IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM

THE CROWN COURT AT ST ALBAN'S

His Honour Judge Foster

[2023] EWCA CRIM 1232

No. 202203600 B5
202301035 B5

Royal Courts of Justice

Wednesday, 4 October 2023

Before:

LORD JUSTICE WARBY

MR JUSTICE MURRAY

HIS HONOUR JUDGE MENARY KC
(RECORDER OF LIVERPOOL)

REGINA

V

FRANK MOONEY

REPORTING RESTRICTIONS APPLY:
THE SEXUAL OFFENCES (AMENDMENT) ACT 1992

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MR J. GADSDEN appeared on behalf of the Appellant.
MS K. CHARLES appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WARBY:

1 This is the hearing of an appeal against conviction for sexual offences against a child on one ground for which the single judge gave leave. The appellant also renews applications for leave to appeal against conviction and leave to appeal against sentence on other grounds which the single judge considered to be unarguable.

2 The Sexual Offences (Amendment) Act 1992 applies to the case. That means that the child concerned is entitled to lifetime anonymity. During her lifetime no matter relating to her shall be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences to which we shall refer unless that prohibition is waived or varied by the court.

3 The appellant is Frank Mooney, now aged 37. On 11 November 2022 in the Crown Court at St Albans he was convicted after a trial on four counts of offences contrary to the Sexual Offences Act 2003: one alleging rape of a child under 13 years contrary to s 5 of the Act; one of causing or inciting a child to engage in sexual activity contrary to s 10, and two counts of sexual assault of a child under 13 years contrary to s 7. As we shall explain, these were all multiple incident counts.

4 On 2 March 2023 the appellant was sentenced by the trial judge (HHJ Foster) to a special custodial sentence of 17 years for the rape, comprising a custodial term of 16 years imprisonment plus a one-year extension period as required by statute. The judge imposed concurrent sentences of five years for each of the assaults and four years for the s 10 offence.

The grounds of appeal against conviction

5 We deal first with the grounds of appeal against conviction. The background facts are these.

6 All the charges we have mentioned relate to the same child to whom we shall refer as "C1". On 16 May 2022, during a school sex education lesson concerning what to do if they saw sexual content on the internet, C1, who was then aged 11, became distressed. She spoke to a pastoral and parental engagement officer called Jacqueline Mattholie, whom she told that the appellant had touched her in the groin area.

7 On 21 May 2022 C1 gave a recorded interview under the ABE procedure. In it she told the police that from the age of five or six the appellant had made her give him oral sex on multiple occasions which she said had happened "lots" and which started by him calling her upstairs to his bedroom and telling her to "open" or "put it in". C1 also alleged that the appellant had made her touch his penis, touched her on her breasts and touched her on her genitals over her clothing. In interview the appellant denied all such offending.

8 An indictment was proffered containing nine counts alleging offences committed between 31 March 2017 and 1 May 2022, which we shall call "the indictment period.". The first eight counts were in pairs - the first three pairs alleging a single incident within the indictment period and the second alleging the same kind of behaviour on multiple occasions during the same period. Counts 1 and 2 were allegations of rape arising from the allegations of oral sex. Count 2 alleged rape on "at least 20" occasions. Counts 3 and 4 dealt in the same way with the alleged touching of the appellant's penis. Counts 5 and 6 related to the alleged touching of C1's breasts and followed the same format. Count 7 was a single incident of touching of C1's vagina. Count 8 alleged the same conduct on "at least ten occasions". Count 9 alleged a single offence of causing a child to watch a sexual act - the case being that the appellant had shown C1 a pornographic video via his mobile phone.

9 The defence case statement denied all the alleged offending saying that C1's account was entirely untrue. The defence case statement put forward a number of possible explanations for that. It relied on the vagueness of C1's account and reserved the right to develop other theories as to why she had told what were said to be falsehoods.

10 Before the trial on 29 September 2022, C1 was cross-examined by defence counsel pursuant to s 28 of the Youth Justice and Criminal Evidence Act 1999 and re-examined by recording. Defence submissions advanced in the light of the evidence given at this stage led the prosecution to drop count 9 by offering no evidence to support it. The case proceeded to trial on the other eight counts which we have described.

11 At trial the Crown opened the case to the jury on the basis that having heard the evidence they would be satisfied so that they were sure that all eight of those counts were made out and that guilty verdicts should be returned on all of them. To prove that case, the prosecution relied on evidence of C1's initial complaints at school and her pre-recorded ABE interview. That evidence was presented to the jury exclusively in video form. An edited version of the ABE interview was played to them, as well as the pre-recorded s 28 cross-examination and re-examination.

12 At the conclusion of the prosecution case defence Counsel, Mr Gadsden, made a submission of no case to answer in respect of each of the even numbered counts, contending that C1's evidence was incapable of supporting a conviction on any of the multiple incident counts as pleaded. He submitted that the evidence could not establish the commission of "at least 20" offences as alleged in counts 2, 4 and 6, or that the offence alleged in count 8 had occurred on "at least ten occasions". Mr Gadsden submitted that the evidence could prove "at most" half a dozen instances of the earlier offences.

13 Counsel also made a submission of no case to answer in respect of count 7 on the basis that the evidence was of touching the genital area over C1's clothing and there was no evidence that her vaginal area itself had been touched. The logic of that submission applied equally to count 8, which used the same wording. That wording did not appear in the particulars of the offending but in explanatory wording that followed those particulars.

14 The judge and prosecuting Counsel agreed that the evidence as it stood could not sustain the multiple incident counts alleging at least 20 occasions of offending. But the judge made it clear that he regarded the matter as essentially one calling for amendment of the indictment. The Crown responded by applying to amend by removing all of the single incident counts altogether, and reducing the minimum number of occasions specified in each of the even-numbered counts to five. Defence Counsel said that he had no submissions to make on the application so far as counts 2 and 4 were concerned but he did submit that C1's evidence could not establish "at least five" occasions of touching of the breasts or of the vagina (counts 6 and 8). In her ABE interview she had said that this had happened "rarely". This submission of the defence led the prosecution to revise its application to amend so that those two counts would allege offending of that kind "on at least two occasions".

15 It was in that form that the prosecution application was granted. In a short ruling on the matter the judge said this:

> "Well quite clearly it is not a procedural game. My job is the umpire in these proceedings to ensure fair play between the prosecution and defence. The prosecution put their case before the jury, and the defendant has a fair trial. It seems to me, there's no prejudice caused, bearing in mind that his case is that none of this happened at all, by a late amendment to amend the number of times."

16 What finally emerged, therefore, was a four-count indictment alleging rape on at least five occasions (count 1), inciting C1 to touch the appellant's penis on at least five occasions (count 2), touching C1's breasts on at least two occasions (count 3), and touching her vagina on at least two occasions (count 4). This indictment was provided to the jury and the judge explained what had happened, saying the following:

> "Often in these types of cases the indictment is reviewed in the light of the evidence to make sure that what you're considering is what on the Crown's case, the evidence is."

17 The judge discharged the jury from returning verdicts on original counts 1, 3, 5 and 7 and directed them to consider the amended four-count indictment.

18 The appellant gave evidence, which followed the lines of his interview and defence case statement. At the close of the evidence the judge gave the jury legal directions both orally and in writing. He did so on the basis of the new amended indictment. Speeches followed.

19 The prosecution told the jury that its case had not materially changed. Defence Counsel submitted to the jury that, to the contrary, the prosecution had begun on one basis and yet within 48 hours had been forced to close their case on a quite different basis, namely at least 14 offences rather than the original 74. Mr Gadsden also made observations to the jury about the absence in this case of certain kinds of evidence that, he told them, one might expect to see in a case involving alleged child sexual abuse. At this point, prosecution Counsel intervened inviting the judge to rule on the proprietary of this line of submission, which was said to involve Counsel giving evidence. The judge upheld the objection, stating that "what is going on in other cases is a matter of evidence" which could have been dealt with, if appropriate, with the officer in the case.

20 Speeches having concluded, the judge delivered the second part of his summing up, ending it with a direction about the amended indictment in these terms:-

> "It is a consolidating indictment which reflects the allegations made by [C1], and at the heart of this case is not paperwork or how the prosecution or CPS have charged in the indictment; it's whether or not you are sure of the truthfulness and accuracy of what [C1] has alleged in this case."

21 By this point the indictment had been amended in manuscript by the jury on the judge's direction to note that the allegation in count 4 was one of touching the vaginal area rather than the sexual organ. The judge had made this clear when the new indictment was presented to the jury and he made the point clear again in his summing-up.

22 Whilst the jury were in retirement defence Counsel sought leave to add a point to his speech which he had overlooked when on his feet. Leave was refused. In due course the jury returned unanimous guilty verdicts on all four counts.

<u>The first ground of appeal: amendment of the indictment</u>

23 The first ground of appeal against conviction, for which the single judge gave leave, is that the judge was wrong to allow amendment of the indictment. In his perfected grounds of appeal Mr Gadsden argued:

(1) that the judge should have acceded to all his submissions of no case to answer and refused leave to amend;

(2) that the procedure adopted created unfairness.

24 In his written grounds Mr Gadsden identified two kinds of unfairness. First, the decision to drop count nine and edit out the references to it in the s 28 recording, deprived the defence of the tactical advantage of demonstrating this weakness in C1's evidence to the jury. Secondly, by presenting the Crown's case as essentially unchanged the prosecution and the judge both "completely undermined" the force of Counsel's closing speech. In his oral argument today Mr Gadsden has gone further, raising some additional points about unfairness to which we shall return.

25 Our consideration of this grounds of appeal must begin with the provisions of s 5 of the Indictments Act 1915. This provides so far as material that:

> "Where ... at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice."

26 This provision has been given a flexible interpretation. The authorities show the following:-

(1) The word "defective" is to be given a generous rather than a narrow and technical meaning. It extends beyond those cases where the indictment would be liable to be quashed, and covers cases where the indictment charges an offence which is not disclosed or supported by the evidence in the case.

(2) As the statute expressly provides, a defect may be cured by amendment at any stage. That includes before or after arraignment. It is permissible in principle to amend after the close of the prosecution case to frame charges appropriate to the evidence in the case in substitution for charges that are inappropriate.

(3) Whenever an amendment is sought the key question is whether the defendant will be prejudiced thereby, a matter which must be considered with great care.

For these propositions see: *R v Martin* [1962] 1 QB 221; *R v Johal* [1973] 1 QB 475; *R v Collison* (1980) 71 Cr App R 249; *R v Radley* (1984) 58 Cr App R 394 and *R v Teong Sun Chuah* [1991] Crim L R 463.

27 In this case the original indictment was unsatisfactory. The form of it was unusual in a number of respects that were identified in argument before the judge. More significantly, there were flaws that clearly count as defects in the extended sense we have identified. Although C1's pre-recorded evidence was clearly capable of establishing that each of the four offences that were eventually left to the jury was committed and, as we shall explain, was committed on more than one occasion, her evidence could not sustain count 9, nor could it support the pleaded allegations that the offences charged on counts 2, 4, and 6 had been committed on as many as 20 occasions or that the offences charged in count 8 had been committed on at least 10 occasions.

28 These flaws were all apparent on the face of the materials that were available to counsel on both sides, and to the trial judge, before the trial began. The evidential insufficiency in relation to count 9 was dealt with before the trial. When the other matters were raised at trial the judge and prosecution counsel both acknowledged that they should have been picked up at an earlier stage. But the defence had not highlighted them until counsel made his submission of no case to answer.

29 In our judgment the trial judge's response to that submission was a legitimate one. The defence was not entitled to an acquittal on a technical pleading ground. In dealing with the application to amend the judge adopted the correct legal criterion and applied it in a proper manner. We share the view of the single judge that there is no arguable merit in the first of Mr Gadsden's allegations of unfairness. It was open to the defence to exploit the weakness of count 9 in various ways. They could have let that charge proceed to trial so as to make a play of the matter before the jury. Instead, they prompted the prosecution to abandon that count and the recorded material was then edited at the behest of the defence. It is too late for a change of heart about that aspect of the matter. Nor, in our view, does Mr Gadsden's second written complaint of unfairness have any real substance.

30 At root, the position here was simply that the prosecution had - for reasons that remain obscure - overstated its case at the outset. It had charged the appellant with offending more extensive than its own evidence could establish. Once that was pointed out by the defence, the prosecution case was reduced in scope to that which a jury could find proved. It was open to defence Counsel to take forensic advantage of these facts and circumstances and he did so. But on analysis these were nothing more than rhetorical points primarily targeted at the presentation of the case by the Crown. They were not points of substance about the credibility or adequacy of the evidential case against the appellant. Those remained the same throughout. So did the essential nature of the case which the appellant had to meet. The reduction in its scale caused him no material prejudice.

31 Today, Mr Gadsden has submitted that his s 28 cross-examination would or at least might have been differently conducted had he been presented with an indictment in the amended form that eventually emerged. We do not accept that submission. C1 was questioned on the footing that her evidence indicated more than one incident of each example of the offending alleged. She was asked if she was telling the truth about these matters. We have not been persuaded that the questioning would have been materially different if the indictment had been in a different form or that any injustice resulted in this respect.

32 We are unpersuaded by the further submission advanced before us today by Mr Gadsden that there was no evidence capable of sustaining the indictment as amended, by establishing to the satisfaction of the jury that there had been five instances of the offences charged in the earlier counts. We note that this was not a submission that he made to the judge. The evidence of C1 included a number of statements indicating that the offences charged in Counts 1 and 2 had happened on several occasions, more than once. The terms which C1 used were imprecise but capable in their context of establishing to the satisfaction of the jury that a minimum of five instances of this offending occurred. Mr Gadsden was right, in our view, not to offer objection to the prosecution’s final application to amend those counts.

33 As for Counts 3 and 4, the allegations of touching on at least two occasions, C1's evidence was that this behaviour happened “rarely”. It was open to the jury to conclude that this meant at least twice. And as for the submission that count 4 could not be made out in any event, this did not, as we have explained, require an amendment of the formal parts of the indictment. The only change was to some explanatory wording. We are satisfied that the case was properly left to the jury on the basis that the allegation they had to consider was the one that C1 had made in her evidence, namely touching of the vaginal area over the clothes, rather than touching of a sexual organ. The judge made this perfectly clear in the manner that we have already explained.

34 For these reasons, we dismiss the appeal on ground one.

Other grounds of appeal against conviction

35 Turning to the renewed grounds of appeal against conviction, the first set of grounds can be taken together. They are that the complainant's account was "vague and unconvincing", that there was an inaccurate leading question in the pre-recorded interview, and that the verdicts were contrary to the weight of the evidence, with the overall result that the convictions are unsafe.

36 The single judge's response to these points was "these were all matters for the jury and do not provide an arguable basis for appeal." We agree. It could not be said, and we do not think it was argued at trial, that C1's evidence was inherently unworthy of belief. We have listened carefully to Mr Gadsden's submissions on the quality of the evidence today, but in our view, if accepted, C1's evidence was sufficient to sustain the amended indictment. If there was a flaw in the way C1 was questioned it was a matter of little weight, and one on which counsel was free to comment. The weight to be given to all this evidence was quintessentially a matter for the jury to assess.

37 The second renewed ground of appeal is that Counsel's closing speech was improperly interrupted. Of this, the single judge said, "this is not a point of substance; nor was the intervention arguably wrong." We agree. It is always unfortunate for Counsel to be interrupted whilst addressing the jury, and it is the custom to avoid doing so if at all possible. Here the transcript shows that the prosecution held fire until Counsel felt compelled to intervene. The intervention was upheld by the judge and in our view was justified. Defence Counsel was going beyond observing that there was an absence of certain kinds of evidence; he was straying into assertions to the jury as to the truth of factual matters that had not been established in evidence. We are not convinced remotely by the complaint that counsel was so discombobulated by the intervention that it was unfair for the judge to refuse him leave to make a further speech, or to decline to inform the jury on Counsel's behalf of the points that he would have made had he been allowed to do so.

38 Finally, the written grounds alleged that the summing up was "heavily biased" in favour of the prosecution. We note that no such complainant was made at the time, which is usually an indication of weakness in a ground of appeal. Mr Gadsden had not pressed this point in his oral submissions today, leaving it to us to assess. The single judge's view was that the written grounds gave no detail to support this contention and "upon reading the summing up, this does not appear to be an arguable ground of appeal." We agree again with the single judge.

39 For those reasons, the convictions will stand. We turn to the matter of sentence.

Grounds of appeal against sentence

40 The appellant fell to be sentenced not only for the offending against C1 but also for three offences on a separate indictment to which he had pleaded guilty. Those offences were wounding with intent, having a bladed article, and assault by beating. All of these were committed whilst on bail for the offences against C1. For these three offences the judge imposed a total sentence of three years' imprisonment after reduction for the guilty plea. That is not itself challenged on this appeal.

41 For the sexual offending the judge passed sentences consecutive to the three years imposed for the offences of violence. That decision too is unchallenged. The judge took the rapes in count 1 as the lead offences, imposing the 17-year sentence we have mentioned to reflect the overall criminality.

42 The offending in count 1 involved a minimum of five occasions of oral rape. The judge was bound to sentence on the basis that it was five not more. He identified the harm caused as in Category 2 for two reasons. First, that the repeat offending was as bad as a single sustained incident, that being one of the Category 2 criteria. Secondly, that C1 was particularly vulnerable due to her youth and personal circumstances, being under the appellant's care in her own home. The culpability was found to be in Category A on the footing that there was abuse of trust. The judge treated the seriousness of the offending as aggravated by the multiplicity of the rapes and the additional offending dealt with in counts 2, 3 and 4. He held that the appellant had no insight and had shown no remorse, but took account of his previous good character and his good prison record. Taking all of that into account the judge imposed the sentences we have identified, the total sentence being one of 16 years' custody, consecutive to the three for the violent offences, together with the one-year additional licence period.

43 The grounds of appeal do not challenge the judge's categorisation as such, although we will come back to that matter. They do allege that the judge erred in three respects which are said to have led him to impose a manifestly excessive sentence:-

(1) First, in taking account of the young age of the victim. It is said that this is "built in" to the offences in question and did not justify an increase to the top of the Category 2A range.

(2) Secondly, it is said that the judge failed to reduce the sentence sufficiently or at all for totality in the light of the sentence imposed on the other indictment.

(3) Thirdly, it was argued that the judge failed to give sufficient credit for the appellant's positive good character, attested to by two character witnesses who had been called at trial.

44 On the first point we would accept that to some extent young age is inherent in the offences themselves. Nonetheless, it must be borne in mind that on this victim's evidence, which the judge was entitled to accept, she was as young as five or perhaps six years old at the time of the initial offending. For that reason, and the other reasons he gave, we are satisfied that the judge was entitled to conclude that the case was in Category 2. Considering the matter overall, we find ourselves in agreement with the single judge that none of the points advanced provide arguable grounds of appeal.

45 The starting point for a Category 2A offence of rape of a child under 13 is imprisonment for 13 years. The category range is 11 to 17 years' imprisonment. All these figures are for a single offence. The judge had to sentence for five offences. He also had to factor in the separate offending against C1 which was the subject of counts 2, 3 and 4, which involved another nine incidents. The judge's assessment was that this offending by itself merited an overall sentence of five years' imprisonment. That assessment went unchallenged in the written grounds. Mr Gadsden has argued today that it was excessive, a submission which we do not accept.

46 In all these circumstances, it is understandable that the judge observed that the guidelines were of limited assistance in the situation before him. A purely arithmetical approach would have led to a starting point for the sexual offending many times the 16 years at which the judge eventually arrived. His focus had to be, and in our judgment it was, on the impact of the mitigating circumstances and the principle of totality.

47 The judge clearly had in mind the appellant's positive good character. He made mention of his good prison record. He must also have had in mind that the guidelines make clear that

good character *"should not normally be given any significant weight nor will it normally justify a reduction in the appropriate sentence."* As for totality, the judge had already taken this into account when dealing with the offences of violence as a group. He clearly took it into account a second time when sentencing for the sexual offending. Otherwise, the overall sentence would have been a great deal higher than it was. As it is, bearing in mind the five-year sentence imposed on counts 2 to 4, the additional sentence imposed for all five of the Category 2A rapes was one of 11 years. This is below the starting point for a single offence of this category and only one year above the category starting point for a single offence of Category 3A, that being the category for which Mr Gadsden contends.

48 Standing back to review the overall sentence in this case we are satisfied that it was just and proportionate. We do not accept that it was arguably wrong in principle or manifestly excessive. Accordingly, the renewed application for leave to appeal against sentence is also refused.

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Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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