Neutral Citation Number: [2019] EWCA Crim 1363

Case No: 201705168 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CARDIFF CROWN COURT
His Honour Judge Vosper QC
T20177054

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2019

Before:

LORD JUSTICE LEGGATT
MR JUSTICE POPPLEWELL
and
HIS HONOUR JUDGE MARSON QC
(Sitting as a Judge of the CACD)

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Between:

REGINA	**Respondent**
- and -	
DONALD GORDON ADAMS	**Appellant**

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- -

Mr A Greenwood appeared on behalf of the **Appellant**
Mr R Griffiths appeared on behalf of the **Crown**

Hearing date: 18 July 2019

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Approved Judgment

Lord Justice Leggatt:

1. This is an appeal against convictions for sexual offences alleged to have been committed many years ago between 1980 and 1987. The provisions of the Sexual Offences (Amendment) Act 1992 apply in this case and nothing may be published which would be likely to lead members of the public to identify the victims of the offences.

2. On 19 October 2017 in the Crown Court at Cardiff, following a retrial before His Honour Judge Vosper QC and a jury, Donald Adams was convicted of six counts of rape and eight counts of indecent assault. He was sentenced for those offences to a total of 15 years' imprisonment. No evidence was offered against him on two further counts on which not guilty verdicts were therefore returned.

3. Mr Adams was born in February 1940. At the time of the trial he was 77 years old and, before these convictions, was of good character. He began an appeal against his convictions, and we will refer to Mr Adams as the appellant, although he died in October 2018. Approval has been granted to his widow under section 44A of the Criminal Appeal Act 1968 to continue the appeal. Leave to appeal limited to three grounds was granted by the full court on 5 March 2019.

4. There were two complainants whom we will refer to (to preserve their anonymity) as M and G. M is female and G is male. M was born in [on a date in] 1967 and G was born in [on a date in] 1970. When they were young they were both members of a brass band of which the appellant was also a member. He was 27 years older than M, in his early forties at the relevant time and married with children.

5. The band practised three times a week and it was M's evidence that the appellant used to give her a lift to and from band practice. She said that on the way back he would take her to a secluded location on a common where he made her perform oral sex on him and raped her vaginally. She said that the first time this occurred was on Bonfire Night when she was about 13 and on this basis the alleged incident was dated to on or about 5 November 1980. M stated that, from then on, the same abuse occurred routinely after band practice and sometimes also on other occasions. It carried on until she was aged 17, at which time she became pregnant by the appellant and had a child. The abuse then stopped. She maintained that she never consented to sexual activity and, although she admitted kissing the appellant and participating in sexual acts, said that she only did so because she was conditioned by earlier abuse.

6. The first three counts on the indictment related to the incident on or about 5 November 1980. The other counts relating to M were specimen charges alleging rape and indecent assault at some time in each year when M was aged respectively 13, 14, 15, 16 and 17.

7. The appellant did not give evidence at the trial, but he answered all questions in interview under caution in which he admitted sexual activity with M but denied that any sexual acts took place before she was aged 16 and that any acts were consensual.

8. Two school friends of M gave evidence that she had told them about a relationship which involved kissing the appellant when they were aged about 14. One said that M

would accompany the appellant after band practice and drive off in the direction of the common, which was where M said the abuse took place. On the other hand, M's mother gave evidence that she worked a shift which ended at approximately 9pm and, when she got home, M would already be at home.

9. As an adult, M has had a history of involvement with mental health services from 2004 and has been admitted to hospitals for treatment on various occasions under section 3 of the Mental Health Act 1983. This history was the subject of formal admissions at the trial, including the fact that M has been diagnosed with and treated for Dialectic Behaviour Disorder, a condition which is characterised by taking extreme positions. It was the appellant's case at the trial that M was now, many years after the event, viewing her past relationship with him through that prism in a distorted way.

10. The last count on the indictment, count 16, related to the second complainant, G. He gave evidence that he was sexually abused by the appellant on two occasions. He said that the first incident occurred on board a ship when the band went on a trip to Denmark and the second incident occurred when he was aged 16 and was working on a youth training scheme at a Debenhams store in Cardiff. G said that he had left the band by then but one day the appellant turned up at his work unannounced and took him to a pub for a drink. The appellant then drove him home and on the way home stopped in a layby where an assault took place. On each occasion G alleged that the appellant forced his penis into G's mouth and tried to make G perform oral sex on him. The first alleged incident was not the subject of a charge as it occurred outside the United Kingdom.

11. G's long term partner gave evidence that, many years earlier, G had told him about the second alleged incident which was the subject of count 16.

12. M and G had been friendly when they were in the band and had kept in touch. Facebook records (disclosed as a result of a request made by the defence) revealed that they had met in August 2016 at a pub in Cardiff. When asked about this, M said in evidence that she could not remember what was discussed at this meeting; G gave evidence that he wanted to find out what M's motive was for making a complaint about the appellant. It was after this meeting had taken place that G agreed to give a full statement to the police.

13. The three grounds on which leave to appeal was granted are in summary as follows. First, it is said that the judge erred in not giving the jury any direction about whether, and if so how, they could rely on the evidence of each complainant when considering the allegations made by the other. Second, it is argued that the judge was also wrong not to direct the jury about the possibility of collusion between M and G in circumstances where it was a central pillar of the defence case that M was manipulative and capable of influencing others to support her allegations. Third, it is said that the judge in summing up the evidence unfairly undermined and cast doubt on a piece of evidence on which the defence was entitled to rely. That evidence was the fact that during his first interview under caution, when asked whether there was anyone in the band apart from M who was under the age of 16 at the time, the appellant had specifically identified G. The defence argued that it was inherently improbable that he would have given to the police the name of a person as someone whom they might speak to if that person was someone whom the appellant had

sexually assaulted. It is submitted by counsel for the appellant, Mr Greenwood, that on these grounds, either individually or in combination, the appellant's convictions are unsafe.

14. In our view, by far the most substantial of these grounds is the first. As confirmed in the leading case of R v Freeman [2008] EWCA Crim 1863; [2009] 1 WLR 2723, there are two main ways in which, in a case of this kind, evidence of an offence allegedly committed on one occasion may be relevant to an allegation that the defendant committed an offence on another occasion, either against the same or against a different complainant. One way in which such evidence may be relevant is if it goes to establish a propensity to commit a particular kind of offence. The basic reasoning is that, if he has done similar things on other occasions, it is more likely that he did it on this occasion. For such reasoning to be legitimate the relevant propensity must first be established, which requires the jury to be sure that an offence of the relevant kind was committed on one or more occasions. They may then rely on those proven offences to support an inference that the defendant committed an offence of a similar type on another occasion.

15. The second main way in which evidence relating to one alleged offence may be relevant to the issue of whether the defendant committed another alleged offence is simply by reducing the likelihood of there being an innocent explanation for the allegations. So, for example, in a case such as the present one, where two individuals each make allegations that they have been sexually assaulted by the same person, provided there is no reason to think that their allegations are linked for some other reason – for example, because they had got together to concoct false stories, the evidence of each complainant may strengthen the case relating to the other. As Rix LJ observed in R v H [2011] EWCA Crim 2344, at paragraph 24, the reality is that independent people do not make false allegations of a like nature against the same person in the absence of collusion or contamination of their evidence. This form of reasoning does not require the jury to find one allegation independently proved before they may properly treat evidence relating to that allegation as relevant to other alleged offences.

16. Both of these categories of case involve the use of evidence which is evidence of the defendant's bad character and the admission of such evidence is therefore governed by the relevant provisions of the Criminal Justice Act 2003. Furthermore, under Part 21 of the Criminal Procedure Rules, where a party wants to introduce evidence of bad character, there is a procedure which must be followed which involves the service of a notice and, if objection is taken to it, an application to the court to rule on the matter.

17. In the present case, no notice was given at any stage by the prosecution that it wanted to rely on any evidence of the appellant's bad character, save for a notice of an intention to rely on the evidence relating to the alleged assault on G on the boat trip to Denmark in connection with the alleged assault on G which was the subject of count 16 of the indictment. Mr Griffiths, who appeared at the trial for the respondent and has appeared today, has confirmed that the prosecution did not seek to put its case at the trial on the basis that evidence relating to any of the counts on the indictment was admissible in relation to the issue of whether the appellant was guilty on any other count.

18. As that was the position adopted by the Crown, the jury ought to have been directed that, in considering each count, they should have regard only to the evidence which was directly relevant to that count and should ignore evidence relating to other counts. In particular, the jury should have been told that, when considering whether each of the alleged offences involving M was committed, they should ignore the evidence relating to the allegations made by G, and vice-versa. In the absence of such a direction, we think that a jury would naturally assume that they were entitled, when considering any particular count, to have regard to any of the evidence they had heard during the trial if they thought that evidence relevant. No such direction was given by the judge. Indeed, he did not give any direction to the jury at all with regard to whether, and if so how, they could take account of evidence relating to one count when considering other counts and in particular whether they could take account of either complainant's evidence when considering the allegations made by the other.

19. The only direction which the judge gave about how the jury should approach the different counts was a standard direction to say that they should consider the case against and for the defendant on each count separately. But that did not tell the jury whether they could or could not, when considering the case against the defendant on a particular count, have regard to evidence relating to other counts or other occasions. For example, in considering whether they should accept M's evidence that the appellant had assaulted her on or around Bonfire Night in 1980 as truthful and reliable, were the jury, or were they not, entitled to place reliance on any view they had formed about the likelihood that the allegations of sexual assault made by G were true? They received no assistance from the judge on that important question. Certainly it was not made clear, indeed it was not suggested at all, that they should treat evidence relating to G's allegations as inadmissible on the counts relating to M, and vice-versa.

20. Mr Griffiths has helpfully drawn our attention to the case of R v H (to which we have already referred), which involved allegations that the defendant had sexually abused three boys at various times. In that case it was treated as sufficient that the trial judge had given a more or less standard direction, similar to the direction given in the present case, about treating each count separately. We are bound to say that we have difficulty in understanding why that was thought adequate in circumstances where it did not appear that any ruling had been given that evidence was cross-admissible. But we agree with the observation at paragraph 31 of the judgment in that case that: "Everything depends on the directions and facts of a particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of his guilt on counts concerned only with another complainant."

21. In this case, had the prosecution sought to argue that evidence of each complainant was admissible in relation to the allegations made by the other because it reduced the likelihood of innocent explanation, we anticipate that the evidence might properly have been admitted on that basis. But no such ruling was sought or given and, unless the procedure for admitting evidence of bad character is to be treated as a complete dead letter, that meant that the evidence was inadmissible and the appellant was entitled to have the case decided on the basis that evidence on each count was inadmissible in relation to other counts. That in turn made it necessary for the judge so to direct the jury.

22. Looking at the matter more broadly, the general tendency of the criminal law over time has been towards a gradual relaxation of rules of evidence and an increasing willingness to trust to the good sense and rationality of juries to judge for themselves whether particular evidence is relevant to an issue they have to decide and if so in what way. But we have not yet reached the point where evidence of a defendant's bad character can be left as a free for all. The particular ways in which evidence that a person has committed one offence may or may not be relevant in deciding whether that person is guilty of another offence are not always immediately obvious even to legal professionals and have had to be worked out by the courts in a number of cases. Lay jurors are entitled to assistance on these questions and cannot be expected to work out the approach which the courts regard as proper for themselves. It therefore seems to us to be essential that, in a case of this kind, the jury should be given clear directions on whether, and if so how, evidence relating to one count may be taken into account in deciding guilt on another count.

23. In this case, as we have indicated, no such direction was given. Moreover, it was a case in which, as we see it, the question whether the evidence of each complainant was admissible in relation to the allegations made by the other was potentially of great significance to the jurors' decisions. In these circumstances, we consider that the failure to give any such direction makes the appellant's convictions unsafe.

24. In the light of this conclusion it is unnecessary to address the other grounds of appeal, save to say that we are not persuaded that either matter of itself impaired the safety of the appellant's convictions. For the reasons given, we uphold the first ground of appeal and accordingly the appellant's convictions will be quashed.