IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT WARWICK

His Honour Judge Cooke

T20227048

CASE NO 202302321/B3

NCN: [2024] EWCA Crim 96

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 23 January 2024

Before:

LORD JUSTICE WARBY
MR JUSTICE JAY
MR JUSTICE ANDREW BAKER

REX
V
L.M.S

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MISS A FAUL appeared on behalf of the Appellant
MR P FAIRLEY appeared on behalf of the Crown

J U D G M E N T
(Approved)

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.

IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE COMPLIANCE WITH OTHER RESTRICTIONS: SEE THE WARNING ABOVE AND PARAGRAPH 4 BELOW.

LORD JUSTICE WARBY:

1. There is a reporting restriction in place prohibiting any reporting of this hearing until the end of the judgment. We will review that at the end of what I am about to say.

Introduction

2. This is an appeal against conviction for historic sexual offending.

3. On 15 June 2023 in the Crown Court at Warwick the appellant was convicted of one count of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 and one count of sexual intercourse with a girl under 13 years, contrary to section 4 of the same Act. He now appeals against conviction with the leave of the single judge.

4. The complainant is entitled to lifetime anonymity by virtue of s 1(1) of the Sexual Offences (Amendment) Act 1992. We will therefore anonymise her as C. The appellant has no right to anonymity, but he is the complainant's older brother. To name him would risk identifying her. For that reason, the appellant will also be anonymised, as LMS. For the same reason, we shall anonymise other family members.

The factual background

5. The appellant was born in mid-1986. He has an older sister whom we shall call D. The complainant, C, is his younger sister, born in 1991.

6. On 2 June 2011, when he was 25, the appellant went to a police station where he told the desk officer that he had sexually assaulted his sister about 10 years earlier. The appellant was interviewed without opting to have a solicitor present. He said he could not remember exactly how old they were or the extent of the touching but had vague memories of touching C's vagina, in the bedroom of the family home. He also said that he had been smoking cannabis and taking drugs since the age of 12.

7. Enquiries were made of C, who was then aged about 20. On 20 June 2011 she was spoken to by a police officer, and stated that she had no recollection of ever having been touched inappropriately by the appellant. About 10 days later, she spoke to the Local Authority Child Services. They recorded that she said that she had lied to the police about the matter and that she did recall being abused by the appellant as a child. About a week after that C was visited by a police officer to whom she said that she could not remember any abuse but did have flashbacks involving a person whose outline she could remember and which would fit her brother. She made clear however that she did not wish to proceed with a formal complaint or prosecution as her only concern at the time was getting her two sons back from care. The case was closed.

8. On 1 June 2019 the appellant, then aged 32, went to a different police station and told the operator over the intercom that he wished to hand himself in for sexually abusing his sister. He said that he recalled doing so at the age of 14. There was a conversation with two officers, recorded on a body-worn camera in which he told them he had abused his younger sister and they explored why he had come forward to make such a confession. On 2 June 2019 the appellant was interviewed under caution in the presence of a solicitor and answered no comment to all questions asked.

9. On 14 July 2019 C made a written witness statement about the matter running to three pages and going into considerable detail. On 17 August 2020 the appellant was interviewed under caution for a second time. Again he answered no comment to all questions. In December 2020 C made a further witness statement.

10. An indictment was framed which alleged that the two offences we have mentioned were committed against C by the appellant between 1 October 1998 and 25 December 1999. The prosecution case was that both offences were committed on the same occasion and that the appellant had confessed because he had been wracked with guilt about his criminality.

The trial

11. C gave evidence at the trial. She said that the incident happened at the family home when she was seven years old in December 1998. She shared the home at that time with her mum and her step-father. They occupied one room. She had another room of a similar

size and the appellant had the box room. There was also a bathroom upstairs. She recalled that her older sister, D, had already moved out of the house at the time of the incident. Her mother and step-father had been at home.

12. C said that the offending had taken place in the dining room where she had been using the computer to do her homework. She described the room and the furniture it contained. She said the appellant had told her that they should sleep in the living room that night. As they were about to lie down, the appellant rubbed against her thighs and put his hand on her genitals over her clothing. He then put his finger inside her vagina. This gave rise to count 1. C's evidence was that she said "ow" and he stopped.

13. C said that a short time later, the appellant removed her trousers and his own, climbed on top of her and penetrated her vagina with his penis. This gave rise to count 2. C could not recall why he stopped but she later went to the toilet where she found what she called a "gunky mess". She remained upstairs in the bathroom. There was an uncomfortable atmosphere between her and the appellant and nothing of that nature happened again.

14. As we have noted, C's evidence was that all of this had taken place in December 1998. Asked by the judge how she could fix it as being that year, she said it was Christmas. The judge asked her why the Christmas of 1998 and her answer was: "You don't forget such a thing."

15. The defence case was that the appellant had neither sexually assaulted nor raped C; his confessions', were false, and made as a cry for help and at times when his mental health

had deteriorated; C's account was fabricated or at best involved her adopting what had been suggested to her after the appellant had made his false “confessions”.

16. In cross-examination it was put to C that she would not have been doing her homework on a computer in 1998 at the age of 7, and in any event there was no computer in the house until 2000. It was suggested that in 2009 C had lived with the appellant for a short while. It was also put to her that in 2011 she had denied being sexually abused by the appellant and claimed only to have had flashbacks. Her response was that she had provided police officers with a three-page statement in 2011 but the case never went to court. The police had no record of any such statement. C had made a three-page statement in 2019 but it was put to her that this statement, made over 20 years after the events she claimed to remember, went into a level of detail that showed it was fabricated.

17. The appellant gave evidence denying the offences. He stated that in late 1998 he was on the cusp of starting secondary school. He had a bedroom of his own and so no reason to sleep in the dining room. He said that their sister D was living at home. She had not moved out until 2000. There was no computer in the house until either 2000 or 2001.

18. The appellant said that he had an unhappy childhood and started smoking cannabis at the age of 12 and a year or two later, started taking heroin and then crack cocaine. He had a drug overdose when he was 15. C had lived with him and his partner in 2009. What he said to the police when he went to them in 2011 was a lie. He did it because his mental health had deteriorated and he was in the middle of a breakdown. He thought going to the police and making a confession was a way to get himself off the streets. He was also

lying when he went to the police again in 2019. He was hearing voices and felt his life was in danger and so made up the allegations, again, to get himself off the streets.

19. The defence also called evidence from his sister, D. D said that she had been living at home in 1998 sharing a room with C and that she had moved out in 1999. She did not recall there being a computer at the property until a few years after that. She said that she had not been sexually assaulted by the appellant.

20. Agreed facts that were placed before the jury included the following:-

(1) The appellant's previous convictions for theft and possessing controlled drugs between 2000 and 2020;

(2) The fact that he had no previous convictions for sexual offending;

(3) Summary details of a written witness statement made by E, a step sister of the appellant and C. E stated that she had lived at the family home for several years. For some of that time the appellant and C were also living there. E was a teenager at that time. E said that in June 2019 she had been contacted by the police who told her that the appellant had reported to them that he had sexually abused E and her brother when they were children. E stated that she was not sexually abused as a child or at all. E's brother could not be asked about the matter as he had died in 2012.

(4) Summary details of the opinions of Dr J K O'Shea, a consultant psychiatrist, concerning the appellant's mental health. Dr O'Shea reported, among other things, that the medical records showed that the appellant had suffered from very significant problems for almost all of his life. These included auditory hallucinations -hearing voices - and paranoid thinking. He had a persistent disorder of thought which the

doctor considered likely to be part of a drug-induced syndrome. Dr O'Shea had listened to the call made by the appellant to the police operator in 2019 and he had watched the body-worn camera footage from that time. His view was that the appellant appeared to have been low in mood and either under the influence of or withdrawing from medication, alcohol or illicit drugs.

The summing-up

21. The judge gave a split summing-up. He provided the jury with written legal directions before speeches and gave them his summary of the evidence after speeches and immediately before they retired to consider their verdicts.

22. The written document contained standard directions on general matters, including the roles of judge and jury, the burden and standard of proof, the need for separate verdicts and the significance of the fact that the appellant had given evidence. The judge identified the elements of the two offences with which the jury were concerned. He gave directions as to the appellant's character and his silence in interview. All of this was done in an entirely proper way, and no complaint is made of any of it. Nor is any complaint made about the judge's tailored directions on "sexual offences and the dangers of stereotyping".

23. On the issue of "delay" the judge's written directions told the jury that with the passage of time memories can becomes less clear, and this can cause specific problems where a trial takes place many years after the alleged events. The judge reminded the jury in this

context that the burden of proof lies with the prosecution and that it follows that "… when considering the impact of the passage of time on the quality or quantity of evidence available, the benefit of any doubt that is created thereby must go to the defendant." No criticism is made of this aspect of the directions, either.

24. The grounds of appeal are solely concerned with what the judge said in the second part of his summing-up, near the start of his summary of the evidence. The judge began by briefly summarising C's evidence about the incident, where it took place, and when. He then went on as follows:

> "Why the Christmas of 1998 I asked her and her answer was not really to provide a detailed explanation but to say, 'You don't forget such a thing'. So, in other words, she's always thought of it as 1998 and she's settled on that view.
>
> You're going to need to think about this because various points are made; how does that square with [LMS's] evidence; how does it square with [D's] evidence; can it have been in 1998? What you can do, and you may find it useful to do it, each of you, within your own head to the extent that it helps you share the results of it in the course of your discussions. Play a little thought experiment. We're all adults. Think back to your own childhood, think back to when you were 7 or 8. I'm going to show my age here but I must have 30 years on [C], so I'll think back to 1968 when I was 7 and Christmas of that year. Now, my thought experiment tells me this, I remember that Christmas for this reason: I had measles, I was very poorly and I felt rotten the whole time. The only thing that interested me about Christmas 1968 was I had a torch, whether it was a Christmas present or not I do not know, I just remember shining it round the room in which my sickbed was and Apollo 8 was circumnavigating the moon; that's what I remember.
>
> You can perform a similar thought experiment; think back to the Christmas when you were 7. Now, I remember that and still a space-nut now, but that's all I remember. Can I remember anything about Christmas 1969, 1970; no. Not a thing. Nor, indeed, 1967 for that matter. As I say, it's an exercise you can perform for yourselves. It's not just confined to [C]. [LMS], how much of such

> matters do you remember from when you were 12? Do you remember the sequence in which furniture came and went into your parents' home? I struggle with detail about that. When did the computer first make its appearance in your home? Can you date it with accuracy or do you have a broad sense of oh, there must've been a computer there by X because ...
>
> This is the sort of approach to take for these rather vexed questions. You might think that what you would undoubtedly remember is if you had been the victim of or indeed if you had committed a serious offence against a family member; the question of furniture the layout of room, use of room, acquisition of the computer may fall into a different category. Things for you to think about."

25. The judge concluded his summary of the evidence just before the midday adjournment. When the jury returned, he directed them that the dates in the indictment were not material. He said this:

> "You know there's a question mark for reasons that have been even addressed about in the course of this morning, about whether [C] has necessarily got it right in her belief that this was 1998, but that's not what the case is about. The case is about whether these things happened. So, it doesn't matter where within that date span, even if it's slightly outside that date span, that these things happened. The issue you have to resolve is whether it did."

The date span referred to was that which was contained in the indictment.

26. The following day, having received appropriate directions, the jury returned majority verdicts of guilty on each count.

The appeal

27. The grounds of appeal allege that the passage of the summing-up which we have quoted

amounted to a material irregularity which undermines the safety of the convictions.

Miss Faul, who appears in this court as she did below, makes four main points.

(1) First, it is said that this involved the judge giving anecdotal evidence on the complex issue of memory which is an area outside his expert knowledge, by suggesting that memories fall into different categories.

(2) Secondly, the judge is said to have misdirected the jury by inviting them to conduct an "experiment" in respect of their own memories at age seven based upon his own memories of certain events.

(3) Thirdly, it is argued that the judge failed to remain impartial. It is said that telling the jury of his own clear memories of Christmas when he was seven years old supported the complainant's account, as did other aspects of the passage which we have quoted.

(4) Fourth and finally, it is said that the judge's standard directions in respect of the roles of the judge and jury were not enough to neutralise the prejudice caused by these flaws. It is argued that the fact that the summing-up was split in the way we have described weakened the impact of the standard directions when it came to the key issue of memory.

28. For the prosecution Mr Fairley, who also appeared below, submits that although the course adopted by the judge was unusual it does not undermine the safety of the appellant's conviction.

29. First of all, he argues, there was nothing inherently wrong with what the judge suggested. It is something that the average juror would have embarked upon in any event, had the judge not mentioned it. These were matters of common sense that would have been

obvious points for discussion amongst the jury.

30. Secondly, Mr Fairley submits, the judge balanced matters out by pointing out that the real issue was not when it happened but whether it happened; and that one might expect a complainant to remember being sexually assaulted in the manner alleged. The evidence as a whole, submits Mr Fairley, pointed to the offence occurring when the complainant was nine and so he says the comment complained of was prejudicial to the Crown rather than to the appellant.

31. Thirdly, Mr Fairley submits, if the "experiment" is found to be inappropriate, the reference to it was small, the summing-up as a whole was balanced, and in order to convict the appellant the jury must have been sure of a number of things:
    (i) that the 2011 attempted confession and the 2019 successful confession were genuine;
    (ii) that the complainant was telling the truth and that the appellant was not;
    (iii) whenever the incident had happened, and whatever was in the room at the time the offence was committed, it had indeed happened; and
    (iv) that the evidence of the appellant's sister D and question of what furniture was in the room in 1998 were not matters that needed to trouble them.

32. In the context of these submissions we have been helpfully referred to the decisions of this court in *R v Cohen* (1989) 2 Cr. App. R 197 (CA) and *R v Evans (David)* (1990) 91 Cr. App. R 173, and the decision of the Privy Council in *R v Mears* (1993) 97 Cr. App. R 239.

Discussion

33. The general principles that govern situations such as this are clear from the authorities we have mentioned. Judges have experience of hearing evidence and assessing its cogency and relevance. When summing-up, judges are entitled to comment on the evidence and its relevance and to do so, where appropriate, in trenchant terms. But the judge must always make it clear that decisions about the evidence are entirely the province of the jury, and that the jury should only take account of any comment which the judge makes about the evidence if they agree with the comment; otherwise, such comments should be ignored in favour of the jury's own view. If that is done, then other things being equal the verdict of the jury is likely to be safe. If, however, the judge's comments are such as to create a fundamental imbalance in the summing-up, these standard directions may not be enough to remedy any unfairness.

34. Similar reasoning must, in our judgment, apply to judicial directions about the impact of delay on evidence such as the directions which were properly given in the present case. If, as here, the judge gives proper legal directions on this issue, the judge may comment on the relevant evidence without putting the fairness of the proceedings in jeopardy. If however the judge comments in such a way as to create a real imbalance, this court may conclude that the resulting conviction is unsafe.

35. The outcome of this case turned mainly on the jury's assessment of the credibility and reliability of the evidence given by the two principal protagonists. Given the burden and

standard of proof a great deal rested, of course, on what the jury made of C's evidence about the assault and the penetration. The prosecution had to make the jury sure that the substance of her evidence was true. The defence were able to point to various matters which tended to cast doubt upon that proposition. We have no doubt that in making the remarks we have quoted the judge was striving conscientiously to provide the jury with further help in resolving the issues fairly. We unhesitatingly reject any suggestion that he departed from the duty of judicial impartiality. That said, we have concluded that his observations strayed across the line that we have identified.

36. In our view, the passage quoted contains a number of general propositions, express or implied. First, that when something striking or unusual happens to someone they are likely to remember it distinctly even many years later. Secondly, that being the victim of a serious offence by a family member is "undoubtedly" such an event (or so the jury "may" think). Thirdly, that the exact date when the striking event happened may be recalled by reference to some other identifiable event at the same time, such as (in the judge's example) Apollo 8 circumventing the moon; but in the absence of such a trigger the date may not be recalled precisely. Fourthly, that a person may settle on a view about the date of an event that is wrong, without being wrong about the happening of the event. Fifthly, that a person may reliably recall a memorable event without also having a reliable memory of matters such as where it fitted in a historical sequence, or circumstantial details such as the furnishing or layout of the room in which it happened.

37. In the circumstances of this case, all of these propositions tended to favour the prosecution and to undermine the case for the defence.

38. These are all matters on which scientific expertise undoubtedly exists. But no expert evidence was before the court. It has not been the practice of the criminal courts to admit expert evidence on issues such as this. The practice has been to rely either upon the accumulated experience and wisdom of the judiciary or that of the jury. Directions based on judicial experience are developed collectively, cautiously and incrementally. The reasons are obvious. It is dangerous for individual judges, holding an authoritative role, to steer the thinking of a jury on issues such as the reliability of memory by advancing contestable theories derived from personal experience, intuition, anecdotal evidence or similar sources.

39. It is true, of course, that the judge had given the jury the standard direction that it was solely their responsibility to judge the evidence and to decide all the relevant facts of the case. He had also stated in terms, and in writing, that if he appeared to express any views concerning the facts the jury should not adopt them unless they agreed with them. We do not believe, however, that these directions neutralised the prejudicial impact of the five propositions we have drawn from the passage complained of. That is not, in our view, because the summing-up was split. It is rather a question of substance. In particular, the passage in question was not phrased in terms of comments on the evidence. It was more in the nature of guidance or directions as to the approach the jury should take. Indeed, the language used was in some respects that of judicial direction or at least strongly redolent of direction.

40. The judge told the jury in terms that C's evidence that the events happened in 1998 was a

"view" on which she had "settled". The effect of that was to downplay the significance of the conflict between her firm evidence that this was the date of the alleged incident and other evidence, inconsistent with her account, such as evidence about D's presence in the house and the date on which the computer first arrived there. More problematic still is the passage in which the judge told the jury that the approach he had outlined on the basis of his own experience was "the sort of approach to take for these rather vexed questions". That was, in substance, a judicial instruction on the right approach to the evidence. It was unqualified and it was said at a very early stage in the summary of the evidence, not very long after the jury had been provided with written legal directions which told them in terms that it was the judge's responsibility to give them directions on the law which they must accept and follow faithfully.

41. Further, the judge's propositions did not cover the whole of the relevant ground. They did not, for instance, address points on which the defence placed much reliance: that the credibility and reliability of C's account were undermined by her initial denial that anything untoward had occurred; the prompt given to her by the appellant's "confessions"; and the detail in which C eventually professed to recall events which, on her account, had taken place over two decades earlier.

42. We bear in mind the submissions advanced by Mr Fairley on behalf of the prosecution but have not been persuaded by his over-arching contention that this was a minor aspect of the case which pales into insignificance in the wider context. This is not a case in which the jury could rely on some weighty item of corroborative evidence that was independent of C. Her credibility and reliability were central.

43. In these circumstances it is our view that the judge, albeit for the best of motives, erred significantly by giving the jury guidance that was tantamount to directions on the issue of the reliability of memory, which naturally tended to support the prosecution and was not firmly grounded in any expertise or established principle or authority. We have concluded that in the circumstances the convictions are unsafe.

44. We therefore allow the appeal and quash the appellant's conviction on each count.

45. MR FAIRLEY: My Lord, the Crown would seek a retrial.
46. LORD JUSTICE WARBY: Yes. Can you resist?
47. MISS FAUL: It is difficult, my Lord, to resist but I would say there has been an extreme delay. The court is aware of the appellant's mental health difficulties and I can say no more than that, my Lord.
48. LORD JUSTICE WARBY: In our judgment there has to be a retrial, despite those submissions, I am afraid.
49. We allow the appeal. We quash the conviction on each count, counts 1 and 2, the only counts on the indictment. We direct that a fresh indictment be served and that the appellant be re-arraigned on that fresh indictment within two months. The appellant I think is not in custody.
50. MISS FAUL: No, my Lord.
51. MR FAIRLEY: No, he has not been sentenced yet.
52. LORD JUSTICE WARBY: I thought that might be so.
53. MR FAIRLEY: The sentence has been adjourned on a number of occasions, not least on

the last occasion because he injured himself outside the court building. It is listed on Thursday and we could use that hearing instead to prefer the new indictment. It is still listed and he can be arraigned on that day.

54. LORD JUSTICE WARBY: Bail?
55. MR FAIRLEY: He is certainly on bail. There are conditions.
56. MISS FAUL: My Lord, there have been conditions throughout not to contact the complainant and residence as well. If I could just refresh my mind, my Lord.
57. LORD JUSTICE WARBY: We will continue bail on the same conditions.
58. MISS FAUL: Thank you, my Lord.
59. LORD JUSTICE WARBY: The practice is for the venue for the retrial to be determined by the Presiding Judge on the circuit. That is what we would do unless persuaded otherwise.
60. MR FAIRLEY: Thank you very much.
61. LORD JUSTICE WARBY: That will be the order. In relation to the reporting restriction. It seems to me, without consulting my Lords, that the normal routine would be to extend that reporting restriction until after the conclusion of the retrial in the terms already set out.
62. MISS FAUL: Yes, my Lord. Absolutely.
63. LORD JUSTICE WARBY: Thank you very much. Is there anything else?
64. MR FAIRLEY: No, my Lord. Thank you.

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