Neutral Citation Number: [2019] EWCA Crim 447

Case No: 201802789 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HER HONOUR JUDGE DHIR QC
T20170205

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2019

Before :

LORD JUSTICE BEAN
SIR DAVID CALVERT-SMITH
and
HER HONOUR JUDGE ADELE WILLIAMS QC

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Between :

PETER TONER	**Appellant**
- and -	
R	**Respondent**

- -
- -

Esther Schutzer-Weissman (instructed by **Registrar of Criminal Appeals**) for the **Appellant**
Abigail Husbands (instructed by **CPS Appeals Unit**) for the **Respondent**

Hearing date : 12 March 2019

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Approved Judgment

Lord Justice Bean :

1. The Appellant stood trial from 24 April to 6 May 2018 at the Central Criminal Court on an indictment which contained charges of indecency with young children allegedly committed between 1986 and 1991 and of possession of indecent photographs of a child (pornography on a laptop and USB sticks) in 2015. The defence applied to sever the indictment so that the historic counts and the recent counts could be tried separately. The judge, Her Honour Judge Dhir QC, refused the application. During the trial the judge directed acquittals on some of the historic counts. Four of the historic counts (representing allegations made by two complainants) and the three recent allegations were left to the jury who returned verdicts of guilty on each of them.

2. The Appellant appeals to this court pursuant to leave of the single judge, Davis LJ who wrote:

> "For the purposes of the bad character provisions, evidence of possession of indecent sexual images of children may be capable of being admitted in connection with sexual assault allegations relating to children: *R v D, P and U*. Had the various offences charged all been close together in point of time, I do not see much difficulty in the allegations being properly joined and in a refusal thereafter to sever. Here, however, the possession of the indecent images post-dated the charges of indecency with a child by well over 20 years. In such circumstances, one can have considerable unease at the propriety of joinder of all such counts for the purposes of Crim. P. R. 3.21(4). Moreover, such joinder was inevitably potentially prejudicial, (as the prosecution would say, because of the relevance of the nature of the later offending): and it can be argued that it was unduly and unfairly prejudicial by reason of the intervening lapse of time. Overall I think the points both on joinder and on severance are sufficiently arguable so as to justify the grant of leave to appeal."

The single judge also granted leave to appeal on a second ground specific to one of the computer pornography charges to which we shall return later.

3. Section 4 of the Indictments Act 1915 provides that "subject to the provisions of the rules under this Act charges … for more than one misdemeanour… may be joined in the same indictment."; and since 1967 this section has applied to all offences triable on indictment. Until the Indictment Rules were replaced in 2016 the provisions of the rules allowing joinder were very strict. Rule 9 of the Indictment Rules 1971 (re-enacting in substance Rule 3 in Schedule 1 to the 1915 Act itself) provided:-

> "Charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form, or are a part of a series of offences of the same or a similar character."

4. A number of authorities dealing with the propriety of joinder under the old rules were cited to us in the Grounds of Appeal and Respoondent's Notice. The leading case was

Ludlow v Metropolitan Police Commission [1971] AC 29. The House of Lords held that for two or more offences to constitute "a series of offences of the same or a similar character" under the then Rule 3 there must be some nexus between the offences, nexus being a feature of similarity which in all the circumstances of the case enabled the offences to be described as a series.

5. Some of the reported authorities were in cases where, as in the present case, two sets of alleged offences were several years apart. In *Baird* (1993) 97 Cr. App. R. 308 this court held that the question whether the two sets of offences could be described as a "series" should not be approached by reference to the dictionary definition of that word: if an appropriate nexus existed to bring the charges within Rule 9 even offences separated by a period of 9 years could be said to form a series.

6. In *R v C*, *The Times* February 4, 1993 the offences were separated by 11 years but were each sexual offences against the same victim (the defendant's daughter). Simon Brown LJ, in a passage relied on by Ms Schutzer-Weissman for the Appellant, said:-

> "It may be, although we express no final view upon it, that in this case Rule 9 was stretched towards its limits to accommodate two counts separated as these were by 11 years"

7. We have real doubts about whether charges of indecency with young children between 1986 and 1991 and of possession of child pornography on a laptop and USB sticks in 2015 could be said to form part of a series of offences of the same or a similar character. However, for reasons which will appear, it is not necessary to decide the point in the present case.

8. Section 5(3) of the Indictments Act 1915 provides:-

> "Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately or any one of more offences charged in an indictment the court may order a separate trial of any count or counts of such indictment."

9. Until 2016, if the joinder of charges in a single indictment was in breach of Rule 9, the court had no option but to order severance.

10. The strict terms of Rule 9 of the 1971 Rules have not been reproduced precisely in the current rules. Criminal Procedure Rules r 3.21(4), provides that:-

> "Where the same indictment charges more than one offence, the court may exercise its power to order separate trials of those offences, if of the opinion that:-
>
> > (a) the defendant otherwise may be prejudiced or embarrassed in his or her defence (for example, where the offences to be tried together are neither founded on the

> same facts nor form or are part of a series of offences of the same or a similar character); or
>
> (b) for any other reason it is desirable that the defendant should be tried separately for any one or more of those offences."

11. We note that the opening words of the rule state that the court "may", not "must", exercise its power to order separate trials in the circumstances set out in subparagraphs (a) and (b). That does not mean that the width of the judge's discretion is infinite, or that the new rule 3.21(4) was intended to effect a revolutionary change. Indeed, paragraph 10A.3 of the Consolidated Criminal Practice Direction states:

> "The rule has been abolished which formerly required an indictment containing more than one count to include only offences founded on the same facts, or offences which constitute all or part of a series of the same or a similar character. *However, if an indictment charges more than one offence, and if at least one of those offences does not meet that criteria, then CrimPR 3.21(4)(a) requires the court to order separate trials; thus maintaining the effect of the long-standing principle*. Subject to that, it is for the court to decide which allegations, against whom, should be tried at the same time, having regard to the prosecutor's proposals, the parties' representations, the court's powers under section 5(3) of the Indictments Act 1915 (see also CrimPR 3.21(4)(b)) and the overriding objective. Where necessary the court should be invited to exercise those powers." [emphasis added]

12. Ms Schutzer-Weissman relies on the italicised sentence as showing that the change in the wording from the old Rule 9 does not diminish the strictness of the test at all. We do not interpret the new Rule in that way.

13. The repeal of Rule 9 of the 1971 Rules and its replacement by CrPR 31.2(4) has in our view removed the technical barriers to joinder in appropriate cases. We consider that in a case where the evidence on one count would be properly admissible on the other as evidence of bad character it is difficult to argue that the defendant would be "prejudiced or embarrassed in his defence" by having both counts or sets of counts on the same indictment. The judge is not required to order severance of the indictment and separate trials unless on their proper construction the rules compel it, or there is some other factor (such as the need to avoid overloading the indictment or over-burdening the jury) making separate trials desirable.

14. We turn, therefore, to consider whether, if the defence application in the present case to order severance had succeeded, the computer pornography allegations would have been admissible at the trial of the defendant on the historic counts alone or vice versa.

15. As the single judge observed, the case of *R v D, P and U* [2013] 1 WLR 676 is clear authority that where a defendant is charged with any prohibited sexual activity involving children, evidence that he had viewed or collected child pornography is capable of being admissible pursuant to sections 101(1)(d) and 103(1) of the Criminal

Justice Act 2003 as demonstrating a sexual interest in children: although, as Hughes LJ observed at paragraph 19:

> "It will not always be so. There may be a sufficient difference between what is viewed and what is alleged to have been done for there to be no plausible link. It may be right to exclude the evidence as a matter of discretion, particularly if its probative value is marginal. But that it is capable being admitted under gateway (d) we entertain no doubt."

16. In the first two cases (D and P) the defendant's possession of the pornographic images was undisputed but not the subject of criminal charges; in the third case, U, it had led to pleas of guilty on ten charges. This court does not appear to have found the distinction significant.

17. The central issue in *R v D, P and U* was admissibility in principle; but there was consideration of the lapse of time in U's case The rapes and indecent assaults with which U was charged were allegedly committed between about 1993 and 2004. The complaints surfaced in 2008 when a substantial quantity of indecent pornographic images of children and videos of similar material were found on or with the defendant's computer.

18. At paragraph 45 Hughes LJ said:

> "For the reasons which we have already given, we are satisfied that this evidence was admissible and properly admitted under gateway (d). It is true that the making of the images found appears to have been in 2008 or thereabouts and that that was some years after the two complainants had ceased to live with the defendant and thus when any offences could have been committed. But a sexual interest in children is a characteristic which is unlikely to change over years. The jury was entitled to find that this evidence tended to show that the complaints were not false but rather were made against a man who would indeed have had the sexual interest in these two children which they said he had. A similar point was made in this court in relation to the timing of the abuse and pornography in *R v A (Alec Edward)* [2009] EWCA Crim 513."

19. In the recent case of *Thompson* [2016] All ER (D) 56 Dec the defendant stood trial in 2015 on four counts of indecent assault allegedly committed in 1972. The trial judge ruled that evidence of child pornography found on the defendant's computer when he was arrested in 2015 was admissible pursuant to section 101(1)(d) of the 2003 Act as being capable of establishing a sexual interest in children which was an important matter in issue at the trial. The pornography was not the subject of separate charges. A long list of websites visited by the appellant was included in the agreed facts placed before the jury. The defendant's explanation was that (having by this time become a clergyman) he had visited them for the purpose of research for a sermon he had intended to preach.

20. This court (Elias LJ, Sweeney J and Judge Dean QC) observed that given the lapse in time, some judges might not have adduced the evidence; however, the jury had been told to take that gap into consideration when coming to their conclusion. Elias LJ said at paragraph 15 of the transcript:

> "The argument adduced before us is that there was far too long a period between the incidents and the subsequent discovery of the indecent material on the computer; that in all the circumstances it would be unsafe for the jury to infer that someone who had a sexual interest in children 40 years after the event necessarily had a sexual interest in children at the time. Indeed, it was submitted that the evidence adduced before the jury did not demonstrate a sexual interest before the jury. We reject that submission. Plainly it was capable of doing so, and the jury had to consider the appellant's explanation as to why the material was present."

21. In the present case we consider that, if the child pornography counts had been severed, an application by the prosecution to adduce the facts on which those charges were based, as showing a sexual interest in young boys, at the defendant's trial for the historic offences could properly have been allowed.

22. By the same token, following severance, an application by the prosecution to adduce the evidence of the boys the subject of the historic offences counts (as they then were) at the trial of the pornography counts could properly have been allowed.

23. We are conscious of the fact that the defendant did not admit either the pornography or the historic offences counts; but that cannot be determinative of the question of whether a bad character application would have succeeded. The pornography depicted boys in the 7-14 age group, the same as the complainants on the indecency charges, one of whom alleged that the defendant had filmed him stripping naked. The defendant's explanation in relation to counts 1 and 2 (the USB sticks) was that he had acquired a variety of USB sticks some of which had been used by others and he did not check the contents: the jury must have found that highly improbable.

24. Ms Schutzer-Weissman submitted that the pornography charges were being used to bolster a weak case on the indecency counts; and that the judge should have reviewed the position when at the close of the prosecution case the Crown withdrew the counts relating to the third complainant. We do not accept this argument; and observe that no application was made at that stage for the jury to be discharged. We think it most unlikely that had such an application been made it would or should have been granted.

25. For these reasons we consider that it was a proper exercise of the judge's discretion to refuse severance of the indictment.

26. There was a separate argument relating to count 3, possession of indecent images on an inaccessible part of the hard drive of the defendant's laptop. An expert witness testified that they would have been accessible at some earlier point (which could not be ascertained) before being deleted. The defendant's case was he had bought the laptop as an ex-display model and had never viewed the indecent images. The judge directed the jury that they could not convict on this count unless satisfied that the

defendant had had the images in his possession before they were deleted. The jury evidently disbelieved the defendant. There is nothing in this ground of appeal.

27. We conclude that the defendant was properly tried on the indictment as it was put before the jury and that his convictions are safe. The appeal is dismissed.