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Judgment: approved by the Court for handing down
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

EAMON FOLEY

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an application by Eamon Foley for leave to appeal against his conviction of the offence of rape. On 12 February 2001 after a trial before Higgins J and a jury at Enniskillen Crown Court the applicant was found guilty of the rape of the victim on 15 January 1999. He was sentenced to 16 years' imprisonment by Higgins J on 25 May 2001.

Factual background

[2] The victim was a single woman who lived alone in a mobile home. She was 91 years old. A neighbour, Mrs Vera Connolly, acted as her home help. At about 7.45 am on Friday, 15 January 1999, Mr Edward Connolly, her husband, called with the victim. As a result of what he discovered in her bedroom and what he was told by her, the police were alerted and arrived a short time later. The victim was taken to hospital where she was examined by Dr C J McCaw. He found that she had suffered a sexual assault. He was told that before the assault the victim was a virgin. He found dried blood on the vulva, on the skin surrounding the vulva and on her thighs. Fresh blood was coming from the vaginal opening. The labia were swollen. There was a tear

of the skin at the posterior of the vagina and a tear of the hymen. The latter tear was fresh and had ragged edges.

[3] Dr McCaw concluded that the tear of the hymen and of the post vaginal wall suggested penetration of the vagina with considerable force. He took swabs of various areas including the vulva, the lower vagina, the high vagina and the anus. These were handed to Detective Constable Monaghan at 4.30 pm on the day that they were taken. She in turn placed the samples in a special designated freezer safe in the Child Abuse and Rape Enquiry unit of PSNI. On Monday 18 January 1999 the detective constable handed over the samples to the Forensic Science Agency. They were there examined by Margaret Boyce of the agency. We shall say something more about the results of that examination presently.

[4] Sadly, the victim died four weeks later in hospital. In the course of a DNA screening operation in the general area of where the attack on her had taken place, the applicant voluntarily submitted on 29 March 1999 to the taking of a buccal swab. This was duly tested and, in the course of the hearing of the application for leave to appeal, the applicant referred to it a number of times. It had not featured in the evidence at the trial, however, because the circumstances in which it had been taken did not meet the requirements of the Police and Criminal Evidence (Northern Ireland) Order 1989. The applicant has claimed that the swab taken at that time was contaminated and although it was matched to the swabs taken from the victim, it ought not to have grounded his subsequent arrest. We have no means of knowing whether his claim that the swab was contaminated is correct or whether this was linked to his arrest. We are entirely satisfied, however, that this issue has no relevance whatever to his application. There is no reason to doubt that he was validly arrested and the evidence that was obtained subsequent to that arrest makes consideration of the earlier swab entirely unnecessary.

[5] After he was arrested on 10 October 1999 a further buccal swab was taken from the applicant by Stephen McIlroy, a scenes of crime officer. We have considered the transcribed evidence of Mr McIlroy about the manner in which that swab was taken and how it was transported to the forensic science agency. Foley has suggested that records of working hours of Mr McIlroy and the police officer to whom he gave it for onward transmission to the agency, Constable Gillian White, together with the time recorded in the agency of its receipt there make it impossible that it was conveyed in the manner or at the time that the officers claimed. They were not challenged to this effect at the trial and we find it utterly inconceivable that they could have failed to ensure the meticulous transport of this vital evidence. We are entirely satisfied of the integrity of the procedure that was followed and we are equally satisfied that the scientific analysis of that swab and the comparison between the results obtained with the DNA detected on the swabs taken from the body of the victim are unchallengeable.

[6] Margaret Boyce carried out a scientific examination of the swabs taken from the victim to ascertain the nature of the material contained therein and to establish a DNA profile for each of them. These results were subsequently compared with the DNA of the applicant. Semen was found on the vaginal and anal swabs taken from the victim. This semen had the same DNA characteristics as that of Foley, established by scientific analysis of the buccal swab taken from him after his arrest. On the basis of the examination first carried out, Ms Boyce was able to state that the characteristics observed would occur in approximately one male in 79 million. Subsequently, a more refined testing technique became available to the forensic science agency and a second comparison between the applicant's DNA and the high vaginal swabs taken from the victim was conducted in about May 2004. The DNA analysis used a preferential extraction that separates the sperm from the female cells so that an analysis of those separated from any female cells present can be undertaken. The outcome of that test is perhaps best expressed in the following exchange between Mr Lynch QC for the Crown and Mrs Boyce: -

> "Mr Lynch: Can you say, statistically speaking, how frequently would the DNA from the scene matching that of the accused, Mr Foley, occur within the population?
>
> Mrs Boyce: The profile obtained from the semen on the high vaginal swab attributed to [the victim] would occur in a minimum of one male in one billion, *i.e.* a thousand million."

[7] The procedures followed by Mrs Boyce in conducting her scientific tests and analysis were painstakingly explained by her in the course of a meticulous direct examination. They were not challenged by Mr McCrory QC on behalf of the applicant and we are satisfied that no serious challenge to them was raised by the applicant in the course of the hearing before this court. It is important therefore that the effect of this evidence be stated in blunt language. It is that semen from this applicant, Eamon Foley, was found deep in the vagina of the victim. That irresistible conclusion should be faced as the inescapable centrepiece of the case against him. The physical findings on examination, combined with the presence of his semen in her vagina make it indisputable that the victim was raped and that it was this applicant who raped her.

The application for leave to appeal

[8] Much of the applicant's presentation of his application for leave to appeal was taken up with demands that witnesses be called or that further material be produced. In a ruling that we delivered yesterday, we refused those claims. We need not repeat here at any length the reasons for that decision. As we said then, there must be material on which the court can make a judgment that it is expedient or necessary in the interests of justice that witnesses be called or documents be produced. We cannot act on the unsupported *ipse dixit* of the applicant. The same holds true for many of the claims made by the applicant on the hearing of the application for leave to appeal. He has made wide ranging allegations about almost everyone associated with the case. He claims that the transcript of the trial has been tampered with by his former solicitors and a member of staff of NIHRC. He asserts that the legal team that represented him on trial failed to abide his instructions and positively misled him about the way in which the case was to be conducted. He has alleged that witnesses have given perjured evidence, in the case of some witnesses claiming that they concocted their evidence to the point of suggesting that they had attended the crime scene when they had not. He has contended that the trial papers are a mockery; that his DNA sample was not matched with anything found at the scene; that the trial judge's charge was not properly transcribed and that there were glaring omissions from it; that the forensic science agency had returned all the DNA samples obtained in the screening exercise without finding what he described as a "single hit"; that the judge 'lied' to the jury in suggesting that the victim had not given a description of her attacker; that the description that she had given did not meet his appearance since she said that he was clean shaven when in fact he was bearded; that much of the material generated by the investigation of the crime and the prosecution had been withheld from him; and that he has been thwarted at every turn by the prosecution's refusal to respond to his requests for the production of relevant material and the failure of his legal representatives to protect his interests.

[9] None of the increasingly outlandish claims made by the applicant has been supported by evidence or analysis of the material presented to us during the application. He has had the temerity to question whether the victim had been raped at all. He has invited this court to conclude that he was the victim of an outrageous conspiracy whose participants ranged from his own legal teams, experts engaged on his behalf, the trial judge, the prosecution, the police witnesses, the forensic science agency and many others. We have no hesitation in rejecting these claims. It is entirely clear that they were presented in an increasingly desperate attempt to divert attention from the central indisputable fact that his DNA was found in the body of his unfortunate victim. So far from being a casualty of the judicial process, his case has been endlessly and painstakingly considered. We are satisfied that it was conducted with complete propriety by his legal representatives on trial and that the trial judge gave a conspicuously fair and comprehensive charge to the jury. Given the overwhelming nature of the case against him it was

inevitable that he was convicted. We are completely satisfied of the correctness and safety of the jury's verdict. The application for leave to appeal is dismissed.