



Neutral Citation Number: [2019] EWCA Crim 2100

Case No: 201804311 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT WARWICK
HIS HONOUR JUDGE BERLIN
T20177364

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MR JUSTICE SWEENEY

and

SIR RODERICK EVANS

Between:

IVAN McCHLEERY

Appellant

- and -

REGINA

Respondent

Ms Michele Heeley QC and Mr Daniel Oscoft (instructed by Alsters Kelley) for the
Appellant
Mr Mark Heywood QC (instructed by Crown Prosecution Service) for the Respondent

Hearing dates: 10 October 2019

Approved Judgment

The Lord Burnett of Maldon CJ:

1. On 21 September 2018 at the Crown Court sitting at Warwick the appellant was convicted of indecent assault. On 28 January 2019 he was sentenced to four years' imprisonment. He appealed against conviction by leave of the single judge on three grounds. A fourth ground, refused by the single judge, was renewed at the hearing on 10 October 2019. At the conclusion of the hearing we announced our decision. We allowed the appeal against conviction and also granted leave to appeal on the additional ground.
2. These are our reasons for reaching those conclusions.
3. The provisions of the Sexual Offences (Amendment) Act 1992 apply with the consequence that the complainant has lifelong anonymity.
4. The grounds of appeal on which leave to appeal was originally granted were:
 - i) The judge erred in rejecting an application that the appellant should be tried separately from two co-accused - the severance ground;
 - ii) The judge erred in rejecting an application for disclosure - the disclosure ground; and
 - iii) The judge failed to give a good character direction - the good character ground.

The additional renewed ground is:

- iv) The judge erred in refusing an application to allow the complainant to be cross-examined on an issue of bad character – the bad character ground.

The Facts in Outline

5. The prosecution concerned events which were alleged to have occurred in 1996. The appellant was a member of staff at a residential children's home in Coventry. There was a wide range of allegations of both physical and sexual abuse against many members of staff at the home stretching back to that time and beyond. The prosecution originally preferred a 28 count indictment against eight defendants involving 16 complainants, with the allegations spanning a decade. Six of those counts related to sexual offences and the balance to cruelty and assault. The judge severed the sexual offences from the others. The result was that this appellant was tried on a six count indictment with two other defendants limited to alleged sexual offending. There was no connection between the single count faced by this appellant and his two co-accused, save that the alleged offending arose in the context of employment at the children's home. The judge rejected an application that he be tried separately.
6. The complainant was a boy who was 15 years old at the time. The appellant and his wife owned a smallholding to which he occasionally took residents of the home. There was nothing improper in that. The trips were recorded. There was a caravan at the smallholding sited within an agricultural building which was connected to water and electricity services.

7. There was a dispute about whether youngsters were ever taken to the smallholding on their own. The appellant's evidence was that he only took them in pairs. Whilst at the smallholding they could help with a range of activities and engage with the animals. The complainant said that there was an occasion in 1996 when he was dropped off at the smallholding by a man, who he was unable to identify. He was the only child there at the time. His account was that the appellant took him to a local pub and bought him two pints of beer, after which they returned to the smallholding to work on a vehicle. The appellant then took a shower in the caravan. Afterwards, the appellant suggested that the complainant should have a shower. The complainant said that when he had finished his shower and returned fully dressed to the living room in the caravan, the appellant was in a chair, naked and masturbating. The complainant said that he sat down and the appellant then approached him and tried to push his head down towards his penis, saying "go on, give us a gobble, I haven't had it in ages." This lasted some minutes and during its course the appellant's penis touched the complainant's face. That was the alleged sexual assault. After a period of some minutes, the appellant gave up and returned to his chair.
8. The complainant said that he was afraid that he might be harmed. He knew that the appellant had a shot gun. He said that he had been present when the appellant shot a fox through the caravan window a few weeks before the incident.
9. No contemporaneous complaint was made. In 2012 and 2013 the complainant told a nurse that he had been sexually assaulted when he was a resident at the children's home. He was unable to recollect the name of the perpetrator but explained that he had smashed a window of the car of the person who had abused him. The complainant had a conviction in 1998 for smashing the car window of a different employee at the home.
10. The appellant was of good character, indeed positive good character. He denied the allegation emphasising that on no occasion could the complainant have been with him at the smallholding on his own. Other children and adults would always have been present. The appellant explained that at the time of the alleged incident he was suffering from erectile dysfunction. That was confirmed by medical evidence. He had shot a fox at the smallholding, but long before. His wife was present when he did so, and she took a photograph of him holding the fox by its brush. That photograph was in the caravan. It would not have been possible to shoot through the window because it was covered in mesh. The complainant had not been present when the fox was shot. The appellant's wife gave evidence supporting his account. Evidence of positive good character was given by a number of witnesses. The prosecution did not challenge the character evidence and agreed that it could be read to the jury.

Relevant Applications Made at Trial

11. The appellant made an application for disclosure of records relating to the movements of other children in the home during the period when the alleged visit by the complainant was said to have occurred. The purpose in seeking the information was to obtain confirmation that the children generally went out in pairs, rather than alone, and that the complainant had visited the smallholding in the company of others. An exercise had already been undertaken to identify the dates on which the complainant was recorded as having visited the smallholding. The appellant identified one other child by name. Her records were checked but with no relevant result. The judge

refused an application to disclose the records of movements by the other children in the home at the material times.

12. The appellant also made an application for leave to cross examine the complainant about his own sexual misconduct under the bad character provisions of the Criminal Justice Act 2003. His records revealed that when he was 13 he exposed his erect penis to an 11-year-old girl, in the presence of her seven-year-old brother, and tried to put it in her mouth. He later masturbated in front of the brother. Then in February 1996 when he was 15 a note in his file recorded that the complainant walked around the house with only a towel around his waist and was asked to change into pyjamas. He did so but left the fly hole open and walked around with his semi-erect penis exposed. The appellant contended that this evidence provided an explanation for the complainant's knowledge of the behaviour he alleged against the appellant because he had behaved in a similar way with the girl. Moreover, it was evidence which went to the complainant's credibility.
13. The judge rejected both applications.

Good Character

14. We deal first with good character. Regrettably, the judge did not give a good character direction. The judge did make reference to the fact that the appellant had no previous convictions and contrasted that with the position of the complainant. The appellant was entitled to a good character direction comprising what, for shorthand, is described as "both limbs". That calls for a direction that explains the relevance of the defendant's good character to his credibility when he has given evidence or made a pre-trial statement and, secondly, to the relevance of good character to the likelihood of the defendant having committed the offence charged. That is the propensity limb. In *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367 this court reviewed the law relating to good character. It reaffirmed the principle applicable to cases of "absolute good character", as was the appellant in this case:

"77. We use the term "absolute good character" to mean a defendant who has no previous convictions or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven. We do not suggest the defendant has to go further and adduce evidence of positive good character. This category of defendant is entitled to both limbs of the good character direction. The law is settled."

78. The first credibility limb of good character is a positive feature which should be taken into account. The second propensity limb means that good character may make it less likely that the defendant acted as alleged and so particular attention should be paid to the fact. What weight is to be given to each limb is a matter for the jury. The judge must tailor the terms of the direction to the case before him/her, but in the name of consistency, we commend the Judicial College standard direction in the Crown Court Bench Book as a basis."

15. At paragraph 89 and following the court noted that the sole statutory basis upon which an appeal against conviction can be allowed is that the conviction is unsafe. A failure to give a good character direction when one is called for, or to give it subject to inappropriate qualification or comment, does not automatically lead to a conviction being quashed. It all depends upon the nature of the case in question.
16. The context of this case was a straightforward conflict of evidence between the complainant and the appellant in circumstances where there was little independent evidence to assist the jury in deciding the issue. Credibility was all. In those circumstances we consider that the good character direction was of importance.
17. The evidence called by the appellant, in addition to his own, consisted of an account of all material events from his wife which supported his own and a series of character witness statements which, as we have already indicated, were read to the jury with the agreement of the prosecution.
18. In connection with the character witness evidence, the judge quoted from the statements and then added:

“Now, members of the jury, there’s always a danger with character references. Of course, they see this person, they’ve known this person for years and, obviously, they are friends, aren’t they? So, you have to bear that in mind you’re looking at these things. Approach them with some degree of caution for obvious reasons.”

The judge had just before that directed the jury to remember that,

“Mrs McChleery is not an independent witness and ... she has discussed matters with her husband ... That doesn’t mean she’s unreliable, but you have to treat her evidence with some caution, bearing in mind that background.”

19. Mr Heywood QC, who appeared before us for the prosecution, submitted that it was “regrettable that the judge invited the jury to take a cautious approach” to the character evidence. We agree, especially in the context of the prosecution having chosen not to question any of those witnesses. None of us has seen a direction of this nature before. It is true that character witnesses know the defendant in respect of whom they give evidence very well. Otherwise their evidence would be valueless. To direct a jury to be “cautious” about it on that account is likely inappropriately to undermine the evidence.
20. There was an absence of any evidence pointing to the guilt of the appellant other than the complainant’s account. The credibility of the competing versions of events was central to the decision of the jury. We consider that the absence of a good character direction in this case leads inevitably to the conclusion that the conviction is unsafe. That is all the more so in the context of a positive direction to the jury to be cautious about the good character evidence called by the appellant, which itself followed a direction for caution in respect of his wife’s evidence.

Severance

21. It is unnecessary to consider in detail the remaining grounds of appeal. We will deal with each only briefly. The complaint in respect of the severance ground is that the judge erred in failing to sever the appellant's case from the other two defendants charged with sexual offences in respect of different alleged victims, on different occasions, albeit resident in the same children's home.
22. The judge had been confronted at the outset with an unmanageable indictment including far too many complainants and defendants. His decision to break it down into physical and sexual abuse trials was admirable. On the subsidiary question whether to try this appellant separately from the other two indicted for sexual offences, the judge directed himself by reference to the correct statutory provisions, Criminal Procedure Rules and authority. He was entitled to conclude that it was convenient to try the three accused together and that there was no unfairness to this appellant in doing so. His decision was vindicated by the outcome. The two co-accused were both acquitted.

The Complainant's Bad Character

23. We have summarised at [12] above the nature of the matters on which leave was sought to adduce evidence and cross-examine the complainant. Whilst we considered the point arguable we concluded, having regard to section 100 of the Criminal Justice Act 2003, that the judge was correct to decide that the two pieces of evidence did not have substantial probative value. The incident in which the complainant was said to have walked around in pyjamas exposing himself had no probative value at all and would do no more than attack his character generally. Moreover, it was not part of the prosecution case that the complainant could have known of oral sex only as a result of what was alleged against the appellant. The limit of the point the appellant might have made in connection with the earlier incident was that the complainant had used his own conduct when aged 13 as a template or background for a false account against the appellant. Such a link was tenuous. The admission of this evidence, in the absence of a positive averment by the prosecution that the sexual activity in question was known to the complainant only on account of the conduct of the appellant, would be simply to undermine credibility with evidence that would not assist the jury in determining whether the complainant's evidence was true.
24. Many other convictions of the complainant were before the jury.

Disclosure

25. Substantial quantities of records from the children's home has been secured by the prosecution for the purposes of the wide-ranging series of prosecutions underway. They were very voluminous, amounting to 174 boxes of documents altogether. A disclosure junior was assigned the task of identifying documents for disclosure. The records which evidenced the dates on which the complainant visited the appellant's smallholding had been identified from his files and disclosed. As we have already mentioned, the appellant identified another child by name who he thought might have visited with the complainant on one or more occasion. Her records were checked but nothing of relevance was discovered. She was a resident in the home both before and

after the relevant period, but not during it. It was in those circumstances that an application was made for the signing in and out sheets of other children on the same days that the complainant was recorded as visiting the smallholding. At any one time the number of children in the home was a maximum of 14, although there was a high turnover. The judge was persuaded by the prosecution that the task of meeting the request would be difficult and time-consuming because there was no definitive list still extant which recorded, day by day, who was resident in the home, nor a single signing in and out register.

26. Had a register existed which recorded the movements of all the children in the home on a day by day basis, that could have been produced. It would have been possible to have undertaken the task of checking the records of individual children for the dates identified as those on which the complainant visited the smallholding if a daily list of residents was available. Neither possibility existed. The judge was conscious of the fact that the records were, in any event, incomplete and scattered. He concluded that the request was speculative and disproportionate.
27. In the course of oral argument, we heard conflicting descriptions of the nature of the documentation available and the ease with which the necessary checks might have been made. An issue arose whether each child had his or her own signing in and out sheet, but no precise description of the nature of the documents held appeared in the written arguments on this issue before the judge or in his ruling. We were troubled that no investigation appears to have been made by the police or prosecution into the question whether children visited the smallholding individually or in pairs, despite that being a point raised by the appellant when he was interviewed after his arrest. That said, we are not persuaded that the judge, who was close to the detail of the substantial extended cases arising out of the running of the children's home and the available documentation, was wrong in his assessment of the disclosure question.

Conclusion

28. The failure to give a good character direction in this case resulted in an unsafe conviction. We quashed the conviction. The prosecution applied for a retrial. We considered that it was not in the interests of justice for there to be a retrial. That was because the appellant has served a large part of any sentence he might receive if convicted. He also had faced a second trial in respect of alleged physical abuse and was acquitted. He is now 78 years old, frail and in poor health and these matters have been running for over five years since his arrest.