WARNING: This is a case to which the provisions of the Sexual Offences (Amendment) Act 1993 apply. Under those provisions, where allegations have been made that sexual offences have been committed against a person or persons, 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 the offences. This prohibition applies throughout the .person's lifetime, unless waived or lifted in accordance with section 3 of the Act

Neutral Citation No [2024] EWCA Crim 1614
IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT IPSWICH
HER HONOUR JUDGE PETERS
T20217170

Case No 2024 00477/00478 B2
Royal Courts of Justice
Strand, London
WC2A 2LL

Tuesday 17 December 2024

Before:
LADY JUSTICE ANDREWS
MR JUSTICE BRYAN
MR JUSTICE SAINI

REX
v
AFH

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR ANTHONY METZER KC appeared on behalf of the Applicant
MS EMMA NASH appeared on behalf of the Crown

J U D G M E N T

LADY JUSTICE ANDREWS:

1. These applications for extensions of time of 190 days in respect of leave to appeal against conviction and 71 days in respect of leave to appeal against sentence, for leave to adduce fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968, and various ancillary or consequential applications were referred to the full court by the single judge. The court has pragmatically considered the evidence which the applicant wishes to adduce *de bene esse*.

2. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1993 apply. Under those provisions, where allegations have been made that sexual offences have been committed against a person or persons, 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 the offences. This prohibition applies throughout the person's lifetime, unless waived or lifted in accordance with section 3 of the Act. Accordingly the two child complainants in this case are entitled to anonymity. We shall refer to them as C1 and C2 respectively. In the light of the relationship between the complainants, their mother and the applicant, there is a real risk of jigsaw identification, and therefore in any report of this judgment the mother and the applicant should also be anonymised. We shall refer to the mother as M.

3. On 3rd July 2023 in the Crown Court at Ipswich before Her Honour Judge Peters and a jury, the applicant was convicted by a majority verdict of eight counts on an eleven-count indictment. Counts 1 and 6 were single incident counts of sexual assault against C1; count 2 was a multiple incident count of sexual assault against C1; count 3 was a single incident count of assault by penetration against C1; count 4 (the most serious count on the indictment) was a multiple incident count of assault by penetration against C1; counts 8 and 9 were single incident counts of sexual assault against C2; and count 11 was a single incident count of assault occasioning actual bodily harm against C2. The jury were unable to agree on the remaining three counts which were ordered to lie on the file.

4. On 30 October 2023, having in the meantime parted company with his trial solicitors and counsel, and instructed leading counsel, Mr Stephen Harvey KC, to advise and represent him on a direct access basis, the applicant was sentenced to a total of 15 years' imprisonment. The judge treated count 4 as the lead offence and reflected the overall culpability and harm in her sentence on that count, passing concurrent sentences on the remaining counts to reflect totality. The Respondent's Notice indicates that this approach was discussed in court and agreed to be appropriate by both counsel at the sentencing hearing. 15 years is 2 years above the maximum tariff in the guidelines for a single Category 2A offence of assault by penetration.

5. Mr Harvey settled the grounds of appeal against conviction and the grounds of appeal against sentence. In a document dated 1 February 2024 Mr Harvey explained in great detail the reasons for the delay in making the applications relating to the appeal against conviction. We have taken those explanations into account, including the fact that the applicant's instructions have been conveyed via his wife, who lives in the United States of America, and with whom he remains in regular contact from prison.

6. Mr Anthony Metzer KC has since taken over conduct of the case on behalf of the applicant. We are very grateful to Mr Metzer and to Ms Nash, who appears on behalf of the Crown as she did at trial, for their helpful oral submissions this morning. In fairness, it can be

observed that Mr Metzer has put the applicant's case as concisely and eloquently as one might expect from eminent King's Counsel instructed in a case of this kind, with a high degree of realism but also with as much force as he felt appropriate. Mr Metzer made it very clear to us in the course of his oral submissions that no criticism was being advanced against either of trial solicitors or counsel, and indeed that no criticism is being advanced of Mr Harvey who had retired from the case for professional reasons in case the court might consider that he was to blame for the some of the delay. That is not our view, but we were grateful for the explanation as to why he handed over the case to fresh counsel.

Background

7. The applicant was in a long-term relationship with M from 2006 until early 2019. They did not live together but the applicant regularly stayed over at M's property. The relationship had its ups and downs, particularly in the last 5 years. M stated in evidence that the relationship ended on 5 January 2019; the appellant stated that it ended on 12 January, though he went back to collect his belongings from the property later that month.

8. C1 and C2 are twins. They were 13 years old at the time of the alleged offending. Both suffered from mental health issues, which were put before the jury in the form of agreed facts. C1 was diagnosed with anorexia nervosa in or around May 2018; C2 used to self-harm by cutting her arms and legs.

9. The applicant alleges that shortly after the split he discovered that M had rekindled a relationship with someone with whom she had previously had an affair whilst they were together. The applicant confronted the other man on 27 January 2019, which led to a physical altercation between them. He alleged, and M denied, that when he left, she told him, "You're going to regret it". At the time he believed this was a reference to her relationship with the other man.

10. On 28 January 2019 C1 sent a text message to her mother stating that she had seen the applicant driving past her school and she was scared of him. After her mother sought to reassure her, C1 then sent a message alleging that she needed to tell her mother something about the applicant: "He used to touch me inappropriately and when I tell him to stop, he got angry with me. I've always been too scared to tell you in case you thought I was disgusting, but it's breaking me down and keeping it inside. This he really scares me. He makes me feel disgusting. I'm glad he's gone. I'm sorry."

11. On the same day C1 disclosed to a support worker at her school that the applicant had done things to her which were wrong, and a referral was made to the Multi-Agency Safeguarding Hub by a member of the school safeguarding team. On 30 January 2019 a police officer and a social worker visited C1 at home and conducted a joint investigation. C1 said that she had been sexually abused by the applicant. C2 was also spoken to. She said that the applicant had tried to strangle her. She indicated that he had also sexually abused her but said that she was not yet ready to talk about what had happened.

12. C1 underwent an achieving best evidence (ABE) interview on 4 February 2019. She said that the offences began when the applicant was looking after her when she was suffering from what was later diagnosed as anorexia. She had been put on bed rest at home following medical advice in April 2018. The applicant spent three to four days a week at M's home looking after her whilst M was at work. C1 said that she was subjected to a year's worth of regular sexual abuse by him which continued even after her return to school in September

2018. She said that he had digitally penetrated her, touched her breasts, and attempted to lick her vagina. He had also made her touch his penis.

13. C2 was ABE interviewed on 8 February 2019. She asserted that the applicant had become angry with her after he believed that she had self-harmed in the bathroom and had physically assaulted her. He had thrown her on the bed and had strangled her to get hold of her phone. That incident occurred in around September 2018. She stated that on another occasion he had touched her leg and grabbed her bottom and breasts and told her that his 'John Thomas' was getting hard.

14. The applicant was arrested on 20 February 2019. He declined the offer of a solicitor and was interviewed without one present. He vehemently denied all the allegations. On 29 February he provided his phone for examination. The contents were downloaded and it was returned to him on the same day. A full report was disclosed and some individual messages were disclosed on 21 October 2021. There were no messages found between him and C1 or C2 on that phone in the period between 28 January 2018 and 28 January 2019.

15. The cross-examinations of C1 and C2 were recorded, pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999. Both girls denied making up the allegations. C1 explained that she had found the applicant frightening. She said that he and her mother would often break up and then resume their relationship.

16. At trial the prosecution relied primarily on their evidence and on evidence from M. Other witness statements which related to the recent complaints were read.

17. M said that the applicant never really got on with C2 as he found her hard to deal with. However he generally got on well with C1 and M thought that they were close. She said that the applicant looked after C1 when she was on bed rest when M was working. C1 had nightmares for quite a long time and said she saw a random man going into her room. On many nights M had ended up laying down with her to get her to go to sleep. M then described many of the problems that both her daughters had experienced and how a deterioration in C1's mental health had led to her being admitted to hospital for two weeks in October 2018. M also gave evidence about receiving the complaint by C1 in January 2019 and her response to it.

18. The defence case was that C1 and C2 had colluded to make false allegations against the applicant. When C1 was asked, "Has mum asked you to say these things?" she said "No". It was put to C2 that she had made the allegations up to get attention, and she denied it saying, "I'm not being funny, but I'm failing to see what I'm getting from making this up; it's not relevant. No-one would make this up for attention. No, I didn't make it up for attention." It was suggested to M in cross-examination that she had an input into the girls making their allegations. She responded, "I've had no input into [C1] making her complaint. I've not put them up to this. Why would anyone want to say that someone did that to them? Why would you want someone to believe that had happened? Why? She's still having counselling now."

19. When he was cross-examined, the applicant said that it was not his position that M must have put C1 and C2 up to it. The allegation came from C1 originally. C1 must have made it up. He knew that she had changed but he did not know what had changed. Despite that, the case as now put in the advice and grounds settled by Mr Harvey KC squarely accuses M of putting the girls up to it.

20. The applicant knew nothing about the allegations until he was arrested. He said his relationship with C1 was much better than with C2, although he used to dye C2's hair. C1 used to hear voices and imagined a shadow of a man in her bedroom. The applicant said she was mixed up and used to punch her head to stop her talking to herself. He said he had split up with M temporarily before Christmas 2018 and it was C1 who had begged him to come back because M was so upset, so he did. When he finally left, he said that C1 helped him with his belongings and had tears in her eyes. He told her that he would be there for her if she needed him. After he left, C2 went round to his flat with a friend because she said she wanted to see how he was. C2 had said the visit was to collect some hair dye, but the applicant said that that was not so.

21. In his police interview, the applicant told the investigating officer that he and C1 were "always on Instagram" and that they shared an interest in the cartoon South Park. He said that they sent each other pictures or shared them but that this had stopped since the break-up.

The application to adduce fresh evidence

22. Section 23 of the Criminal Appeal Act 1968 provides, so far as relevant, as follows:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—
>
> …
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (a) whether the evidence appears to the Court to be capable of belief;
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

23. Following the applicant's conviction, his daughter discovered an old phone of his when she was clearing out his flat. The applicant's wife commissioned an interrogation of it by a firm called Evidence Matters. The analysis retrieved a journal which the applicant had made on his phone which amongst other matters said that the thought of being accused of abusing a child made him physically sick. He went on to say:

> **"**Then add to that … a girl accusing you, 4 weeks before walked out to ur car with u and hugged u saying 'u will always be my Dad' we was both tearing up, then txting and sending silly images on Instagram, her mum and me still the same, then her mum turns, i have to block her number then it just goes quiet the next thing u hear is your daughter calls saying the girl who had been like her sister for

> most of her life, was around the estate telling everyone that i had hurt her."

It continued by emphatically denying his guilt. As the Crown has rightly pointed out, this is a self-serving statement which would have been inadmissible on any issue which is the subject of a prospective appeal. It cannot be adduced as fresh evidence. In fairness, Mr Metzer did not press the part of the application in the grounds which sought to introduce it.

24. After reading this message, the applicant's wife obtained his log-in details and obtained the Instagram messages passing between him and C1. We have read those messages, which were exhibited to the application to adduce fresh evidence. The applicant seeks to adduce certain of the messages in evidence. Not all the messages on the old phone were downloaded. It is alleged that they reveal that C1's relationship with the applicant was not as she portrayed it in her evidence. In particular C1 was asked specifically if she had contacted the applicant before Christmas 2018 and after the alleged offences and she said, "No, not that I can remember".

25. It is of some importance to note that the evidence does not flow from the discovery of the old phone but simply from logging on to the applicant's Instagram account, something that he could easily have done at any time. On behalf of the Crown, on the assumption that the messages ascribed to C1 were in fact sent by her, Ms Nash accepts that the material would likely have been admissible at trial and could have been deployed by trial counsel in cross-examination of C1. However, as Mr Metzer accepts, the applicant has always known his log-in details to his Instagram account. He could easily have accessed them at any stage from after his arrest to the end of trial. He had hardly forgotten about the Instagram messages because he mentioned them in the course of his police interview. The only excuse for not mentioning them to his solicitors and trial counsel or for seeking to get hold of those Instagram messages at an earlier stage was an alleged lack of technical competence, but as Mr Metzer was able to demonstrate, and as the court can probably take judicial notice, it is simple (by just looking at the matter on Google) with three strokes of the keyboard, to access Instagram.

26. Even if there had been a reasonable explanation for the failure to adduce the evidence at trial, when seen against the background as described by C1 and M, Ms Nash submits that taken at its highest the material does not have the potential to render the convictions in relation to C1 unsafe, by virtue of having such a detrimental effect on her credibility. In any event it cannot, she submits, impugn the credibility of M or C2 so as to render the convictions in respect of C2 unsafe.

27. Sadly, as in many cases of this nature, the relationship between the protagonists was complex and not all elements of it were bad. All the witnesses, including C1 herself, agreed that apart from the abuse, the applicant generally had a very good relationship with C1. C1 herself said in cross-examination that he treated her better than her sister and that he treated her like a daughter. The messages from 2018 simply indicate a 13-year-old replying to someone who was effectively her stepfather, and who on her account she was afraid of upsetting due to his temper, at a time when she was keeping her abuse a secret. After the relationship with her mother ended, it is plain that it was the applicant who instigated most of the contact and C1's responses are really brief and largely in response to direct questions. No particular significance can be attached to the fact that they were sometimes signed off

with an 'x', as that is a common signoff. The communications ceased altogether after C1 made her complaint to the police.

28. It is also pointed out in the Respondent's Notice that an allegation that C2 was captured on CCTV going to the applicant's flat in February 2019 is contrary to the date that was put to C2 at trial, which was a January date. C2 agreed that the day that she says she went to the flat to collect her hair dye was the same day as she went on a bowling trip with the friend who accompanied her. As a result of that friend's witness statement (which was not challenged), it became part of agreed fact 3 that that date was 26 January 2019. C2, the friend and M all gave evidence that the purpose of the visit was to pick up C2's hair dye. In evidence the applicant agreed that C2 did call round to the flat to ask for hair dye and that it was a short visit. That predated any allegations of abuse and occurred at a time when, according to C2, she expected the relationship between her mother and the applicant to resume. It also fits with messages from the applicant on 27 January asking to come over and dye C2's hair that day and M telling him to drop the dye over as C2 could do it herself. On 29 January he sent a message to C2, which was in the undisclosed material, stating "I had your toner".

Discussion

29. In order to satisfy the requirements of section 23 the court has to be satisfied that it is necessary or expedient in the interests of justice to receive the fresh evidence. The section sets out a number of matters which it is mandatory for the court to consider.
- Firstly, whether the evidence appears to the court to be capable of belief.
- Secondly, whether it appears to the court that the evidence may afford any ground for allowing the appeal.
- Thirdly, whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal.
- Fourthly, whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

30. The evidence would have been admissible in the proceedings below, and it is conceded that it would have been, and that it is possible that counsel for the defence may have deployed it in cross-examination of C1. The evidence is also capable of belief. It is possible with expert evidence to attribute the messages to the protagonists, and there is no reason to suppose that the messages are anything other than genuine.

31. There is no reasonable explanation for the failure to adduce the evidence in the proceedings. As we have already said, it would have been perfectly possible for the applicant to have told his legal team about these messages and to have elicited help (if he needed it) in retrieving them had he though they contained information of any importance. That factor is not necessarily fatal. It is important for the court to carry out a full evaluation of the evidence, and even in cases where there has been a great deal of delay and there is no excuse, it sometimes happens that material which could and should have been deployed at trial comes to light later which is of such significance that it is likely to be contrary to the interests of justice not to allow that evidence to be admitted for the purposes of an appeal because it clearly would afford a ground for allowing an appeal.

32. That, however, is not this case. Although Mr Metzer has said everything that could possibly have been said in support of the submission that he made, taken at its highest this is material which counsel may have deployed in order to reinforce something which was effectively

common ground at trial, namely, that aside from the abuse the relationship between C1 and the applicant was generally a very good one - something which C1 herself accepted, as did her mother. It is, in our judgment, insufficiently probative of a lack of credibility, let alone collusion between C1 and C2 or between either of the girls and their mother, as to give rise to any concerns about the safety of the conviction or as to afford any grounds for allowing an appeal against conviction. Taken at its highest, it simply shows a degree of affection, which was never really in issue.

33. As Ms Nash points out, there were many points which affected the complainants' credibility which were well ventilated before the jury, who were properly directed by the judge, and it is wholly unlikely that this further material would have made any difference to the result of the trial. Ultimately, the jury were able to assess the credibility of the complainants. The case for collusion was put to them fairly and squarely. They denied it, and the jury chose to accept their evidence.

34. For those reasons, we refuse the application to adduce this evidence as fresh evidence. It follows therefore that we refuse the application for leave to appeal against conviction and all ancillary applications therefore fall to the ground. It is unnecessary for us to consider the application for an extension of time in those circumstances.

35. Turning to the appeal against sentence, the accepted range for a single Category 2A offence is one of 5 to 13 years, but in this particular case the judge had to carry out a sentencing exercise which reflected the totality of the offending. The sentence which she imposed on count 4 was designed to reflect the criminality of the following overall offending against two vulnerable 13-year-old children:

(1) At least eleven occasions of digital penetration of C1's vagina.
(2) At least eleven occasions of touching C1's breasts and vagina, and one occasion of putting her hand on the applicant's penis, which for a single offence carries a starting point of 4 years with a range of 3 to 7.
(3) Two occasions of touching C2's breasts and vagina, each having a starting point of 4 years with a range of 4 to 7.
(4) One count of actual bodily harm on C2, which has a starting point of 18 months with a range of 36 weeks to two-and-a-half years.

There were also aggravating features, including the effect on both girls as detailed in the victim personal statements.

36. The judge was very careful in her sentencing remarks to give full credit for all available mitigation that was available to the applicant. Mr Metzer, in his oral submissions, prayed in aid the generally good relationship between the applicant and the girls (particularly C1) and his general affection for them in his position of responsibility. He submitted that when one stood back and looked at the overall period of 15 years, it was just too long to reflect the totality of the offending. Despite those submissions, in our judgment, bearing in mind the circumstances of the individual offences and the cumulative criminality, a sentence of 15 years for 25 sexual offences and a related assault on two separate 13-year-old children who were vulnerable cannot possibly be described as manifestly excessive. For this reason, leave to appeal sentence is also refused.

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400 Email: Rcj@epiqglobal.co.uk