Neutral Citation Number: [2020] EWCA Crim 1334

Case No: 202000762/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Nottingham Crown Court
HHJ Hurst
T20190324

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2020

Before :

LORD JUSTICE GREEN
MR JUSTICE SPENCER
and
HIS HONOUR JUDGE MENARY QC

- -

Between :

Regina
- v -
Mark Anthony CRAMPTON

(Transcript of the Handed Down Judgment.
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Mr Martin Elwick (instructed by **The Johnson Partnership**) for the **Appellant**
Mr Mark Watson (instructed by **Crown Prosecution Service**) for the **Crown**

Hearing date: Wednesday 7th October 2020

Judgment
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Lord Justice Green :

Introduction

1. On 11 February 2020 in the Crown Court at Nottingham, the appellant was convicted of a single count of indecent assault contrary to Section 14 of the Sexual Offences Act 1956. On 12 February 2020 he received a Special Custodial Sentence under Section 236A of the Criminal Justice Act 2003, comprising a custodial term of 4 years and an extended licence period of 1 year. A restraining order was made under Section 5 of the Protection from Harassment Act 1997.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply. No matter relating to the victim may 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. For the purposes of this judgement the court has anonymised the relevant names.

The Facts

3. On a day between 13th November 1996 and 12th November 1997 the complainant, then aged between 4 and 6, was left at home by her parents and grandparents with a man called Mark. The complainant wet herself and the man called Mark changed her clothes. He put a horror film on television and then started to touch and digitally penetrate the complainant's vagina. When her parents returned, they noticed that she was visibly upset, and she told her mother what had occurred. Mark was thrown out of the house and was never seen again. The family did not report the matter to the police out of a concern that this might further traumatise the child. They took the view that it was best to forget about the incident.

4. The complainant did not however forget and eventually, in 2018, with the support of her partner, she reported the matter to the police. She named the perpetrator as Mark Crampton. He was duly charged and pleaded not guilty. There was no dispute that the complainant had been assaulted. The issue for the jury at trial was one of identification, namely whether the Appellant had been correctly identified as the person who committed the offence.

The Evidence at Trial

5. We turn to the prosecution case.

6. At trial, the Crown submitted that the Appellant had committed the offence and relied upon identification evidence from the complainant and other witnesses to the effect that the perpetrator's name was Mark Crampton, evidence from the complainant's father as to the street where Mark Crampton was living at the time, and evidence from the complainant that she identified the appellant as the offender after she found a photograph of him on Facebook.

7. The complainant's evidence was that all she recalled about the perpetrator for many years was that his name was Mark. However, in May 2014, she was at her grandmother's funeral when the subject of the indecent assault came up. She told her

aunt's boyfriend, JG, that she was trying to find out who the man called Mark was. He told her that the only person he knew of that name and description was Mark Crampton who was involved with a woman called K. The complainant then recalled his name having been mentioned previously and she felt that it all fitted together. She subsequently conducted a search of their names on Facebook where she found the Appellant, saw a photograph of him, and immediately recognised him as the offender. The complainant accurately recollected in her ABE evidence that the man who had abused her had blonde curly hair and this was not something that was evident from the Facebook image of the Appellant taken some 25 year later. In cross examination the appellant accepted that at the time he did have blonde curly hair.

8. The complainant's mother was present during the conversation at the funeral. Her evidence was that she had always known that the man's name was Mark Crampton. Her daughter subsequently showed her a screenshot of the image of the Appellant that she had found on Facebook and the mother immediately recognised him as Mark Crampton.

9. The complainant's father made a witness statement. He knew the man as Mark and said that he would not recognise him again. He did however recall that the man was living at the time in a street which he identified and named.

10. The complainant's grandfather, M, said in his statement that he knew the man was called Mark Crampton. However, it became apparent that this name had been communicated to him by a friend in a hospital 6 days before he made his statement in October 2018, when the investigation was already under way. He subsequently attended a VIPER procedure where he identified the appellant as the man who had been thrown out of the house.

11. A third person, who was a close friend of the family, D, was present when the man was ejected from the house. As far as he could recall, he was not told why the man was being thrown out. He only knew him as Mark.

12. It was common ground that there was one other person present at the house around the time of this incident whose name was Mark Cross. He was a young man of similar age and height to the Appellant. The jury was informed that Mark Cross had a previous conviction for indecent assault as well as a further charge of indecent assault that had been dropped. However, the evidence was that the police had investigated Mark Cross. He was dark haired, and he had stayed in friendly contact with the family for some time after the incident which was conduct incompatible with him having been forcibly ejected from the family home by them and never seen again. Moreover, none of the family identified Mark Cross as in any way connected with the incident. Indeed, as Mr Watson, for the Crown argued before us, Mark Cross had an alibi, namely all the prosecution witnesses.

13. The officer in the case was asked about the VIPER procedure and his evidence was that it had not been considered necessary for the complainant or her mother because they had already produced a photograph of the appellant.

14. We turn now to the defence case.

15. The Appellant was interviewed under caution. He answered questions stating that he knew nothing about the allegation and had never met the family or been to their house. The identification of him as the offender was therefore mistaken. At trial He gave evidence consistent with his interview evidence. He maintained that he did not know this family. He had never been to their house. He did not commit this offence. He had told the police that they had the wrong man and he had asked for an ID parade. He denied that he lived in the street mentioned by the father, but he did accept that although it was not his home address, he did stay there from time to time.

16. We turn now to the issue in the appeal, which concerns the admissibility of the Facebook identifications and the failure on the part of the police to conduct a formal identification exercise in breach of the Police and Criminal Evidence Act 1984 (PACE)

The Ruling on Failure to Conduct a VIPER identification / Breach of Code D / Section 78 PACE

17. In view of the evidence that we have referred to, the defence submitted that there had been a breach of Code D of PACE because neither the complainant, nor her mother, were invited to a formal video identification procedure. It was argued that the Facebook identification should, as a result, be deemed inadmissible or be excluded under section 78 PACE. It was argued that if the identification evidence was excluded then the rest of the evidence was so weak that the case should be stopped. In view of this submission, the Judge ruled upon the omission on the part of the police to conduct an identification exercise in accordance with PACE in relation to the complainant and the mother, and as to the implications of a finding of breach of the Code upon the admissibility of the Facebook evidence, and the case going forward generally to the jury.

18. In his ruling the judge concluded that a VIPER procedure should have been carried out with both the complainant and her mother. He held that the failure so to do was a breach of Code D. He found that the breach was compounded by the fact that the identification of Mark Crampton was hearsay. However, the judge was also satisfied that the Facebook identification was admissible notwithstanding the failure to conduct an identification process. The issue was one of the weight of the evidence, in the context of the other identification evidence. The judge held that, properly and carefully directed, the jury was in a position to form a fair and considered view about this evidence.

The Grounds of Appeal

19. It is now argued upon this appeal that the judge erred in concluding that the Facebook identification evidence was admissible and was not to be excluded under Section 78 PACE and did not lead to the trial being stopped. The starting point of the argument is the judge's finding of a breach on the part of the police of Code D. Allowing evidence premised upon that breach to go to the jury served only to bolster a weak case. Overall there were so many troubling aspects about the evidence taken as a whole that there was lurking doubt as to the safety of the conviction and it should be set aside.

20. The Crown opposes the appeal and argues that at base the grounds all amount to the same complaint, namely that the judge wrongly exercised his discretion or judgment. However, the judge properly considered all the circumstances surrounding the Facebook identification and the breach of Code D in reaching his decision. He properly directed the jury. The position of Mark Cross was a red herring. Nonetheless the jury was very fairly told all about him. Even if there were concerns about the Facebook identification, there was cogent supporting inculpatory evidence and it was for the jury to weigh and consider all the evidence in the case. In short, this was no more than a challenge to the exercise of judgment or discretion by the judge and on appeal the court should be slow to interfere with the conclusion of a trial judge who carefully weighed the evidence and gave careful and fair directions to the jury.

Analysis and Conclusion

21. We turn to our conclusion. We take as our point of departure the finding by the judge of the breach of the Code. It is not in dispute in this appeal that (i) there was a breach of the Code but (ii) this does not, without more, suffice to exclude the Facebook identifications. Such is common ground and we do not therefore need to address the law on these two issues. It is also not suggested that the directions given to the jury on any matter arising of relevance to this appeal were flawed or inadequate. Indeed, the directions given to the jury were, in our view, conspicuously clear and fair.

22. It follows that whether to exclude the Facebook identification evidence and its consequences for the trial was a matter of judgment for the Judge under Section 78 PACE. The question on this appeal is therefore whether the judge erred in the exercise of that judgment. *Prima facie*, the appeal court is slow to disturb such an exercise: see for a recent illustration *LT* [2019] EWCA Crim 58 which concerned a Facebook identification that the Court held had been wrongly excluded. At paragraph [36] the Court, having recited section 78 PACE, stated:

> "36. Whether the court hearing an application under s.78 is exercising a discretion or a judgement, is a matter of debate. However, it is not a matter that needs to be resolved in this case. If it is a discretion it is a broad discretion, and if it is a judgement it is the judgement which the Court of Appeal recognises is primarily a matter for the judge in the Crown Court. In either case, this Court is reluctant to interfere with such decisions in relation to these matters. For a discussion of the law, see for example, Blackstone Criminal Practice 2019 §F2.7."

23. In his ruling, the judge set out at considerable length the evidence of the relevant prosecution witness and the circumstances surrounding the identification evidence of each. Having set out in detail the facts relating to the Facebook identification, the judge identified the risks attendant upon such an identification. He said as follows:

> "The danger of course with those identifications is that they did not take place under the controlled conditions of an identification procedure, which of course these days 99 times

out of 100 is a VIPER procedure. But as the CPS makes clear on their website … Facebook identifications are increasingly common and are admissible in evidence and frankly if the position was the other way, then it would be a very strange state of affairs because it is the natural reaction of anybody seeking to identify the[y] suspect of having committed a crime against them or somebody else to look on Facebook in order to identify who they are. So, the courts will have to wrestle with Facebook identifications for a considerable time into the future."

24. The judge then proceeded to consider the application of the Code and whether any of the exceptions to the requirement to hold an identification exercise applied. He ruled that there was no such exception and that the failure to hold such a process amounted to a breach of the Code.

25. He summarised the argument of the Crown in this regard. Two points were raised. The first was that to be truly viable the identification photos needed to be of the appellant when the offending occurred, some 25 years ago and they were not. This was a factor militating against the need for a VIPER process. The second point was that there was, in any event, no point in holding a formal identification process given that the complainant and her mother had already seen the appellant's face on Facebook so that showing the same or a similar face during a VIPER process would have taken the evidence no further. The judge recognised both the strengths but also the weaknesses of these arguments. We address them separately.

26. In relation to the argument that the process was *only* viable if a photo contemporaneous with the offending was shown the Judge rejected the submission. He said as follow:

> "So in my judgment, an identification procedure should have taken place involving both [the complainant and her mother]. Of course the point is quite properly made by Mr Watson prosecuting that it would have been pointless, and this is highly likely to have been the consideration that underpinned the advice given to the officer in the case, to whom absolutely no criticism of any kind can attach. He took CPS advice and he took advice of the identification people … within the police force in deciding whether or not to conduct identification procedures, so he cannot be criticised in any way. But the advice of those people, both the CPS and those who conduct these procedures is: we cannot realistically have a sensible identification procedure unless we get together pictures of the suspect from 25 years ago and put them with pictures from other suspects from 25 years ago. That is certainly an issue which has arisen in my experience in other cases, and without being referred to it, I do not think that historical identifications are dealt with within the codes of practice; and if they are not, perhaps they should be. But of course what gives the lie to that argument … is that the prosecution did engage in an identification procedure with [M] using a contemporary picture

> of Mark Crampton and contemporary suspects. It was of course [the mother and the complainant], saying, "*I recognised him despite it's 25 years ago. He'd lost his hair and he'd got older, but you could still see his facial expression was the same*".

27. The second point concerned the fact that there was no "*point"* or purpose in the mother and complainant being subject to a formal VIPER identification procedure. The judge accepted that this could well be true, but he also concluded that this did not strip a formal identification exercise of the potential for generating some forensic value for a defendant. He said as follows:

> "The other argument relied upon by the Crown [is] there is no point having an identification procedure when people have looked at Facebook because they will simply pick out on the procedure the person they had recently seen on Facebook, so it is evidentially of no value. It may well be that would often be the case in the trial, but as the specimen compendium direction on identification makes clear that where there should have been an identification procedure, that should be pointed out to the jury because of course the defendant suspect has lost an important safeguard, not least that the jury are entitled to hear what it was he said when he was making his identifications -- or in this case she -- but also he has lost the opportunity of the witness either picking out nobody or picking out a volunteer."

28. With these points in mind, the judge summarised the defence submissions and noted that the Prosecution accepted the thrust of the criticisms made, but countered that the Facebook identification was admissible in principle, that the mere fact that there was a breach of PACE was not determinative, that there was other admissible and inculpatory identification evidence before the court, and that all of this was a matter of weight for a properly directed jury to consider and evaluate.

29. The judge agreed. He firmly rejected the proposition that Facebook identifications of this sort should always be excluded. He said:

> "What is important, it seems to me, these Facebook identifications took place before the police were even involved. Is it the case, I question rhetorically, wherever that has taken place that essentially the previous identifications on social media by the witnesses should always be excluded. In my judgment, that could not possibly be right and the mere fact there has not been a correcting identification procedure afterwards does not in any way undermine those original Facebook identifications."

30. The judge then considered the weight of the Facebook identifications in the context of the other evidence on identification, which we have already summarised. It is clear that, having heard the evidence, he considered that it was not, as the Appellant suggests, inherently weak or flimsy:

> "I then propose this **reductio ad absurdum** argument in the facts of this case: what if the only evidence the prosecution had was the evidence from [the complainant] that, "I was between 4 and 6, it was 25 years ago. There's been no identification procedure, I've seen him on Facebook but I've only found him on Facebook because [JG] told me [that is to say hearsay, which I do think it is hearsay] that his name was Mark Crampton, would there be a case to answer, would the prosecution proceed?
>
> It may well be in those circumstances they would not, but that does not in my judgment lead me to conclude that therefore the [victim's] evidence should be excluded, because although that evidence may on its face appear to be somewhat weak, it is then fortified and corroborated in this case by the point of the address behind the Clinton Arms, by the identification by M in the VIPER procedure that he did engage in, and by the Facebook identifications."

31. In our judgment the judge did not err, and the conviction is safe. This is not a case where it is said that the judge misdirected himself by, for instance, ignoring relevant evidence or taking into account irrelevant evidence. To the contrary, it is clear from the ruling that he engaged in a detailed and careful review of the relevant evidence and assessed both its pros and its cons. It is not said that the judge's account of the evidence was inaccurate or unfair in any way.

32. This is also not a case where it is said that the judge failed to warn the jury of risks and weakness attaching to key pieces of evidence. It is accepted that, having ruled as he did to admit the Facebook identification, he carried out his promise made in the ruling to give the jury a full account of the relevance of the evidence and its probative value.

33. It follows that this is a case where the nub of the challenge is squarely to the exercise of judgment or discretion. At base the issue is a short one: was this, as the judge held, a matter of "*weight*" for the jury or was it, as the Appellant submits, one where the circumstances taken in the round were such that the judge could only properly have come to one conclusion, namely that the Facebook identifications should be excluded and, since the remainder of the case was weak, the entire case should be withdrawn from the jury.

34. We are clear that the judge was entitled to arrive at the conclusion that he did. We are not in a position to substitute our view of the evidence for the judge's considered conclusion as to the probative weight of the Facebook identifications standing alone and/or in the context of the evidence as a whole.

35. It is argued that by the failure to conduct a VIPER process the defendant was materially prejudiced. Whilst this is of course possible, on balance, it is not a compelling submission. If the VIPER process had been performed the likelihood is that the complainant and her mother would both have identified the Appellant, not least because they had only recently identified him on Facebook. There would have been a clear risk that this subsequent identification would have reflected confirmation

bias, not a free-standing identification. This is why the Crown argued that a formal identification exercise was pointless. The judge did not demur in this but equally he did not accept that it was such a powerful point that it amounted to a complete answer to the defence submission. We see the force in the point that had there been a formal VIPER process, there is at least the possibility that the defence would then have been seeking to have the VIPER identification excluded upon the basis that since it corroborated the Facebook evidence, the jury might receive a false impression of the strength of the identification. Be that as it may, this does serve to highlight the conclusion that the judge had a balancing exercise to conduct, which, it is clear from his ruling, he performed with some care.

36. As to the impact upon the other evidence of the admissibility of the Facebook identification, the judge accepted that had it been the only evidence, it could have been classed as weak. But he identified a variety of additional pieces of inculpatory identification evidence which, it is evident from his ruling, he considered to be of material weight. It was not therefore the view of the judge that the Facebook evidence therefore bolstered a weak case unfairly. The judge was in this regard the arbiter of the strengths of the overall evidence and we can see no reason to disturb his considered conclusions on this.

37. Mr Elwick also argued before us that if a judge can ignore a breach of the Code and admit prior identification evidence upon the basis that the breach goes to nothing more than weight before a properly directed jury, then, this is tantamount to the court removing all the safeguards that the Code affords to defendants. It strips the Code of all force. With respect, this overstates the position. This appeal rests upon a balancing exercise conducted by a judge of the weight of the complainant's evidence, of the evidence of other witnesses, of the impact of the non-observance of the Code, and of the ability to cure difficulties arising through directions. The ruling of the judge was fact and context specific; on different facts, the judgment might have been different.

38. Finally, we would refer to the observations of this court in *R v Pope* [2012] EWCA Crim 2241 at paragraph [14], which seem to us to be apposite in this case where the jury was very clearly directed:

> "As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this Court, but with the jury. If therefore there is a case to answer and, after proper directions, the jury has convicted, it is not open to the Court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the Court is confined to a re-examination of the material before the jury."

39. Notwithstanding the attractive submissions of Mr Elwick, for all these reasons we conclude that the conviction was safe and we dismiss the appeal.