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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 27 June 2019

B e f o r e:
LORD JUSTICE DAVIS
MR JUSTICE JAY
SIR JOHN SAUNDERS
R E G I N A
v
"DL"

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Mr B O'Leary appeared on behalf of the **Appellant**
Mr B Douglas-Jones QC appeared on behalf of the **Crown**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE DAVIS:

Introduction

In this case the complainant (who may be styled "R") and who was then aged very nearly 5, on the weekend of the 5 - 7 February 2016 made serious allegations of a sexual nature against her father. The incidents were said to have occurred in the course of the preceding year when she was 4 years old.

2. She was interviewed very swiftly thereafter, under the Achieving Best Evidence procedure, on 9 February 2016. For reasons which the judge found to be "lamentable and inexcusable" the appellant (the defendant at trial) was not charged until 22 September 2017. The trial itself then only commenced on 18 June 2018, a previous trial date having had to be adjourned because of the applicant's illness. By the time of trial, therefore, some 2 years and 4 months had elapsed since the ABE interview and by now R was nearly 7 years and 4 months old.

3. It is said on this appeal, brought by leave of the single judge, that in such circumstances the evidence of R should have been excluded at trial on an application made under section 78 of the Police and Criminal Evidence Act 1984 and, that evidence not having been excluded, the conviction of the appellant of the three counts of rape of a child under 13 and two counts of sexual assault of a child under 13 which he faced is unsafe.

The Background Facts

4. The background facts, relatively shortly stated, are these.

5. R was born on 24 February 2011. The appellant is her father. From a few days old R had been placed into the foster care of a family who may be styled "the Cs". There was, however, gradual involvement of R's parents and in around April 2012 R was returned to the full-time care of her parents. However, the Cs had maintained good relations both with R and with her family and R would quite frequently return to stay with the Cs at their home.

6. Over the weekend of 5 - 7 February 2016 R was staying at the C's home. As it happened a former long-term foster child of the Cs (who may be styled "RC") and who was an adult at that time had also returned to stay at the house. During a conversation between R and RC, R, seemingly spontaneously, said: "My daddy's got a hosepipe" pointing at her lower stomach and then said: "Where his wee wee comes from. I have a sprinkler. Sometimes he's touched my sprinkler when he is touching his hosepipe". RC then asked what R meant in saying he touched her sprinkler to which R replied: "He just uses his hand. Sometimes it hurts and sometimes it doesn't". RC made a note of this at the time and, quite rightly, also informed her foster mother, YC, of what had been said. In consequence the police and Social Services were contacted.

7. As we have indicated, an ABE interview was speedily conducted thereafter on 9 February 2016. In the course of that ABE interview, R was to describe the appellant squeezing what she called his "hosepipe" into what she called her "foof" - meaning her vagina. She described how the appellant would shake his penis up and down and how

her bedding would get wet with the hosepipe (which might be taken as indicating a reference to ejaculation).

8. At all events R did not return to the care of her parents and remained living with the Cs. She did however have supervised visits from her mother. During two of such visits R made further disclosures to her mother in the presence of a family contact support worker. Amongst other things, she also said that the appellant had touched her bottom when he took her to bed and had touched her front area.

9. The appellant himself had been interviewed under caution on 8 February 2016. He was interviewed again on 15 June 2016. He denied all the allegations made against him.

10. The subsequent delay in charging the appellant was the subject of a detailed letter from the Crown Prosecution Service sent to the Crown Court at the behest of one of the judges there. Such letter sought to give such explanation as could be given for the very great delay that had occurred. Suffice it to say that the explanations given, taken overall, were totally unacceptable.

11. The actual period of the offending set out in the indictment ranged from 27 February 2015 to 7 February 2016, when R was throughout 4 years old. It appears that the counts were not charged as multiple incident counts or said to be specimen counts as such. It was common ground that although there had been forensic examination both of clothing and of R herself, there was no forensic support for the prosecution case and no genital injury to R had been found: although it was likewise accepted that that did not of itself necessarily tell against the prosecution overall case.

The Trial

12. The ABE interview of R had been detailed and thorough. In the course of it R, amongst other things, had said that the appellant had squeezed his hosepipe in her foof, making gestures to indicate what she meant. She said, amongst other things, that he squeezed it in really tightly. She gave a demonstration of how she had been lying on the bed when that happened. She was asked how many times she had done this and replied "eleven times", clearly intending to indicate at least a significant number of occasions. In the course of the interview she was later to say that her father had touched her head with his hosepipe and that was to reflect one count of sexual assault, being count 4 on the indictment.

13. She said that on occasion the father had said to her, when she had queried with him his weeing on her foof that he in effect did not care. She also said that she had told her mother and further indicated in the ABE interview that the appellant had touched her bottom under her clothing, that being reflected in count 5 on the indictment.

14. The ABE interview was played to the jury in the presence of R. R was cross-examined during the course of the trial. In accordance with modern procedures appropriate to vulnerable witnesses and child witnesses, the questions had been prepared by Mr O'Leary in advance and had been approved by the judge. Again, as is required, the questions were designed to be short and clear.

15. Mr O'Leary followed the line of his pre-prepared written questions. Amongst other things he asked R whether her mummy or daddy had ever got her changed into her bedtime clothes and she said "no". He then asked whether the appellant's "hosepipe" had ever touched her "sprinkler" (meaning her vagina) and she said "yes". At a later stage she was asked: "Did you tell Mummy that Daddy's hosepipe had touched your sprinkler?" The answer was:

> "A. No.
>
> Q. Daddy says he didn't touch your sprinkler with his hosepipe, is daddy telling the truth or is daddy lying?
>
> A. He was lying.
>
> Q. I want to ask you some questions about the time you say daddy's hosepipe touched your head. Did daddy's hosepipe touch your head?
>
> A. I don't know.
>
> Q. Daddy says his hosepipe didn't touch your head, is daddy telling the truth or is daddy telling lies?
>
> A. I don't know."

That was then queried by the judge as to what she was intending to say and she in effect confirmed that she did not know. (It might be added that a registered intermediary was in the company of R). Then Mr O'Leary asked a further question about the appellant touching her bottom and whether anyone had checked on R's knickers to see if she had done a wee wee and the answer was "no".

16. In addition, the witness statement of RC was read out to the jury. She among other things gave evidence in that about her note made at the time which recorded that R had said, in effect out of the blue, the words that the appellant had a hosepipe and that he had touched her sprinkler.

17. In addition, evidence was read out from the family contact support worker, giving details about the occasions on which R had complained about the appellant touching her and furthermore, about R saying to her mother that her mother had not come to help her and saying also, at one stage, that the appellant had used his hosepipe and hurt her.

18. In addition, there was evidence from YC as to the background as to how she came to foster R and established contact with the family. YC was to accept that she had no prior concerns before the weekend of 5 - 7 February 2016.

19. The defence case was in accordance with the interview and was one of denial. The appellant gave evidence. He denied raping R and denied sexually assaulting her and denied ever going into her room when naked. He gave other evidence about the arrangements for getting R ready for bed. He was unable to say why R would lie or tell untruths.

20. Thus, having regard to the way in which the trial unfolded (the essential position of the defence being one of total denial) certain points, quite apart from the general challenge to the overall reliability of R's evidence, were available to the defence in support of its case. For example, they were able to point to aspects of R's statements over various occasions, which on some occasions had suggested that the appellant had touched her foof, rather than, as said on other occasions, penetrating it. Furthermore, the witness statement made by RC had been phrased in terms which suggested that RC may inadvertently, after R's initial disclosure, have put a leading question to R about whether penetration had occurred. Further, R had not always been consistent about whether or not her mother knew what was going on. In the ABE interview she had said that she did, but in her evidence at court she said that she did not. Furthermore, when it came to her evidence at trial, R was to say that she did not know whether the appellant had touched her head with his penis.

21. At all events the judge summed up in a careful and detailed way both on the law and on the evidence. He gave, in the course of his instructions to the jury, appropriate directions as to the treatment and general assessment of evidence of a child. Among other things in that regard he had said this:

> "A child's evidence should not simply be dismissed because of her age. But by the same token, that evidence should not be accepted simply because she is a child ... "

At a later stage, he referred to the need of the jury to be careful and cautious about judging a child, using the same standards as might be applied to an adult. At all events, no complaint is raised with regard to the adequacy of the summing-up. The complaint raised on this appeal is that the evidence of R should have been excluded. Naturally if that had happened the case would have come to a speedy end.

22. The sole ground of appeal formulated by Mr O'Leary is in these terms:

> "The Learned Judge erred in law in refusing to exclude the Complainant's achieving best evidence interview. The evidence ought to have been excluded on the ground of the delay in the case coming to trial, the extreme youth of the Complainant, and the consequent impossibility to effectively test the evidence of the Complainant. The decision to admit the evidence had such an adverse effect on the fairness of the proceedings it ought not to have been admitted."

23. In his supporting written argument, amongst other things, he submitted:

> "As a result of extreme delay, it is highly unlikely the Complainant had any accurate independent memory of the time of the alleged allegations."

Then it was said:

> "... it was a near impossible task to conduct effective cross-examination of the Complainant, and there was simply no way to assess whether the Complainant had any accurate independent memory of the incidents or that

period of life."

Legal authorities

24. In the court below Mr O'Leary in advancing, at the outset of the trial and before any jury had been sworn, an argument that R's evidence should be excluded under section 78, had placed considerable reliance, as indeed he did before us, on two previous decisions of constitutions of this court, being the decisions in R v Powell [2006] 1 Cr App R 31 and R v Malicki [2009] EWCA Crim 360.

25. Mr O'Leary readily acknowledged before the judge and before us that Powell was significantly different on the facts from the present case. Not only in that case was the complainant only three-and-a-half years old, but there had been a 9-week delay before the Achieving Best Evidence interview was conducted, followed thereafter by a 9-month delay before trial. Mr O'Leary nevertheless placed reliance on the general observations made by Scott Baker LJ in the context of that case at paragraph 41 of the judgment of the court as delivered:

> "41. Explanations can be found for each element of the delay in this case. However the plain fact is that where a case depends on the evidence of a very young child it is absolutely essential (a) that the ABE interview takes place very soon after the event and (b) that the trial (at which the child has to be cross-examined) takes place very soon thereafter. As the expert evidence in this case showed, very young children simply do not have the ability to lay down memory in a manner comparable to adults. Looking at this case with hindsight, it was completely unacceptable that the appellant should have been tried for an offence proof of which relied on the evidence of a 3½ year old when the trial did not take place until over nine months had passed from the date of the alleged offence. Special efforts must be made to fast-track cases of this kind and it is simply not an option to wait weeks for example for forensic evidence to become available."

Those observations go to the obvious desirability of getting a child's account as soon as possible, both in the recorded interview and thereafter in evidence at trial.

26. More particularly however, Mr O'Leary had relied, as he continues to rely, on the case of Malicki. In Malicki the complainant was 4 years and 8 months old. In that particular case she had been interviewed almost immediately after making a complaint of sexual assault. But there was then an unfortunate 14-month delay before the matter came to trial.

27. In dealing with the matter, that being a case where the question of the reliability and competency of the complainant's evidence having been revisited after she had given evidence during the course of the trial, Richards LJ, giving the judgment of the court, referred to the observations of Scott Baker LJ in Powell. Having so done, Richards LJ said this at paragraph 18:

> "We share the concerns expressed in that passage. The complainant in the

> present case was a year and a half or so older than the complainant in Powell, but she was still very young. The video interview in the present case was prompt, but the overall delay until trial was much greater. The problem in such a case as it seems to us is twofold: first, the risk that a child so young does not have any accurate recollection of events fourteen months previously (that is almost a quarter of her life ago); secondly, the even greater risk that if she is shown the video of her interview just before the trial and during the trial, as she must be, all she is actually recollecting is what was said on the video, and that she is incapable of distinguishing between what was said on the video and the underlying events themselves. It seems to us to be a near impossible task to undertake an effective cross-examination in those circumstances when the cross-examination must depend for its effectiveness on probing what actually happened in the course of the incident itself and immediately after it, not just going over what the complainant said in her interview. These problems go beyond the normal difficulties of recollection with an adult witness or an older child."

At all events in Malicki the appeal against conviction, in what otherwise would have appeared to be a strong case on the facts, was allowed on the footing that unfairness had been occasioned to the defence by reason of the delay.

28. However, Mr O'Leary fairly and rightly acknowledged that there is no general principle that delay in the case of young children necessarily can give rise to a principle that the evidence of that child always should be excluded at a subsequent trial or that the subsequent trial should be stopped. Each such case is fact specific.

29. This is borne out by the judgment of Lord Judge LCJ in the case of R v Barker [2010] EWCA Crim 4. In the course of that case the Lord Chief Justice gave a detailed and valuable review of the entire background and approach required where child witnesses are involved.

30. In the course of his review he also reviewed a number of authorities, including the cases of Powell and Malicki. At paragraph 33 of his judgment the Lord Chief Justice, amongst other things, said this:

> "Many accreted suspicions and misunderstandings about children, and their capacity to understand the nature and purpose of an oath and to give truthful and accurate evidence at a trial, have been swept away."

At a later stage he went on to deal with the competency test, stressing that may be re-anaylsed at the end of the child's evidence at trial. In that regard, he said in the course of paragraph 43 this:

> "If the child witness has been unable to provide intelligible answers to questions in cross-examination (as in Powell) or a meaningful cross-examination was impossible (as in Malicki) the first competency decision will not have produced a fair trial, and in that event, the evidence admitted on the basis of a competency decision which turned out to be

> wrong could reasonably be excluded under section 78 of the 1984 Act. The second test should be seen in that context, but, and it is an important but, the judge is not addressing credibility questions at that stage of the process any more than he was when conducting the first competency test."

The Lord Chief Justice then, at paragraph 47 and following, dealt with the whole context of delay. In the course of paragraph 50 the Lord Chief Justice said this:

> "50. ... Be that as it may, in our judgment the decisions in Powell and Malicki should not be understood to establish as a matter of principle that where the complainant is a young child, delay which does not constitute an abuse of process within well understood principles, can give rise to some special form of defence, or that, if it does not, a submission based on 'unfairness' within the ambit of section 78 of the 1984 Act is bound to succeed, or that there is some kind of unspecified limitation period. There will naturally and inevitably be case specific occasions when undue delay may render a trial unfair, and may lead to the exclusion of the evidence of the child on competency grounds. Powell, for example, was a case in which after the evidence was concluded it was clear that the child did not satisfy the competency test, and if the child in Malicki was indeed 'incapable of distinguishing between what she had said on the video and the underlying events themselves' it is at least doubtful that the competency requirement was satisfied. However, in cases involving very young children delay on its own does not automatically require the court to prevent or stop the evidence of the child from being considered by the jury. That would represent a significant and unjustified gloss on the statute. In the present case, of course, we have reflected, as no doubt the jury did, on the fact of delay, and the relevant timetable. Making all allowances for these considerations, we are satisfied, as the judge was, that this particular child continued to satisfy the competency requirement."

31. Thus it is that Mr O'Leary necessarily accepts that there is no general principle in this regard as to whether or not the evidence of a child should be excluded where there has been significant and unacceptable delay.

Ruling of the Judge

32. The application was made by Mr O'Leary, as we have said, at the outset of the trial. No application to stay on the ground of abuse of process was advanced. The arguments advanced, to a considerable extent, reflect the arguments subsequently advanced before us. The judge gave a detailed and thorough ruling. It may be noted that there had been no challenge to the competence of R at the time she gave her ABE interview, no challenge had been made to the fairness of that interview and no challenge had been made, by reference to section 53 of the Youth Justice and Criminal Evidence Act 1999, as to her competence at the time of trial. The judge found the delay which had occurred to be "lamentable" and "inexcusable". He recorded the submission that it would in effect be impossible for R now fairly to be cross-examined. The judge found that this was a case where in effect the defence was one of entire denial and it would not involve

any detailed analysis of the circumstances of a particular incident, unlike the case of Malicki.

33. The judge then said this at paragraph 5D of his ruling:

> "It seems to me that where there is no challenge to the competency of this witness, as there is not, that is the key question that I have to be alive to, and if it becomes clear during the course of her cross-examination on matters that are within the proper scope of cross-examination that she demonstrates an incapability of reflecting those matters from her recollection, and I appreciate that that is a matter that may involve some difficulty in discerning those matters, but if it becomes apparent that is the case, then the court will have to review whether or not at that time her competency within the meaning of Section 53 in the sense of both being able to understand, and more particularly, give answers which can be understood viewed in that context, then the court would have to review this decision and review the test as to her competence.
>
> Until that time arises, I am not minded to withdraw the case from the jury at this stage ..."

34. The trial then proceeded. As we have said, R was cross-examined. Mr O'Leary did not thereafter apply to renew his application to exclude her evidence; and it is clear that it is to be inferred that the judge having the conduct of the trial had seen no reason to stop the trial or to withdraw R's evidence from the jury.

Disposition

35. In those circumstances we can see no proper basis for departing from the judge's ruling.

36. The first point to note is that the application to exclude was made in advance of R giving any oral evidence at trial. But given that there was no real challenge to R's competence, it was clearly a proper course for the judge to say in effect: let us wait and see what happens when she is cross-examined and then revisit the position thereafter. The judge's ruling, as it seems to us, was entirely justified in those circumstances. Thereafter it is to be emphasised that no application to renew the section 78 application was made and, as we have said, clearly it is to be inferred that the judge did not himself have doubts that the trial could properly proceed to its conclusion.

37. We cannot accept the argument, developed before us today by Mr O'Leary, that he was unable properly to cross-examine R by reason of the delay that had occurred. Cross-examination of a young child witness is almost always very difficult. But the fact was that the defence had formulated, in accordance with modern procedures, appropriate questions of R and those were put to her. The answers that R gave were comprehensible and intelligible. Further, it is evident from the transcript itself that the cross-examination had been meaningful. Indeed, it is to be noted that R herself had in some respects departed from her ABE interview and so it cannot be said that she was simply parroting that interview of which she had recently been reminded. (In any event,

we have some difficulty in comprehending Mr O'Leary's almost total aversion to the thought that R might be saying what she had said in the ABE interview: after all, the ABE interview contained the evidence which was closest in time to the complaint when it was made.) Basically, the defence had been advantaged by the cross-examination in, for example, R now saying that she did not know whether the penis had been put against her head, as she had been saying in her interview and as was reflected in count 4.

38. Mr O'Leary today somewhat refined his arguments by saying that the particular area on which he was unable effectively to cross-examine related to RC and the suggestion that RC had put a leading question to R, after R had made her initial disclosure, prompting R to say that the appellant had inserted his penis into her vagina.

39. With all respect, we can see nothing in that point. It does not seem to have been a specific point advanced below, it does not obviously appear in the written grounds of appeal and does not seem very obviously to relate to the issue of delay. It is in any event rather difficult to see what questions could usefully be asked of a child of the age of 7 about such a point. But, more importantly, the point was in any event there to be developed: because RC's own witness statement had been deployed before the jury. The jury knew of the issue being raised by the defence, namely that suggestive questioning had been undertaken by RC when talking to R. So the jury was well able to evaluate that particular point.

40. In all such circumstances, we think that this case is indeed a fact specific case. Mr O'Leary has, as we have said, rightly disclaimed any general principle whereby evidence of a child necessarily should be excluded where there has been great delay. We can see no fault in the judge's initial ruling under section 78 and then in the trial proceeding thereafter. It seems to us that no error of principle was involved in the judge's approach; his approach accorded entirely with the approach indicated as appropriate by the Lord Chief Justice in the case of Barker.

41. With all respect, at a number of stages Mr O'Leary's arguments did in truth seem to come close to resurrecting the notion that there is some general principle available here even though he had himself in terms disclaimed such an approach. (Indeed, not infrequently there will be cases where the complainant of a child may first emerge some years later.) At all events, in so far as Mr O'Leary continued to place considerable reliance on the approach taken in Malicki, we think very considerable reservations should be expressed in so doing. Not only is Malicki the subject of the qualifications made by the court in the case of Barker, but moreover the statements in Malicki have been also commented on, by no means with enthusiasm, by another constitution of this court in the case of R v R [2010] EWCA Crim 2469. That case also had involved the evidence of a young child complainant. In that case, the defence had unsuccessfully at trial sought to exclude the evidence of the child under section 78. The ground of appeal was that it should have been excluded "in circumstances where it had become clear that the witness no longer had reliably independent memory of the events upon which allegations were based."

42. In giving the judgment of the court in that case Hooper LJ, after referring to the case of Malicki, said this:

> "21. It was this paragraph [of Malicki] upon which Miss Russell relied before the trial judge to establish the proposition in her ground of appeal. If that proposition can properly be deduced from this paragraph, we would be concerned. It not infrequently happens that witnesses have no independent recollection of events and can say no more than that their statement is accurate. That happens, for example, in cases of vulnerable witnesses, particularly where the vulnerability is caused by age. It may well be that an elderly person assaulted in his or her own house, or robbed on the street, does not have an independent recollection of events, but nonetheless gives clear evidence that the statement made is true. As we pointed out to Miss Russell in the course of argument, there are cases in which witnesses are too ill to give evidence or they have died. In such circumstances their witness statement may be read. A witness may also become incapable of giving further evidence after giving evidence in chief. The evidence would not necessarily be inadmissible.
>
> 22. We have been invited by the Criminal Appeal Office to have in mind sections 137 and 138 of the Criminal Justice Act 2003 (albeit that those sections are not yet in force). Those sections show that there are circumstances where a video-recording can be played where the witness does not have a good recollection of the events which are recorded within it. We also have in mind section 139, which provides that a witness may refresh his or her memory from a document. Subsection (2) is particularly important in the case of an ABE interview because the witness is entitled to refresh his or her memory from a transcript of the recording. We also bear in mind section 120. Finally, we remind ourselves that the whole purpose of the pre-trial recorded interview is to enable the child witness to give a contemporaneous account of the events and not to have to wait for many months before giving the evidence about the events in question. If Miss Russell is right, the reforms, which were introduced to deal with the evidence of children and other vulnerable witnesses, could well be seriously undermined. As this case shows, a great deal of time would have to be spent on trying to find out whether the child witness has an independent memory and, if so, of what. However, this is not a case for us to give any firm view about Malicki and it would be wrong to do so..."

It seems to us that those, in general terms, are valid points to make and further reinforce a conclusion that the decision in Malicki is to be treated with very great caution indeed if sought to be relied upon as creating some kind of general proposition. That case, at all events, was a decision on its own particular facts.

Conclusion

43. It is in those circumstances that we dismiss this appeal in the present case. As Mr Douglas-Jones QC, appearing for the Crown before us today, has submitted, in substance the various points raised went to the credibility and reliability of R: which is by no means a matter which is to be equated with issues of competence or unfairness of trial procedure. Nevertheless, having reached that conclusion in this particular case, we

would reiterate the importance, where the evidence of a child is involved, of an ABE interview being conducted as soon as possible after a complaint has first emerged and then of any subsequent trial taking place at the soonest practicable moment.

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

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