[2023] EWCA Crim 872
IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300067/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 4 July 2023

Before:

LADY JUSTICE CARR DBE

MR JUSTICE JAY

RECORDER OF SHEFFIELD
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(Sitting as a Judge of the CACD)

REX

V

NEAL CARVER

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MS A BROWN appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE CARR:

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.

Introduction

2. On 9 December 2022, in the Crown Court at Snaresbrook before HHJ Falk, the appellant (now 62 years old) was convicted by a majority jury of 10:2 of four counts of sexual assault of a child, contrary to section 7 of the Sexual Offences Act 2003 (counts 3 to 6), two counts of causing a child to watch a sexual act, contrary to section 12 of the Sexual Offences Act 2003 (counts 7 and 8), two counts of engaging in sexual activity in the presence of a child, contrary to section 11 of the Sexual Offences Act 2003 (counts 9 and 11) and two counts of inciting a child to engage in sexual activity, contrary to section 10 of the Sexual Offences Act 2003 (counts 10 and 12). He was sentenced to an overall custodial term of 10 years.

3. This is his appeal against conviction arising out of two aspects of the trial process: first, the judge's refusal to admit non-defendant bad character evidence under section 100 of the Criminal Justice Act 2003, and secondly, the judge's inquiry of the jury as to their availability for the following week when giving a majority verdict direction.

4. We have had the benefit of forceful and well-framed submissions on both sides from Ms Brown, for the appellant, and Mr Hillman, for the respondent.

The Facts

5. The prosecution concerned alleged historic sexual abuse. The complainant (whom we will call "C") was born on 23 July 2008. Her father had been in a relationship with her mother for around 20 years. They had nine children in all, although sadly two had passed away, and C being the youngest. The parental couple separated in 2009.

6. In 2014 the mother met the appellant. In December 2017, C told her mother that the appellant had asked her to pull down her pants so he could see her private parts. She said he had not done anything else. The mother and her cousin attended the appellant's flat

and challenged him about this. He denied ever doing anything like that but the relationship between the mother and the appellant ended.

7. Following a conversation with C in September 2018, during the course of which C described the appellant as a "paedophile", the father reported the appellant to the police in the following month. When doing so, he told the police that he had collected C from the pub and, on the way home, C had started talking about paedophiles and referred to a photograph of the father's elder daughter and a much older man. That was said to be a reference to a photograph that C had seen in the father's flat; there had been an unreported allegation that the older man had molested the other daughter.

8. C was ABE interviewed in November 2018 and again in February 2022. She alleged that over the course of 3 years (between July 2014 and July 2017) the appellant had sexually abused her when she was between 6 and 9 years old.

9. The jury was unable to reach a verdict on counts 1 and 2 which were based on C's allegations that the appellant had rubbed her legs and smacked her on the bottom twice. Count 3 arose out of an incident when C said she had fallen asleep on the sofa. She woke to find the appellant touching her vagina. She said he touched her under her leggings and inside her knickers with his finger. She asked him what he was doing, and he claimed he had just walked in from the kitchen.

10. Count 4 arose out of an occasion when C said she had been watching Netflix on the sofa. Her mother was in the bath. She saw the appellant lick his finger and touch her vagina. She kicked him. She told him to stop and said she would tell her mother. According to her, he said that it was just between them. He pulled her shorts and knickers down a little bit, she tried to pull them back up, but he blocked her using his hand. This was shortly before Christmas. C stated that the appellant told her not to tell anyone.

11. Counts 5 and 6 arose out of C's allegations that on around five occasions the appellant had touched her breasts. She recalled an occasion when she had been in bed watching a film. It was a non-school day. The appellant had come in and put his hand underneath her vest and started rubbing her chest and nipples and he had also put his hand over her mouth. This lasted a couple of minutes, she said, and stopped when her mother called his name. Count 6 was a multi-incident count alleging the touching of her breasts on at least two further occasions.

12. In relation to count 7, C recalled a specific occasion when the appellant showed her a picture on his telephone of a child engaging in oral sex. She said that there were also pictures of boys' private parts. She said that he told her that it was him. He showed her pictures of teenage girls and would say "that private part is mine". He would ask her if

she wanted to see it in real life. She said that some of the girls looked like they were 7 or 8 years old and some between 12 and 17 years.

13. In her second interview, relating to count 8, C said that the appellant showed her similar sexual pictures on his telephone, on probably more than ten occasions. On one such occasion he held her chin and forced her to look at his telephone.

14. For counts 9 to 12, C said that the appellant asked her on multiple occasions to touch his penis. She described how he always used to sit in what she described as "our chair" playing with his penis and he would look at her and say: "Come and touch it quick before it goes away". When he was playing with it, he would be looking at his telephone. On one specific occasion he was on the sofa and said to her: "Oh please play with it, it needs someone to play with" to which she replied: "Can you stop please. You're in a little girl's house" and he said: "I'm not going to stop until you play with it".

15. The appellant was arrested in February 2019. There was no relevant material discovered on his telephone. In interview he denied any sexual touching or inappropriate behaviour of any sort. At trial, he continued to deny all of the allegations giving evidence to this effect. His case was that these events did not happen at all. If C had been sexually abused, it must have been by someone else, and she had erroneously transferred the memories to the appellant, or the events had not happened to her at all but she had learnt rather through someone else or they had happened to someone else and she was reciting what she had absorbed by other means. In any event, the appellant said that C's allegations were all false.

Ground 1: the non-defendant bad character evidence

16. We turn first to the challenge arising out of the judge's dismissal of the defence application to call bad character evidence. The appellant sought leave to adduce evidence of three reports to the police made by the mother as follows:

    i) During a therapeutic session at the lighthouse the mother had shared that her son was sexually abused by the father when a teenager. The son was happy for her to share it but did not want to engage further with the police.

    ii) Police were called by the mother before Christmas because the father was outside the address shouting about how he was going to "do" C.

    iii) A report by the mother that the father was going around the pub asking if anyone wanted sex with his daughter for £100.

17. Evidence as to the last of these incidents was in fact admitted into evidence (through the mother), but the other two reports were not.

18. The appellant's primary position was that the evidence in question was covered by section 98 of the Criminal Justice Act 2003 being "to do with the facts of the offence with which the defendant is charged and/or is evidence of misconduct in connection with the investigation or prosecution of that offence". However, if it were bad character evidence, the tests under section 100(1)(a) and/or (b) of the Criminal Justice Act 2003 were satisfied. The evidence was to be adduced not to undermine the credibility of father or mother, but to give the jury information as to where else C might have learned about sexual abuse from a young age and to give the details that she had in interview.

19. The judge rejected the application. He said there was no evidence that the father had ever sexually abused anyone, let alone his own son. He had no convictions for any sexual offending and none for abusing his son. The son was not a witness in the case, and no one knew anything about the circumstances or type of any sexual abuse that had purportedly taken place or been alleged.

20. Secondly, in relation to the father saying he would "do" his daughter, there were no details of the circumstances and whether it was a sexual matter, physical abuse or physical punishment.

21. The judge ruled that these matters were pure bad character against the father. Further, the evidence was inadmissible under either subsection (1)(a) and/or (b). It was not explanatory evidence. The jury were clearly able to understand C's allegations, including the narrative of her complaints and how matters were reported to the police without it. As for gateway (b), the father was a witness, giving evidence that he had collected his daughter, as we have identified. In the judge's opinion, the only real relevance of the matters was to impugn the character of the father with unsubstantiated allegations or matters that were equivocal in their meaning.

22. Whilst the father's credibility might very well be an issue, it was not, in the judge's view, an issue of substantial importance in the context of the case as a whole. In any event, even if the judge were wrong about that, the matters sought to be adduced were an unsubstantiated allegation of unspecified sexual abuse against the son at an unknown time, and an equivocal assertion that he shouted out that he would "do" his daughter. These were not matters of probative value at all let alone substantive probative value.

23. Following this rejection of the defence application and during the father's evidence, the defence renewed its application in the following circumstances. The father's evidence-in-chief had been potentially inconsistent with what he had previously told the police: in the witness box, he said that he called a homeless man a paedophile when

collecting C from the pub. When that word had been explained to her, C had said that the appellant was a paedophile who had touched her and rubbed up against her. The judge had allowed the father to be cross-examined by reference to the inconsistency with that version of events and what he had said to the police, as set out above. When so challenged the father maintained that what he had said in the witness box was correct. Thus, the judge asked him at the end of his evidence why he had said what he had to the police about the photograph, to which the father replied that it was possible that the daughter and his son had been taken on a camping trip by the older man and abused by him.

24. In the light of this exchange, the defence renewed its application submitting that the bad character evidence was relevant to the issue that the family might have discussed sexual abuse and C might have absorbed this; her account of abuse by the appellant was tainted by such family talk. Further, the father's account of the complaint evidence was challenged, and this was a matter of his credibility. The judge however remained of the view that the evidence was inadmissible. The father's credibility was not of substantial importance in the context of the case as a whole. The assertion that C knew about any aspect of the son's abuse was mere speculation; she had not been asked about it by any party and there had been no application to do so. To allow the father to be questioned about her complaining or knowledge of it would be to invite the jury to consider the possibility that she had misremembered abuse or misattributed it, impermissibly it would be to invite the jury simply to speculate on a matter on which they had no probative evidence at all.

Submissions

25. Ms Brown submits that this trial provides a prime example of the difficulties involved in navigating trials of historic sexual offences. The offences were said to have taken place at a time when C was only 6 or 7. She reported them and was interviewed when she was 10. By the time of trial she was 14 years old and found it difficult to have any meaningful recollection. In a case like this, says Ms Brown, it is imperative to explore questions as to why the child might have said what they did at a time when so young and whether or not someone else might be responsible for the incidents in question, or whether there was misattribution involved.

26. Ms Brown submits that the bad character evidence was pertinent to the major planks of the defence, and it was unfair to have precluded its admission. The reports of allegations of sexual abuse by the father against the son were important to the probative value of his evidence. His evidence as to C's disclosure was of crucial importance and there were huge inconsistencies in the evidence about her disclosures. Without being able to put that in fact it was the father who the son alleged had abused him and not the older man, the defence was unable to show the jury that there was a motive for the father to have changed his account of events in relation to the disclosure.

27. Ms Brown emphasises that in a case like this it was wholly wrong to minimise the question of contamination and credibility of the father and to ringfence the evidence. The question as to whether and how a complaint had arisen in the context of children in the family being abused was an important one. In her words, the whole of the family background was "up for grabs" and the jury was entitled to, and should have been provided with, the full factual matrix.

28. For the respondent, Mr Hillman emphasises that the judge was entirely right to conclude that provision of this information or, as he would have it, rumour, would have required the jury to enter into the realms of impermissible speculation. There was, for example, no evidence whatsoever that C was ever aware of any allegation that the father had abused the son. The judge was entirely right to rule the evidence inadmissible. The evidence relating to possible abuse of the son was no more than an unsubstantiated allegation of unspecified sexual abuse at an unknown time. The only real relevance of the evidence could be to impugn the father's credibility which was not an issue of substantial importance in the context of the case as a whole. The evidence remained entirely vague and there had been no enhancement of the importance of the father's credibility. The father was in any event a quite unimpressive witness. It is submitted by Mr Hillman, in summary, that the focus was rightly on the principal evidence in the case, which here was a clear and compelling account of abuse given and maintained by C.

Discussion

29. Section 100 of the Criminal Justice Act 2003 provides that in criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if one of three gateways are satisfied, namely (i) that is important explanatory evidence as defined by statute; (ii) it has substantial probative value in relation to a matter which is a matter in issue in the proceeding and is of substantial importance in the context of the case as a whole or (iii) all parties agree to the evidence being admissible.

30. Section 109 of the Criminal Justice Act 2003 requires the court to assume that the evidence in question is true, unless its falsity is obvious. That assumption is not determinative of admissibility; rather it sets the context in which the admissibility decision falls to be made. Section 109 does not circumvent the requirement for there to be a proper evidential basis for an allegation of falsity for example.

31. Amongst other things, section 100 governs the use of bad character evidence to attack the credibility of witnesses. In this context its purpose is to limit the ambit of cross-examination to that which is substantially probative of an issue of credibility, if credibility is an issue of substantial importance to the case. It should eliminate what has been described as "kite-flying and innuendo against the character of a witness in favour of concentration on the real issues in the case" (see *R v Miller* [2010] EWCA Crim 1153; [2010] 2 Cr App R(S) 19). It is proper for trial judges to ensure that cases are tightly

focused on the essential issues and that the parties do not become embroiled in satellite litigation through the introduction of bad character evidence.

32. Ms Brown rightly no longer pressed the submission that the contested evidence was anything other than bad character evidence. It did not fall within section 98. Equally, there was no sensible argument that the evidence was important explanatory evidence for the purpose of gateway (1)(a). The only real question could be whether the evidence in question should be admitted under gateway (1)(b).

33. In order for that to be the case, as the judge correctly identified, he had to be satisfied that the evidence had substantial probative value in relation to a matter which was in issue in the proceedings and which was of substantial importance in the context of the case as a whole. In the event, the only piece of evidence relied upon by Ms Brown was the mother's report that her son had been abused when a teenager by the father.

34. We ask ourselves first: to what issue could that evidence have gone? To the extent that it was relevant to the father's credibility, that issue was, as the judge indicated, not of substantial importance in the context of the case as a whole. C was not even asked about the making of any complaints to her father. In any event, as Mr Hillman has pointed out, the father's credibility was significantly damaged. He was, as a reading of the summary of his evidence in the judge's summing-up reveals, a wholly unimpressive witness. The judge pointed out the multiple inconsistencies in his evidence; he told the jury in terms that they would have to consider this evidence very carefully.

35. In so far as the evidence could be said to be relevant to contamination of C's mind, and the question of whether or not her evidence and recollection and allegations were infected by material from elsewhere, this was already a submission in play. For example, the jury already knew from the judge's questioning of the father that C's brother might have been sexually abused. The issue was also explored in terms, albeit at a high level, with C in cross-examination. As the judge said, the assertion that C knew about an aspect of the brother's abuse was mere speculation. She was not asked anything about that nor was there any application to do so. To ask the father about it and then invite the jury to consider the possibility that C had misremembered or misattributed abuse as a result would have been to invite wholly impermissible speculation.

36. In any event and fundamentally, we find it very difficult, if not impossible, to see how the evidence in question was of any probative force, let alone of substantial probative value. The allegations themselves were unproven, emerging only through a second-hand report. The brother was not to give evidence and the full report made it clear that the father denied the allegation as a matter of substance when confronted with it by the mother. In so far as what was relevant was simply the making of the allegation, the father's denial and possible discussions during the course of a family trip, it is hard to see how the material could materially have advanced the defence case without descending into

impermissible speculation. It would have been little more, in our judgment, than a tangential smear of a non-defendant's character, to which the protection identified in section 100 of the Criminal Justice Act 2003 is directly targeted.

37. For these reasons, we are not persuaded that the appellant's convictions are unsafe because of error on the judge's part in refusing to admit bad character evidence against C's father. On the contrary, we commend the judge for what we consider to have been careful and impressive rulings.

Ground 2: the jury issue

38. We then turn to the second ground of appeal, namely the jury issue. On Wednesday 7 December 2022 at 12.45, the jury retired to consider their verdicts. Immediately before they did so the judge said in terms:

> "Important matter - you must be under no pressure of time at all. You must take as long or as short as you need, completely free of outside influences or concerns because that's the only way to come to true verdicts."

39. The jury were sent out at 16.04 hours. The next day they retired again at 10.46. At around 15.40 they sent a note which read:

> "'We've now discussed the evidence and taken a vote on each count. We've not reached a unanimous decision on any count. We would appreciate further instruction on what to do next."

40. That afternoon, and again the next morning (Friday 9 December), a majority verdict direction was discussed between the judge and the Bar. The judge indicated that a direction on majority verdicts would be given at 11.30 on the Friday, and that he would also inquire as to the jury's availability for the following week.

41. At this stage, Ms Brown argued that the judge should not make that inquiry at the same time as giving the majority verdict direction. She stated that she feared that it would implicitly apply pressure on the jury to reach verdicts before the end of the day. She submitted that realistically, if the jury by the end of the Friday were struggling to achieve majority agreement, then the judge ought to have been asking whether, if given more time, they could reach verdicts. He would then have been in a position to decide whether to continue with, or discharge, the jury.

42. The judge disagreed. He did not want to wait until the afternoon to make inquiries about jury availability for the following week. He said that he would make that inquiry, in his

words “very sensitively”, and he would give counsel the opportunity to comment afterwards.

43. The jury came into court at 10.13 on the Friday and were invited to keep deliberating, striving to reach unanimous verdicts. The judge stated that, when he could, he would bring them back into court to give them a further direction. The jury retired at 10.16. In the absence of verdicts, the judge then gave a majority verdict direction shortly after 12.00 in the following terms:

> “Members of the jury, the time has come where I can now accept a majority verdict and the direction I give you is this. If you can I would still ask you to strive to reach unanimous verdicts on each count, but if you can't the time has come where I can now accept verdicts of which at least ten of you are agreed, so 10:2, 11:1, 12:0; so verdicts on which at least ten of you are agreed.
>
> I recognise that we're halfway through the day on your last sitting day and, do you remember, I said to you when I sent you out that the only way to reach true verdicts is if you do so without pressure of time and without any outside influences and you only know how long or short you will need, but I don't want any of you to be under any pressure at all.
>
> I am going to have to ask, if you're not finished today - you may not, you may not; that's entirely a matter for you, but if the trial continues to Monday, does anyone have any insuperable difficulties why you can't come back? If it's employment, I am brilliant with employers - I speak to them and I tell them about the importance of jury service and how no juror can be penalised because they are still doing jury service. If there's holidays booked and I have no choice, then I would have to adhere to your holidays. If there are appointments I would, as I've done so far, let you go on appointments. If it's childcare I'll have to work with you. But does anyone have any insuperable difficulty as to why you couldn't continue on Monday?”

44. Two jurors mentioned commitments: juror 8 - a trip to Manchester on Tuesday, which the judge indicated could be accommodated if necessary; juror 3 - Christmas performances for their children at 9.15 every morning but the juror could be at court by 10.30. No juror indicated that they were either unable or unwilling to return, let alone that there was any insuperable difficulty in doing so on the Monday. The jury retired again at 12.11. They returned majority verdicts at 15.35 hours.

Submissions

45. Ms Brown submits that the judge should not have raised the issue of availability of the jury for the following week at the same time as giving a majority direction. She suggests that there was a real risk that the jury were made to feel that it was incumbent on them to reach a majority agreement and return verdicts before the end of the day on Friday; they may have been pressurised, such that they failed to comply with their oath. Mr Hillman disagrees. He submits that the judge took the view that there was a risk that leaving it too late might result in the jury feeling anxious during the course of the day about whether or not they would have to come back on the Monday. The judge was quite right to have such a concern.

Discussion

46. We can dispose of this second ground of challenge swiftly. It is without merit. The judge was well placed to assess the best way of managing what can sometimes be a difficult stage of the proceedings. He was fully alive to the need to avoid placing the jury under any pressure to reach verdicts. He had to, and did, balance the options available to him. He proceeded cautiously, as he described it, deciding how best to proceed "in the interests of justice". He was fully entitled to be concerned that it might be worse not to address the jury's capacity to sit in the following week at the same time as giving a majority direction. He wanted to relieve them of the pressure of time straightaway. Just before making the inquiry that he did, he reminded the jury in terms of the need for them to proceed without pressure of time or undue outside influence. The inquiry as to their future availability that followed was perfectly proper, made in order for him to be able to decide what was the best next step. He indicated that he would accommodate any commitments that the jury had, which he had a proven track record of achieving.

47. There is no proper basis for any suspicion that any juror felt that they were under time pressure to return a verdict or to act otherwise than in accordance with their oath. It does not follow from the judge's direction or inquiry that any juror would have had the impression that the trial would continue "until they reach verdicts". In fact, a direction that they would be discharged at the end of the day, in the absence of any verdict, could have put the jury under precisely the sort of pressure which is to be avoided.

48. We do not find assistance from the decision in *R v Abraham* [2021] EWCA Crim 1000. There, Coulson LJ (at [29]) highlighted that it would have been good practice, in the circumstances of that case, for the trial judge to have directed the jury, either at the outset of the day or after the majority verdict, that they were under no pressure of time and that, if they could not reach a verdict, they would be discharged. The premise of that remark was that the jury could not sit beyond the end of the week. That was not the case on the facts here. Friday was not the last day available to this jury for their deliberations.

Conclusion

49. For these reasons, we dismiss the appeal. The convictions are safe.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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