

JERSEY / JUDGMENT

B v His Excellency the Lieutenant Governor [2024] JRC 031 (31 January 2024)

[2024] JRC 031

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JUDGMENT

THE COMMISSIONER: 1. On 29 th March 2023 the Respondent refused to refer the case of the Applicant to the Court of Appeal to consider a further appeal against conviction for the offence of rape. 2. The Applicant sought leave to judicially review that decision. By a written decision dated 30 th June 2023 I refused leave. I made my decision on consideration of the papers which are extensive. 3. By a notice dated 7 th July 2023 the Applicant indicated his intention to appeal my order and sought my leave to do so. 4. As part of his grounds for appeal the Applicant said that I had misunderstood his arguments. For that reason, I considered that there should be an oral hearing so that I could make sure that I had properly understood the arguments made on behalf of the Applicant. Unfortunately, this took a very long time to organise, and it did not happen until 15 th December when I heard Advocate O'Connell who represents the Applicant. He had helpfully supplied a skeleton argument in advance of the hearing. 5. This decision should be considered along with my judgment on the application for leave to apply for judicial review which should be read first (B v His Excellency the Lieutenant Governor

[2023] JRC 268). I have expanded on what I said in my original decision in order to deal with the points raised by Advocate O'Connell. 6. In Ground 1 of the proposed grounds of appeal against my decision it is suggested that I misunderstood the position in relation to the five word documents which were exhibited at trial and on which both the Complainant and the Applicant were questioned. The impression given in paragraph 15 and 16 of my judgment is said to be that I thought that the exhibits produced at trial were emails to which the five documents were attached. 7. The documents which were produced at trial were hard copy word documents which had been produced by the Complainant to the police. The Complainant's evidence at trial was that these documents were sent to the Applicant by email. If that is correct, then there are two ways the word documents could have been incorporated into emails. They could have been attached to the email as attachments or the word documents could have been cut and pasted from the word document into the body of the email. I understand that the emails have never been recovered but there is information supporting the Complainant's account in that, in all but one case, emails were sent to the Applicant by the Complainant on the relevant dates. 8. I have re-reviewed all the documents concerning the word documents and the criticisms

which are made of that evidence. 9. As I understand it the Applicant now argues that the evidence supports the view that he may not have received the word documents; he may not have read them contemporaneously; and/or they might have been altered by the Complainant who had accessed his computer and be different from what was sent to him. The difficulty for the Applicant in relation to those submissions about the word documents is his evidence at trial (see pp 87 to 98 of the transcript). As I set out in paras 15 to 19 of my original judgment, the only sensible interpretation of his evidence given at trial was that the Applicant accepted that he had received and read the word documents at the time they were sent or shortly after. It was not irrational of the Respondent to conclude that an argument based on a case which was very different to the case run at trial did not have any prospects of succeeding in the Court of Appeal. It would require highly exceptional facts for the Court of Appeal to allow the Applicant to run a different case to the one he had run at trial. These facts are not exceptional in my

judgment.

10. Having considered all the matters put forward by the Applicant in both his written submissions and orally I do not consider that an argument based on the five word documents has any prospect of succeeding in the Court of Appeal. It matters not whether the documents were incorporated into the body of the emails or were sent as attachments, the same conclusion would follow. 11. The oral arguments which were made to me by Advocate O'Connell centred more on police failures in carrying out investigations into the Complainant's mobile phone and the consequent failures in disclosure of what is said to be vital information than on the five word documents, although any failure of disclosure is capable of being relevant to them as well. 12. The Applicant argues that the police should have seized and examined the Complainant's phone at an earlier stage than they did. The Respondent in his decision agreed that that should have happened. 13. The Applicant further argues that a different and more detailed interrogation of the phone should have taken place. 14. It seems that there are three levels of extraction of phone data that can take place. The lowest level is a configured logical extraction which can be carried out at a digital forensics' kiosk and, as I understand it, can be done by a police officer with the necessary training. The next level is called a logical and physical extraction which can either be done at a digital forensic hub or go to a laboratory. The highest level of extraction would have to be conducted at a laboratory. 15. The Applicant relies in support of his argument on the contents of the police log. The first reference that I can find in the log for the need for an extraction from the phone is at p. 573 tab 56 of folder 2. In an entry at 12.22 on 10.4.2019 the Officer in the Case in a record of a conversation that he had with the Complainant says: " I explained that I would want to do a kiosk download of her phone in any case due to the disclosure messages she had sent ." This is a reference to messages sent by the Complainant to some of her friends complaining of the rape when she had returned to England. A kiosk download, as I understand it, would refer to the lowest level of extraction. 16. Later in an entry on 15 th April at 11.09 the same officer appears to indicate that a detailed high tech

crime unit download will be required and that a full forensic download was needed because "there are lots of whatsapp and facebook messages". The case of the Applicant is that that was an indication that the basic method of extraction would not be sufficient, although it appears that a basic method of extraction was the one which was carried out. It is not possible to tell from the police log why it was decided not to do a detailed high tech crime unit download. 17. The Applicant argues that looking at the numbering of the various messages, it is apparent that a large number of messages were never disclosed to him. In his application to the Respondent, the Applicant argues that a reason, if not the only reason, for that is that inappropriate filters were applied to the recovered messages as part of the disclosure process by the Officer in Charge. I am not aware of where the evidence comes from to support that suggestion. It was certainly not explored during the trial. In oral submissions to me the Applicant has put his argument on the basis that the missing numbers are messages which have been deleted. He further argues that the result of not applying a more sophisticated method of extraction on the phone has meant that a large number of deleted emails which could have been recovered have been lost. This was the principal argument put to me in oral submissions. 18. The Applicant argues that in doing a level 1 extraction the Officer in charge of the case acted contrary to the Guidance for interrogation of mobile phones issued by the Crown Prosecution Service of England and Wales called 'A guide to reasonable lines of enquiry and communications evidence'. It is accepted that this Guidance is not binding on Jersey police but equally it is argued it would be known to the Attorney General and if it sets out what is best practice then it should be followed. 19. I have considered this part of the Applicant's case in some detail as it is dealt with fairly briefly in the Respondent's reasons, but it is also fair to say that the emphasis in the original application was on the Officer in the case using the wrong selectors to exclude material from the disclosure process rather than the missing messages being ones which had been deleted. 20. Whichever way the issue of disclosure is considered there are a number of unanswered questions. Accepting that it is correct that at some stage the Officer in the case was intending to carry out a higher level of extraction from the phone, we do not know why he changed his mind. We do not know whether the Officer in the case did apply filters to the download and if so, what they were. We do not know whether a higher level of extraction would have revealed the contents of deleted WhatsApp messages or whether encryption would prevent that from happening. 21. There were failings in the way the police dealt with the phone. The Respondent accepted that the phone should have been seized at an earlier stage, there do appear to be a number of undisclosed messages which may have been deleted but is there anything in the arguments put forward by the Applicant which means that an appeal would have a real prospect of success at this stage. To succeed on appeal the Court would have to draw the inference that there was or may well have been material in those messages which would assist the Applicant's case that he did not commit the rape. 22. The unanswered questions demonstrate why issues about disclosure should be dealt with before or at the trial. It was apparent to the defence that the Complainant retained possession of the phone for some time before the contents were downloaded so if there had been any suspicion at the time of the risk of significant messages being deleted that could

have been investigated at the time. 23. While I do not accept that there is anything wrong in the officer in charge of the case being involved in filtering out irrelevant material as part of the disclosure process, if the police officer applied inappropriate filters, then that could be a justified area of complaint. The proper time to investigate the adequacy of the disclosure process is at trial when people can be expected to have some recollection of events. Similarly, questions could have been asked of the Officer in the case about the extraction process that was used. 24. What the Applicant said should have happened was a 'fishing expedition' to see whether anything material might come out of it while putting forward no proper argument for saying that there would be anything. We know that the Complainant did make 'recent complaints' to some of her friends. We also know that some of her friends were giving her advice on her relationship with the Applicant before and after the rape of which he was convicted. Is there any basis for any justified suspicion that the allegation of rape was made as part of a conspiracy by the Complainant and a number of her friends which would be exposed by seeing all the messages? 25. The Applicant argues that even if such a conspiracy was not revealed by the messages, they would show the Complainant's attitude both towards the Applicant after the rape and the contents of all her messages as being inconsistent with the behaviour of someone who had just been raped. 26. The Applicant did have sight of other messages which were disclosed to him prior to the trial and the Complainant was cross examined on the basis that they were inconsistent with someone who had just been raped. Her response was that she was trying as much as possible to carry on with life as normal and was still hopeful the marriage might be saved. There were also messages disclosed that suggested that the Complainant was hoping to get some advantage in any divorce proceedings if the Applicant was convicted of rape. She was asked questions about that at the trial. Those matters were therefore explored at trial. 27. There is no basis for drawing an inference in all the circumstances of this case that, whatever the shortcomings in disclosure maybe that they have resulted in relevant material not being available to the Applicant. There is no evidence to suggest that there would have been evidence to support the suggestion that the complaint of rape was made as a result of a conspiracy between the Complainant and her friends. An appeal would not succeed unless a proper inference could be drawn that evidence helpful to the Applicant was likely to have been revealed by a proper disclosure process. 28. While I was assisted by the submissions made at the oral hearing for which I am grateful, they have not changed my mind as to whether to give leave for a judicial review. 29. As can be seen by correspondence between trial counsel and the Applicant the advice he was being given at the time of the trial was that he should concentrate on the events which happened at the time of the alleged rape. The trial was conducted on that basis. It is not open to the Applicant to try and change his approach now. A trial is a one-off event, and it is not possible to try a different approach if the tactics adopted at trial are not successful. 30. For all the reasons that I have given, having heard the additional arguments, I still refuse the application for judicial review of the Respondent's decision not to refer the case back to the Court of Appeal. I do not consider there is any basis for an argument that the decision was irrational. Further I do not consider that there are any properly arguable grounds of appeal against that decision, and I refuse

leave to appeal. Authorities B v His Excellency the Lieutenant Governor

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Prepared on 22 October 2026 · Esheria