Neutral Citation Number: [2018] EWCA Crim 2552
2017/05224/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 9th November 2018

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE BUTCHER

and

HIS HONONUR JUDGE KATZ QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

ANDREW SINGH

Computer Aided Transcript of Epiq Europe Ltd, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr D Martin-Sperry appeared on behalf of the Appellant

Ms A Hunter QC appeared on behalf of the Crown

J U D G M E N T

(Approved)

Friday 9th November 2018

LORD JUSTICE DAVIS:

1. The appellant, who is now aged 45, appeals against his conviction which occurred as long ago as 18th September 2015 after a trial in the Crown Court at Snaresbrook before Her Honour Judge Carol Atkinson and a jury. He asserts that the manner in which the trial was conducted by counsel then representing him was so flawed as to render his conviction unsafe.

2. The matters in respect of which the appellant was convicted were three counts of indecent assault on a male, contrary to section 15(1) of the Sexual Offences Act 1956 (counts 1, 2 and 3) and one count of attempting to inflict grievous bodily harm (count 6). In due course he was sentenced to a term of two years' imprisonment, suspended for two years.

3. In pursuing this appeal, the appellant has in fact required an extension of time of in excess of two years. The single judge has in this regard put this court in rather a difficult position by granting leave to appeal but referring to the full court the application for the extension of time. That is not a procedure that, with respect, should have been, or should ever be, followed. If the single judge was not minded to refuse the applications outright, the appropriate course would have been to refer the whole matter – that is to say, both the application for the lengthy extension of time and the application for leave to appeal – to the full court: see *R v Hyde* [2016] 2 Cr App R(S) 39 at [29].

4. So far as the application for an extension of time is concerned, we should say here and now that, on the materials provided to us, we can see no justification or sufficient explanation for so great a delay. Mr Martin-Sperry, who did not appear at trial but who was instructed shortly after the conviction and has represented the appellant since, including before us today, had been

instructed by early 2016. It appears that he had prepared draft grounds of appeal then. Mr Martin-Sperry, in his written grounds in support of the application for an extension of time, simply says that he had "assumed" that the grounds of appeal which he had prepared had been submitted, at all events after the sentence hearing. How he made that assumption is not explained before us. Nor is there any explanation, if that assumption was made, why the matter was then not in the interim checked, whether by Mr Martin-Sperry himself, or by the appellant or by any solicitors who may still have been instructed, in the absence of any decision on leave emanating from this court. It would be contrary to the good administration of justice to grant so lengthy an extension of time in circumstances such as these: even though Mr Martin-Sperry has sought to say to us that any error there may have been was not to be visited on the appellant, who of course is not himself a lawyer.

5. In one sense, that ought to be the end of the matter. But we consider that we should go on to deal with the substantive grounds of appeal: not only because the single judge has granted leave to appeal, which of itself requires this court to consider the matter, but also in fairness to the very detailed arguments which Mr Martin-Sperry has presented on behalf of the appellant.

6. For present purposes we need not go into the background facts in any great detail. This case undoubtedly had its unusual features and it is not difficult to infer that this will not have been an easy trial for anyone involved in it.

7. The complainant, who may be styled "M", is the appellant's younger brother by five years. He was aged between 9 and 13 at the time of the assaults which he had alleged. The appellant at those times was aged between 14 and 18 for the purposes of the counts which he ultimately faced.

8. On 13th April 2014 police had been called to the family home in response to an allegation of criminal damage made against the complainant, M. On that occasion, the complainant then told the officer that he had been sexually abused by the appellant many years previously, when he was a child. Put shortly, the prosecution case was that the appellant had grossly sexually and physically abused his younger brother from an early age and over a number of years. It was said that this had had a psychological impact upon the complainant, such that he had psychological issues and thereafter had resorted to a life of crime, violence and drug dealing.

9. The counts, which were not in fact charged as multi-incident counts, reflected allegations from 1987 to 1991 of sexual assaults with fingers and other objects and also penile penetration. There were also non-sexual assault allegations, including an occasion of the appellant allegedly cutting the complainant with a scalpel and pouring acid onto the resultant wounds.

10. The defence case was one of denial. It was said that the complainant was making false allegations and had done so before in order to excuse his behaviour and to deflect attention away from his own persistent criminality. It was accepted on behalf of the defence that the appellant had sought to control his brother by obliging him to maintain a physical distance from him because he considered his brother to be dirty and so on; but the appellant denied that he had assaulted him, either physically or sexually, in the ways alleged or at all. The police interviews of the appellant in this regard were before the jury, in the course of which such matters had been advanced by the appellant and in which he had made it clear that, in effect, he detested his brother. Moreover, during the course of the trial the father of both the appellant and the complainant had been called to give evidence by the prosecution. The father had given evidence about the dysfunctional nature of the family and also about the general compulsive and obsessive behaviour of the appellant and so on.

11. At trial the appellant did not, in fact, give evidence. That is now one of the criticisms sought to be made in support of the argument that the conviction which followed is unsafe.

12. In short, the essential issue at trial for the jury was whether they could rely upon the evidence of the complainant and be sure that on the relevant dates the appellant had inserted his finger or other implements into the complainant's anus. So far as the count of attempting to inflict grievous bodily harm is concerned, the issue was whether the jury could be sure that the appellant had poured acid over the complainant in such a way as to amount to an attempt to cause really serious injury, or being reckless as to that.

13. It is clear that the complainant was cross-examined at considerable length by counsel then appearing for the appellant. It is also clear that there was an amount of material available to counsel in order to present the complainant as a thoroughly unreliable witness upon whose word the jury could place no credence: although that of course was ultimately a matter for the jury. One of the points, for example, made was that the complainant had said that the appellant had made him drink bleach on occasion, but there was no evidence whatsoever that there was any resulting injury, which one would have expected had the complainant indeed had to drink bleach. Further, so far as the matter relating to count 6 is concerned, there was no medical or other evidence available consistent with acid ever having been poured onto the exposed wounds in the way the complainant had asserted. There was, overall, no independent evidence of any assaults having occurred. It was, in effect, the complainant's word against that of the appellant. Moreover, the defence were in a position to point out that this complaint emerged very late in the day; and they were also in a position to deploy the complainant's criminal convictions, problematic lifestyle and other issues in a way in which defence counsel did.

14. The upshot, as we have said, was that the jury must have accepted the complainant's word in

these regards because they convicted on these four counts.

15. No criticism of any kind has been made with regard to the trial judge's various rulings or the summing-up. Indeed, following conviction, trial counsel had given a full written advice setting out her view that no grounds of appeal were properly arguable. So how then can it now be said that the appellant's convictions are unsafe?

16. As we have indicated, Mr Martin-Sperry was instructed either on a Direct Access basis or perhaps via solicitors – he cannot recall – very shortly after conviction. What is now said – and indeed had been proposed to be said in the written grounds of appeal prepared in 2016 by Mr Martin-Sperry – is that the decisions of trial counsel were fundamentally flawed. He says before us that that gives rise to a "lurking doubt" (in his words) and at all events – and this is the key test – renders the convictions unsafe.

17. The grounds of appeal, as drafted, unquestionably leave as an issue for this court the assertion that trial counsel was flagrantly incompetent. That cannot be got over by drafting such as this contained in paragraph 12, after setting out the contentions:

> "... Whether or not that advice could fairly be characterised as 'flagrantly incompetent' is for others to assess. …"

All three members of the court certainly took it that that was one of the issues which this court was being required to assess. At paragraph 18 of the written grounds of appeal, this is then said:

> "The decision not to call available evidence of the [appellant's] longstanding condition and then not to call him to give evidence himself was, through no fault of his own, so fundamentally flawed as to preclude the [appellant] from having the fair trial to which he was entitled."

18. The particular respects in which it is said that the decisions made at trial were fundamentally flawed, in effect, came down to these. Sufficient concerns had been identified with regard to the appellant's presentation as to cause his then legal team, prior to trial, to obtain a written report from an experienced and qualified psychiatrist, Dr Ho. That report was a very detailed document. It is dated 23rd July 2015. It sets out full reasons for the conclusion that the appellant had (albeit it seems not to have been previously diagnosed) suffered from a degree of autism in the particular form of Asperger's Syndrome. It is not necessary to go into further details here. It is said, amongst other things, that at the time of the alleged offences the appellant was likely to have experienced "pervasive and significant difficulties". Indeed, what the appellant had recounted to the psychiatrist is set out in detail. Dr Ho also says, amongst other things, this:

> "11.19 … As his Autistic Spectrum Disorder was undiagnosed, he is likely to have been perceived as a 'difficult or odd' person. His behaviours and interaction with others are also likely to have been misinterpreted.
>
> 11.20 Although characteristic of [the appellant's] Autistic Spectrum Disorder explain a significant amount of his 'difficult' behaviour from childhood, these are limited to his behaviour within the three main categories (social interaction, repetitive behaviour and communication). It is not possible to draw a conclusion that [the appellant] was more likely to have committed the alleged offences on the basis of Autistic Spectrum Disorder alone. Clearly, whether [the appellant] is guilty of these charges is a matter for the court."

19. This report was presented against a context of a Defence Case Statement which, in effect, asserted that the defence was one of entire denial of the alleged offending – a defence which never changed throughout the trial. It can be seen from Dr Ho's report that it was not in any way directed to the substance of whether or not the appellant had in fact committed the acts alleged or to explain them. Rather, the report was to explain the appellant's diagnosis, his manner of

presentation and his unusual make-up in the light of his now diagnosed Autistic Spectrum Disorder; as well as to confirm his capacity to give evidence.

20. It is the position of Mr Martin-Sperry that Dr Ho's report should have been both disclosed and deployed on behalf of the defence at trial; and should further have caused the Defence Case Statement to be amended (though quite how was not made entirely clear). He further says that the appellant should also have been advised to give evidence, which evidence could then be put into the context of the prospective evidence of Dr Ho, the expert psychiatrist. He further says that the complainant should have been cross-examined in a way wholly different to that deployed at trial.

21. We felt it necessary to press Mr Martin-Sperry as to just how he put his case on this appeal. As we have said, his written grounds of appeal were calculated to give the impression that there was an allegation of flagrant incompetence on the part of trial counsel. However, when he began his argument before us this morning, Mr Martin-Sperry sought to disclaim that. He sought to say that he did not so allege, albeit he maintained that the decisions taken at trial were indeed "fundamentally flawed" (in his words). We have to say that throughout his argument Mr Martin-Sperry, with respect, gave the impression to this court of being prepared to wound but afraid to strike: indeed, at a further stage in his argument, when he was pressed further about what his criticisms were of trial counsel's decisions, he referred us (not by way of formal citation) to the words of a former unnamed Lord Chancellor or Chief Justice in previous times apparently describing a particular decision as "stark, staring bonkers". We then asked Mr Martin-Sperry why he had referred us to that phrase. Was he suggesting, as was the clear inuendo, that counsel's decision-making at trial had been "stark, staring bonkers"? His answer to that then was that he did not seek to imply that; but he nevertheless maintained that the decision-making was "fundamentally flawed". Indeed, Mr Martin-Sperry said that, given the details of

the report of Dr Ho, the jury were "misled"; and he said, bluntly, that it could not have been right that there should have been "concealed" from the jury the psychiatric appraisal of the appellant with all his psychiatric problems.

22. We have to say that we think it very unfortunate – indeed, it is unacceptable – that Mr Martin-Sperry in his grounds of appeal should have launched on such criticisms of trial counsel, by whatever language used, when finalising his grounds of appeal, without first contacting her for her views. These views should have been sought in accordance with the procedure first laid down in *R v McCook* [2016] 2 Cr App R 301, and subsequently re-affirmed in strong terms by constitutions of this court on a number of subsequent occasions. It seems to be the case that Mr Martin-Sperry relied to a considerable extent on what the appellant was telling him, on the papers made available to Mr Martin-Sperry and on what Dr Ho was saying to Mr Martin-Sperry. As we understand it, Mr Martin-Sperry had himself been in direct contact with Dr Ho after conviction. Indeed, following conviction, Dr Ho wrote a letter dated 4th January 2016, directed to the judge but addressed to Mr Martin-Sperry, in which he sought to address the judge about his (Dr Ho's) concerns about the conviction and to expand upon and embroider his previous report.

23. At all events, Mr Martin-Sperry very strongly criticises trial counsel for not having deployed the report of Dr Ho at the trial. One criticism, for example, he also makes of trial counsel is that she either must have been unaware of, or at all events fell short of, the Advocate's Gateway Toolkit 15, published in 2015, which had been available to the Bar with regard to witnesses with such difficulties. That point has since been indignantly and cogently rebutted by trial counsel, who was indeed well aware of such Toolkit.

24. Trial counsel has now given her explanations, legal professional privilege having been

waived. Trial counsel entirely agrees that she did advise the appellant (who is an intelligent man) not to give evidence, albeit, as she points out, it was the ultimate decision of the appellant whether or not he chose to go into the witness box (an appropriate written endorsement had been duly obtained). Trial counsel further has explained that she had indeed considered whether or not to call the evidence of Dr Ho. Her view was that that would not lend real assistance in this particular case. Indeed, she had concerns that there were parts of the report of Dr Ho which, if they emerged, might well have been positively damaging to the defence being advanced at trial (for example, in referencing pathological levels of jealousy towards his brother). In our view, we having studied the report of Dr Ho, that was a decision reasonably open to her. At the same time, trial counsel (as Ms Hunter QC has confirmed to us) had taken the precaution of showing the prosecution the report of Dr Ho, in advance of the decision of whether or not the defendant would give evidence in case it were needed to explain his characteristics and presentation.

25. As to her advice to the appellant that he should not give evidence, again counsel has given reasons explaining precisely her thinking. Put shortly, it appeared that considerable inroads had been made into the evidence and reliability of the complainant. That was certainly trial counsel's perception; and Ms Hunter, appearing then as now for the prosecution, has confirmed that that was indeed a perception that could well have been formed after the complainant had given his evidence. There were concerns on the part of trial counsel that there were real downsides in the appellant giving evidence in view of the way in which he would be likely to present: that is to say, being cold, indifferent, hostile to the complainant and unemotional. Whilst it may be that that presentation could to an extent then be explained by calling Dr Ho to give evidence, that of course would have the risk, as counsel assessed it, of Dr Ho then also saying things which could have undermined the defence case.

26. For an appeal to succeed on the basis of lack of competence of trial counsel, it is required,

for obvious and frequently stated reasons in the courts, that the bar be set high. A high level of incompetence needs to be shown (which is doubtless why the Grounds of Appeal were drafted as they were). It is not enough for it to be said that some counsel may have made different decisions. It is not enough for it to be said that some counsel may have approached the matter tactically in a different way. It is not enough to say that an error of judgment may, with hindsight, have been involved. All we would say – and we can say it shortly – is that we can see no basis whatsoever for asserting any incompetence at all on the part of trial counsel in this case. She has fully explained her reasons. That reasoning makes sense. It is then nothing to the point that, as Mr Martin-Sperry tells us, he personally would have conducted the case entirely differently.

27. We have to say in this regard that the way in which Mr Martin-Sperry says the case should, and should only, have been conducted caused us some surprise. Aspects of his argument, if we understood it aright, would seem to suggest that he considered that the only sensible strategy would have been to have called Dr Ho to give evidence, with a view, in part, to it designedly emerging that the complainant had indeed suffered sustained psychological abuse at the hands of the appellant and to showing commiseration and understanding of the complainant's position. That may or may not have been a sensible approach to adopt. But it would surely run the clear risk that the jury might conclude that if the appellant were accepting that he had psychologically abused the complainant over the years (as would emerge from Dr Ho's report) it would not be so very big a step for the appellant then to have sexually and physically abused him in the way the prosecution alleged.

28. As we consider, once the advice was (reasonably) given that the appellant should not give evidence – advice which the appellant chose to accept – the relevance of Dr Ho's report, in effect, could properly be judged to fall away. As we have said, the report did not directly relate

to the substance of the defence, which was a defence of denial. Moreover, it had, as we have said, properly been concluded by trial counsel that Dr Ho's report, if adduced in evidence, could have been double-edged.

29. Mr Martin-Sperry also sought in this regard to rely on *R v Thompson* [2014] EWCA Crim 836. That was a totally different case from the facts with which we are concerned, aside from the fact that that case did also involve at the time undiagnosed Autism Spectrum Disorder. However, amongst other differences, in *Thompson* the defendant had given evidence at trial and had indeed accepted doing some of the acts alleged. So the real relevance of the proposed fresh evidence relating to Autism Spectrum Disorder would be to explain why he may not have viewed such acts as sexual. There were also many other points of difference; but the critical difference to this case is that in the present case the appellant throughout denied that he had committed the alleged acts at all. Consequently, the case of *Thompson* lends no assistance here. Indeed, it may be noted that in the subsequent case of *R v GM* [2017] EWCA Crim 1228, the Court of Appeal stressed that *Thompson* was very much to be viewed as a decision on its own particular facts.

30. Mr Martin-Sperry also criticised trial counsel for failing to ensure that medical evidence had been obtained with regard to the lack of any evident injury which, it is said, would have been bound to have occurred, had bleach indeed been poured onto wounds or had bleach indeed been consumed. He has sought to produce a report from a Dr Neville Davis to this effect. But this point was, in any event, an obvious one; and trial counsel was entitled to take the view that no such medical evidence was needed. It was an agreed fact at trial that there was no medical evidence of any kind to support the complainant's assertions in this regard.

31. It is thus evident from what Mr Martin-Sperry has said to us that he would have conducted

this case very, very differently. But just because Mr Martin-Sperry would have conducted this case very, very differently does not show that trial counsel's conduct of the case was unreasonable or incompetent. On the contrary, it was the opinion of all three members of this court, as will be gathered, that the way in which Mr Martin-Sperry said the case should have been conducted could be viewed as unusual. It may or may not have resulted in success. We know not. It certainly, as we have indicated, would have represented, on one view, a high risk strategy. That is not to say it might not have been a strategy that could reasonably be adopted; but, equally, it does not follow that some other strategy, such as was adopted at trial, was not reasonable. Indeed, it appears to us to have been entirely orthodox that the main strategy of counsel at trial was to seek entirely to undermine the evidence of the complainant as not capable of belief. The reasonableness of that approach cannot be overcome by virtue of the fact that the jury in the result chose to believe it.

32. We do not propose to say much more. We agree with the submissions of Ms Hunter that the grounds of appeal are misconceived in their entirety. The criticisms of trial counsel have been shown to be baseless and seem to be the product of an attempted hindsight approach formulated in the light of the unwelcome convictions. As we have said, the criticisms of trial counsel should not have been made at all without first obtaining her views. In any event, they became unsustainable once her views had been obtained.

33. We have also, as Mr Martin-Sperry invited us to do, stood back and considered matters in the round. Having done that, we can see no basis for thinking that these convictions are unsafe. We must repeat that the appeal process is not simply a means for a disappointed defendant to have another go: and that remains so even if it is prepared to adopt a different way of presenting the case.

34. We therefore dismiss this appeal.

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

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
