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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 6 November 2018

B e f o r e:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MR JUSTICE WILLIAM DAVIS

MRS JUSTICE MAY DBE
R E G I N A

GERALD THOMAS DAVIES

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Mr D Leathley appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. MR JUSTICE WILLIAM DAVIS: On 24 November 2017, in the Crown Court at Swansea, the applicant, Gerald Thomas Davies, was convicted following a retrial of two offences: indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 and assault of a child under 13 by penetration, contrary to section 6 of the Sexual Offences Act 2003. On 15 December 2017 he was sentenced to 2 years' imprisonment in relation to the indecent assault and a concurrent determinate sentence of 4 years' imprisonment in relation to the assault of a child under 13 by penetration.

2. We observe in passing that this was an unlawful sentence. Section 236A of the Criminal Justice Act 2003 required the applicant to be treated as an offender of particular concern and there should have been 1 year additional licence attached to the sentence. That is not something we can do anything to remedy. We observe simply that it is yet another example of advocates not assisting the trial judge in relation to the relevant sentencing regime.

3. We are concerned with the applicant's renewed application for leave to appeal against conviction after refusal by the single judge.

4. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. No matter relating to the victims of the assault shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify them as the victims of the offences.

5. We deal with the facts relatively briefly. The complainants (and there were two) formed part of the applicant's large extended family. He and his wife had no children but often hosted large family gatherings. The applicant's habit was to entertain the younger children with stories.

6. K, born in 1996, was sexually assaulted by the applicant in about 2003 when she was aged either 7 or 8. She was visiting the applicant's home. Her mother and stepfather remained in the kitchen with the applicant's wife. K was in the living room with the applicant who is telling her stories. In the course of their being together the applicant placed his hand on her leg and moved it under her skirt. He then brushed her vagina with his hand over her knickers and apparently made some attempt to insert his hand underneath her underwear. K's evidence was she pushed his hand away, went into the kitchen and told her parents that she wanted to leave. The evidence of her mother was that K was distressed.

7. On the journey home, K apparently told her parents what had happened. They took the view it must have been an accident or a misunderstanding. The applicant was not confronted at the time nor was the matter reported to the police.

8. Some 9 years later K told her boyfriend about the incident. Eventually in 2016, upon hearing of the allegation that had been made against the applicant by another, namely C, she decided to make a formal complaint and provided evidence to the police.

9. In the course of her evidence, she agreed that there had been an occasion when she had gone on holiday to France with C, in which they had spoken together about the applicant and she told C that she found the applicant "creepy".

10. C, 19 by the time of trial, alleged that the applicant had sexually abused her when she was aged 9 which was in 2007. She had been staying with the applicant and his wife. Her evidence was that the applicant took her upstairs to a spare bedroom, supposedly to watch birds from the window. As she was kneeling on the window sill the applicant came in, put his hand on her shoulder and then put his hand inside her jeans into her knickers and penetrated her vagina with his fingers. C did not inform anybody at the time. Her case was that she was scared that no one would believe her. In 2016 she was in a relationship with a young man to whom she sent a series of text messages which described the sexual abuse. The young man encouraged C to inform her mother which she did by letter and in due course the matter was reported to the police.

11. In the course of the trial a young woman whom we shall refer to as "BW" was called to give evidence by the prosecution. Her evidence was that she had received compensation following a sexual assault by a family member and that she had told C about this. C's evidence was that she was not aware that BW had received compensation.

12. The applicant's case in relation to K was that there had been no sexual touching. It may have been that by accident he had brushed against her vaginal area but she must have misinterpreted it. In relation to C, his case was that the allegation was wholly fabricated. He said that the act alleged would have been physically impossible, taking into account the size of the window sill and the configuration of the room in which it was said to have happened.

13. Counsel, who appeared for the applicant at trial (Mr Leathley) and who has appeared before us today pro bono, provided lengthy written grounds of appeal, setting out four grounds. He has appeared before us today, and we are grateful for his submissions. He has abandoned two of the four grounds. We say nothing more about them.

14. The two grounds which he maintains are (i) the summing-up was biased in favour of the prosecution and could not be cured by the standard warning that was given and (ii) the judge disallowed material evidence.

15. Mr Leathley, as well as appearing before us today, helpfully put his submissions into writing, shortly before this hearing, concentrating on those two grounds.

16. In his original grounds Mr Leathley described the summing-up in these words:

17.

> "The writer can only describe this as an impassioned plea from the judge to convict."

He ameliorated that somewhat florid description in his recent written submissions, by using these words:

> "The learned judge's summing-up was weighted far too much in favour of the prosecution. The learned judge exhibited blatant unfairness and pro-prosecution bias."

We have no difficulty in rejecting the description of the judge's summing-up as an impassioned plea to convict or to do anything. It was a painstaking rehearsal of all of the evidence given in the trial. The transcript is 50 closely typed pages. For a relatively short case the summing-up, with great respect to the judge, was far too long. "Impassioned" is almost the last word we would use to describe it.

18. Particular criticisms are made of the summing-up. In the written grounds, first, it was pointed out that at one point the judge described defence exhibits as being of "limited value". He was there referring to photographs. What the judge actually said was this:

> "... the photos, you've got the photographs I, I hope I'm not doing them a disservice when you may think the photographs are of somewhat limited value but you have them there and give them such weight as you think they deserve."

In the recent written submissions, that is distilled with these words: "The learned judge informed the jury that the defence photographs were of limited value." As we have just rehearsed, that is not what the judge said. He gave a perfectly reasonable description of the photographs and made a comment about them which the jury could take on board or not as they saw fit.

It is said that the defence case was summed-up in a very short time compared with the prosecution case. We emphasise, again, this summing-up missed nothing out at all. The defence evidence was summed up in totality. It plainly did not occupy the same amount in terms of summing-up as the prosecution case, but that is because it simply did not take as long to give. What is more, the defence case was referred to throughout the review of the evidence via a rehearsal of the cross-examination. Much is made of the fact that the judge read out, in full, the text messages that had been sent to C's boyfriend and the letter that C had sent to her mother. We do not understand why the judge felt it necessary to do that at all. It occupied a considerable amount of time in the course of the summing-up. It covers some eight pages of the closely typed transcript. The jury clearly had those documents in front of them and it was not necessary for anything other than a brief reference to be made to them for the jury to look at in their own time. But the submission is made that the text messages and the letter were read out in a way that left no room for doubt that they were absolutely sincere or were genuine.

19. Of course, we only have the summing-up on paper. But the fact of the matter is that what happened was that the text messages and the letter were read out. Nothing was said in terms of either text messages or the letter that invited one view or the other as to their genuineness. In relation to the letter for instance, the judge said in terms of whether the letter was truthful:

> "... the Prosecution case, this is essentially a truthful document. The

> Defence case is it isn't and it's just made to set up the false claim and the false allegations."

The competing accounts were set out in clear terms and the judge then, as we say, unnecessarily read out the letter in full.

20. We see nothing in the proposition that the way in which the judge read out material that the jury already had in any way "left no room for doubt that they were absolutely sincere or genuine".

21. In his oral submissions today, Mr Leathley picked on one particular passage in the summing-up and said that it demonstrated the judge's animus to the defence. It was a passage in which he referred to some photographs that were before the jury, of K, dressed in a somewhat voluminous party dress on her way to some kind of end of school year party. She was riding on the applicant's motorcycle. The point was being made by the defence: well, there she is on a motorcycle with the applicant; would she be doing that if she had been sexually assaulted?

22. Criticism is made that the judge sided with K's evidence when he said this:

> "... you've got the photographs, it's, looking at her, her party dress it's perfectly obvious that she didn't go any great distance on that motorcycle on that, dressed like that, she's sitting side saddle on the pillion seat and he says that he drove down the drive, I think he says about 300 yards, she says it was just a few yards but anyway there it is. I think the Prosecution, the Defence case is that this shows she wasn't frightened of him. Well, she agrees, she wasn't frightened of him then because, she says, she knew how to deal with him."

With great respect, we entirely fail to see how that passage can demonstrate animus on the part of the judge.

23. Finally, in the written submissions reference is made to a passage in the evidence in which the judge was referring to the fact that C had described at one point the fact she had been raped by the applicant, whereas her case before the jury was that there had been digital penetration. We do not need to rehearse the passage in the summing-up but it sets out in clear terms the defence case i.e. why what she said to a friend of hers and what she said in her mother's letter could be demonstrated to be both inconsistent and exaggerated. The judge also set out the prosecution's response to that argument. The judge set out what the competing cases were. There is no legitimate criticism to be made.

24. We are quite satisfied that the judge, albeit at inordinate and unnecessary length, set out the competing cases fully and fairly. We see absolutely nothing in the proposition that this was a biased or unfair summing-up.

25. The second ground is that the judge refused to admit evidence which the jury should have had before them in order properly to consider the case.

26. The defence at trial at one point wished to put before the jury a photograph of the room where C said she had been digitally penetrated. When C said that happened the room had been a bedroom. By the time of the trial it had been refurbished as a bathroom. It appears to us from all the material we have seen that the photographs were not actually produced until after C had given evidence and therefore not had any opportunity to comment on them.

27. The respondent's notice indicated that they objected to the production of those photographs to the jury. We find no reference to the judge being required to give or indeed giving any ruling on the topic. The photographs were simply removed from the bundle. Even if the judge had given the ruling, we could well see why he would say in the circumstances that it would be potentially misleading for the jury to have those photographs.

28. There is then a series of propositions put in relation to the evidence of BW. As we have already indicated, BW was a witness who gave evidence both at the original trial and at the retrial that she had been sexually assaulted, that she had received compensation for that sexual assault, and that, critically from the defence point of view, she had told C about that. We have already observed that C denied any such conversation, at least any such conversation involving mention of compensation. However, that was BW's evidence and she gave it both at the first trial and the retrial. Before she gave evidence at the retrial, but after C had given evidence and apparently left the court building, BW spoke to a police officer or a member of the Crown Prosecution Service. She said that she had been approached by C at some point, after the first trial, and that C had said to her: "You have to choose whose side you're on". The judge concluded in part because C by now was no longer available to have that matter put to her and in part because the matter was wholly collateral that BW should not be permitted to be asked about that. That comment was and is categorised as a threat by the applicant. We confess that we are not able to identify why it should inevitably be considered to be a threat. In any event, the fact of the matter is that BW gave exactly the same evidence in substantive terms at the retrial as she did at the first trial. Whatever C may have said to her, it had no effect on that evidence.

29. We can see perhaps some very small value in the jury knowing that C had said that to BW but the value is so small that its exclusion could not conceivably affect the safety of the resulting conviction.

30. The judge was also invited to allow the jury to be told about a series of events involving various people, none of who had any direct involvement in the case. Apparently BW's boyfriend had been struck in some form of assault by K's boyfriend. In an altogether separate incident, BW's boyfriend had been struck by C's boyfriend. The judge gave leave for those matters to be put to the prosecution witnesses who supposedly had been present on those events. These were prosecution witnesses who attended to give other marginal evidence. Quite what the relevance of that was is difficult for us to see. However, the witnesses denied that the events had taken place. The judge then refused to allow evidence to be called to rebut the denials. We are quite satisfied he was quite right to do so. At very best, the evidence went to credit. Quite whose credit is not clear

to us but it does not seem to us that sensibly could be argued that it went to the credit either of K or C, who after all were the people whose credit was in issue.

31. Cited to us was the case of R v Busby, a case involving cross-examination of police officers who had investigated the case which formed the subject matter of the trial. This court deceided that Busby should have been permitted to call evidence to rebut evidence that the police officers had given evidence that, on the face of it, went to credit. In our view, the rationale of the decision in Busby has no conceivable relevance to this case. As we have said, it seems to us that the judge was, if anything, over-accommodating to the applicant in permitting anybody to be asked about those incidents at all. It follows that the second ground that there was wrongful exclusion of evidence has no substance.

32. Since grounds 3 and 4 have been abandoned it follows that this application must be dismissed.