IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LEEDS

HIS HONOUR JUDGE BAYLISS T20217473

CASE NO 202400484/B3

Neutral Citation Number [2024] EWCA Crim 1356

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 29 October 2024

Before:

LORD JUSTICE HOLGATE
MR JUSTICE GRIFFITHS
HER HONOUR JUDGE DE BERTODANO
(Sitting as a Judge of the CACD)

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V
BJS

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MR R CANNING appeared on behalf of the Appellant
MR M COLLINS appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE HOLGATE: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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. We will refer to the complainant in this case as "C".
2. On 15 December 2023 in the Crown Court at Leeds before His Honour Judge Bayliss, the appellant, then aged 43, was convicted of three counts of rape (counts 1 to 3) and an assault of a child under 13 years by penetration, contrary to section 6 of the Sexual Offences act 2003 (count 4).
3. On 16 January 2024 the appellant was sentenced concurrently on each of the four counts to a special custodial sentence, pursuant to section 278 of the Sentencing Act 2020, comprising a custodial term of 15 years and an extended licence period of one year. He appeals against conviction with the leave of the single judge, who also granted the short extension of time needed.
4. The central issue in this appeal is whether the convictions on the four counts are unsafe because the judge wrongly gave a Watson direction to the jury.
5. The complainant, C, was aged about six to seven at the time of the offences between 2015 and 2017 alleged in the indictment. The appellant, her step-father, was in a relationship with her mother. The offences were said to have taken place in the family home. Each count related to a single incident.

   Count 1
6. C said that when her mother was out of the house shopping the appellant sent her brother

upstairs to his room. The appellant then told C to go to him. She was scared and did so. The appellant unzipped his trousers, pulled her trousers and knickers down and took his boxer shorts off. C said: "He put his privates inside my - I don't know how to explain. I sat on top of him." C said the appellant laid on the sofa and she was on top of his "private parts". She said: "He slotted his privates inside of mine, forced them in for about five minutes' maximum, slotted them into me really hard." She had a sharp pain inside both her chest and her private parts. C also said that he slapped her about 20 times. She maintained that this happened when she was six years old.

Count 2

7. C said that on another occasion the appellant put his penis into C's mouth. They were alone in the living room. She was made to suck on his penis. The appellant said he would give her Lucozade if she kept it in her mouth for at least five minutes but she ran out of the living room and vomited on the floor. Her mother returned home shortly afterwards. The appellant said that C had been sick but did not explain why.

Count 3

8. C said on another occasion the appellant had put his penis into her mouth: "He grabbed on to my head and pushed it down. He forcibly pushed it [his penis] down, which really hurt the back of my neck." C said that this had made her gag a lot.

Count 4

9. C described how on another occasion the appellant had digitally penetrated her vagina using two fingers. She said that this was painful and uncomfortable.
10. C explained how she had kept all this to herself for about four years. She then told one of her friends, J, and her assistant head teacher at school. She said that she did not tell anyone about what was happening at the time as she was too scared of the appellant and

of the fact that he had behaved in this way so many times.

11. C maintained that the appellant had slapped her previously and she had to have an ice cube on her face to stop it from swelling.

12. In summary to prove its case the prosecution relied upon:

    (1) The evidence of C in her ABE video recording and the recording of her cross-examination at an earlier hearing;

    (2) The evidence of C's brother in his ABE video recording and the cross-examination;

    (3) The evidence of C's mother on her relationship with the appellant;

    (4) J's evidence on C's disclosure to him that she had been raped by her stepfather;

    (5) The evidence of a teacher at C's school on C's disclosure via J and the action taken;

    (6) The evidence of C's assistant head teacher on C's disclosures to her an d the reports she made to social care and the police;

    (7) The defendant's interviews;

    (8) Agreed facts: a medical examination of C and the appellant's previous convictions.

13. The appellant denied the allegations against him. He gave evidence in which he said that he had never touched C inappropriately. He suggested that C's mother may have put C up to making the false allegations, alternatively she may have maliciously thought it up on her own to stop him seeing his own son. The appellant's mother gave evidence that he had difficulty in having erections.

14. The issue for the jury was whether C was lying about the sexual abuse and whether or not she had made it up.

15. The trial began on Monday 11 December 2023. The evidence of C, her brother and J was completed on day one. The Crown's case was completed on the morning of day two. In the afternoon the appellant and his mother gave evidence. The judge then gave legal

directions and speeches followed.

16. In the morning of day three, Wednesday 13 December, the judge summed-up the evidence.

17. The jury retired to begin their deliberations at 11.16 am. Later that morning the jury asked for one aspect of the evidence to be clarified. The judge did this at 2.17 pm and the jury retired again at 2.25 pm. The jury returned to court to be given a majority direction at 3.34 pm. The foreman clearly stated that they had not reached unanimous verdicts on any count at that stage. The judge said twice that the jury should not feel under any pressure of time. If they had not reached any verdicts by about 4.30 pm that day they would be able to go home and carry on with their deliberations the next day. The jury carried on deliberating until about 4.23 pm when the court adjourned for the day.

18. On day four the jury began their deliberations at about 10.04 am. According to the court log they carried on until about 4.17 pm when they sent a note to the judge. By that stage they had been deliberating for about 10 hours in total and for about six hours since the majority direction. It is also to be noted that the appellant makes no criticism of the way in which the trial was conducted up until that point, including the legal directions and the summing-up, which is described as accurate, fair, and balanced.

19. The judge said that the jury note contained voting figures which could not be and have not been revealed and asked the question at the end: "How would you like us to proceed?" The judge said that he proposed to send the jury home for the day and to give a Watson direction when they resumed in the morning, subject to any submissions from counsel.

20. After the jury had left for the day the judge referred counsel to the relevant section of part one of the Crown Court Compendium and to R v Logo [2015] 2 Cr.App.R 17. The judge

noted that the circumstances in which a Watson direction may be given will be rare, they will not arise unless the jury had been deliberating for a significant period of time in the context of the particular case and have had further time since the majority direction. The judge then said:

> "If the judge receives a note from the jury asking for help, which I have, or stating that they are having difficulty reaching a verdict, which I have, after discussion with the advocates the judge may give a further direction [a Watson direction] if he decides it's appropriate to do so."

21. The judge explicitly acknowledged that he would have to avoid putting the jury under any pressure or creating any perception that he was doing so.

22. Mr Richard Canning, who appeared for the appellant in the Crown Court and appears before us on this appeal, inquired whether the judge intended to ask the jury whether any more time would assist. The judge replied as follows:

> "No, no. I'll just send them away and then await further developments. I'm bound to take a view in a case involving an allegation of rape, which is a serious allegation, that it is in everybody's interests that it's resolved if it can be resolved and this is a case where it's a retrial and if the jury can't reach a verdict on this occasion, I will expect the prosecution to adopt a certain course, but whether they do or not is a matter within the prosecutorial discretion, I think, still, but that's my view, and so it's not simply a case of saying, 'Well, okay, let's just get rid of the jury and start again'. It's a case where this is very unlikely to – unlikely but possible, I suppose I should say – very unlikely to trouble a jury on another occasion, and I, in fairness to everybody, have to therefore give the jury ample time. The temptation is to just rush these things through, and if I ever give the impression that I try to do things quickly, well, that's a correct impression but when it comes to this, the jury must be given all the time that they need and if they finally come to me and say, 'We can't reach a decision', well, there we are."

23. Prosecuting counsel then drew attention to R v James Watson [2023] EWCA Crim 1016

as endorsing the principles set out in Logo. The judge invited Mr Canning to consider the authorities overnight. The judge added:

> "Although I have voting figures, no one has said, 'We're incapable of reaching a verdict'. They have given me voting figures, which of course I can't disclose to you, but no one has said, 'We're incapable of reaching a verdict.' They've just asked, used the term, 'Well, how would you like us to proceed.'"

24. At the beginning of day five the judge asked Mr Canning whether he wished to make any further submissions. Counsel pointed out that in Watson [2023] this court said that a judge should think long and hard before he gives a Watson direction. The judge replied that he had and Mr Canning said that he was sure that the judge had done that. After having had overnight to reflect on the authorities, and the circumstances of this case, the appellant's counsel did not seek to persuade the judge to ask the jury whether further time would assist them or that he should not give a Watson direction.

25. The jury came back into court at 10.05 am. The judge first reminded them of their request for advice on how to proceed. He then reminded them of the majority direction previously given and went on to give a standard Watson direction in these terms:

> "Now, each of you has taken an oath to return -- or affirmed -- to return a true verdict according to the evidence. No one must be false to that oath but you do have a duty not only as individuals but collectively and that's the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom, and your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath or affirmation. That's the way in which agreement is reached. And so I am going to ask you to continue, please, to deliberate and let me know in due course your verdicts. Again, if no verdict by one, the half-hour break, on the understanding that no one speaks about the case during that break, but if unhappily 10 of you cannot reach agreement you must in the

end say so."

26. At 10.09 am the jury retired to carry on deliberating. Just over two hours later they returned unanimous verdicts of guilty on all four counts.

27. We are grateful to both Mr Canning and also to Mr Michael Collins for the prosecution for their helpful written and oral submissions.

28. Mr Canning submits on behalf of the appellant that the appellant's conviction is unsafe because the judge erred in exercising his discretion to give a Watson direction. He submits that the direction should not have been given at all. No criticism is made of the language used by the judge when he gave the direction. In summary his submissions fall under three headings:

    1. The case was short and straight forward. It was far from exceptional. It was based upon allegations from a child which were said to have been fabricated. The judge therefore erred in exercising his discretion to give a Watson direction at the beginning of day five of the trial.
    2. The judge erred in law in relying upon the fact that the case was a retrial as part of his reasons for exercising his discretion to give a Watson direction. That was an irrelevant consideration.
    3. The judge also erred in deciding to give a Watson direction without first asking the jury after receipt of their note at 4.17 pm on day four of the trial whether more time would assist them. In other words the Watson direction was not given in circumstances of last resort.

Discussion

29. A convenient starting point is the statement by Lord Hobhouse in R v Mirza [2004] 1 AC 1118 at [163] that:

> "In the absence of any overt indication to the contrary, such as returning inconsistent verdicts on different counts on the indictment, the law assumes that the jurors will have duly applied the judge's directions."

30. Furthermore, jury deliberations can often involve give and take and the change of initial views in the light of the discussion whilst each juror remains faithful to their oath or affirmation: see for example R v Kimberley James [2022] EWCA Crim 928 at [17].

31. The law on Watson directions was reviewed by this court in Logo. At [20] the court said:

> "In our judgment, the principles to be derived from *Watson* and subsequent cases are these, in brief. First, such a direction should only be given after the majority direction has been given and after some time has elapsed or a further direction is sought from the judge by the jury. That is a gloss on *Watson* which has become generally accepted in other cases. Secondly, there will usually be no need for a direction. Thirdly, the judge should follow the wording set out in the headnote to *Watson*, which has now been repeated and set out in terms in the Crown Court Bench Book. Those principles are to be culled from the cases and, we would add, while the decision is one for the judge's discretion, he or she should normally invite submissions from counsel as to the way in which the discretion is exercised."

32. This court then referred to R v Arthur [2013] EWCA Crim 1852 and R v Malcolm [2014] EWCA Crim. 2508. In Arthur, Pitchford LJ said that:

> "Exceptional circumstances may arise that will require the trial judge to deal with the exigencies of the moment but, in general, there is no occasion to make exhortations to the jury to arrive at a verdict."

33. Malcolm treated Arthur as being the leading case on Watson directions and said at [24]:

> "As we read the decision in *Arthur*, there are cumulative tests which must be satisfied before a *Watson* direction can be given: (i) it requires exceptional circumstances, which is why it is rarely given; and even then (ii) it can only be given as a last resort where there has been a prolonged retirement following the giving of a

majority direction."

34. In Logo this court said at [22] that the leading authority remains Watson in 1988, not Arthur, and that the word "exceptional" did not appear in Watson. That word could only have been used as a shorthand for what was said in Watson which is binding on this court. In other words, there is no "exceptionality" test.

35. The court in Logo then referred at [23] to R v G [2014] EWCA Crim 2508 where it was held that the conviction was unsafe as undue pressure had been placed on the jury to reach a verdict. That is not suggested in the present case. Logo pointed out that although on an initial reading of G it might appear that a court had been saying by implication that a Watson direction should never be given, what the court decided was that the verdicts brought in after the Watson direction were inconsistent with those given before the direction. In other words, the court's criticism of the giving of a Watson direction in that case was inextricably linked with its conclusion on inconsistent verdicts. It was a decision on its own facts and the circumstances of that case are not present in this case.

36. At [24] in Logo the court then said:

> "As was made clear by Moses LJ in the case of R v Pinches [2010] EWCA Crim 2000, it remains good law that the direction can be given if the trial judge considers it appropriate in the trial and he or she exercises his or her discretion properly."

37. At [27] in Logo the court accepted that the judge should have given counsel an opportunity to make submissions on the giving of the Watson direction. The appellant does not complain that that was not done in the present case, plainly it was.

38. At [28] in Logo the court reviewed the exercise of the judge's discretion in that case:

> "This was a serious case of rape. No doubt if the jury had failed to

> reach a verdict there would have been a retrial. The complainant, as is clear from her victim impact statement, had found the whole court procedure traumatic, and in particular found it a great ordeal to give evidence about the rapes. Provided the direction could be given in such a way as not to put pressure on individual members of the jury not to be faithful to their oaths, this was, in our judgment, the sort of case in which a judge might well do whatever they properly could to avoid the matter having to be re-litigated. The exercise of discretion was for the recorder. We do not consider that her decision to give the direction was outside the proper exercise of that discretion."

39. In Watson [2023] the Vice President, Holroyde LJ giving the judgment of this court said at [78] to [79]:

> "In R v Logo [2015] 2 Cr. App. R. 17 this court emphasised that R v Watson and others remains binding on other constitutions of the Court of Appeal, Criminal Division. A Watson direction may therefore be given if a trial judge thinks it appropriate to do so in the exercise of his or her discretion. At [21]ff, the court summarised the principles as being that such a direction should only be given after a majority direction had been given and after some further time had elapsed; that there would usually be no need for such a direction; and that a judge should follow the wording in R v Watson and others.
>
> At [25], the court suggested that trial judges may wish to think long and hard before exercising their discretion to give a Watson direction. We respectfully agree with and endorse that observation."

40. We have also considered the case of R v AZT [2023] EWCA Crim 1531. The decision does not lay down any different principles from those we have set out above. It is plain that the decision to quash the conviction turned on the particular circumstances which arose in that case and not in this.

41. The issue in this case is whether the appellant's convictions were unsafe because the judge erred in the exercise of his discretion to give a Watson direction. The role of this court is to review the judge's exercise of his discretion in order to determine whether he

erred as a matter of legal principle or whether he acted in a way in which no rational judge, acting reasonably, could have done. Otherwise it is inappropriate for an appellant to ask this court to substitute its own view for that of the judge, particularly where counsel made no real attempt to persuade the judge not to give a Watson direction, despite having had an ample opportunity to make submissions before that was done.

42. The appellant is incorrect to submit under ground 1 that the appeal should succeed because this case was not exceptional. As the case law makes clear, there is no exceptionality test. Although in practice the number of cases where a Watson direction may be given are likely to be very few and far between, that provides no assistance to this court, or indeed to the trial judge whose responsibility it is to take the decision, to determine whether the giving of a Watson direction would properly lie within the ambit of his or her discretion in the circumstances of that particular trial. Here the judge accurately directed himself by reference to the principles restated in Logo. He said that in the context of this case the jury had already deliberated for a significant time after a majority direction had been given. After the jury had deliberated for about 10 hours in a trial where the evidence and speeches had taken no more than two days, the judge knew their position with regard to voting numbers, that they had stated that they were having difficulty in reaching verdicts but not that they were incapable of doing so and that they were asking for the court's help. Thus far we consider that the judge relied upon principles which accord with Watson and Logo and did not introduce any irrelevant or inappropriate principle.

43. In addition, it cannot be said that he reached a decision which no reasonable judge properly directing himself could have reached. The judge was fully aware of the fact that it is highly unusual to give a Watson direction. He allowed himself and counsel time

overnight to reflect on the issue and in the morning on day five said in response to the sole submission made by the appellant's counsel that he had thought long and hard about it. Having been reminded of relevant authorities the previous afternoon, counsel did not seek to persuade the judge that morning that he should not proceed with the giving of a Watson direction, for example, because to do so would fall out with the proper exercise of judicial discretion.

44. Turning to ground 2, two points arise. First, in Logo the court stated that it may be appropriate in a serious case such as rape, when a judge was considering whether to give a Watson direction, to have in mind the desirability of avoiding having to re-litigate the matter in the interests of justice and all parties, so long as the jury are placed under no pressure to reach verdicts. We find that we do not need to reach a conclusion on whether a similar approach may be taken by a judge presiding over a retrial.

45. Second, the remarks made by the judge towards the end of day four, which the appellant criticises, were made in the context of the appellant's counsel inquiring if the judge intended to ask the jury whether giving them more time to deliberate would assist. The judge inferred from the jury's note that the answer to that question was "yes". They had not suggested that they could not reach verdicts at all. We do not read his reference to the likelihood that there would be no further trial if the current jury should be unable to return verdicts as a matter which played a material part in the exercise of his discretion the following day to give a Watson direction.

46. In his oral submissions this morning, Mr Canning suggested on behalf of the appellant that the judge's decision to give a Watson direction depended upon this particular consideration and that if it had not been present in this case then he would not have given the Watson direction. With respect we do not agree that that represents a fair reading of

the judge's remarks in context and in the light of all that happened both before and after the passage which is criticised under ground 2.

47. In our judgment there is no merit in ground 3. The judge explained that from his reading of their note the jury were not saying that they were unable to reach verdicts. They were not saying that further time for deliberation would be of no assistance. Accordingly, the judge did not err in not asking that question specifically of the jury at any point.

48. For all these reasons, on the particular facts and the arguments presented in this case, both in the Crown Court and in this court, we conclude that the judge did not err in his decision to give a Watson direction or in his handling of the trial. There is no basis for this court to hold that the convictions are unsafe. Accordingly the appeal must be dismissed. However, we should re-emphasise that any judge will need to think long and hard before giving a Watson direction. It is only likely to be necessary in a few cases. We would add that this decision should not be taken as any authority on the appropriateness of a trial judge in other cases giving a Watson direction when that point has not been contested and properly argued before the trial judge.