IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation Number:
[2023] EWCA Crim 1650

CASE NO 202201952/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 20 December 2023

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE HILLIARD
HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

REX
V
MICHAEL MCCAFFERTY

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MISS L WIBBERLEY appeared on behalf of the Applicant

J U D G M E N T

1. MR JUSTICE HILLIARD: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. 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 30 May 2022, in the Crown Court at Derby, the applicant, then aged 74, was convicted of six sexual offences. On 28 June 2022, he was sentenced but the sentence was varied on 11 August 2022 when sentence was pronounced as follows. Count 1, indecent assault upon C1, contrary to section 14(1) of the Sexual Offences Act 1956, three years' imprisonment; count 3, indecent assault upon C1, contrary to section 14(1), a special custodial sentence of five years' imprisonment, consisting of a custodial term of four years and a further licence period of one year; count 8, indecent assault upon C2, contrary to section 14(1), six months' imprisonment; count 10, indecent assault upon C3, contrary to section 14(1), three months' imprisonment; counts 12, 13 and 14, making indecent photographs of a child (C1), contrary to section 1(1)(a) of the Protection of Children Act 1978, nine months' imprisonment on each count. All the sentences were ordered to run concurrently.
3. The appellant was acquitted on the following counts: count 2, indecent assault upon C1; count 4, indecent assault upon C1; count 5, indecency with a child (C1); counts 6 and seven, rape of C1; count 9, indecent assault upon C3. Count 11 was not left to the jury for a reason we do not know and that count was ordered to lie on the file.
4. The applicant now renews an application for leave to appeal against conviction after refusal by the single judge.

5. The case concerned allegations that the applicant committed sexual offences between 1992 and 2005 when the three complainants were children. C1 and C2 were sisters. Count 1 (convicted) alleged that he touched C1's vagina under her clothing on at least ten occasions when she was aged four to 12. Count 2 (acquitted) alleged that he had touched her vagina on at least five occasions when C1 was 13. Count 3 (convicted) alleged that on one occasion he penetrated C1's vagina with his finger when she was aged four to 12. Count 4 (acquitted) alleged that he had put C1's hand on his erect penis when she was aged four to 12. Count 5 (acquitted) alleged that when C1 was seven or eight, the applicant got C1 to put her vagina over bubbles in a jacuzzi. Count 6 (acquitted) alleged that he raped C1 when she was 12 or 13, having rendered her unconscious with some kind of stupefying drug. Count 7 (acquitted) alleged that he had raped C1 when she was 15, having forced her to drink alcohol. Count 8 (convicted) alleged that he had indecently assaulted C2 when she was aged about 12 by touching her near to her vagina in the jacuzzi. Count 9 (acquitted) alleged that he had touched C3 on her inner thigh when she was aged about 13. Count 10 (convicted) alleged that he put his tongue in C3's mouth when kissing her goodbye. Counts 12, 13 and 14 alleged that he took indecent photographs of C1 when she was aged 17 and a half. The applicant accepted taking the photographs but denied that they were indecent.
6. The issues in the case were whether the applicant assaulted the complainants as alleged and whether the photographs were indecent. The applicant gave evidence that he knew the complainants but denied any indecency had taken place.
7. Four grounds of appeal are now advanced by Miss Wibberley in her very helpful and extremely well-structured submissions on the applicant's behalf.
8. First, it is argued that the applicant's trial was unfair because inadmissible hearsay bad

character evidence which should have been removed from C3's ABE interview was accidentally left in when the recording was played to the jury. In that interview, C3 said that various people at a sports club, including her father, would pass comment on the applicant, saying that now she was 16, he would not be interested. Later, she repeated the same comment and also said that everyone used to joke about how the applicant used to go after younger girls at the club.

9. It is now argued that this was extremely prejudicial for the applicant and detracted from the fact of his previous good character. Counsel who was then representing the applicant says that on reflection, with the benefit of hindsight, he should have applied for the jury to be discharged. In the event no such application was made.

10. At the time neither side suggested that the jury should be discharged and both sides were content with the directions which the judge gave to the jury. He said this:

> "... unfortunately something was in the interview that should not have been in ... I am going to tell you you must, capital MUST, underlined, in bold whatever you want to say, you must ignore the following things that were said, because what other people think and say about anybody in the case, particularly a defendant, is not evidence against him. All right. People's opinions they do not matter.
>
> What you are trying the case on is the evidence in this case. Now, in this interview that you have just heard, you may have made a note of it, you may not have, but there were three times when people sort of cast aspersions against Mr McAfferty; you must ignore them ... It has absolutely nothing to do with this case what other people's views are about Mr McAfferty ... Ignore it, you have not heard evidence from these people. It has absolutely nothing to do with the case. It should not have been in there; unfortunately it was ... This is not evidence against Mr McAfferty. It is unfortunate, but I am telling you under no circumstances must you take that into account. Try the case and the witnesses that you see in the court. That is what I told you at the beginning and that is what I will be telling you at the end."

11. In the course of these directions the judge summarised the offending passages in a very few words as he was obliged to do to put matters right. The judge asked counsel if they wanted him to say anything else and neither side did.

12. It is not of course unknown for inadmissible material to come in by accident in a criminal trial. Sometimes the immediate reaction of the participants as to the appropriate remedial course of action is a good indication of what is best to be done. They may have a feel for the potential impact in the circumstances which exist at the time. All concerned thought that the action taken by the judge was sufficient. He made it plain that there was no evidence from anyone making any of the statements, that the jury should try the case on witnesses who they saw in court and that they must under no circumstances take this material into account. They should ignore it. In due course, the judge gave the jury a conventional good character direction in respect of the applicant. In our judgment, there is nothing in this point which renders the convictions unsafe.

13. Next, it is argued that the verdicts returned by the jury are logically inconsistent and therefore unsafe. Miss Wibberley says that this is not her strongest ground but still maintains that the verdicts are indicative of unsatisfactory compromise rather than any careful analysis of the evidence. However, as the single judge put it:

> "An alternative explanation for these verdicts is that the jury were giving full effect to the directions of the learned judge in two respects: first that they could not convict on any count unless they were sure of the Applicant's guilt and secondly that they should consider each count separately. The jury were not directed that they had to believe [C1] on everything or nothing, and it would have been a serious misdirection if they had been. For example, as the Crown submits, there is nothing illogical in the jury considering that they could not be sure that the type of behaviour reflected in counts 1 and 2 did persist after [C1] turned 13 but had occurred when she was aged 4-12, hence the conviction on count 1 and the acquittal on count 2. The allegation reflected in count 3

> equally related to when [C1] was aged 4-12 and the conviction is consistent with the conviction for count 1. The remaining counts involving [C1] were of a different nature and it was perfectly logical for the jury to have been sure of counts 1 and 3, but not those other counts. I agree with the Crown's submission that 'There are sources of identifiable evidence which may reflect the jury's assiduous application of the standard of proof that they required before convicting the Applicant.' The jury returned their final verdict 8 hours and 35 minutes after first retiring: this is not consistent with the sort of slapdash approach involving a 'complete guess as to which of the complaints was genuine' suggested."

14. We note, as examples only, that C1 made an application to the Criminal Injuries Compensation Authority in which she said that the touching of her genitals by the applicant continued until she was approximately 12. She mentioned one offence of rape, not two. A defence witness said that C1 told her that the applicant had "messed about with us as kids". Question: was his penis erect? C1 was alleged to have said: "No, nothing like that". There was other contradictory evidence about whether and in what circumstances the applicant's penis might ever have been visible, capable of affecting consideration of count 4. There was evidence that the hot tub purchase had not taken place until well after C1 was seven or eight (count 5). There was evidence that C3 had made an initial complaint about the applicant putting his tongue in her mouth but not about him touching her leg.

15. Having given this aspect careful consideration, like the single judge we are not persuaded that the different verdicts demonstrate logical inconsistency as opposed to a careful examination of all of the evidence and strict adherence to the burden and standard of proof.

16. It is also argued that the judge erred in the directions he gave to the jury about cross-admissibility. The judge directed the jury without objection that the evidence upon one count was capable of supporting the prosecution case on another count. The

prosecution suggested, he said, that the fact that each complainant had made similar but otherwise unconnected complaints about the applicant's behaviour made it more likely that each of the complaints was true. The judge said that this aspect did not bear on the allegations of rape, which were of a wholly different nature.

17. Miss Wibberley argues that whether this may have been appropriate as between C1 and C2 on the one hand, and C3 on the other, it was not appropriate as between C1 and C2 who were sisters and who were aware of each other's allegations before they made reports to the authorities. However, the judge explicitly told the jury that the point only had force if the complaints made were truly independent of each other. If one witness had influenced another, either deliberately or unconsciously to make a complaint, then it would not be surprising if each went on to make those complaints. He said that the point only had potential force if the jury were sure that the realistic possibility of influence, conscious or subconscious, by each complainant on the other had been excluded and counsel had obviously been able to make submissions about this aspect of the case to the jury.

18. In these circumstances, we are satisfied that it is not arguable that anything about this direction renders any of the convictions unsafe. As we have already observed, the jury's verdicts viewed as a whole point decisively away from any suggestion that they took an overall or broad brush view of the case.

19. Finally, we are invited to consider whether, even if no individual ground of appeal can arguably be said to render the convictions unsafe, nonetheless their cumulative impact has that effect. We have given this submission the equally careful consideration that it deserves. There was undoubtedly sufficient evidence for the jury to reach guilty verdicts on the counts where they convicted if they were sure of that evidence. Whether or not

they were sure of guilt was a matter for them and not for us. They saw and heard all of the various witnesses in the case. There was sufficient evidence, subject to the jury's assessment of it, and in our judgment it is not arguable that there was any legal or procedural error which would render any of the convictions unsafe, either individually or cumulatively.

20. We are also satisfied that the applicant was properly represented at his trial. The evidence against him was effectively tested and the applicant's own case was properly advanced.

21. In these circumstances, this renewed application for leave to appeal against conviction must be refused.

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

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