IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202000535/B3

NEUTRAL CITATION NO [2020] EWCA Crim 1742

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 9 December 2020

Before:

LADY JUSTICE CARR DBE
MRS JUSTICE McGOWAN DBE
HIS HONOUR JUDGE KATZ
(Sitting as a Judge of the CACD)

REGINA
V
GR

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Miss S Morris appeared on behalf of the Appellant

Mr B McElduff appeared on behalf of the Crown

J U D G M E N T

LADY JUSTICE CARR:

The provisions of the Sexual Offences (Amendment) Act 1992 apply. Where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction

1. This is the appeal of the appellant, now 43 years old, against her convictions on 16 January 2020 following trial in the Crown Court at Portsmouth before His Honour Judge Mousley QC ("the judge") on 12 counts of sexual offences relating to her two sons, as follows:

(i) Nine counts of causing or inciting a child under 13 to engage in sexual activity, contrary to section 8(1) of the Sexual Offences Act 2003 (counts 1 to 5, 7 to 9 and 11).

(ii) One court of sexual assault of a child under 13, contrary to section 7(1) of the Sexual Offences Act 2003 (count 6).

(iii) One count of causing a child to watch a sexual act, contrary to section 12(1) of the Sexual Offences Act 2003 (count 10).

(iv) One count of engaging in sexual activity in the presence of a child, contrary to section 11(1) of the Sexual Offences Act 2003 (count 12).

2. Counts 1 to 9 involved the appellant's first son, counts 10 to 12 her second. We shall refer to the sons as A and B respectively.

3. On 6 March 2020 the appellant was sentenced to a total of 17 years' imprisonment and made the subject of a Sexual Harm Prevention Order under section 103 of the Sexual Offences Act 2003.

The facts

4. A was born in January 2004. B was born in January 2008. The offences were alleged to have been committed between 2010 and 2014.

5. In November 2012, social services had concerns about the level of unsupervised contact that the appellant's uncle ("the uncle") was having with A and B. The uncle was a registered sex offender and the subject of a Sexual Offences Prevention Order. In 2004 he had been convicted of sexual offences committed between 1979 and 1987 against his daughter when she was aged eight. In 2010 he was charged with four offences of buggery involving his son between 1977 and 1979, but the case against him in that regard was discontinued.

6. On 22 November 2012 a child protection plan for A and B was put in place as a result of the boys' contact with the uncle. It was later discovered that in fact the uncle was A's biological father.

7. On 15 December 2014 the boys, then aged ten and almost seven respectively, were removed by social services from the appellant's care and placed into foster care. Social

services remained concerned about contact with the uncle, but were also concerned that the appellant was unable to protect B from alleged sexual abuse by A as the boys were still allowed to share the same bed.

8. The boys were then separated a few days later. On 19 October 2016 A was placed at a residential home. In August 2017 he disclosed to his therapist and staff at the home that he had been sexually abused by the appellant.

9. On 1 September 2017 the police began their investigation and A was initially interviewed by the police a few days later.

10. In September 2017, B made a number of disclosures about his former life to his foster carer. Those disclosures included allegations that his brother A had sexually abused him. B was interviewed by the police in October 2017.

11. In May 2018, B made a further disclosure to staff of sexual abuse by the appellant as a result of which B was interviewed again by the police in January 2019.

12. The prosecution case was that the children lived in a highly sexualised household. The appellant sexually abused A from the age of around seven years old, and B from the age of two years old. As well as sexual abuse, the relationship was said to be characterised by the appellant's violence to and neglect of both her sons. She would encourage A to insert a vibrator into her vagina or her anus and on occasions to take pictures of her naked. She took his penis in her mouth. She encouraged A to suck her vagina and to place his penis between her buttocks. She also touched his penis. On one occasion, it was alleged that when A was around nine years old he was wearing edible pants made out of sweets on string. His memory of the incident had been triggered by a photograph of B with a box in the background, a photograph which was before the jury in the jury bundle. A said that the appellant ate the sweets one by one whilst he was wearing the pants and then proceeded slowly to undress in front of him. They began to kiss and ended up on her bed. He said he was encouraged to suck the appellant's breasts, insert a vibrator into her vagina and anus, and to lick chocolate sauce from her body.

13. In relation to B, the prosecution case was that the appellant made him watch pornography, caused him to touch her breasts and engaged in sexual activity with a man in front him. B said that the appellant would encourage him to slap her breasts and described an occasion when in his presence the appellant stuck an object, a sex toy or perhaps a hair curling tong, into her vagina and moved it in and out.

14. The defence case was that the allegations were fabricated and A and B were lying. The appellant's relationship with her sons was a normal and loving one.

15. In overview, to prove the case, the prosecution relied on the evidence of A and B, letters written by A to the appellant in which he referred to sexual activities between him and his mother, the disclosures made by A and B, including a statement by B to social services in September 2014 that he liked touching his mother's breasts. B's foster mother also gave

evidence of an incident in hospital in December 2014 when the appellant had demonstrated sexual behaviour towards B. The appellant had also admitted that she had lied in interview about her iPad and underwear, saying that they belonged to a friend of hers. The prosecution also alleged that she had lied about the existence of pornographic material on her telephone. There was also evidence that she was violent and neglectful towards A and B.

16. The appellant gave evidence at trial. She denied telling social services that she usually slept in the same bed as B or that she let him touch her breasts. She denied that the children ever went without food or that she neglected them. She denied that the boys watched pornography with her or saw her naked. She also denied that she drank alcohol in her bedroom or offered B alcohol, that she used rude language or that she kissed her sons on the lips. She said that no sexual activity ever took place in front of her sons. She denied ever owning a vibrator or asking A to take photographs of her. She denied the incident described by A involving the edible pants had ever took place, nor did the slapping of her breasts happen and she never used a vibrator in front of B. She said that she had lied in her police interview because she was embarrassed.

17. For the defence reliance was also placed on the appellant's previous good character, evidence that A could be manipulative and the delay in reporting the alleged incidents.

18. The central issue for the jury was whether or not any sexual activity between the appellant and her sons occurred at all.

Rulings during the course of trial

19. The judge made a number of evidential rulings during trial. This appeal arises out of three of them.

Ruling on B's disclosure against A

20. The judge was required to rule on whether the evidence of B that A behaved in a sexual way towards him should be admitted. The evidence took the form of B's recorded interview when he told the police that he and his brother used to "pee together" and that A came into his bedroom when he "wanted to have sex with him". B said that A used to put his penis to B's bottom and vice versa. A would want B to suck his penis and A used to suck B's penis. B said that he never told his mother about this behaviour which would happen when she was out.

21. In the application before the judge, it was said that A had denied the behaviour and had stated that B had admitted to fabricating these allegations. (As discussed further below, A's responses to the allegations were in fact far from clear.) It was also documented in social services' records that when first placed into foster care, A tried to get into B's bedroom to sexually abuse him.

22. The defence submitted that the evidence should be adduced, making an application under section 41 of the Youth Justice and Criminal Evidence Act 1999 ("s. 41"), alternatively section 100 of the Criminal Justice Act 2003 ("s. 100") (as important explanatory evidence

as to the way in which B alleged that the appellant had abused the boys and why they were removed from the appellant's care) and relevant to the credibility of the boys. It was said that there was material suggesting that A had denied the activity and had alleged that B had retracted the allegations. Secondly, the fact that the boys had behaved in this way with each other provided them with the information necessary to make false accusations against the appellant. It was thus said to be relevant to an important matter in issue or amounted to important explanatory evidence.

23. The judge disagreed. In his judgment the issue as to what, if anything, sexual took place between the boys was generally irrelevant to the issues that the jury had to determine. The judge was unable to conclude that resolving the question of which boy had told the truth, even if the jury could resolve it, would assist the jury in determining where the truth lay as between the boys and the appellant. He permitted into evidence of deceit and manipulation on the part of A, as recorded in the social services' records, to be adduced.

Ruling on B's behaviour

24. The judge was also required to rule on whether that part of B's account that he on a single occasion inserted his penis into the appellant's vagina unbidden and of his own volition whilst she was asleep should go before the jury. Miss Morris, counsel for the defence, who has also appeared before us today, submitted to the judge that this behaviour was not the subject of any count and to admit the evidence would be prejudicial.

25. The judge disagreed. The evidence was relevant to an important matter in issue, namely whether the appellant's relationship with her sons was normal and loving. It was not so prejudicial that it should be excluded.

Ruling on admissibility of iPad video

26. During the trial the prosecution sought to admit evidence of B touching himself in an allegedly sexual manner whilst videoing himself on an iPad in A's bedroom. The video was recorded in November 2014, about a month before B was taken into care and when he was about six years old. It showed B allegedly mimicking sexual behaviour by touching his chest and groin area. It was a 30-second segment of a much longer video showing B playing on A's X-box.

27. The prosecution submitted that B's actions in the video were consistent with the allegations made in relation to counts 11 and 12 and possibly 10, and that it should be admitted. The defence submitted that B could well be mimicking a man, not a woman.

28. The judge ruled that it would ultimately be a matter for the jury to determine what the video showed and how far it assisted. B's behaviour did appear to be consistent with a woman touching her own breasts and with something that B might have seen on a pornographic film. The evidence was relevant to the issues that the jury had to determine and he could see no reason as a matter of fairness why it should be excluded. It was accordingly put before the jury. The suggestion advanced at trial for the appellant was indeed that B could have been mimicking Michael Jackson.

Grounds of appeal

29. Miss Morris for the appellant essentially repeats the submissions relied upon before the judge. She submits that the grounds of appeal that she raises are interlinked and to be treated together. The cumulative effect of the judge's errors was that the jury was left without highly relevant background and context.

30. In relation to the first ruling, it is submitted that the judge erred in ruling inadmissible the evidence of the sexual abuse of B at the hands of A. This was evidence relevant both to credibility and the reasons for the boys being removed from the appellant's care. It also offered a potential explanation for B's sexualised behaviour with his own mother and more generally. The jury should have been informed of the wider context, including what was said to be the daily abuse of B by A. That offending was far more serious and in stark contrast to the single occasion offending which formed the subject of counts 10 to 12.

31. As for the second ruling, having ruled inadmissible the evidence of the sexual abuse from B, the judge further erred in permitting the prosecution to adduce evidence of B penetrating his mother's vagina in circumstances where it could not be indicted and was much more serious than the counts involving B. It is submitted that the prejudicial effect was exacerbated by the first ruling. The prosecution was able to say that B's sexualised behaviour was evidence of him having been exposed to sexual behaviour by the mother. Had the jury known of A's abuse of B, that might have provided an alternative explanation. The behaviour of B had nothing whatsoever at all to do with the mother.

32. As for the third ruling, having declined to admit the evidence of the sexual abuse by A of B, the judge again erred in permitting the prosecution to adduce evidence of B being engaged in sexual self-touching in the video clip. Given that the judge had already ruled inadmissible the wealth of material relating to B's sexualised behaviour, as reported by his school and seen by social services, the judge should, as a matter of consistency, have excluded this material. Proceeding as the judge did again enabled the prosecution to say to the jury that B was behaving in this sexual manner only because of what his mother had exposed him to.

33. Miss Morris submits that these errors go beyond the appellant's convictions relating to B on counts 10 to 12 because of the judge's cross-admissibility direction in relation to counts 1 to 9. All of the appellant's convictions are therefore said to be unsafe as a result of these failings.

Grounds of opposition

34. Mr McElduff for the prosecution submits in relation to the first ruling that the judge was correct to refuse the application to adduce evidence concerning the alleged sexual behaviour between the two sons. Neither the requirements of s.41 nor s.100 were met. The probative value of the evidence in question was non-existent. They amounted to little more than unproven allegations. The evidence for the purposes of s.100 was simply too uncertain and for the purposes of s.41 irrelevant to counts 1 to 9. The allegations against the appellant were entirely different in nature to the behaviour alleged between the two boys. Mr McElduff submits that any credibility issues between the boys' conflicting

versions would not have assisted the jury in determining the issues in the case. Further, the defence was permitted to adduce a number of entries from social services' material suggesting manipulative and acceptive behaviour by A. As to providing an alternative explanation, any sexual behaviour between the boys would not assist the jury with determining whether events between the mother and B had occurred or not, which was the issue, not why they had occurred.

35. As for the second ruling, the judge was again correct to admit what is said to have been probative and relevant evidence of the sexualised nature of the relationship between the appellant and B, and the judge was also correct in the third ruling to permit the prosecution to adduce the video clip showing B to be engaged in alleged sexual self-touching. Either individually or cumulatively it is said the convictions cannot be said to be unsafe.

36. Further and finally, Mr McElduff submits that in any event the case against the appellant was strong. This was not a case where either contamination or collusion could realistically be suggested. He has referred us to various particularly implausible aspects of the appellant's evidence, for example her denial of ever owning a vibrator, when set against messages before the jury between the appellant and a friend of hers that were inconsistent with that. He also pointed, by way of example of the strength of the prosecution case, to the evidence that the appellant did keep chocolate in her bedroom.

Analysis

Relevant statutory and legal framework

37. S. 100 provides materially as follows:

> "(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
>
> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which—
>
> (i) is a matter in issue in the proceedings, and
>
> (ii) is of substantial importance in the context of the case as a whole ... "

38. S.100(2) provides that evidence is important explanatory evidence for the purpose of section 100(1)(a) if:

> "(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
> (b) its value for understanding the case as a whole is substantial."

39. S.100(3) identifies the factors to which the court must have regard in assessing the probative value of evidence for the purpose of subsection s.100(1)(b), including where the evidence is evidence of a person's misconduct and it is suggested that the evidence has

probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct. The assessment is by definition highly fact-sensitive in each case and falls to be carried out in the context of the case as a whole: see R v Braithwaite [2010] 2 Cr.App.R 18 at [12].

40. By s.109 references to the relevance or probative value of evidence is a reference to relevance and probative value on the assumption that it is true, unless it appears that no court or jury could reasonably find it to be true.

41. As summarised in R v Bogdanovic [2020] EWCA Crim. 1229 at [46], the court has no power as such to rule evidence inadmissible on the ground that it will give rise to satellite litigation which might risk the derailment of the trial: see R v Dizaei [2013] EWCA Crim. 88, [2013] 1 Cr.App.R 31, [2013] 1 WLR 2257 at [35], approved in R v King [2015] EWCA Crim 1631 at [43]. However, such risk is something that the court can properly take into account in deciding whether the conditions for admissibility in s.100 have been met, see in particular R v Dizaei [36] to [38], endorsed most recently in R v Umo and Another [2020] EWCA Crim 284 at [37], and R v TG [2020] EWCA Crim 939 at [31] and [32]. Whether the evidential dispute is capable of resolution by the jury is an "important factor" when considering an application under s.100(1)(b).

42. Once the criteria in s.100 are met, the court does not have a general discretion to exclude the evidence on grounds of fairness (as is the case when a defendant seeks to exclude prosecution evidence pursuant to s.78 of the Police and Criminal Evidence Act 1984: see R v Brewster and Cromwell [2010] EWCA Crim 1194, [2010] 2 Cr.App.R 20.

43. S.41 provides materially as follows:

> "(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination,by or on behalf of any accused at the trial, about any sexual behaviour of the complainant."

44. "Sexual behaviour" is defined materially as "any sexual behaviour or other sexual experience whether or not involving any accused or other person, but excluding ... anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused." (see s. 42(1)(c)).

45. By s.41(2) the court can give leave in relation to any evidence or question only if satisfied that subsection (3) or subsection (5) applies and that a refusal of leave might have the result of rendering unsafe a conclusion of the court or jury on any relevant issue in the case. Subsection (3) applies, amongst other things, if the evidence or question relates to a relevant issues in the case that is not an issue of consent.

46. S.41(4) provides:

> "For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness."

47. Once the criteria in s.41 for admissibility are met it is not open to a judge to exclude the evidence: see Re: T [2012] EWCA Crim 2358, [2013] Crim.L.R 596.

48. S.112(3)(b) of the Criminal Justice Act 2003 provides that the restriction in section 41 is not affected by the bad character provisions of that Act. Any evidence about a complainant's sexual history that amounts to bad character thus has to satisfy the requirements of both s.100 and s.41.

The first ruling

49. Against this background we turn to the first ruling, namely the decision to exclude the evidence of B relating to the alleged sexual conduct of A towards him and A's alleged denial of that complaint and alleged subsequent admission.

50. It is important to identify the two strands of evidence in play: evidence of the sexual behaviour of A alleged by B and the credibility issues said to arise out of A's responses to those allegations. It is not suggested that this evidence is anything other than bad character evidence, thus engaging s.100.

51. The position under s.41 is more complicated. This is a case where the alleged sexual behaviour in question amounts to bad character evidence such that the requirements of both s.100 and s.41 fall to be considered. Had the evidence raised pure credibility issues, then it could be said that s.41 was not engaged because the evidence would not be "about any sexual behaviour" of a complainant: see the useful discussion in R v Fichardo [2020] EWCA Crim 667 ("*Fichardo*") in the context of false complaints, in particular at [33] referring to the line of cases beginning with R v BT and MH [2001] EWCA Crim 1877, [2002] 1 Cr.App.R 22. However, in this case, the appellant seeks to deploy the evidence beyond questions of credibility and to rely on matters which do relate to the sexual behaviour of a complainant, thus engaging s.41: see *Fichardo* at [35]. On the facts of this case, it does not seem to us that the two strands can sensibly be separated out. The jury could not assess the credibility issues without also hearing evidence of the sexual behaviour alleged and A's responses.

54. We start with a consideration of the application under s.100.

55. As for s.100(1)(a) neither the evidence of A's alleged sexual behaviour towards B, nor the credibility issues said to arise, can be said to be important explanatory evidence for the purpose of that section. The jury would not find it difficult or impossible properly to understand other evidence in the case without it. Further, and as explored more fully in the context of s.100(1)(b) below, its value for understanding the case as a whole would not be

"substantial".

56. As for s.100(1)(b), we do not consider that the evidence either as to A's alleged sexual behaviour towards B or A's alleged subsequent denial and admission, had substantial probative value in relation to a matter in issue of substantial importance in the context of the case as a whole. Credibility was a matter in issue of substantial importance in the context of the case as a whole. The reason for B's generalised sexual behaviour was also an issue, though not necessarily an issue of substantial importance. However, in each case the evidence would not have had the necessary substantial probative value.

57. It is very far from clear on the material before us as to what A's position on B's allegations was. B's allegations were not addressed in any of A's ABE interviews. The only record of a clear denial is in a social care report dated October 2014 recording an incident when B disclosed that when he was five, he said in front of A and his mother that A used to make B put his "privates into A's bottom", an allegation which A had on that occasion denied. Nor can we find or have we been taken to any clear subsequent admission, only comments by a social worker that A had been on the verge of admitting prompting sexual behaviour with B. A is also recorded there as stating that it was B who had led the sexual behaviour between them.

58. It is also not clear, as the judge commented and as debated in the course of the hearing before us, that the jury would ever have been in a position fairly to resolve the question of what, if any, sexual activity took place between the boys. A would have had to have had the opportunity to respond fully to those allegations. Nor is it clear how the jury could ever have resolved the question as to precisely how A responded to B's allegations and why he did so in the way that he did. Further, if as the defence suggested there was also a suggestion by A that B had retracted his complaints against A, further complications would have arisen in the sense of a potential credibility/false complaint issue for B. All this, to our minds, illustrates the lack of substantial probative value in this tangle. Further, none of the material went to the central question of the boys' relationship with their mother and whether or not sexual activity took place with her as they alleged.

59. Even if a clear picture of events could have been established, it is not obvious that, for example, any change of position by A would go to his credibility in any meaningful sense. This was a young, damaged child whom it was believed was withholding material because he was terrified of going to prison. Further, there was in any event material before the jury going to A's credibility, namely his capacity to manipulate and deceive, and to the effect that B was exposed to sexual behaviour by A, for example watching pornography together and seeing A masturbate. This last point is important: it was already fully open to the appellant to argue an alternative theory for B's behaviour, namely that it was the result of his interaction with A.

60. We question in any event whether the evidence would in fact have assisted the appellant in any way. Such behaviour by her children would be a strong indicator of sexual abuse and neglect more generally in the household. Even if the jury were satisfied the two boys had acted in a sexual way with each other, the question is begged as to why and how two boys

under the age of ten would have learnt such behaviour or why, if A was the instigator, he was acting in that way at such a tender age. This is perhaps another way of finding that the evidence was not of substantive probative value for the purpose of section 100(1)(b).

61. Thus the requirements of s.100 were not satisfied and we need go no further. But we note the judge's comments that, as the defence argument before him developed, it became clearer that the purpose of seeking to admit the material was "really because of the conflicting versions between the boys as to who had said what and whether or not it had been retracted was that this undermined their credibility". On this basis, s.41(4) was clearly engaged.

The second ruling

62. As for the second ruling relating to B's sexualised behaviour with his mother, the fact that there was no count to reflect this behaviour was not determinative of admissibility, not least since it may not have amounted to an offence in any event. The judge was in our judgment fully entitled to conclude that the evidence was admissible based on relevance to an important matter, namely the nature of the relationship between B and his mother. Indeed this was the key question for the jury. The judge went on expressly to consider s.78 of the Police and Criminal Evidence Act 1984 and the question of prejudice. There is no basis on which to interfere with his conclusion that the effect of this evidence would not be unduly prejudicial set in the context of the allegations themselves.

The third ruling

63. We can take the third ruling equally shortly. The iPad video amounted to direct evidence of B's behaviour during the indictment period. It was evidence that was different in quality to the school reports and in nature to the alleged sexual behaviour between the brothers. It was open to the jury to conclude that it showed B imitating someone touching their breasts and genital area. It was closely aligned to the allegations on counts 11 and 12 at least and, depending on the jury's assessment of the material, again relevant to the key question of the nature of B's relationship with the appellant.

64. Finally, we consider that there is force in the submission that the case overall against the appellant was in any event a compelling one. The complaints against her came to light after the boys had been removed from her care and crucially at a time when they had no contact with each other. There was no realistic basis for a suggestion of either contamination or collusion and indeed no such suggestion was made. The appellant's defence statement and her evidence amounted to a blanket denial of the allegations of abuse made by her sons, both sexual and non-sexual. Her case was advanced on the basis that her relationship with both boys was entirely normal and loving. The only explanation put forward in her defence statement for the fabrication of complaints against her was that her sons wished to prevent her moving to Birmingham. It is hard to see how that or indeed anything else could explain the extremely detailed and graphic accounts of grossly sexual activity given by each boy independently. There was a good deal of evidence of prior complaints, including letters written by A before he was ABE interviewed and from social services' records. It should be noted that when the appellant gave evidence she denied the recorded admission by her in those records that she had allowed B to touch her breasts for comfort in bed at night. There was also support for the prosecution case from the

appellant's own significant lies. There was cogent independent evidence, quite apart from the material on the iPad, that both boys were highly sexualised.

Conclusion

65. For these reasons, whether considering the challenges raised either individually or cumulatively, we do not consider the appellant's convictions to be unsafe and would dismiss the appeal.