Neutral Citation Number: [2024] EWCA Crim 899

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT

CASE NO 202401943/B5 & 202401944/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 23 July 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE CUTTS DBE
THE RECORDER OF WOLVERHAMPTON
HIS HONOUR JUDGE MICHAEL CHAMBERS KC
(Sitting as a Judge of the CACD)

REX
V
AMF
AZJ

APPLICATION FOR LEAVE TO APPEAL A TERMINATING RULING UNDER S.58 CRIMINAL JUSTICE ACT 2003

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MR S BAILEY appeared on behalf of the Applicant Crown
MISS C BRAY appeared on behalf of the Respondent Defendant AMF

MR A HOWARTH appeared on behalf of the Respondent Defendant AZJ

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. We consider that those provisions shall not apply so that our decision may be reported. We consider that this is appropriate. The judgment will be anonymised. The defendants in the Crown Court will be referred to as AMF and AZJ. The details of the case will be set out in such a way as to prevent any prejudice to future proceedings.
2. On 29 April 2024 the trial of AMF and AZJ began in the Crown Court. AMF was charged on counts 1 to 19 of the indictment with historical sexual offences committed between 1989 and 1992. Two separate victims were said to have been abused by him. The victims, brother and sister, were aged between 10 and 13. AMF, then a young male, was aged between 15 and 18. The offences alleged included buggery (what would now be called anal rape) of the boy and rape of the girl.
3. A third victim, to whom we shall refer as VV, was alleged to have been sexually abused by both AMF and AZJ between 1994 and 1996. VV was a boy aged 13 or 14 at the time. By now AMF was aged between 20 and 22. He was in a relationship with AZJ a young female who was a year younger than him. Each defendant was charged with indecent assault and indecency with a child. Counts 20 and 21 charged AMF; counts 22 and 23 charged AZJ.
4. As the prosecution case was nearing its close, the judge invited consideration as to whether there was sufficient evidence to go to the jury in relation to counts 20 to 23. Having heard submissions he concluded that there was not. He delivered a full ruling on 3 May 2024. This was on a Friday shortly before the midday adjournment.
5. The prosecution was given time to consider the position. The following Monday was a bank holiday, so the court did not sit. On Tuesday 7 May 2024 the prosecution by email

informed the court that the prosecution intended to appeal against the ruling, pursuant to section 58 of the Criminal Justice Act 2003. An undertaking as to acquittal was given.

6. The jury were discharged from giving any verdicts. There was no application for expedition of the appeal.

7. Before we deal with the procedural issues that arise, we make these observations. The judge's ruling concluded at about 12.30 p.m. on 3 May 2024. Whatever the outcome of the appeal, there were two complainants who had given evidence. Whatever the outcome of the appeal, the discharge of the jury meant that there would have to be a retrial. It appears that no investigation was carried out as to whether it might be possible to retain that jury. That would have avoided requiring the first two complainants to give evidence again. In the event of a successful appeal, VV would have completed his evidence. No suggestion was made to the prosecution that it would have been to everyone's benefit for a decision to be made on the same day as the ruling. This court is well capable of accommodating this kind of appeal at very short notice should the need arise. In this case there is a good prospect that, had the jury indicated a willingness to sit after a delay of a week or thereabouts, the appeal could have been disposed of within that timescale. There was and is nothing complicated about this case. We urge prosecutors faced with a factual and evidential position such as arose here to give proper consideration to seeking expedition.

8. Pursuant to Criminal Procedural Rule 38.3(2)(b) the prosecution were required to serve an Appeal Notice no later than five business days from 7 May 2024 on the Crown Court, the Registrar and the defence. The fifth business day was 14 May 2024. No Notice of Appeal was served on that day. It was not until nearly midnight on Friday 24 May 2024 that the Form NG prescribed by the court as the Appeal Notice was emailed to the

Criminal Appeal Office and the solicitors acting for the defence. By reference to Criminal Procedure Rule 4.1(1) that means that the effective date of service was Tuesday 28 May 2024 (Monday 27 May 2024 was a bank holiday).

9. The prosecution apply pursuant to CPR 36.3(a) for an extension of time to serve the Appeal Notice. The court has a discretion under the rule to extend time even after time has expired. In this case the prosecution explanation for the delay of eight business days, i.e. more than twice the period allowed for service under CPR 38.3 is that "there was a misunderstanding between counsel and the CPS as to who was serving Form NG", both believing that the other had served the form on all parties. The assertion is that each party had completed parts of the NG form. We find that explanation difficult to follow. Counsel who prosecuted in the Crown Court prepared a short document headed "Grounds of Appeal" which reads as follows:

> "In ruling that there was insufficient evidence for counts 20-23 to continue, the learned Judge came to a decision that it was not reasonable for him to have made, in that the court:
> 1. made a decision as to the credibility of the witnesses which was beyond its proper domain; and
> 2. failed to allow sufficiently or at all for the circumstances of any historic sexual abuse case, and the particular facts of the instant case."

10. The document bears the date 22 May 2024. The Form NG, which we have seen, is dated 7 May 2024. It was signed by a Crown Prosecutor. Within the body of the form, as it was completed, appeared the text which we have just quoted. On the face of it therefore the form simply incorporated what counsel had drafted. There is no indication that the form was completed as a joint effort. The date on the form and the date of counsel's document are not consistent.

11. In our view there is no satisfactory explanation of why there was a delay of eight days in

serving the Appeal Notice. Whilst there remains a discretion to extend time in an appropriate case, the court requires some reasonable explanation of why the delay occurred. Here we have none. The prosecution argue that no party has suffered any risk of prejudice, the respondents to the proposed appeal having known since 7 May 2024 that an appeal was to be pursued and that they would learn little from the Form NG that they did not already know.

12. We consider that this argument misses the point of the time limits in CPR 38.3. The rule requires expedition on the part of the prosecution so that all parties, in particular but not exclusively the defendants, know where they stand. As the court said in R v H [2008] EWCA Crim 483 at [12] in relation to prosecution appeals: "There has to be a real justification for an extension of time at all and that expedition is always requisite."

13. The right of the prosecution to appeal a ruling by a trial judge is an incursion into the finality of the trial process in the Crown Court. Prior to 2003 it did not exist. The time limits relating to such appeals are very short in comparison to time limits in almost all other contexts within the criminal process. That is deliberate. If a defendant believes they have been acquitted by reason of the ruling of a trial judge, the prosecution must act quickly if they wish to challenge the acquittal.

14. The prosecution ask us to apply the overriding objective of the Criminal Procedure Rules. Dealing with a criminal case justly includes convicting the guilty. Even if we were to refuse to extend time, it is said that we risk not convicting the guilty. In our judgment there is more than one problem with that argument. First, it prejudges the issue. A reasoned assessment by a judge of the evidence on which it is said that the respondents could or should have been convicted has led to the conclusion that the evidence could not support a conviction. But second and more significantly, it is now conceded that neither

respondent can in law be convicted of indecency with a child. At the time of the alleged offences the law required the child to be under the age of 14. The prosecution accept that the evidence does not demonstrate that the victim (VV) was under 14 at the relevant time. The jury could not have convicted on those counts in any circumstances, namely counts 21 and 23. We do not consider that justice requires us to extend time for service of the Appeal Notice. The explanation for late service is not satisfactory. The time limits are important in the context of seeking to overturn the ruling of a trial judge acquitting the defendants and it is only relatively late in the day that it has been conceded that a submission of no case to answer in relation to two of the counts was unanswerable. That disposes of the prosecution's application for leave to appeal which we must refuse.

15. We propose to deal only very briefly with the substance of the proposed appeal. In the trial VV gave evidence of sexual abuse by the respondents. Had that evidence stood alone there would have been no basis for removing consideration of the counts of indecent assault from the jury. His evidence may have lacked clarity and certainty. That is not surprising given that he was giving evidence of events nearly 30 years ago. Indeed, counsel for the respondents very properly accepted that if only VV had given evidence the case in relation to him would have been left to the jury.

16. The position appeared to change so far as the judge was concerned when VV's brother gave evidence. We shall refer to him as "C". The way in which he came to give evidence was unusual. He attended the Crown Court for some reason wholly unconnected with the trial of the respondents. When he was at court, he saw and spoke to the respondents. He knew who they were. When he heard what the case was against them, he told them that the allegations involving VV were untrue. He said that he would be prepared to give evidence to that effect.

17. In the event he made a witness statement to a police officer. In the witness statement he said precisely the opposite to that which he had vouchsafed to the respondents. He said that VV had been sexually abused by the respondents. In his evidence before the jury he said he had been prepared to lie about the sexual abuse and say that nothing had happened in order to "do down" his brother with whom he had fallen out. Although he came up to proof in terms of what was in his witness statement, his evidence was singularly at odds with very significant parts of the evidence of VV. His evidence was not quite complete when the judge raised with counsel the question of the sufficiency of the evidence on counts 20 to 23 and invited submissions of no case to answer.

18. In responding in the Crown Court to the submissions made on behalf of the respondents, prosecution counsel argued that the jury would be entitled to consider the evidence of C and to reject it for completely rational reasons. There were aspects of his evidence which were inherently unlikely irrespective of what VV had said. Further, the jury knew the way in which C had come to give evidence. He was apparently willing to say one thing at one point and something wholly different but a short time later. In his ruling the judge acknowledged that submission as was made. He did not explicitly reject it. In our view that proposition would and should have been a matter for the jury.

19. In refusing the application for leave in this case we do not wish to encourage trial judges to usurp the function of the jury, particularly in cases of historical sexual abuse. However, since we have refused to extend the time for service of the Notice of Appeal, we must confirm the judge's ruling that there was no case to answer. Pursuant to section 61(7) of the 2003 Act we order that the respondents be acquitted of counts 20 to 23 on the indictment. It appears to us, the jury having been discharged on counts 1 to 19,

there must be a fresh trial in relation to those counts. That will only of course concern the first respondent. A Presiding Judge of the relevant circuit will determine the appropriate venue.

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

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