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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 8 November 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE NICOL

and

HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

RICHARD EDWARD HYDE-GOMES

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Ms C Gardner appeared on behalf of the Applicant

Ms N Merrick appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE SIMON:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. On 11 April 2018, following a trial in the Crown Court at Croydon before Mr Recorder Dawson and a jury, the applicant, Richard Hyde-Gomes, was convicted of eleven counts of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 (counts 1 to 11), and a single charge of attempted rape, contrary to section 1(1) of the Criminal Attempts Act 1981 (count 12). On 12 April 2018, he was sentenced to an overall term of ten years' imprisonment.

3. On 5 July 2018, following a Reference by the Attorney General under section 36 of the Criminal Justice Act 1988, this court increased the overall sentence to a term of sixteen years' imprisonment.

4. The applicant now applies for leave to appeal against his convictions on ten grounds. The single judge referred ground 8 to 10 to the full court, but refused leave in relation to grounds 1 to 7. Ms Chloe Gardner renews the application in relation to grounds 1 to 7 and appears with a representation order in relation to grounds 8 to 10. Ms Nicola Merrick appears for the prosecution.

5. Before coming to the grounds of appeal, it is necessary to set out the prosecution case and some of the evidence in summary. In 1997, the complainant's mother, "TB", met the applicant and they formed a relationship. TB was then living in Portsmouth with her four children, one of

whom was her daughter, "CB", against whom the offences were said to have been committed. She was just over 11 old.

6. The applicant lived in London, but he stayed with TB and her children in Portsmouth most weekends. In 1998, TB, her daughter CB and her son "C" moved in with the applicant in South London. They lived at two addresses in London: first, at Pontefract Road in Bromley; and later at Avenue Road in Penge. CB did not immediately secure a place in a local school and so she remained at home for some time while in London. The applicant was often drunk and, it was said, violent towards the family.

7. Sometime after this, CB returned to Portsmouth. In March 2000, she told a school friend that she had been sexually abused. The friend, in turn, told a teacher who reported the matter. CB said that the abuse had started in Portsmouth and had continued in London. She described the abuse as regular and said that it took place in the family home, in alleyways, in the car, and on one occasion at the applicant's parents' house. The police and Social Services were notified, and both CB and the applicant were interviewed. The applicant denied the allegations. No charges were brought. CB's mother (TB) supported the applicant and continued to live with him. Subsequently, CB was taken into care.

8. In 2015, CB made contact with the applicant and recorded a telephone conversation with him. She asked him to admit that he had sexually abused her. At one point in the context of a face-to-face meeting he told her: "You haven't got to be scared of me". She replied, "But I have though, Rich. You used to beat us up. You used to put knives to our throats". He said, "I'm really sorry for that". Then she said, "You sexually abused me for two years". His response was, "I'm really, really sorry for that. Right?"

9. The police investigated the matter following receipt of the tape. On 17 December 2015, the applicant was arrested and interviewed. He accepted that he was an alcoholic and that he had been violent towards the family on occasions. However, he denied the allegations of sexual abuse that were put to him. He said that CB had fabricated the allegations in order to get at him.

10. The prosecution case was that the offences occurred when CB was between the ages of just over 11 and just over 14. Her precise age at the time of the offences charged as counts 3 and 4 was important to the sentence in order to determine whether the comparable offence under the Sexual Offences Act 2003 was section 5 (rape of a child under 13): see *Attorney General's Reference (R v Hyde-Gomes)* [2018] EWCA Crim 2364. However, for present purposes her exact age is of less importance.

11. CB gave evidence that the first time the applicant stayed at their house in Portsmouth, when she was about 12 years of age, he sexually abused her. She was lying down on her mother's bed in her nightdress when he began to stroke her leg. He then stroked her knickers and bra, and touched her vagina. She froze. The applicant told her not to tell her mother (Count 1).

12. She said that he regularly touched her vagina whilst her mother was out at work. Occasionally, her elder sister would be downstairs, but there were no witnesses to the assaults and CB had been too scared to tell anyone about them (Count 2, a multiple incident count confined to Portsmouth).

13. She said that when the family moved to London, the applicant began to ask her to suck his penis. The first time this happened was in her bedroom in Pontefract Road. He was in his boxer shorts, listening to the football on the radio. He pulled one leg of his boxer shorts to the side to expose his penis and said, "Fucking do it". He then put his penis into her mouth and moved it up

and down. He pulled her mouth away before he ejaculated, and then told her to go to bed (Count 3).

14. CB said that she was too scared to tell her mother what had happened. There were many other occasions when the applicant made her suck his penis in the house (count 4, a multi-incident count relating to sucking his penis at Pontefract Road). However, she said that the first time was the worst as he told her he would kill her. She said that she had lost count of the number of times that she had been forced to perform oral sex on the applicant.

15. She described an occasion when he made her lie naked on the floor at the flat in Pontefract Road while he licked her vagina (count 5).

16. She said that when the family moved from Bromley to Penge, the applicant continued to force her to suck his penis on a regular basis in different rooms of the house. She said that it normally took place in the bedroom, but she described an occasion when it took place in the kitchen (counts 6 and 7, further multiple-incident counts).

17. She told the jury that the applicant collected her from her dance class every Wednesday and that while driving her home he would stroke her vagina with one hand (count 8). She also described several occasions when he took her into an alleyway and made her suck his penis (count 10).

18. She described one occasion when he took her to his parents' house and into the spare room, where he licked her vagina (count 11).

19. She gave evidence that on 10 June 1991, while her mother was in hospital giving birth to her

sister, she was at home with the applicant. He put her into her mother's bed and turned her around so that he was behind her. He touched all around her vagina, then rubbed his penis against her vagina and buttocks. She said that the only reason he did not rape her was because she told him that she was a virgin and he would be caught out (count 12).

20. Towards the end of the examination in chief, Ms Gardner raised the question of the presence of GB (CB's father) in court while CB was giving evidence. Ms Gardner said that the defence had received a statement from GB about two weeks before and that, although it was unlikely that she would call him on behalf of the defence, it was possible that she would. Time was taken to consider the matter, and Ms Gardner reiterated that she did not think that she would wish to call him. It appears that the matter was left to the Recorder, who indicated that GB's presence in court appeared to calm and reassure the witness.

21. This incident gives rise to ground 8 of the Grounds of Appeal. Having received GB's statement, the defence had indicated that they wished to consider calling him and had asked for him to come to court. The complaint is that, as a possible witness for the defence, he should have been excluded from court and not been present while CB was giving her evidence.

22. In our view, there is nothing in this point. We have looked at the transcript. Initially (at volume II, page 6E), Ms Gardner raised no objection to GB's presence in the court room, "but [GB] for my part as well … he is sitting with her, so it is not appropriate for me to be calling him as a witness and I have not contacted him, so I put that to one side". Later (volume II, page 16F), she recognised that she did not have any "difficult" questions for the father. She identified a possible solution, should she wish to refer to his evidence. She had his witness statement and could refer to it if she needed to. However, she never sought to do so. Nor did she indicate that she wanted to call him. Apart from a broad assertion that being unable to call GB to give

evidence harmed the defence case, the application fails to identify any piece of evidence that GB could have given and which he was for some reason unable to give, which would have assisted the defence. Ms Gardner suggested that she may have made a mistake. We are not persuaded that she did. The point is entirely without merit.

23. Ms Gardner cross-examined CB. For present purposes it is unnecessary to set out the detail of the evidence that was elicited. We note that CB was not an easy witness to cross-examine. She strongly resisted the suggestion that she was not telling the truth, and the transcript shows a considerable amount of cross-talking. However, it is clear that CB repeatedly referred to the violence that she said that she, her mother and brother had endured at the hands of the applicant. Often the comment was gratuitous (page 33E). On one occasion it was a response to a question about her mother smacking CB, when she compared a slap on her bottom from her mother to the violence from the applicant. In fact, the applicant had indicated that he had slapped CB, amongst other assaults.

24. This evidence in cross-examination forms the basis of the complaint in ground 9 of the Grounds of Appeal. It is said that the Recorder had given a ruling that the prosecution's reliance on evidence of the applicant's non-sexual domestic violence against the family was largely inadmissible. In fact, the Recorder's ruling on 3 April was to different effect, as we have seen from volume I. He noted that a "backdrop" to the allegations of the sexual offences were allegations made by CB and her brother (C) that the applicant would regularly be violent towards them. He also noted that no complaint of this was made at the time, and there was no count on the indictment in relation to any form of violence. There was just a general complaint that he was a violent man towards the family.

25. The Recorder reminded himself of the prejudicial effect of such an allegation and the

importance of ensuring a fair trial. He concluded that it was inevitable that in some degree evidence of the violence would come out because it was part of the case and it could not be excluded in its entirety. He added:

> But I think it can be significantly limited such as to reduce as much as humanly possible any prejudice towards the [applicant] on the basis of the unproven allegations of violence. So, I am going to rule that the edited version of the ABE [interview] be played and of course that may include some degree of suggestion of violence, but at least it is limited to that.

As is clear from this extract, there was, in fact, another unedited version of the Achieving Best Evidence interview, which is relevant to a subsequent ground of appeal.

26. The complaint in relation to ground 9, in broad terms, is that the prosecution reliance on domestic violence was "largely inadmissible"; that CB was "allowed virtual carte blanche" to mention allegations of non-sexual domestic violence; and that the prosecution actually cross-examined the applicant about domestic violence. It is said that the Recorder failed in at least two respects: first, he made no attempts to prevent CB or any other prosecution witnesses from referring to the violence, when he should have done; and secondly, he gave no direction to the jury reminding them to ignore such evidence, when he should have done.

27. In our view, these complaints are also without proper foundation. In the course of his examination in chief, the applicant admitted that he was violent to CB, her mother and brother. He said that this was what he was apologising for in the recorded conversation (volume IV, page 30E-F). He persisted with this explanation in cross-examination (volume IV, page 37B onwards). It is clear that, at least by the time he gave evidence, the admission of violence towards the family was a necessary part of his defence so as to explain what he had said in the recorded conversation and his apology.

28. CB's evidence had been followed by evidence from her mother, TB, and other prosecution witnesses. We can conveniently move on to a later stage of the trial and the late disclosure of TB's hospital records. This was potentially relevant to the attempted rape charge, which CB said had occurred while her mother was in hospital giving birth. In fact, the records were not disclosed until 9 April, after CB and TB had given evidence. This was unfortunate. It appears to have been due to an oversight by prosecuting counsel who had failed to ask for a court order. The Recorder made the order on 6 April and, in the event, the prosecution very properly made a number of admissions in the light of the disclosures, recorded in the agreed facts, in relation to what the hospital records revealed in terms of timing.

29. The delayed disclosure gives rise to the complaint in ground 1. The hospital records for TB's admission for the birth of her daughter on 10 April were directly relevant to count 12 (attempted rape), because CB's evidence related it specifically to when her half-sister was born. The hospital records did not refer to any incident of assault against TB at the hospital, although TB had given evidence of such an assault.

30. It was obviously unfortunate that the records were not made available for the start of the trial. However, no unfairness arose, because admissions were made that cast doubt on the prosecution evidence that there had been an assault on TB at the hospital; and such inferences as could be drawn as to the presence of the applicant at any particular time were there to be made. The defence did not ask for TB to be recalled and, in the light of the agreed facts, we can understand why. It is clear that there was no prejudice in the point emerging later in the trial than it should have.

31. The applicant's evidence began on 9 April 2018. The Recorder granted Ms Gardner an opportunity to consider the hospital records and allowed her to have a conference with the

applicant, although he had already started his evidence. In the time that he allowed for the adjournment, the Recorder heard an appeal from a magistrates' court. It may be - and we accept from Ms Gardner that this is so - that he had already at that stage resolved to hear the appeal.

32. The adjournment gives rise to an unusual complaint - ground 7, which has two components. First, it is said that the Recorder should not have allowed the applicant's evidence to begin. The interposing of an appeal in the middle of his evidence was inappropriate and unfair to the applicant. Second, it is said that the Recorder should not have continued to hear the appeal from the magistrates' court once the defence conference had finished. The jury and the applicant were forced to wait for approximately an hour, until the court was ready to continue the applicant's evidence. Thereafter, the applicant gave evidence for only a short period before the midday adjournment.

33. We should say at once that it would have been very much better not to have interposed another case in the middle of the trial. We can see no reason why the Recorder decided to do this. However, the interruption lasted from 11.10am to 12.39pm on Monday 9 April. The transcript (volume IV, page 17E) shows that, in addition to the conference with the applicant, Ms Gardner was able to use the time to agree and to draft agreed facts with Ms Merrick, including facts relating to the hospital records. We do not consider that what occurred gives rise to any unfairness or renders the conviction unsafe.

34. After the applicant had given evidence and counsel had made their closing speeches to the jury, the Recorder began his summing-up of the case. Grounds 3, 4, 5 and 6 are complaints about the summing-up.

35. Ground 3 relates to the legal direction and the Recorder's summing up of distress. He

referred to the evidence given by CB, and said this:

> It is easy to feel indignant at the idea of this sort of thing happening and easy to be sympathetic to a witness who seems to be showing difficulty or distress at having to recall and recount an incident which was distressing and unpleasant for her. Those are practically proper and normal emotions but they do not assist in deciding whether these allegations are satisfactorily proved. You must put aside any feelings you have about cases such as these, and review the evidence you have heard dispassionately. Take into account, if you wish, the emotions and demeanour of the witness, but do not allow your own emotions to take over.

Later, under the heading "Distress", the Recorder said:

> When the complainant was giving evidence, it was perfectly plain that she started to cry and was distressed. How should you deal with that matter? Distress is capable of being corroboration but only if: 1) you are satisfied that there is no question of the distress being feigned; and 2) that the distress relates to the incident being discussed. You must be satisfied that the distress that you witnessed was genuine and that the reason for the distress was referable to the sexual abuse that the complainant said happened to her.

36. Ms Gardner submits that the Recorder's direction was inappropriate, given the circumstances of the case. She also complains that she was not given an opportunity to consider with the Recorder his draft direction and make submissions about it.

37. In general terms we would observe that it is good practice for a judge to discuss draft directions with counsel before giving them.

38. The substantive complaint is that, since the Recorder had ruled the evidence regarding non-sexual abuse was largely inadmissible, defence counsel did not cross-examine CB about it and therefore the Recorder should have directed the jury that the signs of distress might be attributable to the violence (irrelevant), rather than the sexual abuse (potentially relevant).

39. In the light of CB's forcefully expressed feelings about the applicant, the relevant issue for the jury was whether the distress shown by CB in giving evidence was generated by her evidence about sexual abuse or violence - both of which she claimed to have suffered. The reference to the distress relating to sexual abuse adequately covered the point.

40. Ground 4 is a broad challenge to the adequacy and balance of the Recorder's review of the evidence. Ms Gardner accepts that there is no definitive guide as to how long a judge should spend referring to the evidence heard in the trial, but she submits that, on any view, the summing up of the evidence was insufficient and unbalanced.

41. The Recorder reminded the jury of the evidence of CB's complaint in 2000 and the content of her edited 2015 ABE interview. He also reminded the jury of the applicant's evidence in response and the answers that he had given in interview, in which he had denied each and every allegation put to him.

42. The difference in the evidence was stark. CB adhered to her account before the jury, and the applicant gave evidence that her allegations were false. The Recorder referred to some of the cross-examination by Ms Gardner and none of the cross-examination by Ms Merrick. In fact, very little evidence had emerged in the cross-examination on either side, and the jury were left with a choice as to whose evidence they accepted. By their verdicts, they must have been sure that CB was telling the truth and that the applicant was lying. In our view the criticism of the supping-up is unjustified, and ground 4 does not give rise to a legitimate complaint.

43. Ground 5 we take from the Amended Perfected Grounds of Appeal, since a transcript in relation to this matter is not available. After retirement, a member of the jury asked the Recorder: "Is the specification of the incident taking place in the lounge critical to the charge?"

The Recorder replied: "The answer to that is no, it does not matter where it happens". Ms Gardner's initial complaint is that the location of an incident did matter. The counts on the indictment referred to three specific addresses - count 5, Pontefract Road in Bromley; count 9, Avenue Road in Penge; and count 11, the applicant's parents' house - which, in turn, related to specific time periods. There were, therefore, periods when the offences could not have occurred. Location was, therefore, of importance, particularly as the indictment contained multiple incident counts.

44. Ms Gardner has a further complaint in paragraph 146 of her grounds, in which she says this:

> The [Recorder] then stated to the jury 'Ignore Avenue Road – just a question of if he licked her out'. This was apparently because the jury foreman had sent another note to the [Recorder] … and the [Recorder] replied, without any consideration of counsel's views.

45. In our view, there is nothing of substance in this point. The enquiry, as it appears to have been, was whether it was material that a particular incident took place in the lounge or elsewhere. The answer was plainly: No. In relation to the observation "Ignore Avenue Road", we have no transcript, and it is impossible to form a view about this without seeing the context. Unfortunately, Ms Merrick was not able to assist on the context, and there we must leave the matter. Leave was refused by the single judge.

46. Ground 6 was a complaint about the good character direction. We will deal with this matter shortly, although it was not pursued today by Ms Gardner. It appears that the defence understood that the Recorder would give a full good character direction. In the event, he made reference to the applicant's driving offences, including two convictions for driving with excess alcohol and said that the applicant could not put himself forward as a man of good character. However, importantly, he drew attention to the fact that he had never been convicted of any

offence of violence or a sexual offence. He then made four points: first, the lack of any such offences should be considered in the applicant's favour when considering the case against him; secondly, since he had no convictions for dishonesty, he was more likely to be an honest witness; thirdly, however, the weight the jury should give to his character was a matter for them; and fourthly, good character did not itself amount to a defence.

47. As we have noted, it was necessarily the applicant's case that he had been physically violent in the home in order to explain what he said in the recorded conversation. In these circumstances, he was plainly not entitled to a full good character direction. The Recorder was, at the very least, entitled not to give a direction that ignored this evidence and might be said to have given a direction that was more generous - and perhaps very much more generous - than that to which the applicant was entitled. We understand why Ms Gardner did not pursue this point.

48. The jury had seen a recording of CB's 2015 ABE interview. Two disks had been used to record the interview. The one that was edited was shown to the jury. Ground 2 is a complaint that the jury saw the unedited version.

49. This seems simply to be wrong as a matter of fact. The unedited version was never at any stage seen by the jury. Indeed, it would have been wholly surprising if they had been allowed to view either of the recordings alone in the jury room. It is clear that they did not, since a jury note asked to be reminded of parts of the interview. The disk may have made its way into the jury room. If so, that was highly unsatisfactory. But the possibility that the unedited DVD was in fact viewed by the jury can be plainly excluded on the material before us. There is nothing in this ground of appeal.

50. The final complaint (ground 10) relates to the majority direction. On Wednesday 11 April 2018, at just before 3.29pm, a jury note was sent to the Recorder indicating that, while unanimous guilty verdicts had been reached on counts 1 to 9, no verdicts had been reached on counts 10 to 12. Without canvassing the views of counsel, the Recorder then gave a majority direction. At 3.48pm the jury indicated that they had reached verdicts and were brought into court at 3.58pm. They returned verdicts of guilty by a majority of 10:2 in respect of each of counts 10 to 12.

51. The complaint is that the jury had become aware that the normal "end" of a court day was 4pm, and that the Recorder's majority direction at 3.45pm would, therefore, have exerted undue pressure on them to deliver a decision by then.

52. In our view, there is simply nothing in this point. It was entirely up to the Recorder to decide when to give a majority direction once a period of two hours and ten minutes in retirement had elapsed. There can have been no time pressure on the jury. The majority direction was given on Wednesday 11 April, and the jury would have expected to complete a week's jury service, if necessary returning the following day. In any event, we have not seen the note to the Recorder indicating where the jury were in relation to their verdicts, and it is therefore impossible for us to form a view that the majority verdict direction was given often than appropriately.

53. In these circumstances, whether viewed individually or, as Ms Gardner invited us to do, collectively, the points of complaint do not give rise to arguable grounds of appeal. This was a strong case. It was not simply a contest between CB and the other supporting prosecution witnesses on the one hand, and the applicant on the other. On one view of the recorded conversation in 2015, the applicant had made a clear admission of sexually abusing CB such as

to provide a compelling foundation for the convictions on all counts.

54. There is no good reason to doubt the safety of these conviction. The application is accordingly refused.