Neutral Citation Number: [2018] EWCA Crim 603

Case No. No: 201605022 C5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 8 March 2018

B e f o r e:

LADY JUSTICE HALLETT DBE
VICE PRESIDENT OF THE CACD

MR JUSTICE GOSS

MR JUSTICE ANDREW BAKER

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R E G I N A

v

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Ms M Cowe appeared on behalf of the **Appellant**
Mr B Douglas-Jones appeared on behalf of the **Crown**

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J U D G M E N T (Approved)

1. THE VICE PRESIDENT: The provisions of the Sexual Offences (Amendment) Act 1992 apply, so that there are reporting restrictions preventing publication of anything that might lead to the identification of the complainant.

2. On 25 May 2016, at the Swindon Crown Court, before His Honour Judge Mousley QC, the appellant was convicted of two counts of sexual assault of a child under the age of 13, contrary to section 7(1) of the Sexual Offences Act 2003. On 22 June, he was sentenced to 5 years and 6 months' imprisonment concurrently on each count.

3. At trial, the appellant was represented by solicitors and an in-house solicitor advocate, Mr Alex Daymond. He appeals against conviction by limited leave of Holroyde J (as he then was), who also granted an extension of time of 139 days. Mr Ben Douglas-Jones QC appeared for him before us.

4. The facts are that the complainant, S, who was then just over 3, spent some of 11 March at the home of her aunt, E. E's then partner, the appellant, was also at home for part of that afternoon. S left E and the appellant's home at about 5.00 pm and made disclosures to her parents about an hour later that the appellant had been touching her. S was seen by a consultant paediatrician on the same day. The examination of S's genitals revealed no injuries but S told the doctor that she had been touched in the area of her vagina by the appellant. She claimed it was in "[E]'s house, upstairs in [E]'s bedroom". She was asked, "What does he touch you with?" and she said, "With his fingers like this" and demonstrated ‘clitoral masturbation’.

5. S was then ABE interviewed by Detective Constable Jarvis for 21 minutes on 12 March. S told Detective Constable Jarvis the appellant had touched her vagina (described as her "moo moo") with his fingers and his tongue.

6. The appellant was arrested and interviewed on 12 March. A prepared statement was read on his behalf in which he denied any sexual activity with S. He accepted returning home on 11 March at 2.30 pm. E was there with five children including S. S's mother collected her at about 5.00 pm. He said that whilst she was there he had tickled S in E's presence. He stated the last time he had taken S to the lavatory had been on New Year's Eve. He did not answer any questions on the advice of his solicitor, who asserted there had been inadequate disclosure.

7. Forensic analysis was conducted of the underpants that S was wearing on 11 March. This revealed amylase, a constituent of saliva, but also urine and vaginal secretions. It could not be confirmed that saliva was present in the sample but DNA was present from three people, including at least one male and one female. Both S and the appellant were fully represented in the analysis albeit the appellant was represented at a lower level. The DNA present was in the range of what one might have expected if the appellant had licked and/or touched S's vagina. It was possible but less likely that had he coughed near her or by some other indirect means had left DNA in this quantity.

8. The appellant was further interviewed on 4 August and he answered all questions. On this occasion, he referred to cleaning S up in the lavatory on 11 March 2015, claiming he had wiped her backside in between her legs.

9. S was seen by an intermediary on 17 September 2015 who concluded that: "[S] will be able to give evidence but should receive support for her specific communication and emotional needs". S was found to be of normal development and understanding for a then three and a half year old.

10. During a hearing, of which we do not have the transcript, His Honour Judge Mousley and Mr Daymond discussed whether the child would be cross-examined and His Honour Judge Mousley informed Mr Daymond that no judicial criticism would be made of any defence decision not to require the child for cross-examination.

11. On 20 November 2015, a ground rules hearing was listed before His Honour Judge Blair QC in advance of the trial that was then listed for 7 December. Mr Nelson for the Crown and Mrs Woodman for the appellant informed the court that the ground rules hearing and the intermediary were no longer required because the child was not going to be cross-examined. The parties were invited to consider the directions to the jury in the light of this decision and the judge suggested that the then defence advocate Mr Daymond should draft a list of questions that he would have asked S had she been called as opposed to simply having her ABE interview played. The trial date was refixed.

12. On 11 May 2016, Ms Cowe, who by then was trial counsel for the Crown, lodged a 'position statement' in which she very carefully set out her concern about the basis for not cross examining S. S was a competent witness and the defence case could be put to her. If the defence felt that their case could be adequately put to E rather than to S, then she sought a judicial ruling.

13. On 13 May 2016, the matter was listed before His Honour Judge Mousley with trial advocates in attendance and it was agreed that S would not be cross-examined. The defence insisted they could adequately put their case to E. The trial continued with S's ABE interview being played and there being no cross-examination of her. The defence case was put to E that the appellant may have touched S's vagina accidentally on 11 March when he had cleaned her after she had been to the lavatory.

14. In his summing-up to the jury, the judge gave very full and careful directions on the evidence of S. He directed the jury about the "obvious difficulties in questioning a child of her age arising from the scope, detail and length of any questions" and he directed the jury to approach her ABE interview with caution and to bear in mind her lack of maturity and understanding.

15. In retirement, the jury asked the judge a question: "In order to reach our decision on count 2 does count 2 have to have happened on 11th March 2015". Counsel for the Crown stated the case had been put on the basis that it had occurred on 11 March; almost all the evidence related to 11 March and the forensic evidence only related to 11

March. The Crown would not depart from that but dates were not technically a material averment. The real issue was whether the incident happened.

16. Mr Daymond agreed that the date was not a material averment but he too reminded the judge that all the evidence, which had taken just one day of court time, had focused on 11 March and the case had never been put in any other way by any other party.

17. The judge, in response to the question, directed the jury they did not have to be sure that count 2 took place on 11 March, they had to be sure it happened. The jury were directed to bear in mind, however, that the forensic evidence related to 11 March. 26 minutes later, the jury returned and unanimously convicted the appellant.

18. The ground upon which the appellant has leave to appeal is that the judge erred in directing the judge in response to their question that they did not have to be sure that the offence in count 2 had occurred on 11 March. The prosecution case had put its case on the basis that the offending had taken place on that date; the defence case had been put on the basis the alleged offending had taken place on that date.

19. Mr Douglas-Jones relied on two decisions: R v Dossi 13 Cr App R 158 and Wright v Nicholson (1970) 54 Cr App R 38, and derived from them the principle that although a date may not be a material averment in a criminal charge, the question for the court is whether any prejudice has been caused to a particular defendant. Applying that principle to the facts of this case, the judge's direction did cause prejudice. The appellant had been interviewed the day after the alleged offence, had read a prepared statement about the previous day and thereafter all parties had continued to focus almost entirely on 11 March.

20. As far as ground 2 is concerned upon which there is no leave, Mr Douglas-Jones firmly and fairly and squarely criticised the defence advocate Mr Daymond for deciding not to cross-examine the child. Mr Douglas-Jones suggests that Mr Daymond was incompetent in not doing so. He must put it that highly because he has a high hurdle to surmount. The decision not to cross examine was a tactical decision taken by Mr Daymond in consultation with the appellant.

21. Mr Douglas-Jones first reminded us of previous decisions of this court on how to approach the cross-examination of a child, including R v Barker [2010] EWCA Crim 4, R v Lubemba and R v JP [2014] EWCA Crim 2064, and the extremely helpful Advocates Gateway Toolkits. They indicate the court's concern to ensure the effective participation of a child witness and provide a proper way for testing the evidence of a child complainant.

22. He took us through Mr Daymond's responses to the very careful questions Mr Douglas-Jones had drafted in compliance with the decision in McCook [2014] EWCA Crim 734. Mr Douglas-Jones suggested that Mr Daymond does not seem to have considered any of this recent caselaw, nor did he consult the intermediary as to what questions he might be able to ask. The decision not to cross-examine the child was therefore not an informed decision. That means that the defence was not put to the

child, her evidence was not challenged and, accordingly, the conviction must be unsafe, either on that ground alone or in combination with his other ground.

23. On ground 1 Ms Cowe, on behalf of the Crown, accepted that this was a case where the parties had focused on 11 March but the defence case at trial, she informed us, had been clear that there were other occasions when the appellant had contact with S in addition to 11 March and when he was alone with her. It was therefore difficult to see therefore how the appellant has been in any away prejudiced. In any event, this was a very short trial during which everyone knew that the focus was on 11 March and the DNA related to 11 March. She insisted that even if we found the judge should have directed the jury to focus solely on 11 March, the conviction is safe.

24. On ground 2, she informed us that by the time she was instructed it is clear the defence had decided not to cross-examine S. Mr Daymond felt that the only questions he had on the appellant's then instructions could be put to E. All the suggested topics of cross-examination that Mr Douglas-Jones has put before us were put to E and there is no basis for suggesting that the decision not to cross-examine was incompetent or ill-informed and therefore no basis for finding any prejudice to the appellant. She added that S was competent and she had hoped the judge would have made more of that fact in his directions to the jury. She suggested the judge's directions were over generous to the appellant. However, any failures on that part, if there were any, by the judge were to the appellant's advantage not disadvantage.

25. She also reminded the court that, pursuant to section 27(5)(a)(ii) of the Youth Justice and Criminal Evidence Act 1999, the parties may agree that a witness who gives evidence in chief by means of a video recording does not need to attend for cross-examination. She invited us to find that the previous judgments of this court indicate, either expressly or by implication, that if the only questions that can be asked are whether the incident took place, then the parties may conclude that there is no need to put any questions.

26. We understand the single judge's concern as to ground 1. Although the date of the alleged offences was not a material averment and the child herself had made no reference to the date, the case had been presented throughout by both parties firmly on the basis the offence occurred on 11 March. The DNA related to 11 March. With the greatest of respect to the trial judge, in our view it would have been simpler and fairer to all parties to direct the jury that they should focus on that date. However, it does not follow that the conviction is unsafe.

27. In relation to ground 2, we first question what we are told is becoming an increasing practice for defence advocates to decide they will not cross-examine a vulnerable, particularly a child, witness. We understand the concern to protect a child witness and the desire of a defence advocate to avoid any suggestion of confronting a child witness. However, if a child is assessed as competent and the judge agrees the child is competent, we would generally expect the child to be called and cross-examined, with the benefit of the range of special measures we now deploy. There is no reason to distress her or cause her any anxiety and therefore no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past

doubted the *right* to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general *duty* to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible.

28. Furthermore, if the judge approves a decision not to cross examine, it raises the problem of what directions should be given to the jury. The directions should not indicate the child is incompetent when she is competent and should not inadvertently leave the jury with the impression that the child is not worthy of belief. We see some force in Ms Cowe's submission that the judge's directions in this case as to S's lack of maturity and understanding risked giving the jury such an impression, without giving them the best opportunity to assess her.

29. For these reasons, and accepting the statutory power exists for the parties to agree that a witness who gives evidence in chief by means of a video recording should not be cross-examined, we suggest the prosecutor should think very carefully before agreeing to that course and a trial judge should think very carefully before s/he expresses judicial approval of any agreement.

30. It follows that we can see some force in Mr Douglas-Jones' submission that cross-examination of S should have taken place. However, that is a very different matter from finding, as Mr Douglas-Jones invited us to do, that this was a case of the defence advocate being incompetent. It is clear from the attendance notes sent to us and from the information provided by Mr Daymond that, albeit he was not as conscious of the judgments in Barker and Lubemba & Ors, as he should have been, he did consider carefully what tactics to adopt from the defence point of view. He considered in conference with the appellant the advantages and disadvantages of calling S and asking her questions. When we pressed Mr Mr Douglas-Jones on what questions he would have asked had he been the trial advocate, we were not persuaded they advanced the defence case to any significant extent.

31. We return to the ultimate issue for us namely whether any disagreements we have with the approach adopted at the trial render the conviction unsafe. In our view they do not. This was an evidentially strong prosecution case: S, unprompted, soon after the event and for no apparent reason made an allegation to her parents in a language suitable to a child of her age. She repeated the allegation to others in response to non-leading questions. What she said was consistent with other evidence, in particular the DNA evidence. Furthermore, although we would have preferred the judge to direct the jury somewhat differently on the relevance of the date and for the child to be cross-examined, the directions and the decision not to cross examine did not prejudice the appellant.

32. For all those reasons, as indebted as we are both to Mr Douglas-Jones and to Ms Cowe, we are satisfied the conviction is safe and this appeal is dismissed.

33. For the avoidance of doubt, we give you leave on the failure to cross-examine, Mr Douglas-Jones.

34. MR DOUGLAS-JONES: Thank you. I don't know if I need representation formally to be ordered as extended to cover that?

35. THE VICE PRESIDENT: Definitely extended to cover it, yes.

36. MR DOUGLAS-JONES: Thank you.