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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/02887/B1
[2023] EWCA Crim 730

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 23rd May 2023

B e f o r e:

VICE- PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE McGOWAN

MR JUSTICE BRIGHT

R E X

- v -

A Y S

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Mr M Magarian KC appeared on behalf of the Applicant

Miss E Acker appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 23rd May 2023

LORD JUSTICE HOLROYDE:

1. On 20th October 2021, following a trial in the Crown Court at Kingston Upon Thames before Mr Recorder Nicholson-Pratt and a jury, the applicant was convicted of an offence of indecent assault committed many years ago against his younger sister, "C". He was acquitted of two similar charges relating to a cousin, "C2".

2. At a sentencing hearing on 10th December 2021, he was made subject to a suspended sentence order.

3. He now applies for an extension of time (313 days) in which to apply for leave to appeal against his conviction. His applications have been referred to the full court by the single judge.

4. C and C2 are entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes no matter may be included in any publication if it is likely to lead members of the public to identify either of them as a victim of one of the offences or a person against whom offences were alleged to have been committed. In view of the familial relationships between the applicant, C and C2, it will be necessary for any report of these proceedings to be anonymised by replacing the applicant's name with the randomly chosen letters A Y S.

5. For present purposes we can summarise the relevant facts briefly. C alleged five incidents of behaviour by the applicant which would be capable of constituting the actus reus of an offence of indecent assault, contrary to section 14 of the Sexual Offences Act 1956. She said that the first four incidents occurred when she was aged between about 5 and 7 years, the fifth

when she was aged about 10 years. On that fifth occasion, she said that the applicant had come into her bedroom in the family home, taken down her clothing and pushed his penis against her stomach. The applicant is six years and seven months older than C. Accordingly, the allegations related to a period when he was aged between about 11 and 16.

6. By section 50 of the Children and Young Persons Act 1933 a child aged under 10 is irrebutably presumed to be incapable of committing a crime: *doli incapax*, to adopt the Latin phrase which is commonly used. During the period to which C's evidence related, there was also a rebuttable presumption that a child aged 10 or more, but under 14, was also *doli incapax*. That presumption could be rebutted if the prosecution proved that the child knew that his actions were seriously wrong and not merely naughty. That rebuttable presumption was abolished, by section 34 of the Crime and Disorder Act 1998, with effect from 30th September 1998.

7. The fifth incident alleged by C was the subject of count 1 on the indictment, the offence of indecent assault of which the applicant was convicted. The prosecution accepted that the earlier four incidents may have occurred when the applicant was aged under 14 and before 30th September 1998. The prosecution also conceded that, owing to the passage of time, they had not been able to obtain evidence to show that the applicant knew at the time that his alleged actions were seriously wrong. The prosecution therefore did not charge any of those four incidents as a criminal offence. Instead, relying on *R v DM* [2016] EWCA Crim 674, the prosecution applied to adduce C's evidence relating to those incidents as bad character evidence, admissible as important explanatory evidence under section 101(1)(c) of the Criminal Justice Act 2003 and/or as evidence relevant to an important matter in issue between the prosecution and the defence under section 101(1)(d) of that Act.

8. That application, which was opposed by those then representing the applicant, was granted

by Her Honour Judge Kent. Basing her ruling on the reasoning in *R v DM*, Judge Kent held that the first four incidents alleged by C were capable of amounting to reprehensible behaviour and so were evidence of bad character, as defined by section 98 of the 2003 Act. She was satisfied that the evidence was admissible both through gateway (c), because without it the jury would find it difficult to understand the context of C's evidence relating to count 1, and through gateway (d), because it was capable of showing a propensity on the applicant's part to behave towards his sister in the way alleged in count 1.

9. Judge Kent further concluded that the admission of the evidence would not have such an adverse effect on the fairness of the proceedings that it ought not to be admitted and so declined to exclude the evidence, pursuant to either section 103(3) of the 2003 Act, or section 78 of the Police and Criminal Evidence Act 1984. Her reasons, in summary, were that the jury could and would be appropriately directed, C's evidence could be tested in cross-examination, the applicant could give and/or call relevant evidence if he wished, and the jury needed to hear the evidence so as to understand the relationship and behaviour between brother and sister.

10. Accordingly, C gave evidence of all five incidents. In addition to her evidence, the prosecution relied at trial on evidence of her complaints to others long before her allegations were reported to the police, and on "cross-admissibility" with the evidence of C2. The prosecution also relied on evidence, which ultimately went before the jury in the form of an agreed fact, that on 4th February 2012 the late grandmother of the applicant and C had signed a letter of wishes to accompany her will, in which she said that she did not want to include the applicant as a beneficiary under her will "as I have reason to believe that he acted inappropriately with his sister [C] when they were both younger".

11. The applicant gave evidence at trial denying any improper activity with either C or C2.

It was part of his case that C had made false allegations about him to their grandmother so that he would not benefit under the grandmother's will .

12. At the conclusion of the applicant's evidence the Recorder asked him a number of questions, including the following exchange. Having asked about the period when the applicant was at senior school, the Recorder asked:

> "Q. … Did you have sex education at school during this time?
> A. Yes, we did.
>
> Q. So, would it have been clear and apparent to you that touching a young person would have been seriously wrong?
> A. Absolutely, yes."

13. In his directions of law, the Recorder explained that the jury had heard C's evidence alleging the four earlier incidents, even though they were not the subject of a charge, because they formed part of the narrative background to what C said had happened to her. He directed the jury that the evidence did not tell them whether the applicant had committed the offence with which he was charged, and that they must be careful not to be unfairly prejudiced against him by what they had heard about the earlier incidents. He continued:

> "The prosecution say that these incidents show a propensity or a tendency to commit offences of the kind alleged, and that count 1 on the indictment did not occur in isolation. It is for you to decide the relevance (if any) of any of these other incidents, if you are sure that they occurred. In making that decision you must be sure, (1) that the incident or incidents did occur, and because the [applicant] was under the age of 14 at the time, under the law as it then was the prosecution must make you sure that he knew what he was doing was seriously wrong as distinct from mere naughtiness or childhood mischief.
>
> The third factor is the evidence that the [applicant] knew the conduct was seriously wrong must be clear, and not merely based on the acts involved in the alleged incidents themselves. It is only then that you may take the non-indicted allegations into account when deciding whether or not he has committed

> the offence he is indicted on, but bear in mind that the non-indicted incidents only form part of the evidence, so you should not convict wholly or mainly because of them. If you are not sure that any one or more of the non-indicted incidents occurred, you should put it or them aside when deciding whether the prosecution have made you sure of guilt on count 1."

14. Mr Magarian KC, now representing the applicant, submits that the conviction is unsafe. He puts forward three grounds of appeal. In his initial written grounds of appeal he had challenged the admission of the evidence relating to the four earlier alleged incidents and to the terms in which the Recorder had directed the jury about that evidence. Mr Magarian now accepts that the evidence was admissible under section 101(1)(d) of the 2003 Act because it was relevant to an important matter in issue, namely whether the applicant had a propensity to behave in the way alleged in count 1. He maintains, however, as his first ground of appeal, his submission that the evidence should have been excluded by the court in view of the respondent's concession that the presumption of *doli incapax* could not be rebutted in relation to those earlier incidents. Mr Magarian argues that the result of admitting the evidence was that *doli incapax* became a live issue for the jury to determine, even though the respondent had accepted that it could not rebut the presumption. Mr Magarian submits that the applicant was left with the worst of all worlds, and that the resultant position was very unfair to him.

15. Secondly, Mr Magarian submits that the Recorder was wrong to ask the applicant the questions which we have quoted. He submits that those questions assumed that the applicant had acted as alleged in the four earlier incidents. Developing this point in his oral submissions to us this morning, Mr Magarian further submits that the questioning was imprecise and unfair, so that the applicant was left with no clarity as to which period of time he was being asked about and would have felt under pressure to give answers agreeing with the apparent tenor of the Recorder's questions.

16. Thirdly, Mr Magarian submits that the Recorder should have given a fuller direction to the jury about the agreed fact relating to the grandmother's letter of wishes. In particular, he submits that the jury should have been directed that if anything had been said by C to her grandmother, it should not be treated as evidence of recent complaint. Rather, he submits, the jury should have been directed that the only relevance of that evidence was that it went to the suggested financial motivation of what the applicant said was a false allegation by C. In the absence of directions in accordance with those submissions, Mr Magarian argues that there was a clear risk of prejudice to the applicant.

17. Mr Magarian has also put forward the applicant's explanation for his delay in commencing this appeal. The applicant says that after he was sentenced he had much to contend with during the most stressful period of his life: divorce proceedings; the prospect of his children and their mother moving to another part of the country; the sale of the former matrimonial home; his own accommodation; financial matters; a demanding job; and the need to comply with the requirements of the suspended sentence order. The applicant says he "had no choice but to park the conviction situation as I did not have the capacity to handle that on top of everything else". He adds that at the time he had lost trust in the legal system and "had just about given up with it all".

19. Miss Acker, representing the respondent in this court as she did below, opposes each of the grounds of appeal. She submits: first, that the evidence of the earlier incidents was properly admitted through both gateways (c) and (d); secondly, that the questions asked by the Recorder and the directions which he then gave about those incidents caused no prejudice to the applicant, but rather created an additional and unnecessary hurdle which the jury would have to surmount before they could use the applicant's replies as evidence supporting the prosecution case; and thirdly, that the evidence relating to the grandmother's letter of wishes was evidence which the prosecution had not initially intended to adduce, but which the

defence actively wished to be before the jury as supporting the allegation of a financial motivation for C to make false allegations.

20. We are grateful to both counsel for their helpful submissions. We have summarised those submissions briefly, but have had them all well in mind and have reflected upon them.

21. We begin by addressing the application for an extension of time. By section 18(2) of the Criminal Appeal Act 1968, notice of an application for leave to appeal against conviction must be given within 28 days of the conviction appealed against. Notice of an application for leave to appeal against sentence must be given within 28 days from the date on which the sentence was passed. Those are separate time limits, which will expire on different dates unless sentence is passed on the same day as the conviction.

22. The first problem which the applicant faces is that his explanation for seeking an extension of time starts by referring to his circumstances after the date of sentence, overlooking the important fact that by the time he was sentenced he was already out of time for seeking leave to appeal against conviction.

23. The applicant faces a further and more substantial problem. Whilst we understand the difficult circumstances in which the applicant found himself, and recognise the realities of his position, it is apparent from his account that he chose to prioritise other matters and chose for a period of many months not to take any steps to seek further advice upon, or initiate, an appeal. In an appropriate case the statutory time limit for commencing an appeal may be extended; but it is not an option which a convicted person may simply choose to postpone until the timing is more convenient for him. There is a strong public interest in the finality of proceedings, and good reason must be shown for any period in respect of which an applicant seeks an extension of time, and not just for the first few days or couple of weeks.

24. We are far from satisfied that the explanation put forward by the applicant justifies the extension of time which he seeks. In fairness to him, however, we go on to consider the merits of his proposed appeal in case the merits of his case enable us to take a more favourable view of his delay in commencing this appeal.

25. The circumstances in *R v DM* were materially similar to those in the present case. The appellant, DM, was alleged to have committed acts of sexual abuse against his younger half-sister when he was aged between 14 and 16. The prosecution were permitted to adduce evidence relating to two earlier incidents said to have occurred when DM was aged under 14. It is implicit in the circumstances of the case that the prosecution had not been able to prove that at the time of those incidents DM knew that behaviour of the kind alleged was seriously wrong. On appeal to this court it was held that the judge had been entitled to admit the evidence. Giving the judgment of the court, Simon LJ said at [19] that but for the age of the appellant, there could be little serious argument against the admissibility of the evidence. He continued:

> "The question then arises: did the appellant's age at the time call for a different approach based on the presumption of *doli incapax*? In our view, it did not. The appellant was not facing a criminal charge in relation to the two incidents and therefore the *doli incapax* presumption had no direct application."

The court went on to say at [21] that what was required in those circumstances was a direction to the jury that they must be sure that the earlier incidents occurred and, if they were, how the incidents might help them decide whether the appellant had committed the indicted offences.

26. We respectfully agree with that analysis. Applying it to the present case, and to the first

ground of appeal, we have no doubt that the evidence of the four earlier incidents was admissible both through gateway (c) and through gateway (d), and that Judge Kent was correct so to rule. The evidence was relevant because it was capable of showing that the applicant had a propensity to behave, and did behave, in the manner alleged by C. If the prosecution had sought to prove that the applicant was thereby guilty of criminal offences on the earlier occasions, it would have been necessary also to prove that the applicant knew at the time that his behaviour was seriously wrong. But it was not necessary to do so before relying on the evidence as showing incidents of reprehensible behaviour admissible under the 2003 Act, because the fact of the behaviour was relevant whether or not that knowledge could be proved.

27. We accept that in circumstances of the kind raised in this case, there may be arguments that the evidence, though admissible, should be excluded because its prejudicial effect outweighs any probative value. In the present case, however, Judge Kent was, in our view, entitled, and indeed correct, to conclude that the evidence should not be excluded on the ground that it would have an adverse effect on the fairness of the proceedings.

28. We turn to ground 2. It follows from what we have already said that in relation to each of the earlier incidents, the jury only had to consider whether they were sure it happened and, if so, whether it helped them decide whether the applicant was guilty of the offence charged in count 1. With respect to the Recorder, he was in error in thinking that the prosecution also had to rebut a presumption of *doli incapax* before they could rely on this evidence. If that had been the position, then it would have been inappropriate for the Recorder to ask the questions which we have quoted, because by doing so he would have risked appearing to enter into the arena. In the circumstances of this case, however, it was not necessary for the prosecution to prove that the applicant knew that the alleged behaviour was seriously wrong. The questions and answers were therefore legally irrelevant and, in our view, they caused no

prejudice to the applicant. On the contrary, as Miss Acker submits, they served only to place an inappropriate obstacle in the way of the prosecution's reliance on the earlier incidents. We are unable to accept the submission that the questions necessarily presupposed that the incidents had occurred as C alleged, and that the questions were for that reason unfair to the applicant.

29. In those circumstances, whilst it would have been better if the questions had not been asked, we cannot see any basis on which it could be argued that they caused unfair prejudice to the applicant, or cast doubt on the safety of the conviction.

30. We turn to Mr Magarian's third ground. It is important to emphasise that the defence wanted the evidence of the grandmother's letter of wishes to go before the jury in the agreed terms to which we have referred. That was a perfectly understandable approach for those then representing the applicant to take, given the terms of his instructions, and there is no basis on which it could be argued now that the admission of the evidence was unfair. It was also perfectly understandable that the manner of adducing this evidence was by a direct quotation of the grandmother's own words. Any form of paraphrase would have risked inaccuracy. Furthermore, we understand that C confirmed in her evidence in chief that she had told her grandmother about what the applicant had done. The Recorder had directed the jury, when dealing with matters primarily relating to C2, that "telling someone else what they say happened does not provide independent support for their evidence; it obviously comes from them". We are told that defence counsel not only did not ask for any direction beyond that in relation to the grandmother's letter of wishes, but actively resisted Miss Acker's submission that that letter might properly be the subject of a direction as to recent complaint.

31. In those circumstances we accept Miss Acker's submission that there was no risk of the jury thinking that the letter of wishes somehow amounted to independent evidence of the

applicant's guilt. We are unable to accept Mr Magarian's submission that a further direction should have been given. The Recorder could not properly have directed that whatever C had said to her grandmother was not evidence capable of showing consistency, because it indicated that she had made some complaint prior to February 2012. Given that C was the source of that complaint, we are not persuaded that there was an increased prejudicial effect simply because the grandmother had subsequently died.

32. For those reasons we are satisfied that none of the grounds of appeal is arguable and that there is no basis on which it could be said that the conviction is unsafe. It follows that no purpose would be served by our granting an extension of time, even if we were persuaded that we could properly do so, because an appeal would be bound to fail.

33. The applications for an extension of time and for leave to appeal against conviction are accordingly refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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