Neutral Citation Number: [2019] EWCA Crim 565

Case No: 201801802 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
HIS HONOUR JUDGE HAMMERTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2019

Before :

LORD JUSTICE DAVIS
MR JUSTICE WARBY
and
HIS HONOUR JUDGE POTTER (SITTING AS A JUDGE OF THE CACD)

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Between :

R	**Respondent**
- and –	
SB	**Appellant**

- -
- -

A Dunn for the **Appellant**
J Sugarman QC for the **Respondent**

Hearing date : 15 March 2019

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Approved Judgment

Lord Justice Davis :

Introduction

1. The appeal against conviction in this case has been based on fresh evidence. In particular, the appellant has relied on a written statement from the complainant (made after conviction and sentence) retracting as false all her previous complaints of sexual abuse which had resulted in the conviction of the appellant at trial. It has been argued on behalf of the appellant that in such circumstances the conviction of the appellant on the four counts on the indictment cannot be regarded as safe.

2. At the hearing, this court received and had regard to such statement (and certain other statements sought to be adduced), initially de bene esse. We also received oral evidence from various witnesses.

3. At the conclusion of the hearing, this court announced its decision that, whilst leave to adduce such evidence under s.23 of the Criminal Appeal Act 1968 would be granted and leave to appeal would also be granted, the appeal itself would be dismissed. We said that we would give our reasons at a later date. These are those reasons.

4. Before us the appellant was represented by Mr Dunn, who had also appeared at the trial below. The respondent was represented by Mr Sugarman QC, who had not appeared below.

Background facts leading up to conviction

5. The complainant, whom we will call M, is the granddaughter of the appellant, her father being one of his sons. The complainant was born on 6 February 2002.

6. Complaint about what the appellant had allegedly done to M first apparently emerged at the end of 2015. At that time, the evidence was that M was a fragile and troubled teenager, who was self-harming. The evidence was that, after M had been arguing with her brother and after her mother, who may be styled P, intervened, M said to her words to the effect "you don't know what happened": repeating that at a later stage when the two were walking to M's school. P was also to say that in around February 2016 M, who was crying, said that the appellant had offered her money and had touched her private parts. M was at a later stage (according to P) to say to P that the appellant had put his finger in her vagina and later still that this happened two or three times.

7. By May 2016 M was seeing a counsellor. In a session on 17 May 2016 M told the counsellor that her grandfather had been doing sexual things to her whilst she was a child living with her grandparents. She said that this had happened more than once. She said to the counsellor that she (M) had only realised it was wrong after doing sex education classes at school in year 8. She then kept it to herself, feeling that it was her fault. In the meantime she had started self-harming. The counsellor reported these allegations. Police officers, DC Murray and PC Matthews, in consequence attended on M the following day: and she repeated these allegations in more detail. She also said that she had thought it was her fault. Among other things, she further said that her

grandmother had told her not to challenge her grandfather. She also said that she had told her mother, P, in early 2016.

8. For some considerable time, relations between P and the appellant (her father-in-law) had not been at all good. P's perception was – rightly or wrongly – that he had behaved in a sexually inappropriate way towards P: and, in particular, P had complained to the police in 2008 and 2010 about sexualised communications sent to her at the behest, as she saw it, of her father-in-law. She also had concerns about how he on occasion had behaved with regard to M as a child.

9. At all events, the complaints having been made there was a lengthy ABE interview of M on 28 June 2016. This court had the transcript of such interview and also viewed the video recording of such interview. The interview was conducted objectively, sensitively and fairly by an experienced female police officer. M gave her answers in a seemingly articulate, direct and clear way, albeit clearly in a nervous and sometimes embarrassed way. She provided considerable detail to her allegations. A jury would at all events have been well capable of assessing her evidence given in that interview as credible and her demeanour impressive: although that was, of course, ultimately a jury matter.

10. The appellant had in the meantime been interviewed on 18 May 2016. He among other things said that he was often out of the house; when there, he was never alone with any of his grandchildren; and he had never touched M in any sexual way.

11. The appellant was not charged until 2 August 2017. The matter came on for trial on 29 January 2018. There were four counts of assault of a child under 13 by penetration on the indictment, each being a specific incident count and each being based on what M had said in her ABE interview. The first two counts related to alleged incidents when M was 3 or 4. The third count related to an alleged incident when M was 6 or 7. The fourth count related to an alleged incident when M was 8 or 9.

12. The police officer having overall charge of the case was DC Duncan Milne. In December 2017, P had told DC Milne that M was saying that she did not want to go to court. DC Milne in consequence visited M at school to discuss the situation with her. What passed between the two on that occasion is in dispute: we will come on to the differing accounts. But at all events the matter proceeded to trial.

13. Shortly before trial, M studied the video recording of her ABE interview at a local police station in the presence (most probably) of a female police officer. Further, she attended court (Snaresbrook Crown Court) with her mother for a familiarisation visits and she spoke to DC Milne and Mr David Smith, counsel then appearing for the prosecution.

14. Her ABE interview was played at trial, both in her presence and in court before the jury, as her evidence in chief. In supplemental oral evidence in chief she confirmed that what she had there said was true. She was then cross-examined, thoroughly and professionally, by Mr Dunn. Whilst in some places her answers to questions were "I don't remember", her answers overall were to the clear effect that she maintained that what she had alleged had indeed occurred. She denied that she was not telling the truth and said that she was telling the truth. She further denied the suggestion put to her that it was her mother, P, who had prompted her to say these things about her grandfather.

She also said that she had not complained earlier (after having the sex education classes in year 8) as she thought that no one would believe her.

15. At the conclusion of her re-examination there was this passage:

> "Q. Why are you here now giving this evidence?
>
> A. Because I want him to get what he deserves.
>
> Q. Sorry, your voice is dropping.
>
> A. I want him to get what he deserves."

16. The mother, P, then gave evidence about the family background and about M's complaints. In the course of her evidence, she also denied prompting M to make these allegations because of her own dislike of her father-in-law. The counsellor gave evidence, her statement being read, about the complaints. DC Murray also gave evidence The appellant himself then gave oral evidence. He maintained his denials. He also pointed to mobility problems which he had for part of the time and to other matters which the defence said showed limited opportunity for him to do what was alleged.

17. The trial judge, Judge Hammerton, summed up to the jury in two stages. It is accepted that the summing up was thorough, balanced and fair and that the legal directions were full and accurate. The judge among other things stressed that the jury had, in respect of each count, to be sure that there had been digital penetration as alleged by M.

18. In the result the jury on 5 February 2018 convicted, by a majority of 11 to 1, on all four counts. Subsequently on 16 March 2018 the appellant – who is now 68 – was sentenced to a custodial term of 12 years imprisonment and an extended licence period of 1 year under s.236A of the Criminal Justice Act 2003.

19. There matters would appear to have rested. The jury had heard the evidence. Plainly they had accepted that of M and plainly they had rejected that of the appellant.

Events following conviction

20. However, on 1 May 2018 a form NG was lodged at Snaresbrook Crown Court. The sole ground of appeal was that M had given false evidence at trial. Reliance was placed in this regard on a written witness statement of M dated 13 April 2018: that is, some four weeks after sentence.

21. This statement, as unchallenged evidence before us showed, had been made by M in the presence of a solicitor (and his assistant). That solicitor's name had been provided by one of M's uncles, B, who is himself a criminal law solicitor and who had attended the trial. When M attended on those solicitors, on 5 and 13 April 2018, she was accompanied by another uncle, R, but not by her mother: who was said to have been busy at work. B and R are both sons of the appellant.

22. This statement, which is signed and witnessed on each page by M, R and the solicitor, contains an unqualified retraction by M of her evidence at trial. It extends over 14 paragraphs. She amongst other things says in it that she wished to "withdraw my

allegations as the alleged incidents did not in fact take place". She says that she had made them up to "seek attention from my family, teachers and classmates". She says that she was "not informed of the consequences that would follow if the allegations I made were believed until after the proceedings had commenced, by which time I was too scared to say that I had lied. I now fully understand the severity of my allegations and the consequences of my actions….".

23. She went on to say that she had not liked the way her grandfather had treated her mother and "this gave me the idea" to make false allegations against him. She also said, however, that she told the counsellor in order to draw more attention to herself. She further claimed that the police "told me that it was very unlikely the case would go to court so I felt at ease in continuing to make the false allegations".

24. The last two paragraphs of her statement are as follows:

> "13. When I gave evidence at Snaresbrook Crown Court, I did not want to lie anymore and answered most questions with "I don't know" or "I don't remember". I hoped that this would make things right and that my grandfather would be found "not guilty". I was shocked and horrified to discover that my grandfather was not only convicted but had gone to prison. This was never my intention and was not what was supposed to happen. I was just supposed to get attention and that would be it.
>
> 14. I now realise the severity of my actions and sincerely regret them. After my grandfather went to prison, I knew I had to do the right thing and tell the truth. I therefore confided in my uncle, [R]. He has always been the understanding one in the family and I knew he would listen to me. With his help, I have come to see a solicitor and make this statement of my own free will. No one has pressurised me and no one has told me what to do. I am making this statement because it is the right thing to do and I want to tell the truth. I am truly sorry for what I have done."

25. The import of this statement is specific, even though the language of it is in some respects scarcely the language of a 16 year old (at one stage she refers to "my momentary lapse of judgment in making the false allegations").

26. In the light of this, on 24 May 2018 the police then interviewed M under caution. What they in fact saw fit to do was to arrest her on suspicion of perjury: a thoroughly unsuitable and inappropriate procedure given the circumstances and given M's age, as Mr Sugarman rightly acknowledged. Unsurprisingly, M then (on the advice of her accompanying solicitor) made no comment to all questions asked of her.

27. On 28 May 2018 the mother, P, herself provided a statement. Amongst other things, she said in that statement that 2 or 3 days after the appellant was convicted M told her that she had lied. P said she was shocked. P said that later that day she rang DC Milne and informed him that "we wanted to withdraw the case". A week after that, she went to the grandmother's house and told R what M had said. Her other brother-in-law B was in due course consulted; and the upshot was that M went with R to the new solicitors. She also said that she (P) also went round to the grandparents' home shortly

after M had herself told R about her lies. P further said that neither she nor M had been pressurised to withdraw the allegations.

28. At a later stage, a witness statement dated 15 July 2018 was put in by R setting out his account of the circumstances in which M withdrew her allegations. Subsequently, and following a directions hearing in this court on 5 February 2019 convened in accordance with the procedure suggested as appropriate in *SV* [2013] 1 Cr. App. R 35, statements were put in, on behalf of the respondent, of DC Milne and of Mr David Smith, trial counsel.

29. It was in such circumstances that the matter came on for hearing before this court on 15 March 2019. M, P, R and DC Milne were orally examined and cross-examined before us. The statement of Mr Smith was not challenged. M chose to answer all questions put to her, although we had reminded her of her entitlement to refuse to do so on grounds of the risk of self-incrimination. We should record that, while making all allowances for the present situation in which she finds herself, M (who is now aged 17) gave her oral evidence in a markedly different manner from that revealed in her ABE interview and was also notably hesitant on occasions in giving answers to direct questions; and some of her answers were, on any view, absurd (for instance, that she made complaint to the counsellor because she was "bored" or that she felt that the police officer in the ABE interview was telling her what to say).

30. It was the position of the appellant that, in the light of the retraction, the evidence of M at trial is to be regarded as wholly unreliable and tainted and thus that the convictions cannot stand. It was the position of the respondent that it is the retraction evidence which is wholly unreliable and to be rejected: its production is to be explained as deriving if not from direct family pressure then at all events from the pressure of M appreciating that her grandfather was now subject to a 12 year sentence.

31. Given the circumstances, we concluded that it was expedient in the interests of justice, having regard to the provisions of s.23 of the 1968 Act, to give leave for this fresh evidence to be adduced. The question thus has been, in the light both of that evidence and of the other evidence deployed before us (including the oral evidence), whether these convictions are safe.

Disposal

32. The latest evidence adduced on behalf of the appellant simply cannot, we have concluded, be accepted. The retraction is, we have concluded, demonstrably unreliable.

33. There are numerous reasons for so concluding - reasons which are to be assessed cumulatively:

    (1) M's allegations in her ABE interview are detailed and (on the face of it) compelling and consistent. It is difficult to credit that a fifteen year old girl could maintain such an account if it was all a lying account: although we accept of course, as other such cases show, that that can happen. But at all events, if this was a lying account, it needed sophisticated lying.

    (2) M thereafter consistently maintained that account up to and including trial: when she had both re-studied her ABE interview and had ample other opportunity to

withdraw her allegations. She never did. Nor did she at any time before or at trial tell her mother that her account was false and (as she confirmed to us) P throughout had believed at that time that M's complaints were true.

(3) M must have known throughout that her allegations were very serious. It is also difficult to comprehend why she would maintain that account at trial and then, as is now alleged, just two or three days later (after conviction) tell her mother that it was false.

(4) We in fact, in this regard, reject P's evidence that M had confessed to her (P) two or three days after conviction. M herself never in her own witness statement had claimed such a thing. To the contrary, the clear tenor of M's statement is that the first person she confided in was her uncle R and that this was after the 12 year sentence had been imposed. Further, DC Milne had no recollection or note of P contacting him at this time after conviction. P in oral examination maintained that she had; and indeed she further said that she told DC Milne at this time that M had said that she had lied, adding that DC Milne had said that nothing could be done and that they would both be arrested if they now sought to withdraw. Not only is none of that in P's statement (all she said there is that she told DC Milne that they wanted to "withdraw") but it would have been grossly unprofessional and wrong for DC Milne to have said such a thing. To the contrary, we accept his evidence that he would have told his superior officer and the CPS had this been said. At all events, having heard him, we are entirely satisfied that he said no such thing; and indeed that there was no such conversation at all at this time and all this has since been made up by P.

(5) It was common ground that in November 2017 M had been indicating reluctance to go to court and that DC Milne in consequence saw her at school. We accept DC Milne's evidence that he never told her that she had to go to court and that she never suggested to him that she had lied or wanted to withdraw. To the extent that M in her oral evidence claimed that DC Milne cut her short and told her that she could not withdraw we reject that. M was, in our view, plainly embroidering in this regard: not only was this not said in her written retraction statement but M also herself then threw in, in her oral evidence, absurd suggestions that she too – as, subsequently, was also to be claimed by P – had at this time herself been threatened with arrest by DC Milne. We reject that: it is not credible.

(6) Not only had M, in her ABE interview and at trial, provided what might be thought telling detail but she also had volunteered comments about conversations with her grandmother concerning her grandfather. This, if untrue, ran a high risk of being exposed as untrue: as the grandmother could be approached to verify such conversations (the grandmother gave no evidence at trial).

(7) M had made consistent – albeit late – complaints to her mother, to her counsellor and to the police. She maintained those complaints at trial and adhered to them in cross-examination and re-examination.

(8) The unchallenged evidence of Mr Smith, a very experienced practitioner, showed that, in accordance with the applicable protocols, he had had an amount

of contact with M at court before and after she gave evidence; and he also retained his notes. His recollection and notes record M as, though nervous, happy with the way she was being treated. No indication whatsoever was given to him that she wanted to withdraw her allegations or to cause him to doubt what she was saying. That corresponded precisely with the perception of DC Milne: which was, as he said and we accept, that M and P were at the time supportive of the court case.

(9) We are entirely satisfied, accepting DC Milne's evidence, that no indication of withdrawal was given at any time prior to sentence. The only substantial communication DC Milne had from P at that stage, before sentence, we find, was about an incident of criminal damage to her car after trial, which she was concerned may be connected. This complaint was recorded in the police records.

(10) M's suggestion in evidence that the police told her that the case would not go to court is utterly implausible. It is not only denied by DC Milne but is belied also by the opening remarks of the police officer at the ABE interview. We accept that DC Milne said no such thing: indeed the case *did* go to court, as M full well knew it would after it had been listed in November 2017 for trial.

34. Overall, we have concluded that M's and P's evidence on this appeal was thoroughly unsatisfactory and could not be accepted in these respects: the more so when many of the points they sought to make in oral evidence are not contained in their prior witness statements. We accept DC Milne's evidence and Mr Smith's evidence. The suggestion that M or P told DC Milne that M had lied and/or wanted to withdraw and that he had then threatened them with arrest if they did so is a false suggestion. We wholly reject the submission that Mr Dunn was constrained to make to the effect that DC Milne had been lying in his evidence to this court. To the contrary, we consider him to have been a reliable and truthful witness; and we accept that had he been so told he both would have remembered and would have reported it to his superior officer and the CPS. We further reject the suggestion that DC Milne had been "gung ho" (in Mr Dunn's words) and intent on securing a conviction at all costs. We conclude that (as he said) DC Milne only realised that the allegations were being withdrawn in May 2018. We also conclude that the first time any unhappiness at the outcome was expressed was by P when she was told by DC Milne of the (lengthy) sentence and asked if a community sentence might not suffice. As for R's evidence, that clearly, as we assessed it, was toeing the party line and we have assessed it as of no material support to the appellant's case. Furthermore, if (as he claimed, purportedly in line with P's evidence) P really had told him that M had said she lied shortly after conviction, it was, to say the least, remarkable that nothing was seemingly done until several weeks later.

35. Mr Sugarman accepted that, whatever suspicions one may have (and he said it was of further concern that M had been accompanied to the solicitors by R but not by her own mother), he was not in a position positively to show that M had been subject to direct pressure, following sentence, from family members. He was content to say that the pressure at all events came from within, once M knew that the sentence was as long as 12 years: with the inevitable consequential impact on the whole family. Mr Dunn, for his part, said that such a scenario can be a (belated) prompt to tell the truth. That can indeed sometimes be so: but we do not accept it as so here, given the evidence and the circumstances of this particular case.

Conclusion

36. We do not propose to say more. There is no proper basis for rejecting M's original evidence, as reflected in her complaints, detailed in her ABE interview, maintained throughout the trial and accepted by the jury. We reject the veracity and reliability of her subsequent retraction statement, put in after sentence was announced. We consider, in all the circumstances, that the convictions are safe.

37. It is for these reasons that we have (as previously announced) dismissed this appeal.