guilty, but before she was sentenced. This account, too, was quite insufficient to justify an application by her legal advisors for the court to allow her to vacate her guilty plea.

66. Even her most recent statement does not suggest that she was threatened with violence during this period, and in particular, at the time when she made her false retractions. We have set out her account in some detail in paragraphs 51-55. We immediately recognise that the appellant felt under huge pressure, but although feeling concerned for or even fearful of her husband, or a sense of guilt, or concern about what would happen to her children if her husband was in prison for 10 years or thereabouts, taken in combination, undoubtedly creates difficult problems and provides significant mitigation, does not constitute duress. It is unnecessary for us to examine the further problem of the alternative ways in which the appellant might have sought to avoid any such risk, not least, the favourable attitude of the police, who undoubtedly were anxious to give her every possible assistance.

67. The recent psychiatric report is based on an assessment made in December 2011 and January 2012. We have studied it in detail. The appellant's account of why she retracted her allegations has developed. Nevertheless, even on this basis, the duress defence was not realistically available to her. According to the report she stated that at the time of retraction "she felt very guilty". … "she believed instigating divorce proceedings was punishment enough and so decided to withdraw her complaint". … "when Mr A had been released on bail he had contacted her". … "she was in a very emotional state and was confused at the time and she was fearful of him as a result of the years of abuse she had suffered". … "due to her feelings of guilt, low self-esteem and wanting her children to have a family Christmas, she continued communicating with Mr A." … "she had been under immense pressure from Mr A to retract her statement and due to her fear of repercussions from her husband she had agreed."

68. The conclusions proceed on the basis of the appellant's account to the writer that the retraction was made as a consequence of her husband's "continued abusive behaviour towards her after the allegations were made". This, however, is inconsistent with any of the other accounts provided by the appellant. She referred to the visit of his sister, stating that:

> "She became very upset and told Mr A's sister that she couldn't cope without Mr A and the family needed him back. She states that at this point they planned to say the allegations were a lie."

69. The report goes on to record that she said that

> "the reason she told police that the allegations were untrue is because of the immense feelings of guilt and worry and also the pressure from Mr A and what he would do to her if she did not sort the problem out."

70. Notwithstanding Mr Quinn's forceful and persuasive advocacy, we can see no basis for concluding that the appellant felt exposed to violence or the threat of violence when she made the false retractions on which her prosecution was founded. The defence of duress was not realistically available, and faced with the material now available, no responsible counsel would have advised her that the case should be contested on this basis.

The plea

71. It was suggested in written and brief oral submissions that the guilty plea tendered by the appellant was an equivocal plea. The basis for this assertion was duress. No further basis for this argument appears. There is nothing in the material available to us to which suggests that the plea was equivocal.

The decision to prosecute

72. This submission as developed, had a number of different facets, and we shall attempt to summarise the most significant features. It is suggested that a combination of errors before the appellant's conviction was made by the police, the appellant's legal advisors, the Crown Prosecution Service, and indeed the court. Although the errors were not made maliciously, and indeed in his oral argument, Mr Quinn accepted that he could not identify any specific area of professional incompetence, he submitted that the overall effect of the errors was that the appellant was prosecuted when, if they had not been made, the prosecution would not have proceeded.

73. In the context of the prosecution which took place, dealing first with the police, we can find nothing for which the police should be criticised. We have to be realistic. The allegation of rape depended on the appellant's complaint. Her husband resolutely denied the allegations. The police were presented with a woman who they believed had been raped by her husband, but who was nevertheless determined to assert that the allegations against him were false. They made every proper attempt to dissuade her from retracting her allegations, without success. They sought to find an explanation, examining with her whether she had been forced by her husband to withdraw the allegations. They could not do more to help her avoid the consequences

of her actions. They could not pressurise her into re-writing the script she was determined to provide, and indeed it is not beyond the bounds of imagination that they would have been criticised for being over forceful and lacking in sensitivity to the needs of a victim of rape who no longer wished to proceed with the allegations. Moreover once the case against her husband had been wholly undermined by the appellant's first retraction and assertion that she had lied, the facts which might reasonably undermine her credibility would have been disclosed to her husband's defence team. There was no alternative. In reality, he was only released from prison when his continuing detention in custody and his continued prosecution would have been unjustified. There was no longer any realistic prospect of success. At the same time, faced with a clear belief that the appellant was lying when she exonerated her husband of rape, the investigating officers were entitled to believe that he had escaped justice. That is not an irrelevant consideration. So they went as far as they properly could in interview in an endeavour to discover whether she had been subjected to threats. Their efforts were, because of the position taken by the appellant, unsuccessful. That does not found any justified criticism.

74. We turn to the appellant's legal representatives. In our judgment she was well represented. The files show that both her solicitor and counsel were anxious that she should tell the truth. Her position if convicted of making a false allegation of rape would certainly have been far more perilous than if she were convicted on the basis of the retraction of a true allegation. The fact that she was immediately released from custody on her appeal against sentence amply establishes the value of the advice given by her legal advisors. If she had been convicted of making a false allegation of rape, the custodial sentence would have been longer, and wholly unappealable.

75. Specific criticism is directed at the failure by the legal advisors to seek a psychiatric report of the kind now available. For this purpose, Mr Quinn would presumably wish us to proceed on the basis of the accounts given to Mr Hutchinson by the appellant, rather than her accounts to the police, or indeed to the writer of the Pre-Sentence Report, and indeed her own account in this appeal. The question of medical evidence was addressed by the solicitors. They obtained the appellant's medical records. On examination they could find nothing in them to suggest that there was or could be a psychiatric defence, not least because on the accounts the appellant was giving to the police and on her instructions to them, and her later account for the purposes of the Pre-Sentence Report, for the reasons we have given, no such defence was viable. Even now, as we have explained, the psychiatric evidence, properly examined, would not, in the light of the remaining evidence, provide a sustainable defence. Although this criticism is directed at the process which culminated in the conviction, as for the possible mitigation the report might have provided, the court considering the appeal against sentence did not need to be informed by psychiatric evidence.

76. Faced with these considerations, Mr Quinn submitted that if a psychiatric report of the kind now available had been presented to the Crown Prosecution Service it would, or might, have led the Crown to discontinue the proceedings in the light of the Code for Crown Prosecutors and the CPS for prosecuting cases of domestic violence. The general Code, while asserting the continuing value of the prosecutorial discretion not to prosecute, starts on the basis that a prosecution will normally take place unless the factors in favour of allowing the matter to be dealt with by an out-of-court disposal, such as the defendant's illness, outweigh the public interest. In particular, however,

the more serious the offence, the more likely that the public interest would require a prosecution. The Code also observes that although public interest factors in an individual case may argue against a prosecution, the prosecutors nevertheless should reflect whether these factors should not be put before the court after conviction, as mitigation of sentence.

77. In relation to domestic violence, the entire policy of the CPS acknowledges, as this court has, that many victims of domestic violence find it difficult to give evidence at court, and that they need practical and emotional support for this purpose. Sometimes the victim withdraws support for the prosecution and no longer wishes to give evidence. The policy requires all these matters to be addressed. The focus, however, is the withdrawal of support for the prosecution, not the fabrication of false retractions. That issue has been directly addressed as a result of the present case, but the new policy was directed to fill the gap in the existing CPS Guidance revealed by this case.

78. As it seems to us, Mr Quinn's submission overlooks the seriousness involved of the offence committed by the appellant. If the allegation of rape was true, the appellant had deliberately and falsely and persistently chosen to exonerate the man who had raped her. The real issue for the Crown Prosecution Service was the form of perverting the course of justice which should be prosecuted, not whether there should have been any prosecution at all. In fact, Mr Sherrard on her behalf, advanced all relevant considerations arising from the police belief that she had been the victim of rape for consideration. We very much doubt that disclosure of a psychiatric report in terms of the present report but approaching the appellant's accounts of events on the basis of those she was advancing during 2010 would have induced or persuaded the CPS to discontinue the prosecution. The reality is that such a report would have provided ample mitigation, (but for the reasons given in our judgment in the appeal against sentence, this was obvious). Given the way the investigation had developed throughout 2010 up to and including the interview on 31st August, many competent legal advisors would have seen no advantage to their client in disclosing it to the prosecution. In any event, however, the report was not obtained, and we fully understand the reasons why it was not, and the reasons why, if it had been obtained, it would still not have been disclosed to the prosecution.

79. Miss Levitt accepted that if the most recent CPS Guidance about the approach to be adopted to cases where truthful allegations are retracted by the victim of rape or domestic violence had been in existence at the time when the appellant pleaded guilty, she would not have been prosecuted. This Guidance followed the expression by the Director of Public Prosecutions of his view on this particular case. Miss Levitt did not accept that there had been an abuse of process or, that if all the steps suggested by Mr Quinn had been taken, a stay of proceedings would have been ordered.

80. We agree. We have detected the development of what may, if not arrested at an early stage, become a new form of satellite litigation, in which the exercise of the prosecutorial discretion is made subject to a judicial review or abuse of process/stay of proceedings argument in the Crown Court.

81. As to judicial review, there can, we suggest, be very few occasions indeed when an application for permission by or on behalf of a defendant should not be refused at the outset on the basis that an alternative remedy is available in the Crown Court. This is

the appropriate tribunal for dealing with these questions on the rare occasions on which they may arise. Precisely the same considerations apply to a case involving summary trial.

82. This principle is well established. In *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, the House of Lords allowed an appeal from the decision of the Divisional Court presided over by Lord Bingham CJ on the basis that the decision of the Director of Public Prosecutions to consent to a prosecution was correctly addressed in the Crown Court as part of the ordinary criminal process. Lord Steyn, with whom Lord Slynn of Hadley and Lord Cooke of Thorndon agreed, observed:

> "… I would rule that absent dishonesty or mala fides or an exceptional circumstance the decision … to consent to the prosecution of the applicants is not amenable to judicial review. Whilst the passing of the Human Rights Act marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal".

Lord Hobhouse was equally trenchant.

> "If the substance of what it is sought to review is the answer to some issue between the prosecution and defence arising during a trial on indictment, that issue may not be made the subject of judicial review proceedings."

R (E) v DPP [2012] 1 Cr. App. R 6 is for the reasons set out in paragraph [85] wholly exceptional: if *E's* case had stood alone judicial review would not have provided an appropriate remedy.

83. There is, however a much more fundamental issue involved than the correct form of process. It is elementary, but it has become necessary to emphasise, that Guidance issued by the Director of Public Prosecutions does not and, as a matter of law cannot, create any immunity or defence. The guidance and any policy documents publicly reflect the considerations which, in an individual case of the kind under consideration, are considered to be relevant to the exercise of the prosecutorial discretion not to bring an individual case to trial notwithstanding admissible evidence which would otherwise justify a prosecution. If, however, this exercise has been conscientiously undertaken, the sole question for the court is whether the offence has been committed. It is not the function of the court to substitute its own view for that of the Crown about whether there should be a prosecution. The well known general observations of Lord Salmon in *DPP v Humphrys* [1977] AC 1, at 46, apply here as in any other case of suggested abuse of process.

> "I respectfully agree … that a judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if

> the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to invervene."

The court is not powerless. In an appropriate case an order for absolute or conditional discharge will convey its distinct message.

84. Grounds for a stay on the basis of oppression or misconduct are exemplified in *ex parte Bennett* [2994] 1 AC 42, *Mullen* [2000] QB 520 and *Early* [2003] 1 Cr. App. R 19. Occasionally, too, the exercise of this jurisdiction may be justified in a case where the prosecution constitutes an infringement of this country's international obligations (see, for example *Asfaw* [2008] 1 AC 1061 (where the international obligation was reflected in statute) and *LM and Others* [2010] EWCA Crim. 2327, (subject to the qualifications in paragraphs [13]. [19] and [21]). In summary, when it is sought to advance an argument for a stay by reference to policy or guidance issued by the Director of Public Prosecutions, by way of emphasis it is worth repeating, first, that the decision whether to prosecute or not must always be made by the Crown Prosecution Service and not the court. The court does not make prosecutorial decisions. Second, provided there is evidence from which the jury may properly convict, it can only be in the rarest circumstances that the prosecution may be required to justify the decision to prosecute. Third, the decision whether or not to prosecute in most cases requires a judgment to be made about a multiplicity of interlocking circumstances. Therefore even if it can be shown that in one respect or another, part or parts of the relevant guidance or policy have not been adhered to, it does not follow that there was an abuse of process. Indeed, it remains open to the prosecution in an individual case, for good reason, to disapply its own policy or guidance.

85. A further aspect of the trend currently under discussion is exemplified by Mr Quinn's submissions in this appeal. In essence, his argument is that if everyone involved in the case had behaved differently, then the appellant would or might not have been prosecuted at all. In short, in the present case, the overall effect if all those concerned, fulfilling their different responsibilities, had behaved differently would have been the discontinuance of the prosecution. However the unavoidable reality is that the discretion whether to prosecute or not is exercised, and can only be exercised by the CPS on the basis of the information available to it. After conviction it is unrealistic for fresh legal advisors to attempt to reconstruct a different series of facts or events which might have led the CPS to reach a different decision, or on that basis, to require the CPS to re-examine what the decision might have been if a series of hypothetical but different facts had been in contemplation at the time when the decision to prosecute was taken, or the defendant was convicted.

86. Miss Levitt does not accept that any contravention of prosecutorial policy or guidance in existence at the time when the appellant was convicted has been established. In short, she rejects the suggestion that there was some unreasonable disregard for or unjustified or inexplicable disapplication of existing prosecutorial policy. We agree. A prosecution which did not constitute an abuse of process at the date of conviction cannot acquire that characteristic, on the basis of new or amended prosecutorial guidance or policy subsequently issued.

87. In the end, the final submission comes to the proposition that it is somehow not fair for the appellant to remain convicted. Basing herself on the observations of the DPP in the aftermath of the successful appeal against sentence, and the consequent issue of new or amended policy guidance for use in cases of this kind, Miss Levitt adopted a neutral approach to it. The problem can be readily understood. The principles relating to abuse of process have not extended to, and it would be surprising if they had extended to, enabling this court to quash a conviction on a broad, somewhat nebulous basis of unfairness where the conviction, following due process, is in every respect safe. If so, it cannot be quashed.

88. The reality of this case is that the appellant was undoubtedly guilty of a serious crime, from which police officers did all they reasonably could to dissuade her. Compassion for her position, and indeed for any woman in the same or a similar position, should have produced a non-custodial sentence. That is why this court acted speedily to quash the custodial sentence and replace it with a community order which would offer practical assistance to the appellant in the immediate aftermath of her release from prison. The court also expressed itself in clear and direct language, which was immediately considered by the Director of Public Prosecutions, who has now issued fresh guidance about how cases involving false retractions of true allegations by vulnerable defendants will be addressed in the future. All that acknowledged, we cannot dispense with or suspend the statute, or grant ourselves an extra statutory jurisdiction. Accordingly, we are not entitled to interfere with this conviction. The appeal must be dismissed.