

NCN: [2020] EWCA Crim 939

2020/00233/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 14th July 2020

B e f o r e:

LADY JUSTICE CARR DBE

MR JUSTICE SWEENEY

and

THE COMMON SERJEANT OF LONDON

(His Honour Judge Marks QC)

(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

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Mr C Stockwell QC appeared on behalf of the Appellant

Miss H Stangoe appeared on behalf of the Crown

J U D G M E N T

Tuesday 14th July 2020

LADY JUSTICE CARR:

Introduction

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this matter. Under those provisions, 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.

2. On 19th December 2019, following a trial in the Crown Court at Nottingham before Her Honour Judge Hancox (“the Judge”), the appellant, who is now 79 years old, was convicted of ten offences of indecent assault (counts 1, 2, 3, 4, 6, 13, 14, 15, 16 and 17); one count of rape (count 7); two offences of indecency with a child (counts 11 and 12) and three offences of sexual activity with a child family member (counts 21, 23 and 24). He was acquitted of count 18 (indecent assault) and counts 20 and 25 (sexual activity with a child family member). The jury failed to agree verdicts on the remaining counts: count 5 (indecent assault) and counts 8, 9 and 10 (Rape) were ordered to lie on the file. No evidence was offered against the appellant on counts 19 and 22 and not guilty verdicts on those counts were entered under section 17 of the Criminal Justice Act 1967.

3. On 10th January 2020, the appellant was sentenced to a total of nine years' imprisonment, seven years of which were imposed on count 7.

4. The appellant now appeals against conviction by leave of the Single Judge. The appeal is limited to a challenge to the convictions on counts 1 to 4, 6 and 7, all of which relate to a particular complainant, namely the appellant's niece "LA". The appeal turns on the judge's decision to reject an application made on behalf of the appellant, pursuant to section 100(1)(b) of the Criminal Justice Act 2003 to adduce bad character evidence against LA. It is said that the Judge was wrong to refuse that application and that the appellant's convictions on the counts relating to LA are unsafe accordingly.

5. We have had the benefit of clear and succinct written and oral submissions from Mr Stockwell QC for the appellant and Miss Stangoe for the respondent.

The Facts

6. The 25 count indictment alleged sexual offences against five complainants. Counts 1 to 10 related to alleged offending on LA between 1969 and 1973. Counts 11 to 17 related to alleged offending on the appellant's daughter. Count 18 related to alleged offending on an ex-partner of the appellant's son and mother to one of the appellant's granddaughters. Counts 19 to 25 related to alleged offending on two of the appellant's granddaughters.

7. The facts which are the subjects of the counts relating to LA were as follows. In 2017, LA told police that the appellant had abused her when she was 13 years old. She said that when she was 13 her father used to go to the pub with the appellant on a Friday and Saturday night. When they returned the appellant would enter her bedroom and kiss her by putting his tongue in her mouth (counts 1 and 2). As time went on, the appellant started to touch her breasts both under and over her night dress (counts 3 and 4). He then began to stroke her vagina (counts 5 and 6). She said that the appellant would only be in her room for a few minutes, but that he came almost every week. Once she turned 14, her father started to drive and so the appellant would come around to their house less often. She said that as she was older,

they would then go out as a family and they would often go to Uncle Mick and Aunt Sally's house, where she and her brother would babysit the children. When the adults returned from the pub, the appellant would also return. When she went to the toilet, LA said that the appellant would be there waiting for her and would kiss her and touch her breasts. She said that she did not know what to do because she was 14 and 15 and did not want to tell her family because the appellant was her father's "pub mate".

8. When LA had turned 16 years, she said that one day the appellant asked if he could take her for a drink to thank her for babysitting his children. He collected her from her school during her dinner hour and drove to a dirt track by a farm, parked the car and then pounced on her. She said that the appellant kissed her, touched her breasts and then pulled down her tights. He then got on top of her on the reclined passenger seat and had sexual intercourse with her. She said that it lasted only a couple of minutes, before the appellant withdrew his penis and ejaculated into a handkerchief (count 7). She said that she cried after the incident and the appellant told her that she must not tell anyone because if she did her parents would know what she had done and his children would lose their father.

9. LA also told the police that the appellant raped her a second time by a farm gate (count 8) and then on at least two further occasions (count 10).

10. She said that she kept a diary at the time about what was happening, some in words and some in code. Her eldest sister had found the diary and showed their mother. LA had then been accused of having an affair with the appellant, which she denied. But no one asked what had happened.

11. LA said that when she was in her 30s, she told her mother what had happened. She also told her father. However, he continued to go to the pub and spend time with the appellant. She said that she also told her husband a few months after the two of them had met. She said that she had also spoken to the appellant's daughter a great deal over the year before going to the police.

12. The appellant was first due to stand trial in April 2019. However, just prior to that trial, LA indicated that she had had further memories, and she provided police with another interview in the summer. She said that during the Easter school holidays in 1973, the appellant had asked if she and her brother could clean cars on the forecourt of his lot for some pocket money. She was 16 at the time and her brother was 14. Whilst she was there, the appellant took her to a church so that she could use the toilet and he there had sexual intercourse with her (count 9).

13. LA denied flirting with the appellant when they went out as a family. She said that she did not have a teenage crush on him. She did do anything consensual with him and they had never had an affair or any relationship of that nature. She did seek his help during her marriage troubles, but was not at the time trying to rekindle an affair. Rather, she wanted to ask the appellant about the things he had done to her when she was younger.

14. The prosecution case, in short, was that the appellant had sexually assaulted his niece (along with other family members) across a number of years. In order to prove its case, the prosecution relied on evidence from LA, evidence from LA's husband, including that not long after they had met LA had told him that the appellant had raped her not long after her 16th birthday. He thought that she had said that the appellant had raped her more than once. In addition, there was evidence from LA's brother, including that he became aware of the appellant's behaviour towards LA when he was aged around 11 or 12.

15. The defence case on counts 1 to 10 was that the allegations were fabricated. The appellant and LA had engaged in a brief sexual relationship that ended when LA was 16 or 17 years old. They had remained in contact and socialised together in the years that followed. LA only reported the allegations against the appellant in 2016 when she felt abandoned by him, having sought his help, towards the end of 2015, over her failing marriage. Text messages, some of which have been read out to us today, were produced, demonstrating that LA was distressed by the fact that the appellant had not helped her. In short, the appellant's case was that LA was lying out of spite, because he had let her down when she needed him.

16. The appellant did not give evidence at trial. He relied on the contents of his police interviews. He called two witnesses who gave evidence on his behalf about the family, including that the appellant had never behaved inappropriately towards them.

Defence application pursuant to section 100 of the Criminal Justice Act 2003

17. At the commencement of trial before the Judge, Mr Stockwell sought leave to adduce evidence of complaints made by LA on three separate occasions to a representative of Women's Aid during 2018 about her husband, which the appellant alleged to be false. LA had reported first, that in around late February or early March 2018, her husband had vaginally raped her; secondly, that for about eight years her husband had been verbally abusive to her, had controlled her and had prevented her from leaving the house; and thirdly, that in January 2018 her husband had pushed her to the floor. We describe these together as "the complaints".

18. It was submitted that LA had made the complaints at a time when her marriage was failing. She refused, however, to make any formal complaint, statement or Achieving Best Evidence interview in relation to the allegations. Her husband was interviewed by the police and denied each allegation. An examination by a police officer of the second complaint of controlling behaviour found apparently "major discrepancies" in the accounts provided by LA. Miss Stangoe explained to us that LA never went to the police. Rather, she made these complaints in the context of counselling sessions with the domestic abuse Charity. But because she was vulnerable and being cared for by her husband, the charity had a duty of care to report the matters to the police which is how the police contact came about.

18. Against this background, in summary, Mr Stockwell submitted to the Judge first, that the appellant sought to advance that LA had fabricated her complaints about him, following the breakdown in their relationship. Secondly, there was an evidential basis to support the contention that the complaints (against LA's husband) were false because: (a) having made the complaints, LA refused to provide any statements to confirm the same or assist the police investigation; (b) where any examination of the complaints was possible, what were described as "major discrepancies" between her various accounts were identified; and (c) her husband had denied the truth of the allegations and was called by the prosecution at trial as a witness of truth and so was available for questioning in relation to the complaints. Thirdly, the matter in issue, for the purpose of section 100(1)(b) of the Criminal Justice Act 2003 was LA's credibility. The material sought to be adduced would have substantive probative value in relation to that matter in issue, which was of substantial importance in the context of the case as a whole.

19. In its opposition to the application, the prosecution submitted that no proper evidential basis existed for the suggestion that the complaints were false. LA had never indicated that they were false; and the husband's denial did not confirm that they were. The issue would

inevitably result in satellite litigation and would be an unwelcome distraction to the jury's consideration of the evidence.

20. In a short ruling, the Judge refused the application. She said that there was nothing within the application material that provided a proper foundation for the suggestion that the complaints made by LA were or might be false. It would be wrong to draw an inference that a complaint made against a partner, if not pursued, was a false one.

Grounds of Appeal

21. On this appeal Mr Stockwell submits that the Judge erred in refusing to grant to leave pursuant to section 100 of the Criminal Justice Act 2003 to adduce evidence of the complaints. For there to be a proper evidential basis, the evidence in question does not have to be conclusive. He relies on his submissions made in the application below and asks rhetorically: in the absence of a complainant retracting formally a previous complaint, where might a proper evidential foundation be found, particularly concerning allegations of a sexual nature, if not in these circumstances?

22. Mr Stockwell submits that there was more material before the Judge than she considered in her ruling. There were three separate occasions when LA refused to co-operate and support a police prosecution. There were major discrepancies identified in relation to one of the complaints by the police officer. There was the husband's denial. The husband was a prosecution witness. He gave evidence as to LA's reporting of complaints to him. Mr Stockwell submits that, had the jury concluded that the complaints had been fabricated by LA when her marriage was failing, that could have supported the appellant's case that LA had likewise fabricated the allegations against him when their relationship had also broken down. The surrounding circumstances were "virtually identical".

23. Mr Stockwell goes on to submit that the extent of any satellite litigation would be limited. The question was whether or not LA was someone capable of making false sexual allegations against men with whom her relationship had deteriorated. Having made the complaints, LA would simply be asked whether she maintained that they were true, and, if so, why she refused to pursue them; and whether, at the time of making the allegations, her relationship with her husband had broken down. Her husband could be asked to confirm that he denied the truth of the allegations. This issue of credibility was a central one for the jury to consider. It was unfair for the husband to be called by the prosecution as a witness of truth without the appellant being able to challenge him, for example, by reference to his beliefs as to the truth or otherwise of what was being reported to him by LA.

24. Finally, Mr Stockwell contends that the case for granting the application can be made with more force now in the light of the fact that the jury failed to agree upon verdicts on counts 5, 8, 9 and 10; doubt must have existed in relation to the credibility or reliability of LA. The appellant was thus prejudiced by the jury not being afforded the opportunity to assess LA's credibility on a fully informed basis. If the judge was wrong to make the ruling that she did, it cannot be said that guilty verdicts would nevertheless have followed. Where there was evidence to undermine LA's evidence, or she was inconsistent in her detail, it is clear from the overall results that the jury were not able to be sure. Thus, evidence of the complaints, and on the question of credibility, may have made a significant difference.

25. In resisting this appeal, Miss Stangoe, in summary, submits that there was a paucity of information surrounding the precise terms of the complaints made by LA to the domestic abuse charity. Allowing the evidence to be adduced would have resulted in satellite litigation. In any event, it involved very different allegations relating to very different

periods of time.

Analysis

26. Section 100(1)(b) of the Criminal Justice Act 2003 provides as follows:

"(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if —

...

(b) it has substantial probative value in relation to a matter which —

(i) is a matter in issue in the proceedings, and

the (ii) is of substantial importance in the context of case as a whole ..."

27. Section 100(3) identifies the factors to which the court must have regard in assessing the probative value of evidence for the purpose of subsection (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 a similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and dissimilarities between each of the alleged instances of misconduct.

29. Section 109 of the Criminal Justice Act 2003 provides:

"(1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

(2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true."

30. By section 100(4), evidence of the bad character of a non-defendant to be adduced under section 100(1)(b) must not be given without the leave of the court. One of the intended effects of the section is to limit inuendo against the character of a witness in favour of concentration on the real issues in the case: see *R v Miller* [2010] EWCA Crim 1153; [2010] 2 Cr App R 19, at [20].

31. 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 1631 at [43]. However, such risk is something that the court can properly take into account in deciding whether the conditions for admissibility in section 100 have been met. In *Dizaei*, Lord Judge CJ said this:

"36. ... a fact specific judgment directed to the statutory

conditions in section 100(1)(b) and section 100(3) must be made whether to admit evidence of bad character (within the ambit of section 98(a) of the [2003] Act). Where it applies, the assumption in section 109 is not determinative of the admissibility question. Rather it provides the context in which the admissibility decision falls to be made. In short, the pre-conditions to admissibility under section 100(1) are not automatically established, and, notwithstanding the evidential assumptions provided by section 109 at the admissibility stage, the bare fact of an allegation (even if assumed to be true) is not necessarily conclusive of the question whether it constitutes substantial probative evidence or evidence of substantial importance in the context of the case as a whole. If it were otherwise, the court would be obliged to admit evidence of an allegation of a serious crime allegedly committed by the witness, even if it had been fully investigated by the police, but, because the investigation revealed serious doubts about the complainant's veracity, on the basis that the complainant continued to insist that the allegation was true. Accordingly, ... we do not see how the necessary judgment whether the pre-conditions to admissibility under section 100 can be satisfied without a careful examination of all the material which bears on the question.

37. A trial concerned with whether it is proved that the *defendant* has committed crime 'A' is liable to be derailed if the jury is required to decide whether a *witness* has committed the distinct, separate crimes, 'B' and 'C'. As we have explained, the evidential assumption in section 109 does not bind the jury, and the investigation of this evidence at trial may be liable to distract attention from the crucial issue which is whether the case against the defendant has been proved. If, in the context under discussion, the judge correctly directs the jury that they must not consider the alleged bad character evidence unless they are sure that it is true, two trials would be simultaneously in progress before the same jury. First, the trial of the defendant for the crime alleged against him by the prosecution, and second, the crime or misconduct alleged against the witness.

38. In our judgment these are relevant considerations bearing on the assessment of the probative value of the evidence sought to be adduced and its importance in the overall context of the case. When it is assessing the probative value of the evidence in accordance with section 100(1)(b) and section 100(3), and consistently with section 100(2), among the factors relevant to the admissibility judgment, the court should reflect whether the admission of the evidence relating to the bad character of the witness might make it difficult for the jury to understand the remainder of the evidence, and whether its understanding of the case as a whole might be diminished. In such cases the conclusion may be that the evidence is not of substantial probative value in establishing the propensity in or lack of credit worthiness of the witness, or that the evidence is not of

substantial importance in the context of the case as a whole, or both. If so, the pre-conditions to admissibility will not be established."

32. This approach was endorsed most recently in *R v Umo and Another* [2020] EWCA Crim 284 at [37]. Whether the evidential dispute is capable of resolution by the jury is an "important factor" when considering an application under section 100(1)(b).

33. It is common ground that in order for questions relating to previous allegedly false complaints to be permitted, the defence must have a proper evidential basis for asserting that any such statement was (a) made, and (b) untrue: see *R v All Hilly* [2014] EWCA Crim 1614 at [12]. A proper evidential basis requires less than a strong factual foundation for concluding that the previous complaint was false, but there must be some material from which it could be concluded properly that the complaint was false. This is a fact sensitive exercise and reference to the facts of other cases is unlikely to be of assistance. The judge has to exercise judgment, rather than discretion, and to evaluate the matter on the basis of all the relevant material. The ultimate question is whether the material is capable of leading to a conclusion that a previous complaint was false: see *R v All Hilly* (supra) at [13] and [14]; *R v AM* [2009] EWCA Crim 618 at [22] and [23]; *R v Gorania* [2017] EWCA Crim 1535 at [14] and [27].

34. In this case, LA's credibility was a matter in issue and was of substantial importance in the context of the case as a whole. Further, there was clearly a proper evidential basis for asserting that the complaints were made by LA. The issues are: (1) whether there was a proper evidential basis for asserting that the complaints were untrue; and if so, (2) whether the evidence would have substantive probative value.

35. It is not suggested that the Judge incorrectly identified the law. We are unable to conclude that her judgment that there was no proper evidential basis for asserting that the complaints were untrue, was wrong. First, a failure to pursue an allegation of sexual or other offending does not necessarily prove that the allegation is false. LA had stated that she had not wanted to report because she feared that the fact that she was seeing her husband, despite a non-molestation order, would create a rift in the family. Additionally, she had not wanted to make a complaint because she was vulnerable, due to her complex health needs and disabilities, and did not want the stress of attending court. We are told that LA suffered from depression, along with physical problems which led her to being wheelchair bound. She was also very upset when she discovered that her husband had been arrested and interviewed. Further, the circumstances of the making of the complaints, namely to a domestic abuse charity, rather than to the police, are relevant.

36. Secondly, the husband's denial equally did not mean that the complaints were fabricated. It was one person's word against another.

37. Thirdly, a police officer's view, based on recollection alone, that there were "major discrepancies" in LA's accounts of the events behind her allegation of coercive behaviour, was neither here nor there. What would have been required were objective discrepancies so stark as to show that the complaint was the product of invention. We have not been taken to any such discrepancies; nor, it appears, was the Judge.

38. Thus, in our judgment, the Judge was entitled to conclude that the material was incapable of leading to a conclusion that the complaints were false.

39. Further and in any event, although the Judge did not express any concern about satellite litigation as part of her reasons for refusing the defence application, such concerns were expressed on behalf of the prosecution (albeit without express reference to the question to which they were relevant, namely whether or not, as a result, the complaints would carry substantive probative value). But those concerns were understandable given, as we have set out, LA's reasons (according to her) for not wanting to pursue the complaints, and, assuming that LA denied fabricating the complaints, the contentious nature of the allegations of falsity. The difficulty of establishing the facts and whether or not the complaints were fabricated would have introduced a substantial issue of satellite litigation on which it was most unlikely that the jury would be able to come to any firm conclusion. The reasons for not pursuing the complaints to the police and the marital history between LA and her husband would have been opened up, as would exploration of the alleged discrepancies in LA's account of the coercive and controlling behaviour. Put simply, unlike the position in *Umo*, there was no "hard evidence", such as an incriminating text message. Indeed, there was a paucity of relevant information, including a lack of clear record of the precise terms of the complaints at the outset.

40. Thus, in our judgment, evidence of the complaints, as presented, would not have been of substantive probative value, and on this basis the pre-conditions for admission of the evidence of the complaints under section 100(1)(b) were not met.

41. Further, and even if only of forensic worth, it is by no means obvious that the defence theory would have assisted the appellant's cause. Assuming in his favour that the complaints were false (which was why, on the appellant's case, LA was not prepared to pursue them), here she clearly was prepared to pursue her complaints against the appellant and to support a police investigation and prosecution (implicitly it could be said because the complaints were true).

42. For the sake of completeness, we would not have been persuaded that the appeal was strengthened by the fact that the jury was unable to reach verdicts on counts 5 and 8 to 10. The jury was sure that LA was a truthful witness in order to convict on other counts relating to her. The result is explicable, by way of example, by the fact that LA did not raise the rape (the subject of count 9) at the outset of her complaints to the police in her first interview.

43. For these reasons, and despite the able submissions advanced by Mr Stockwell on behalf of the appellant, the convictions on counts 1 to 4, 6 and 7 are not unsafe. Accordingly, the appeal is dismissed.

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