No: 202001351/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA Crim 1056

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 July 2020

B e f o r e:
LORD JUSTICE HICKINBOTTOM

MR JUSTICE SPENCER

RECORDER OF NOTTINGHAM
(HIS HONOUR JUDGE DICKINSON QC)

(Sitting as a Judge of the CACD)

R E G I N A
v

"GP"

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Ms J Yeo appeared on behalf of the **Applicant**
Ms M Lewis appeared on behalf of the **Crown**

J U D G M E N T

MR JUSTICE SPENCER:

1. This application for leave to appeal against conviction has been referred to the Full Court by the Registrar. The applicant's trial for historic offences of indecent assault concluded on Friday 20 March 2020, the last working day before the Prime Minister's announcement of the Covid-19 lockdown. The sole ground of appeal is that the jury may have felt under pressure to return a verdict when they did owing to the developing public health emergency and that the convictions are therefore unsafe.
2. The trial took place at Newport Crown Court before His Honour Judge Richard Williams. The applicant, who is now 38 years old, was charged with six offences of indecent assault committed against his two nieces between 1990 and 1998, when each of the girls was under the age of 13 years. Following conviction on five of the six counts the case was adjourned for sentence and on 4 June 2020 the applicant was sentenced to a total of 12 years' imprisonment plus 2 years extended licence pursuant to section 236A of the Criminal Justice Act 2003.
3. This is therefore a case to which the anonymity provisions of the Sexual Offences (Amendment) Act 1992 apply. There must be no reporting of the case which is likely to lead to the identification of the victims.
4. It is unnecessary to go into any detail of the offences themselves or the evidence, given the single discrete issue raised in the appeal. The main prosecution witnesses were the two nieces. The prosecution also called the mother, father and sister of the nieces. They gave evidence of disclosures made to them by the girls at different stages.
5. Counts 1 and 2 related to the older niece. Count 1 was an allegation that the applicant kissed her, placed her hand on his penis and penetrated her vagina digitally. Count 2 was an allegation that he indecently assaulted her under the bedclothes. The jury acquitted the applicant on count 2. Counts 3 to 6 related to the younger niece. The allegation was that on several occasions he made the girl touch his penis and masturbate him. The allegation in count 6 was that he made her kiss his penis and attempted to penetrate her mouth with his penis.
6. Although no further recitation of the facts is required, it is necessary to set out the chronology of the trial. It began on the afternoon of Monday 16 March, the last working week before the Covid-19 lockdown. We have been assisted by the case log, available to the court on the Digital Case System.
7. The case was called on shortly before 3.00 pm on the Monday. The judge enquired of counsel when it was expected the jury would be retiring to consider their verdicts. Counsel agreed that it might be Friday, so there was a small risk that the case might go into the following week. This would have been information the judge needed when the jury was being empanelled. in order to check the availability of the jurors should the trial go beyond Friday,
8. On the Monday afternoon the prosecution opened the case at 3.30 pm and the court adjourned for the day shortly after 4.00 pm.
9. Next morning, Tuesday 17 March, the prosecution called the first complainant, who gave evidence over the video link. Shortly after midday concern was expressed by prosecuting counsel that there was someone in the public gallery who appeared to have a persistent cough (as it is recorded in the case log). That, of course, is one of the symptoms of Covid. This issue was raised in the absence of the jury. It turned out to be the son of the applicant's

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partner. The judge suggested that as it was causing a distraction to counsel, and possibly to the jury as well, perhaps the gentleman concerned could be asked not to come into court for the time being although the judge stressed that he was not ordering that. The gentleman did leave court and the trial resumed. Cross-examination of the first complainant was completed before the luncheon adjournment.

10. When the court resumed for the afternoon session the judge was informed of a potential problem which had been reported by two of the jurors. Over lunch, as they were walking to Tesco (as the note from the jury bailiff explained) they were approached by a man who asked if they were jurors in court 3 and if they had broken for lunch. When the jurors returned to court the applicant was seen to be standing in the canteen talking to this man. In fact it was the partner's nephew, the man who had left court in the morning after the coughing.
11. The judge had the two jurors brought into court and established that they felt able to carry on with the trial. Counsel both agreed, and they also agreed that the judge should tell the jury that this was the man who had been asked to leave court earlier because he was coughing and that he had probably approached the jurors out of misguided curiosity. The second complainant's evidence-in-chief was completed that afternoon with cross-examination adjourned to the following morning. The jury left court shortly before 4.00 pm.
12. The next morning, Wednesday 18 March, there was another message from the jury, via the usher, saying that the previous evening after court the same nephew had shouted to one of the jurors, as he was walking through the car park near the court, asking: "How are you Paul?" The judge established that neither prosecution nor defence were asking that the juror be discharged on that account. The judge had the juror brought into court and the juror confirmed that he was perfectly content to continue.

13. We mention these two episodes because it is plain to us that the jury were well aware of their obligation to bring to the judge's attention any matter of concern, in accordance with the directions the judge would have given them in his homily at the start of the trial and also in the jury guidance document they would have received "Your legal responsibilities as a juror". Moreover, the judge had warned the jury each day that if they needed to self-isolate for health reasons or showed any Covid symptoms they should not come to court.
14. The evidence of the second complainant was completed by lunchtime on the Wednesday. The remaining prosecution witnesses gave evidence on Wednesday afternoon. The jury were released shortly before 4.15 pm. The judge circulated his draft directions of law so that counsel could consider them overnight. 1
15. Next morning, Thursday 19 March, the prosecution closed their case and the defendant was called to give evidence. His evidence concluded at 11.42 am. In the absence of the jury the judge then discussed with counsel the proposed directions of law and agreement was reached.
16. At 12.31 the judge began his split summing-up, giving the jury directions of law. He provided the jury with those directions in writing as well as reading them out. They were extremely clear and comprehensive. No issue is or could be taken with those directions. The judge completed his legal directions shortly before 1.00 pm.
17. Importantly, having completed his directions of law, the judge helpfully gave the jury the following information about the timetable for the rest of the case:

> "We're going to stop now until 2 o'clock. The next stage will be for the advocates to address you in their closing speeches, beginning with the Prosecution and ending with the Defence. When that's concluded I shall sum up the evidence to you and ask you to retire and begin your deliberations. Whether we get to that this afternoon or first thing tomorrow remains to be seen. Whenever it happens you will be under no pressure of time. The pressure of time from the court's perspective is to enable you to be in that position. Once you're in that position you take all the time you need. OK? We'll see you at 2 o'clock."

18. After the luncheon adjournment, starting at 2.13 pm, the jury heard counsel speeches, which concluded by 3.27 pm. The jury were then given a break until 3.40 pm. The judge commenced the remainder of the summing-up at 3.41 pm concluding at 4.53 pm, that is to say 1 hour and 12 minutes.
19. One of the points made on behalf of the applicant by Ms Yeo is that towards the end of the summing-up the judge appeared to lose his place in his notes on several occasions and corrected himself with an apology each time. We shall return to this point. Ms Yeo also says that the jury appeared, to her at least, progressively disengaged, as she puts it, for the last 45 minutes of the summing-up, with two jurors closing their eyes intermittently. Ms Lewis, prosecuting counsel, has no recollection of that. It is certainly not something which Ms Yeo raised with the judge, as one might have expected her to do if it was a matter of real concern, although in her oral submissions this morning Ms Yeo apologises if that was an oversight on her part in not drawing it to the judge's attention.
20. On the Friday morning, 20 March, the judge gave the jury the usual concluding directions of law in relation to the requirement for unanimity and choosing a foreman. His final words before the jury bailiffs were sworn were as follows:

> "I won't be accepting any verdict between 1 and 2 o'clock. You're under no pressure of time whatsoever. If you're still deliberating later today then, then you can be given more time to do so. Don't worry about being put in a hotel for the weekend or anything like that, we don't do that anymore, so you're under no pressure of time. As I said to you yesterday, my concern was to get you to this stage in a timely fashion, in, given where we currently are, but now you take all the time that you need."

21. Pausing there, the reference in the judge's remarks there to "where we currently are" was clearly a reference to the developing situation so far as Covid-19 was concerned, because naturally that would have been on everyone's mind in the country during that week. That is very different from saying that the situation had developed to the point that it was inappropriate even to consider sending a jury out to deliberate that morning.
22. The jury retired at 10.05 am. There was no message from the jury until 2.16 pm, when they indicated they had verdicts. In view of what the judge had said about not accepting any verdict between 1 and 2 o'clock, it does not follow that the jury had not reached their verdicts until after 2 o'clock. They may well have reached their verdicts before 1 o'clock but knew they could not actually return the verdicts until after 2 o'clock. In any event, the court was reassembled and the verdicts were formally returned at 2.26 pm, the jury having been in

retirement, according to the case log, for 4 hours and 20 minutes. As we have already explained, the jury acquitted on count 2 but convicted on the remaining counts.

23. To put the chronology of the trial in context Ms Yeo points out that during the week of the trial there had been daily televised briefings from the government at 5.00 pm each evening in respect of the pandemic. She also points out that on Tuesday 17 March the Lord Chief Justice issued a statement in the following terms:

> "Trials in the Crown Court present particular problems in a fast-developing situation because they require the presence in court of many different participants including the judge, the jury, the defendant, lawyers and witnesses as well as staff. Given the risks of a trial not being able to complete, I have decided that no new trial should start in the Crown Court unless it is expected to last for three days or less."

That announcement plainly did not apply to this trial, even if the jurors had read of the statement in the Press or heard it reported in the media.

24. Ms Yeo explains that there was only one other trial in progress at Newport Crown Court that week, a multi-handed murder trial with seven defendants and 16 counsel, presided over by Picken J. In fact Picken J discharged the jury in that case on Wednesday 18 March (which was Day 17 of that trial). It was reported in the local Press that the trial had been abandoned due to the coronavirus. In fact, the position is that the murder trial over which Picken J was presiding was nowhere near a conclusion. The prosecution case had not even been completed and the judge had been told that the defence cases were likely to take 3 weeks.
25. Ms Yeo submits that it is likely that the jury in the applicant's trial would have heard what had happened in the other trial and may have felt under pressure to conclude matters speedily to avoid returning to court the following week. They would have been aware that they were the only remaining jury in the building.
26. In her grounds of appeal Ms Yeo sets out (with page references) the errors which the judge corrected in his summing-up. There are seven in total. We need not rehearse them. Suffice it to say that they amount, in our view, to no more than slips of the tongue which he immediately corrected. It is not suggested by Ms Yeo that they were serious errors. She relies on them simply to suggest that the judge himself was feeling under a degree of pressure which was exhibited by the mistakes he was making and that this may have registered with the jury and increased their anxiety.
27. Ms Yeo submits that although the judge told the jury they had unlimited time to deliberate, the context implied that there was time pressure owing to the "current circumstances".
28. In support of her submissions, Ms Yeo referred in the grounds of appeal to some of the authorities which establish the undoubted proposition that it is of fundamental importance in their deliberations that a jury should be free to take as much time as they feel they need, subject to the right of the judge to discharge them if a protracted consideration has still produced disagreement: see R v McKenna [1960] 1 QB 411. We observe that McKenna was an extreme case in which the judge had told the jury that if they had not reached a verdict in the next 10 minutes they would have to stay on all night if necessary.
29. More recently in the case of R v Brown [2016] EWCA Crim 523, this court reviewed the authorities in the context of how a judge should respond to a note from the jury indicating that they are in deadlock. At paragraph 21 of the judgment of the court, given by Gross LJ,

it was said:

> "The principle which emerges from all the authorities does not go to some inflexible mode of responding to a note from a jury indicating deadlock or possible deadlock. Instead, the principle which emerges is the need to ensure that no juror should be put under pressure to reach any particular verdict. Desirable though it obviously is that any trial is brought to a conclusion, a jury must be free to deliberate without any form of pressure being imposed upon them, and no juror must be made to feel that it is incumbent upon them to express agreement with a view that they do not hold, simply because it might otherwise be tiresome inconvenient or expensive..."

30. Ms Yeo also drew our attention in her grounds to the following passage in Archbold 2020, at paragraph 4-431:

> "The Court of Appeal has discouraged starting a summing up, or starting a particularly important part thereof (e.g. the defence case) at a late hour or late on a Friday. The more serious and complex the case, the greater the need to ensure that the directions to the jury are given when they are likely to be fresh and attentive..."

31. Two authorities are cited in support of those propositions. The first is R v Rimmer and Beech [1983] Crim LR 250. That was a murder trial in which immediately after counsel's closing speeches the judge began his summing-up at 4.15 pm, giving the jury complex legal directions in relation to joint enterprise. This of course was in the days before the jury were provided with written directions. From questions the jury asked in retirement the next day it was clear that they had not understood the directions they had been given the previous day and the judge had to explain the directions again. Because the problem had been remedied in this way by the judge, it was held on appeal that the convictions were safe but the court observed that it had been an error of judgment to begin his summing-up when he did.
32. The second is a case reported only in The Times (3 October 1991), R v Day, where the judge summed up the whole defence case at 3.00 pm on a Friday at the end of a 22-day trial and after summing-up all day. It would have been preferable, it was held, to postpone this part of the summing up until the Monday.
33. Ms Yeo suggests in her grounds that the judge was wrong to have sat late on the Thursday to complete the summing-up, including reviewing the evidence of the defendant, rather than leaving that until the Friday.
34. For all these reasons, Ms Yeo submits that there must be a real risk that the jury felt under pressure owing to the pandemic crisis and the convictions are therefore unsafe.
35. In her oral submissions, she added to what she had said in writing, by suggesting that, for example, jurors might have been concerned about child care problems which were looming if they had to come back on the Monday and that this might have influenced them to reach verdicts inappropriately feeling under time pressure on the Friday. She submits that there must be a "lurking doubt" as to the safety of these convictions.
36. On behalf of the respondent Ms Lewis submits that these convictions are safe. The evidence the jury had to consider was given over a period of only two-and-a-half days. It was a short trial. The jury did not seek any assistance from the judge during their

deliberations. They clearly considered the evidence with care, in that they returned a not guilty verdict on count 2. The judge had made it clear that there was no restriction of time. The jury were told each day that they should not attend if they had any symptoms of Covid-19. None of them failed to attend or expressed any concern, at any stage, during the course of the trial.

37. We have considered all these submissions carefully. We are not remotely persuaded that these convictions are unsafe. This was a short trial, unlike the murder trial in the adjoining court. It is no more than speculation to suggest that the jury in the applicant's trial would have thought it of any significance for their case that the other jury had been discharged. It was entirely understandable for the judge to complete his summing-up on the Thursday afternoon, thereby leaving the jury maximum time the following day to deliberate. Although the judge sat a little later than usual to complete the summing-up, the jury were still leaving court comfortably before 5 o'clock. It was to the applicant's advantage, for the reasons the judge explained, that they should be reminded of the applicant's own evidence in the same session of the summing-up as the remainder of the evidence, so that they were not left overnight with only the prosecution case ringing in their ears.
38. We are unimpressed by the suggestion that the judge himself was feeling under pressure and for that reason made the minor errors that Ms Yeo has identified, or that the judge's errors were likely to have caused the jury any anxiety. The judge may well have been tired after a long day, reminding the jury of evidence which had only recently been given and which he would have had little or no opportunity to collate from his notes. Had Ms Yeo been concerned that jurors were becoming inattentive she should have raised that with the judge at the time or at the very least put it on record at the end of the day. Ms Yeo realistically accepted that in her submissions. The experience of this court, however, is that often it is counsel's reactions at the time which are important and the very fact that neither she nor Ms Lewis thought it necessary to draw that matter to the judge's attention is the best indication that it was not really registering as a matter of concern.
39. Similarly, if on reflection overnight Ms Yeo was concerned that the jury should not be retiring to consider their verdicts that Friday at all, because of the risk of time pressure owing to the developing public health crisis, we would have expected her to raise that with the judge and invite him to discharge the jury; indeed we have no doubt that prosecuting counsel as experienced as Ms Lewis would have raised the matter herself had she thought it necessary and appropriate to do so. In fact there was no discussion of any kind with the judge raising any concern that the jury should not be retiring to consider their verdicts even with the whole of Friday ahead of them.
40. The reality here is that the jury had a full day of deliberations available to them, with no restriction on further time after that, if necessary. As it turned out, they needed only half-a-day. They required no further assistance from the judge. They plainly analysed the evidence carefully because they returned mixed verdicts. On five counts they were unanimous in convicting; on the sixth they were unanimous in acquitting. From the material placed before us , all the indications are that this was a diligent and conscientious jury. There is no reason whatsoever to think that any member of the jury was doing other than adhering fully and conscientiously to the oath they had taken at the start of the trial.
41. If we may say so, the experience of members of this court sitting at first instance in the Crown Court during that week in March, and indeed during the whole pandemic crisis, is that jurors have invariably treated their public duty with enormous conscientiousness and

have stepped up to the mark by ensuring that justice is properly and fairly done.

42. For all these reasons, it is not arguable that these convictions are unsafe or that the applicant's trial was in any way unfair. Leave to appeal is accordingly refused.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk