Neutral Citation Number: [2018] EWCA Crim 2458
Case No. 2017/01866/C1 & 2017/02010/C1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Wednesday 10th October 2018

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lady Justice Hallett DBE)

MR JUSTICE STUART-SMITH

and

MRS JUSTICE MAY DBE

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Mr R Wright QC and Mr P W Genney appeared on behalf of the Appellant
Mr N F A Worsley appeared on behalf of the Crown

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J U D G M E N T (Approved)

LADY JUSTICE HALLETT:

Introduction

1. In recent years the criminal justice system has made huge strides in its efforts to ensure that vulnerable witnesses are treated fairly and appropriately during the trial process. This court has strived to ensure that a proper balance is maintained between the interests of a witness and the rights of a defendant. This appeal has been referred to the full court by the single judge for us to consider today whether in this case the balance tipped too far in favour of a child witness and thereby deprived the appellant of his right to a fair trial.

The Background

2. On 24th March 2017, in the Crown Court at Kingston upon Hull, the appellant was convicted of two counts of rape of a child under 13. On 21st April 2017, he was sentenced by His Honour Judge Richardson (the trial judge) to a special custodial sentence for an offender of particular concern, on both counts to be served concurrently, comprising a custodial term of sixteen years, with an extended licence period of one year. He was acquitted of count 3 by the jury on the judge's direction and of count 4 by the jury. Counts 3 and 4 related to allegations made by the complainant's sister to her mother. The sister did not give evidence.

3. The appellant appeals against conviction with the limited leave of the single judge and he renews his application for leave to appeal against sentence.

4. Reporting restrictions apply to this judgment to protect the identity of the complainant and child witness.

The Facts

5. The complainant's mother and the applicant had three children. The complainant was the

middle child. She was aged seven at the time of the allegations. After the relationship between the complainant's mother and the appellant broke down, arrangements were made for the appellant to see his children once or twice a week. The complainant and her younger sister both told their mother that they did not wish to see their father but did not give reasons.

6. In July 2016, the mother saw the complainant touching her vagina and she asked her daughter what she was doing. She claimed her daughter told her, "You know, my dad, well that thing my daddy has got down there, he rubbed it on my bum". She said that by "bum" she meant her "front bum", namely her vagina. She said that it happened "a lot" after her parents had separated. She also claimed that her father had told her "not to tell mummy, we would both be dead".

7. The police were contacted and the children were placed in foster care. The complainant was interviewed by the police.

8. In the light of the grounds of appeal, it is necessary to rehearse in a little detail the conduct of the Achieving Best Evidence Interview. It took sixty seven minutes. There was an intermediary present and a police officer asked most of the questions. The officer began by asking the child about the last occasion she had been at the hospital and examined by a doctor. The child could not remember why she had been examined. The officer moved the conversation on to her family. This led to her answering questions about her father and how she spent time with him. She was asked about the sleeping arrangements at her father's home but did not disclose any abuse at that stage. On the contrary, she said that she liked to spend time with her father. The police officer then reminded her that they had already spoken about ‘Daddy’ and invited her to draw a picture of what they had discussed. The drawing of a picture of her and her father took several minutes. The complainant, when pressed, told the officers that she did not know how to

draw what had happened and what she had told the officer on a previous occasion.

9. After about twenty minutes, the complainant said that in the night time her father would take down her trousers. She found it difficult to describe what happened next, but eventually told the officer that her father would "get his privates". She then hesitated, and some time was spent settling her down and fetching a drink. The officer and intermediary then used pictures of people and children, with arrows, to help her explain. Gradually, she indicated that the appellant put his "private" on to her "private" and pressed down hard so that it hurt "in the inside bit". She agreed with the officer's summary of what she was saying, namely that "Daddy put his private inside (her) private and then moved it from side to side". She told the officer that she did not tell anyone at the time because her father told her that if she did, they would die. The officer then went over her complaint twice more in an attempt to elicit further detail, before completing the interview.

10.. The complainant was examined by a consultant paediatrician. She described the complainant as a generally healthy child, but with abnormal findings to her genitalia. Examination showed a complete transection of the hymen in the seven to nine o'clock position posteriorly. This was indicative of penetrative injury to the hymen which had occurred at some time in the past. There were no signs of recent injury. The doctor was of the opinion that the findings were strongly supportive of child sexual abuse having occurred.

11. The appellant was arrested in 2017. He denied the allegations. At trial his case was that the complaints were false and made at the instigation of the complainant's mother who was living a chaotic lifestyle and taking drugs. It was said that she wanted rid of the appellant and to thwart any attempt by him to remove her children from her.

12. Mr Genney, who represented the appellant at trial and who assisted Mr Wright QC before us this morning, asked the complainant a number of questions, as agreed and authorised by the judge. They were short, direct and limited in nature. However, he included in his questions matters relevant to the defence case about the family situation and he also asked the child directly whether her mother had put her up to making the allegations. He cross-examined a police officer about the conduct of the interview and he cross-examined the complainant's mother about her lifestyle and her possible motives for getting her daughter to make a false complaint.

13. Before his summing-up, the judge circulated a draft of his proposed directions. Mr Genney invited the judge to direct the jury about the limitations placed upon him by the current principles governing cross-examination of a vulnerable witness. The judge ruled that it would be appropriate to provide an explanation to the jury that cross-examination of a child cannot be as extensive or as forceful as it might otherwise be of an adult. He stated that he intended to direct the jury that Mr Genney had conducted a cross-examination which was entirely proper and in accordance with the current regime; but that such a cross-examination has limitations, because it is not possible to test every item with depth and vigour and the jury should take that into account in weighing the evidence. However, the judge would not allow Mr Genney to make any implied criticism of the new regime or comment about the disparity in the time taken for the evidence in chief to be elicited and the permitted cross-examination. He suggested that Mr Genney read the judgment in *R v Lubemba* [2014] EWCA Crim 2064 and he declined Mr Genney's invitation to change his proposed direction that "such cross-examination had limitations" to include "such cross-examination had limitations as to the content, form and duration of the questioning".

14. Thereafter, Mr Genney addressed the jury in accordance with the judge's directions, as he

understood them to be. Helpfully, we have a transcript of those submissions in which he addressed the restrictions placed on cross-examination as to form, content and duration, and he specifically focused on the detailed contents of the ABE interview. Essentially, it was his submission to the jury that the interviewers had great difficulty in extracting the complaints from the complainant and this was because the complaints were untrue.

15. In his summing-up, the judge directed the jury, both in writing and orally, as follows:

> "It is also very important for me to make mention of one thing. It is good practice that children are not cross-examined with the vigour that might be adopted for an adult. That, inevitably, has limitations because it is not possible to test every item with depth and vigour. I am sure you will take that into account (the limitation) when you are weighing the evidence of [the complainant]. I will read that sentence again. …
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> I am sure you will take into account that limitation when you are weighing the evidence of [the complainant]. There have been a limited number of questions, and they have been, inevitably, shorter and to the point than might otherwise by the case. I should add that the cross-examination was conducted entirely properly by counsel. The key point is that you must, at all times, act fairly."

The judge repeated, in short form, the same warning when he came to remind the jury of the contents of Mr Genney's cross-examination, which he again described as "entirely proper".

The Grounds of Appeal

16. Initially, there were three grounds of appeal upon which leave was given:

> Ground 1: the disparity between what the defence was allowed to ask in cross-examination and the method, content and duration of what the prosecution adduced in the complainant's ABE interview had a wholly disproportionate and

unfair effect.

Ground 2: the judge's directions to the jury as to the law regarding permitted cross-examination of a child by the defence were insufficient and the judge erred in refusing Mr Genney's suggestions for further amendment.

Ground 3: the judge unfairly curtailed Mr Genney's comment in his closing speech on the extent to which he was permitted to cross-examine, in contrast to the questions that the police officer was allowed to ask in the ABE interview.

17. In the course of Mr Wright's written submissions and his oral argument ground 1 seems to have become part of ground 2. Mr Genney's cross-examination of the complainant is now described by Mr Wright as "a model of its kind" in that he loyally complied with best practice for cross-examination of vulnerable witnesses. No complaint is now advanced as to the restrictions placed by the court on Mr Genney's cross-examination of the complainant. We shall therefore, combine the two grounds.

18. Mr Wright complains that the judge's directions to the jury failed sufficiently to compare and contrast the nature and content of the short and properly structured cross-examination with the ABE interview that lasted over one hour. Where, as here, one has an ABE interview and limited cross-examination, Mr Wright maintains that it is incumbent on the judge to go a great deal further to ensure a proper balance between the prosecution and the defence than His Honour Judge Richardson did. Mr Wright also accused the interviewers of being repetitive and of asking leading, prompting or 'tag' questions. He and Mr Genney identified the following alleged deficiencies in the judge's directions:

i. The judge did not explain to the jury the limitations on cross-examination prior to its occurring, as is recommended in the current Compendium, section 10-5 of the Judicial College Guidance and in the judgment in *R v Wills* [2011] EWCA Crim 1938.

ii. The judge failed to compare and contrast the content, form and duration of the cross-examination with that of the examination in chief at the time of the cross-examination. Mr Wright suggested that the judge should have directed the jury on the issues that Mr Genney would have wished to pursue with the complainant and pursue in greater detail had she not been a vulnerable witness, and that these directions should have been given before, at the time of, or possibly after, the cross-examination.

iii. In his summing-up, the judge failed to address Mr Genney's concerns as to the contrasting approaches in the evidence in chief and the cross-examination, and failed in his warning as to the limitations on cross-examination to go as far as is now recommended in the Compendium.

iv. The judge's directions in his summing-up did not go far enough to make plain that the evidence of the child was very much in dispute and did not sufficiently remind the jury of the defence case.

19. As to ground 3, Mr Wright accepts that there may have been a degree of misunderstanding between Mr Genney and the judge as to what Mr Genney wished to say in his closing submissions to the jury, but he contends that the judge restricted Mr Genney's comments. Mr

Genney should have been entitled to make further submissions on the length of time it took the interviewers to elicit the complaints and the criticisms that Mr Genney had of the way in which the interviewers had conducted the examination, and, the perceived imbalance between the latitude given to the prosecution and the lack of latitude given to the defence.

20. In his Grounds of Opposition, supplemented by short oral submissions, Mr Worsley, who appeared for the Crown, submitted that the evidence of the complainant was elicited in accordance with good practice and the relevant advocacy tool kits. The defence were able to suggest editing of the interviews to eliminate any extraneous or irrelevant material, or material improperly obtained. As to the cross examination, the defence accepted that, given the vulnerability of the complainant, they could not put their case by traditional means and Mr Genney was allowed to put any matters relevant to the defence. Any limitations placed were as to style rather than content. In any event, the complainant detailed the allegations against her father in very clear terms. Mr Worsley described her presentation to the jury as one of a child who plainly loved her father, but that when it came to disclosing his abuse of her, she was "very matter of fact". He conceded, during the course of his submissions, that it would have been preferable had the judge followed what is now accepted to be best practice and warned the jury before the child was cross-examined of the limitations placed on the cross examiner and possibly discussed with counsel whether any further direction was required after the cross-examination as to the issues that had not been explored in greater detail. Nonetheless, Mr Worsley maintains that this was a very experienced trial judge who amended his directions to include a sufficient warning on the limitations and that that warning, in the context of this particular trial which was very short and the issues very clear, was perfectly sufficient to ensure that the appellant had a fair trial.

Conclusions

21. Given the concerns expressed by the very experienced single judge in giving leave, we pressed counsel on their experiences of the process now adopted for cross examining vulnerable witnesses and considered whether we should give any further guidance on best practice. Guidance is bound to evolve with the benefit of experience. We believe that the following is best practice in a case involving cross examination of a vulnerable witness. First, the identification of any limitations on cross examination should take place at an early stage. We assume that this will occur at the ground rules hearing where the judge will discuss with the advocates the nature and extent of the limitations imposed and whether they are simply as to style or also relate to content. Before the witness is cross examined, it is best practice, (as recommended by the Judicial College) that as well as giving the standard special measures direction, the trial judge also directs the jury in general terms that limitations have been placed on the defence advocate. If any specific issues of content have been identified that the cross examiner cannot explore, the judge may wish to direct the jury about them after the cross examination is completed. On any view, the judge should direct the jury about them in the summing-up. Finally, we should add that every advocate (and trial judge) is expected to ensure that they are up to date with current best practice in the treatment of vulnerable witnesses.

22. Bearing those observations in mind, we turn to the issue of the safety of the appellant's convictions. It is clear from the transcripts of the discussions between counsel and the judge, and the judge's summing up that all parties were doing their best to ensure that they complied with what they understood to be current best practice. However, counsel wrongly informed the judge that there was no guidance available from the Judicial College. Guidance was available and easily accessible in the Compendium and in the judgment in *Wills*. It is unfortunate that this guidance was missed. However, it does not follow from the fact that the trial judge did not adopt best practice in every respect that a conviction is unsafe.

23. Having considered the conduct of the trial overall and the limited nature of the restrictions placed on the cross examiner, we reject the assertion that the appellant's convictions are unsafe. We have reached that conclusion for the following reasons.

24. First, the appellant no longer complains about the limitations placed on the defence in cross-examination and concedes that the limitations (essentially only as to style) did not themselves undermine the fairness of the trial. Even if limitations as to content had been placed on the defence advocate, this would not necessarily have affected the safety of the conviction. There are usually ways in which a defence case and any relevant material can be put fully and fairly before a jury without confronting a vulnerable witness and causing unnecessary distress or confusion.

25. Second, whilst we accept that the ABE interview was probably too long for a child of seven and was not a perfect model of its kind, many of the questions asked by the officer were questions that Mr Genney would have wished to ask. Mr Genney relied on some of the answers elicited. The answers were as much evidence when the questions were asked by the officer as they would have been had they been asked by Mr Genney.

26. Third, whilst it is true that the judge did not warn the jury of the limitations placed on cross-examination before it took place, as we would recommend as best practice, he gave every other direction recommended with care and precision. He directed the jury in his summing up of the need to limit the cross-examination and he repeated that warning when he reminded the jury of the contents of the cross-examination. He reminded the jury of the contents of the ABE interview in some detail, including a comment of his own, favourable to the defence. We also note that the judge referred to the defence case throughout his summing-up and summarised it in some detail at the end of the summing-up. This included the defence list of seven principal

submissions said to undermine the prosecution case. One of the seven submissions amounted to a clear assertion that the mother had persuaded her children to make false complaints about their father. The list of submissions was included in the judge's written directions handed to the jury.

27. Accordingly, we are satisfied that, overall, the summing-up and the judge's directions were fair. The jury must have been well aware of the kind of limitations placed upon Mr Genney: (a) from the judge's directions; (b) from the cross-examination itself; and (c) from Mr Genney's own submissions to them. There could be no doubt in the jury's mind that the child's evidence was very much in dispute. The judge reminded them of that fact more than once.

28. As to Mr Genney's submissions to the jury, on our reading of the transcript the only matter that the judge refused to allow Mr Genney to address was the length of the ABE interview, as compared to the timing of the cross-examination. The judge was entitled to form the view that it was not a relevant factor. What was relevant was the effectiveness of the questions asked and the facts elicited. In any event, both the judge and Mr Genney reminded the jury of the difficulties the police officer encountered in eliciting the disclosures. Mr Genney went through the ABE interview in some considerable detail in his closing submissions. The jury would have been well aware of the length of the interview and his observations on the nature and content of the officer's questions.

29. Overall, therefore, we are satisfied that the conduct of the trial was fair and sufficiently consistent with best practice, albeit, with the benefit of hindsight, we would have preferred the judge to have gone further. In our judgment, the conduct of the trial has not tipped the balance unduly in favour of the prosecution. The appellant had a fair trial and there is nothing to undermine the safety of the conviction.

The Renewed Application for Leave to Appeal against Sentence:

30. The applicant was aged 41 at the time of sentence. He had two previous convictions of a wholly different nature, dating back some years.

31. In his sentencing remarks, the judge described the applicant's conduct as "depraved and cruel". He sentenced on the basis that the rapes occurred in excess of four times, probably five or six. He placed the case within category 2A of the relevant guideline and identified a number of aggravating features. Category 2A provides a starting point of thirteen years' custody and a range of eleven to seventeen years for one offence. The victim was very young and obviously very vulnerable; the conduct was repeated several times; the applicant was the complainant's father and his conduct was a gross breach of trust; the offences occurred in a place where the child should have felt protected by her father; and the applicant had made threats that if the complainant told anyone, something terrible would happen to her.

32. The judge could identify very limited mitigation. He accepted the previous criminality was irrelevant and also that the applicant might find imprisonment more burdensome because of his language difficulties and other unspecified vulnerabilities.

33. In his succinct grounds of appeal, Mr Wright submits that the sentence imposed was excessive. The judge was accused of 'double counting' and having insufficient regard to the overall length of the sentence. Mr Wright did not accept that five or six occasions of rape could be called a 'campaign of rape'. He conceded that the judge placed the offending in the right category but submits that the sentence could have been somewhat shorter.

34. Refusing leave to appeal against sentence, the single judge gave the following reasons:

> "1. A long sentence was inevitable and a higher sentence than the Category 2A starting point was justified. The relevant range, for one offence, extends upwards to seventeen years.
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> 2. The judge dealt with this case on the basis that there were five or six offences. The breach of trust operated to move the case upwards within the range as did the location of the offences (her home). It was important to avoid double counting in that respect but the overall impact of this offending on the victim is likely to be lifelong because her father violated her in her own home.
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> 3. For those reasons a sentence towards the top of the category range was required, and that is what the judge imposed.
>
> …"

35. We agree with those observations. Despite, therefore, the eloquence and excellence of Mr Wright's submissions, we are driven to the conclusion that both the appeal against conviction and the renewed application for leave to appeal against sentence must be respectively dismissed and refused.
