Neutral Citation Number: [2024] EWCA Crim 1355

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT DONCASTER
HIS HONOUR JUDGE KELSON KC

CASE NO 202203673/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 6 November 2024

Before:

LORD JUSTICE HOLGATE
MR JUSTICE GRIFFITHS
HER HONOUR JUDGE BERTODANO

REX
- and -
BVY

MR PAUL JARVIS appeared on behalf of the Appellant.
MR GERALD HENDRON appeared on behalf of the Crown.

Hearing Date: 31st October 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 7th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

LORD JUSTICE HOLGATE:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. 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 s.3 of the Act. We are satisfied that the name of the appellant should be anonymised in order to prevent identification of the victims from the facts set out in this judgment.

2. The case concerned alleged sexual offending by the appellant against two complainants, C1 (counts 1-4) and her half-sister C2 (count 5). On 22nd November 2022 in the Crown Court at Sheffield (HHJ Kelson KC) the appellant was convicted unanimously on counts 1 and 4 of sexual assault of a child under 13 and on count 5 of rape of a child under 13. The jury were unable to reach verdicts on counts 2 and 3, sexual assault of a child under 13, and they were ordered to lie on the file.

3. On 23rd November 2022 the trial judge sentenced the appellant to an overall term of 10 years' imprisonment, comprising concurrent terms of 12 months (count 1), 6 months (count 4), and 10 years (count 5). On 30th November 2023 the sentence on count 5 was amended to a special custodial sentence of 10 years under s.278 of the Sentencing Act 2020, comprising a custodial term of 9 years and an extended licence period of 1 year.

4. The appellant appeals against conviction by leave of the full court. The sole issue is whether the convictions are unsafe because the judge erred in his decision to refuse to admit under s.100(1)(b) of the Criminal Justice Act 2003 bad character evidence of C1 on the issue of her credibility.

The evidence
Counts 1-4

5. In October 2018, C1 (born December 2006) made a report to police after having made disclosures to her mother and her step-father on 26th July 2018. She alleged that her step uncle, the appellant, had sexually touched her on a number of occasions between November 2016 and December 2017. On 2nd October 2018 C1 was ABE-interviewed.

6. She said the first incident happened one morning at about 11.00am (count 1). She was in bed on the top bunk. She said she was falling asleep but awoke to find the appellant in her bedroom. He approached her bunk, pulled her pants down and started to touch her vagina. When she came to, the appellant quickly climbed into the bottom bunk and pretended to be asleep.

7. The allegation in count 2 concerned the appellant entering C1's bedroom when she was asleep, lifting her leg up and placing his hand on her vagina. He also tried to move her underwear to one side as he tried to touch her. Under count 3 it was alleged that on an occasion when C1 was in the living room on the sofa, the appellant tickled her back, which she had asked him to do, and then licked her shoulder.

8. Count 4 was said to have taken place at the appellant's address. C1 fell asleep on the sofa watching television. The appellant entered the room and lay next to her. She awoke to find that he had lifted up the blanket, her nightie and pulled down her pants. He had then touched her on her side.

Count 5

9. C2 alleged that she had been orally raped by the appellant between July 2018 and September 2019, when she was aged between 5 years and a few months before her 7th birthday.

10. In February 2021 she made a disclosure to her mother's partner who then told C2's mother. On 4th March 2021 C2 was ABE interviewed. She said the appellant had made her suck his "privates". This happened the day they went swimming, after which she had had a sleepover at his house. She said that after going to a bedroom to sleep, the appellant entered the room. He was wearing a black top and some black bottoms. He asked her to "suck on his private spot". He kept telling her to do it harder and harder. C2 kept choking, but the appellant continued saying "carry on fake choking". Eventually he left the room.

11. The appellant was of previous good character. He was interviewed twice. In an interview on 24th October 2018 the appellant said that there was no truth in C1's allegations. He believed that they may have been made because his brother had broken up with C1's mother. In an interview on 7th February 2021 the appellant denied that he had done anything sexual with or to C2.

12. The appellant gave evidence in accordance with his defence case statement. He denied that any sexual activity took place between himself and C1 or C2.

13. C2 is the appellant's half-sister. The appellant recalled one occasion when she stayed overnight, after having spent the day with him. She stayed at the home of his adult sister, not his own address. His sister provided a statement confirming that. The appellant said that he and C2 used to go swimming but had not done so that day.

14. The appellant said that he came to know C1 as the step-daughter to his brother at the time. The appellant would visit the home address of C1's mother and his brother. When he visited, C1 was usually present. Occasionally he stayed overnight. At her request, he sometimes took C1 for days out to do swimming or bowling. He denied that he ever sexually assaulted C1. He denied asking C1 to stay downstairs to watch films with him, but C1 would often ask to stay downstairs with the appellant when he was staying over, to watch TV/films. The appellant recalled that on one occasion C1 stayed overnight at his address, which he shared with his brother. He thought his brother was present. He denied sexually assaulting C1 on that occasion. He had told C1 to sleep in his bedroom and he would sleep on a sofa in the living room. But C1 wanted to sleep in the living room. So she slept on a sofa there and the appellant slept on the other sofa in that room. He denied playing any "Truth or Dare" game with C1. The appellant recalled one occasion when C1 stayed overnight at his mother's address. He slept downstairs and C1 and her sister slept upstairs. His brother also stayed overnight. He denied sexually assaulting C1 on that occasion.

He denied that he laid at the side of the bed where C1 was sleeping or that he lifted up C1's bed covers.

The appellant's application to adduce bad character evidence.

15. At the trial the defence made two applications under s.100(1)(b). One related to the character of C2 and falls outside the scope of the leave to appeal granted by the Full Court. The second concerned the character of C1. The evidence the subject of this appeal was as follows:

16. C1's school records contain the following entry for 11 May 2018:

> "[redacted] approached [redacted] and C1 in the morning in the Y6 playground. She said that she hadn't had any dinner yesterday. She then said that she had had a camera down her throat once then added, "it wasn't like the time it went up my tushie and I woke up and realised I wasn't wearing any knickers". [redacted] moved the conversation to another subject."

17. The prosecution confirmed in a letter dated 18th March 2022 that:
    i. There is no reference in C1's medical records of any procedure that involved a camera. C1's mother has also been asked about this and has no knowledge of this.
    ii. There is also no reference to her waking up without knickers.

18. The defence contended that this evidence had substantial probative value in relation to the credibility of C1, an issue of substantial importance in the context of the case as a whole. The defence said C1 was not telling the truth in relation to any of the counts. Therefore, evidence that only the month before she made her allegations against the appellant of sexual assault, she was telling lies about what it was suggested should be understood as references to medical procedures to intimate parts of her body and waking up with those parts unclothed, was highly relevant to her credibility, her propensity to lie about her intimate body parts and what happened to them, and to her attention-seeking behaviour.

The judge's ruling.

19. In his ruling, the judge summarised the allegations in the trial, the bad character evidence and the submissions made to him. He said:

> "There can be no doubt that the credibility of both of these witnesses is at the heart of the case."

20. He referred to the requirement in *R v Brewster* [2010] EWCA Crim 1194; [2011] 1 WLR 601 that he should evaluate the bad character material to see whether it is reasonably capable of assisting the jury on the issues as to credibility. He added:

> "The vital thing in this case is the test at s.100 and that test …. means that the evidence contended for is admissible if and only if it has substantial probative value in relation to the issue of

[C1's] credibility and is of substantial importance in the context of the case as a whole"

21. The judge referred to the heightened concerns of the defence that the prosecution would in due course seek and obtain a cross-admissibility direction as between counts 1 to 4 and count 5 and thus, the importance of being able to adduce the bad character evidence.

22. In applying the test of "substantial probative value" to the evidence the judge said:

> "What we do not know, of course, is what she meant by "tushie". Miss Alam took her to be referring to her back passage and, therefore, that this is a reference to what we would know as a colonoscopy. Mr Hendron thought that she was referring to her vagina. Nobody knows what she was referring to. I revert to s.100: does this assertion have substantial probative value in relation to C1's credibility or tendency to make things up and is it of substantial importance in the context of the case as a whole? Absolutely not. It is simply of no great assistance or any real assistance to a jury in my view. It is again material, which was rightly disclosed, and which has rightly been examined, but it falls far short of the sort of material that I would want to put before a jury as relevant to the issues in this case. C1 is a young child, things are being said in the playground, this is nowhere near the threshold in my view. I am mindful of the eloquent way this case has been argued before me. I am mindful of the defence sensitivities to the fact that this case comes down entirely to the credibility of these two children. I am mindful of their desire to attack that credibility by any means whatsoever. But unfortunately, the material that they seek to deploy in this matter amounts to little more than mudslinging; it is not substantial enough for me to allow to go before a jury applying the test under s.100. Of course, I will keep the matter under constant review."

The appellant's submissions

23. In summary Mr Paul Jarvis, who did not appear at the trial, submitted on behalf of the appellant that:

i. The test for admissibility under s.100(1)(b) which the judge was required to apply, was whether the proposed bad character evidence would, according to a fair-minded tribunal, have a "bearing upon" or "affect" the worth of C1's evidence (Brewster at [21] and [23]);

ii. The judge did not apply that test. The judge failed to grapple with the principles laid down in Brewster;

iii. A month before making a complaint to her parents about what the appellant was alleged to have done to her, C1 made what, if they referred to medical procedures, must have been untrue statements to her teacher, one of which concerned physical contact between another person and an intimate part of her body, whether her vagina or her anus. The defence case was that C1 had made untrue statements about physical contact between the appellant and an intimate part of her body, her vagina, (count 1);

iv. The untrue statements made by C1 to her teacher were capable of having a bearing on whether her evidence in relation to count 1 was untrue. Because the judge failed to admit that bad character material applying that test, the jury was impermissibly denied the opportunity of deciding whether that evidence would assist them in their assessment of C1's credibility. For this reason, the convictions on counts 1 and 4 are unsafe;

v. If the convictions on counts 1 and 4 are unsafe then, given the cross-admissibility direction, the conviction on count 5 is also unsafe. If, taking into account the bad character evidence, the jury had decided not to convict the appellant under counts 1 and 4, then the evidence on those counts could not have influenced their consideration of count 5. On that basis the jury could have reached a different conclusion on count 5.

Discussion

24. We are grateful to Mr Paul Jarvis who appears on behalf of the appellant and to Mr Gerald Hendron, who appears on behalf of the prosecution, for their helpful written and oral submissions.

25. Section 100(1) of the 2003 Act provides:

> "(1). In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
>
> (a) …..
>
> (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,
>
> or
>
> (c) ……"

26. It is common ground that the creditworthiness of C1 was a matter in issue in the trial of substantial importance in the context of the case as a whole. The appellant challenges the judge's decision that the bad character evidence upon which the defence sought to rely did not have substantial probative value in relation to that issue, and so did not satisfy that requirement of s.100(1)(b). Mr Jarvis relies heavily upon the judgment of Pitchford LJ in *Brewster*. It is necessary, however, to read that authority in context.

27. In his judgment in *R v Braithwaite* [2010] EWCA Crim 1082; [2010] 2 Cr. App. R. 18 handed down two days before *Brewster*, Hughes LJ stated that whether the relevant evidence has substantial probative value is a matter of judgment for the trial judge (see [12]). Accordingly, this court will not interfere with the evaluation made by a judge on such an issue unless he has misdirected himself on a matter of legal principle, or his judgment was plainly wrong, that is, it was one to which no judge acting reasonably could have come (*R v Hanson* [2005] 1 WLR 3169 at [15]).

28. It is also necessary to refer to the subsequent judgment of Pitchford LJ in *R v Phillips* [2011] EWCA Crim 2935; [2012] 1 Cr. App. R. 25 in which he drew upon *Braithwaite.*

29. A number of principles on the application of s. 100(1)(b) of the 2003 Act have been established by *Braithwaite* and *Phillips*:

    i. The test of "substantial probative value" in s. 100(1)(b) imposes a higher requirement than the test in s.101(1)(d) of whether evidence is simply relevant. The former is a test of the "force" of the evidence which it is proposed to adduce. It involves an assessment of whether the evidence in question *substantially* goes to show the point which the defendant is seeking to prove;

    ii. This assessment is highly fact sensitive in each case;

    iii. The probative value of that evidence falls to be assessed in the context of the case as a whole. This means that it may sometimes be appropriate for the trial judge to consider whether or not it adds significantly to other more probative evidence already admitted in the case which is directed to the same point;

    iv. If the judge decides that the test in s.100(1)(b) is met, then he or she has no residual discretion to refuse to admit the evidence;

    v. Accordingly, it is important that the threshold for admissibility under s.100(1)(b) is not understated. Its purpose is to ensure as far as possible that the probative strength of the evidence removes the risk of unfair prejudice.

30. In *Brewster* the court was concerned with evidence of the complainant's bad character which was relevant to her creditworthiness, an issue of substantial importance in that case. A central issue was whether for the purposes of s.100(1)(b) convictions for offences which do not involve the making of false statements or the giving of false evidence are incapable of having substantial probative value, by analogy with *Hanson* on s.101(1)(d). This was labelled "the narrow view" of the ambit of s.101(1)(b). The court held that s.100(1)(b) was not so limited ([20]).

31. It was in that context that at [20] *Brewster* drew upon an analysis by Professor John Spencer QC in his work Evidence of Bad Character (2nd ed 2009). He identified two types of case. First, some convictions or bad character "bear on" the credibility of the witness directly, because they provide a reason for doubting the truth of the evidence of the witness. Second, other convictions or bad character "bear on" credibility only indirectly, by inviting us to reason that a person who would do something like that cannot be trusted or their honesty cannot be taken for granted. He added that difficulties on admissibility may arise in the second type of case.

32. This analysis by Professor Spencer simply identified the potential relevance of two types of bad character evidence under s.100(1)(b). He did not use the words "bear on" as an interpretation of the statutory test for admissibility "substantial probative value." The words "bear on" do not have the same meaning as "substantial probative value."

33. At [21] the Court of Appeal said this:

> "In Professor Spencer's view, with which we respectfully agree, the purpose of section 100 was to remove from the criminal trial the right to introduce by cross-examination old or irrelevant or trivial behaviour in an attempt unfairly to diminish in the eyes of the tribunal of fact the standing of the witness, or to permit unsubstantiated attacks on credit. Those convictions which will be material to the second category to which Professor Spencer refers are those which would have a bearing, in the mind of a fair-minded tribunal, upon the worth of the witness's testimony ……"

34. In this passage the Court of Appeal was simply endorsing Professor Spencer's analysis of the potential *relevance* of two types of bad character evidence under s.100(1)(b). It is in that sense that the court referred to "convictions material to the second category" as having "a bearing" upon the worth of a witness's testimony. As Mr Jarvis rightly accepted, the words "a bearing upon" connote simple relevance. In our judgment it follows that they do not express the substantial probative value test which governs admissibility under this provision.

35. In the first part of [22] the Court of Appeal moved on to consider admissibility under s.100(1)(b). They said this:

> "*It seems to us that the trial judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it is reasonably capable of assisting a fair-minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief. Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness.* In reaching this view, with respect to the court in *R v S* [2007] 1 WLR 63 , we agree with the observations of Hughes LJ in *R v Stephenson (David)* [2006] EWCA Crim 2325. It does not seem to us that the words "substantial probative value", in their section 100(1)(b) context, require the applicant to establish that the bad character relied on amounts to proof of a lack of credibility of the witness when credibility is an issue of substantial importance, or that the convictions demonstrate a tendency towards untruthfulness. *The question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness's creditworthiness*." (emphasis added)

36. The words we have emphasised do not alter the statutory test "substantial probative value". They simply describe in practical terms the exercise which a judge undertakes when he or she applies that test.
37. In the second part of [22] the Court of Appeal said this:

> "When the evidence is reasonably capable of giving assistance to the jury in the way we have described, it should not be

> assumed that the jury is not capable of forming an intelligent judgment whether it in fact bears on the present credibility of the witness and, therefore, upon the decision whether the witness is telling the truth. Jurors can, with suitable assistance from the judge, safely be left to make a proper evaluation of such evidence just as they are when considering issues of credibility and propensity arising from a defendant's bad character."

38. This passage did not purport to define the test that the judge should adopt when determining admissibility under s.101(1)(b). Instead, it was simply saying that, if admissible, it will be for the jury to evaluate the bad character evidence. Even if a judge decides that it has "substantial probative value" the jury is not bound to accept that it has any bearing on credibility. They may conclude that it does not. Even if they conclude that it does, it still remains a matter for them to decide how much weight to give to that material, alongside other relevant evidence. Accordingly, its is wrong to suggest that the words "bear on" in that passage were put forward as the test for admissibility.

39. Then at the end of [23] the Court of Appeal said:

> "If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue. Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age of the convictions. However, we do not consider that the conviction must, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as *affecting* the worth of the witness's evidence." (emphasis added)

40. Again, counsel relied upon the word "affecting" in that last sentence, as representing the test to be applied by a judge when determining the admissibility of bad character evidence going to an issue as to credibility under s.100(1)(b). That is an incorrect reading of *Brewster.* That last sentence was simply restating the court's rejection of the proposition in the immediately preceding sentence – i.e. the "narrow view" of the scope of s.100(1)(b) in relation to credibility and trustworthiness.

41. Accordingly, when *Brewster* is read fairly and as a whole, the decision did not purport to put a gloss on the statutory test – "substantial probative value." As we would expect, the true understanding of *Brewster* is consistent with the principles laid down in *Phillips* and in *Braithwaite.*

42. We reject Mr Jarvis's criticism of the judge for failing to apply as a test for admissibility whether the bad character evidence "affected" or had a "bearing upon" the creditworthiness of C1. For the reasons we have given, *Brewster* did not suggest that those expressions are tests for the admissibility of evidence going to creditworthiness under s.100(1)(b). We also reject the submission that the judge failed to engage with the principles on admissibility discussed in *Brewster*. The

judge considered whether the material would be reasonably capable of assisting, or would provide any real assistance to, the jury on the issue of C1's credibility. He therefore did apply the appropriate approach described in *Brewster*. He also made it plain that he was applying the test of whether the evidence had substantial probative value in relation to C1's credibility. Accordingly, we reject the criticism that the judge erred as a matter of legal principle.

43. We have gone on to consider whether the judge's assessment that the evidence did not have substantial probative value was not one to which any reasonable judge properly directing themselves on the law could have come.

44. We conclude that the judge's assessment cannot be treated as *Wednesbury* unreasonable. The appellant's criticism of the judge's ruling needs to be seen in the context of the case as a whole. C1 gave specific evidence upon what the appellant was said to have done to her and when and where that happened. There was evidence of her complaints to her mother. In addition, the defence carefully explored before the jury the credibility and reliability of C1, both in cross-examination and submissions. For example, it was put to her that she had a motive to lie about counts 1 to 4 because she did not want her mother to resume her relationship with the appellant's brother. Counsel tested C1 on important details of the account she had given and on potential inconsistencies. There was no explanation from the defence as to how the school records add significantly to the points going to credibility which were deployed in the earlier cross-examination. Furthermore, the s.28 cross-examination of C1 took place about 9 months before the trial and the application to adduce the bad character evidence was not made until the second day of that trial. There has been no explanation as to why the defence considered the material to be of substantial probative value at the trial but did not seek to raise that issue at the time of the cross-examination or shortly thereafter. In the final analysis, the school record is a short note of a single conversation which did not relate to any allegation of sexual behaviour. Taken overall, the judge was entitled to say that this did not have substantial probative value to C1's credibility.

45. We also bear in mind that C2 gave independent, cogent evidence of the oral rape carried out on her.

46. For all these reasons we see no merit in the challenge to the judge's decision on the bad character evidence and no basis for treating any of the convictions as unsafe. For these reasons, the appeal must be dismissed.