IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 477

CASE NO 201701457/C3

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 19 April 2023

Before:

LADY JUSTICE THIRLWALL DBE

MR JUSTICE CAVANAGH

MRS JUSTICE STACEY DBE

REX

V

DANIEL JAMES ROBERTS

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

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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MS J SMART KC appeared on behalf of the Applicant.

J U D G M E N T

WARNING: Reporting restrictions apply to this judgment -The Sexual Offences (Amendment) Act 1992

1. MRS JUSTICE STACEY: The provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions, where a sexual offence has been committed against a person no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. We shall refer to the complainant as "C" and the witness, who is his sister, as "W" in order to assist with anonymity.
2. On 2 March 2017, in the Crown Court at Mold before HHJ Rowlands, the applicant (then aged 36) was convicted of a number of child sexual offences: five counts of sexual assault of a child under 13 contrary to section 7(1) of the Sexual Offences Act 2003, one count of causing or inciting a child under 13 to engage in sexual activity contrary to section 8(1) of the Sexual Offences Act 2003 and two counts of engaging in sexual activity in the presence of a child, contrary to section 11(1) of that Act. The offences were committed against a young extended family member aged 9-11 (“C”) on various occasions and in various locations over a 2-year period. One incident occurred in the presence of another extended family member (“W”) who was 2 years older than C aged around 13 at the time.
3. The incidents included the applicant touching C's penis under a blanket whilst he was sitting on the applicant's knee when in a family group on several occasions and touching C's penis after getting into the shower with him on another occasion. On a further

occasion, count 3, the applicant took C's hand and placed it on the applicant's penis. The two counts of engaging in sexual activity in the presence of a child concerned the applicant fondling and stretching his exposed penis in the presence of C.

4. The applicant said that he may once have accidently brushed C's penis when play fighting with him and once when he was undressing him before a shower, but the touching was not sexual and there was a complete denial of the alleged incidents under a blanket and all the other allegations.

5. The applicant was convicted by a majority of ten jurors to two and acquitted by the jury of a further count of sexual assault on a child under 13, alleged to have occurred while the applicant and C were playing Minecraft together. The applicant was sentenced to a total of 6 years' imprisonment and made subject to a sexual harm prevention order ("SHPO"). The original terms of the SHPO were subsequently varied by this Court which accepted that since the applicant had limited his offending behaviour to C, and there was no suggestion that he was a risk to female children, the order had been drafted too broadly and the restrictions on his contact with children under the order would be limited to male children only.

6. The case turned on whether C and W's accounts, or the account of the applicant, were to be believed. The jury must have believed C's evidence as to the central fact of the offences having taken place, even though there were one or two minor and non-material details that were proved to be inaccurate. In relation to count 5 – one of the counts of engaging in sexual activity in the presence of C - C did not specifically recall it, but W gave evidence that she had witnessed it. The jury must have accepted W's evidence.

7. There has been a complicated appellate history and a number of lawyers have been instructed at various times. After lodging the application for leave to appeal against

conviction within the time limit on 31 March 2017, there have been considerable delays. It is necessary to set these out in a little detail. Fresh solicitors were appointed but took 7 months to order a transcript of the entire trial on 15 August 2018. Eight months later counsel, Ms Smart KC, who represents the applicant today, was instructed to consider whether there were any grounds. Four months later the advice on appeal was drafted. Three months after the *McCook* response was received from trial counsel a conference with the applicant took place. An application to the Criminal Cases Review Commission was made in March 2020 but refused in October 2020. It then took a further 18 months for counsel to prepare draft grounds of appeal against conviction and an out-of-time renewal application was made in April 2022. There was then a further 9-month delay for the application to appeal against conviction to be renewed out of time and Form SJ lodged on 2 February 2023. The renewal application was therefore lodged just shy of 5 years from the single judge refusal. Meanwhile, on 5 March 2021, this Court allowed the appeal against sentence to the limited extent of a variation of the SHPO as set out above.

8. There are four applications before the Court: firstly, an application for leave to appeal; secondly, an application for an extension of time of 1,817 days in which to renew the application for leave to appeal following refusal by the single judge; thirdly, an application for leave to vary the Notice of Appeal from the original grounds to rely on entirely different grounds (he does not renew his original grounds); and fourthly, an application to adduce fresh evidence consisting of statements from other extended family members.

9. Turning to the proposed new grounds of appeal. Ground 1 alleges a failure to adduce the complainant's second Achieving Best Evidence ("ABE") interview which was not played at trial. It is said that there were important discrepancies in C's account that were not

explored in cross-examination or commented upon in the closing speech. However there are no significant discrepancies between the second ABE and all the other evidence that was before the jury at trial. It is correct that in the short, 9-minute interview, C stated that he did not remember an occasion when W was in the room when the applicant engaged in sexual activity in front of him. However that fact was before the jury by way of an Agreed Fact and so the jury had the relevant information from the second ABE without having listened to the tape itself.

10. It is fair to say that there were one or two discrepancies in the evidence, as is often the case in cases of this type. There were some differences of small details in the accounts as between C and W, and some differences in recollection as to how and where various complaints had come to light. It was for the jury to decide if those inconsistencies, such as they were, went to the truth of the allegations, or were minor details of misremembering and trivial incidents that did not undermine the validity of the central allegations. These matters were well canvassed in the judge's summing-up and by the applicant's then trial counsel in her closing speech.
11. Ground 2 concerns a failure to call character evidence. It is common ground that the applicant was a man of good character and the jury was given a full good character direction by the judge. Furthermore his wife gave evidence of his positive qualities. The fact that other family members were not called to speak of his positive qualities does not arguably render the conviction unsafe.
12. Ground 3 concerns the fresh evidence witnesses. It is said that there were three members of the extended family who were important witnesses of fact who were not called at trial. Their evidence was said to be relevant to counts 1 and 2, which occurred when the family members were in the room. However it was before the jury that none of them saw

anything untoward happen and the jury was reminded of that fact in both trial counsel's closing speech and in the summing-up. The statements now sought to be relied on do not take matters further. The witnesses did not recall C sitting on the applicant's lap, but they were consistent with C's evidence in other respects: they remembered the game that was being played at the time and that C had a blanket on his lap. The new statements do not take the matter further or provide significant assistance, if any, to the applicant. It is not cogent evidence that the incidents cannot have taken place as alleged.

13. Ground 4 is the concern that evidence of C being coached before giving his ABE was not adequately explored in the trial. Counsel does not seek to argue that trial counsel was incompetent, but rather that the evidence did not go far enough. Ms Smart submits that the ABE was not sufficiently or adequately explored before the jury. But it was before the jury that there were conversations between C, W and their parents before the police interviews and that there was a delay before the police interviews took place on account of the family having to return from abroad before the interviews could take place. It is clear that the facts were before the jury and that more emphasis could have perhaps been given to the point is not sufficient to give rise to arguable grounds.

14. Ground 5 concerns the failure of trial counsel to make a submission of no case to answer on count 5 on the basis that C did not recall the incident of the applicant's indecent exposure relied on in that count. But this ground of appeal ignores the evidence of W who said that she had seen the applicant exposing himself to C when she was also in the room which, if accepted, would prove the allegation. The jury was aware of W's fragility and had the opportunity to test the accuracy of her evidence in the knowledge of some of the mental health issues she was experiencing. Her brother's lack of recall of the incident did not mean that there was insufficient prosecution evidence before the jury to prove the

count.

15. Ground 6 concerns C's first account, which formed part of the unused material, not being disclosed or deployed at trial. The history of the matter is that C had given a first account which is recorded in a brief, 3 line, police record. In error the wrong item from the unused material was disclosed when requested by the defence, which was not spotted at trial. The first account is entirely consistent with the evidence that was subsequently given in the ABE and at trial, save for a reference in the first account that there may have been a suggestion of an allegation that the applicant had invited others to watch him masturbate C. In his ABE and evidence at trial, this allegation was not repeated by C. The difficulty with the submission is that the record provides only a tentative suggestion of this allegation. The failure to explore the reference and put the police's first record of the complaint before the jury could not arguably lead to an unsafe conviction.
16. The grounds of appeal do not allege or identify an error of law. It is not suggested that there was an irregularity in the course of trial. There is no criticism of the legal directions or the evidential summing-up by the judge and, in the view of the Court, we are not persuaded that it is reasonably arguable that there is any underlying merit in any of the proposed new grounds of appeal whether considered either separately or cumulatively.
17. Leave is sought to extend time. If granted, the proposed grounds do not give rise to an arguable case that the conviction is unsafe. It is therefore not in the interests of justice and there is no good reason to grant the extension of time and it is refused. For the same reason the application to substitute fresh grounds must also fail. The delays in this matter have been considerable at every stage and are not properly explained.
18. As to the fresh evidence application, the test has not been met. By section 23 Criminal Appeals Act 1968 the Court of Appeal has an overriding power to admit fresh evidence

where it is necessary or expedient in the interests of justice. Considering the matters to be taken into account in deciding whether to receive fresh evidence as set out in section 23(2) of the Act, the court accepts that the evidence is capable of belief, and that it would have been admissible, but the difficulty for the applicant is that the evidence would not have afforded any grounds for allowing the appeal. It cannot be said that without the evidence the convictions were unsafe for the reasons discussed above. There is also no reasonable explanation for failure to adduce the evidence in the proceedings. The witnesses were available at the time of trial and what evidence they might have been able to give was also known to the applicant at the time of trial which is abundantly clear from the trial counsel's advice on conviction at the time. Trial counsel's careful observations in her advice concerning conviction explains why the evidence now sought to be introduced would not have affected the outcome of the case and why, for sensible reasons, it was decided not to explore those avenues.

19. Leave to appeal and all the applications are therefore refused.

proceedings or part thereof.

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