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[2024] EWCA Crim 111

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202300769/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 25 January 2024

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE ANDREW BAKER

HER HONOUR JUDGE ANGELA RAFFERTY KC
(Sitting as a Judge of the CACD)

REX
-v-
"MF"

Computer Aided Transcript of Epiq Europe Ltd,
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NON-COUNSEL APPLICATION

J U D G M E N T
(Approved Transcript)

Mr Justice Andrew Baker

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions, no matter relating to the complainant shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as the victim of the offences in this case. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. The applicant has no entitlement to anonymity, but the complainant is his step niece so identifying the applicant would risk identifying the complainant. Therefore, we shall not refer to the applicant by name in this judgment and his name must be anonymised in the title of any transcript or report of it. For the same reason, we shall not refer by name to other members of the family whom we mention.
3. On 12 May 2017, in the Crown Court at Wolverhampton before HHJ Berlin, the applicant (then aged 32) was convicted, after trial, of offences of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956 (counts 1 to 4) and assault by penetration, contrary to section 2 of the Sexual Offences Act 2003 (counts 5 to 7 and 9) and one offence of rape, contrary to section 1(1) of the 2003 Act. He was acquitted by the jury of a second charge of rape (count 10). Counts 3, 5 and 9 were multiple incident counts relating to repeated conduct as alleged by the prosecution. On 23 June 2017, the applicant was sentenced by the same court to 13 years' imprisonment for the rape as a sentence to reflect the totality of his offending, with concurrent sentences of 5 years and 8 years respectively on each of the indecent assault and assault by penetration counts.
4. The applicant applied for leave to appeal against conviction over 5½ years out of time. That application was refused by a single judge. The applicant now renews the application before the Full Court. We agree with the single judge that there is no good reason to grant

the very substantial extension of time the applicant would require for an appeal. Although this is not how the applicant expresses it, the explanation he has given for the delay amounts in substance to a refusal on his part to accept negative advice as to his prospects on appeal, given both originally after trial and subsequently, in the light of the concerns the applicant says he now has but did not express at the time about how his case was dealt with at trial. The concerns the applicant has professed about the trial, in our view, do not arguably cast doubt on the safety of his convictions.

5. The case concerned allegations of sexual abuse by the applicant of the complainant (his step niece) who is 8 years younger than him, for significant periods of her childhood. The complainant was close to her grandmother (the applicant's mother). It was alleged that she often stayed at her grandmother's house and that the offending all took place there. The complaint was of two specific incidents when the complainant was 7 or so, a repeated pattern of abusive behaviour every weekend, for a period when she was about 8, after which there was said to have been a confrontation between the applicant and his sister (the complainant's mother) and the complainant did not go back to her grandmother's for some 6 months or so, then a specific incident at Christmas time when she was 9 or 10 before a gap of several years.

6. The prosecution case was that the abuse resumed when the complainant was 14, and then continued, on a regular basis, until she was 17, after which she stopped going to her grandmother's house. The allegations relating to that later period included the allegation of rape on which the jury convicted. The allegation of rape on which the jury acquitted the applicant concerned a specific alleged incident some several years later again, when the complainant was a young adult aged 21 and the applicant was 29.

7. The defence case was a denial that the alleged incidents occurred. There was also a positive case of motive to fabricate. The applicant said that in May 2015, a couple of months after the death of his mother (the complainant's grandmother), the complainant had wanted to stay again at what had been her grandmother's home but the applicant refused and that this rejection, and a desire to get closer to her mother (the applicant's sister), had motivated the complainant to make up her allegations against him.
8. In relation to the alleged confrontation by his sister after the early pattern of abuse, as alleged, the applicant agreed that there was a confrontation but said it was a complaint that he was scaring the complainant, with no suggestion that anything sexual had occurred.
9. The applicant put forward nine grounds of appeal:
    1. Trial counsel should have put before the jury a counselling report concerning the complainant that had been disclosed to the defence. The applicant wishes to argue that the report would have assisted his defence.
    2. Trial counsel should not have agreed to the removal of reference to a physical altercation between the applicant and his sister (the complainant's mother) in the editing of the complainant's ABE interview for the jury.
    3. Trial counsel should not have agreed in the same ABE editing to remove comments about her mother, grandmother and herself falling out.
    4. The applicant was prejudiced by a late change of trial counsel. Neither original nor final trial counsel, he wishes to argue, dealt transparently with him.
    5. The trial judge made a mistake in summing-up by saying to the jury that no rape was mentioned to the complainant's mother.

6. The trial judge told the jury that the applicant agreed the confrontation with his sister was around 1999 to 2000, when his case had been that the complainant could not have stayed at the house at all until after 2001.
7. The trial judge told the jury the complainant's evidence was that abuse began when she was 7 and ended when she was 13 or 14, when actually the complainant had been inconsistent in relation to her age as to what happened and when.
8. The trial judge erred in summarising count 9 to the jury which concerned events in the complainant's later teens, by mentioning that her parents had disowned her, and she began living with her grandmother, whereas in her ABE interview she had said her mother disowned her 2 months before she made the allegations at the age of 21.
9. The trial judge was mistaken in telling the jury that the complainant and her mother were on speaking terms prior to the allegations, whereas the applicant says there was inconsistent testimony about that, the complainant's evidence being that she had been disowned, her mother's being that they had argued but not such that there was a split between them. The applicant wishes to argue that this muddled the evidence to his disadvantage.

10. In refusing leave to appeal, the single judge gave the following reasons:

> "The test that the Court of Appeal has to apply is, 'are there any arguable grounds to show that your conviction is unsafe?' That means they take an overall view of the way the evidence was presented, the way your case was put and the way in which the jury was directed.
>
> Ground 1. In cases involving allegations of sexual offending which happened a long time before the trial and when the complainant was young, there are very often discrepancies about dates and times. You accept that the Crown does not have to prove precise dates and the jury is always directed that they should consider any discrepancy about dates but have to bear in mind that a child may be very poor at recalling dates and ages.

You suggest that the counselling report in this case would have made a difference to the way the jury approached the complainant's evidence but she was challenged both on her truthfulness and her reliability. I have gone through the report carefully and it does not provide material that shows that your conviction is unsafe. It contains very brief notes of a conversation which were not shown to the complainant at the time or later to see if she agreed. Your lawyers were keen to obtain the report in case it was of any value to your case but it does not prove the unreliability or false recollection that you suggest. Not adducing it was not a failing that means you should not have been convicted. The report might very well have added strength to the prosecution case, given that the complainant was recorded making her complaints in broad terms by an independent party.

Ground 2. It is clear from all the work done before your trial that your original counsel had considered very carefully the evidence in the case against you. In counsel's view the evidence that you had assaulted the mother in a fight causing bruising would or might cause prejudice against you was a proper decision. The damage that might have caused your case was not going to be outweighed by a possible difference of account between the complainant and her mother. In any event the admissibility of evidence is a matter of law and is counsel's responsibility for them and not a point on which you give instructions.

Ground 3. This follows on from Ground 2, counsel on both sides in a criminal trial have to decide what is admissible. The difference in accounts is difficult to assess, if it exists at all. A falling out does not preclude a decision not to tall the grandmother at the complainant's request. This a not an issue which could possibly have altered the way in which the jury assessed the overall reliability and credibility of the complainant.

Ground 4. All the necessary preparation for trial had been done by your original counsel. When your new counsel came into the case it was already fully prepared. She asked for and was given time to speak to you and was ready and able to defend you. You say that counsel were 'not transparent' with the evidence but you had obviously been given an opportunity to go through the material and give your instructions.

Grounds 5,6,7,8 and 9. I have taken these grounds together because the criticism is similar and you give different examples of what you say at the judge's errors.

I have read the entire summing up and on a number of occasions the judge gave the jury the standard directions about it only being a summary, about any emphasis he might give and, importantly that it is their recollection

> and views that count not his. In any event, the incorrect reminder about the complainant not telling her mother about a rape was a mistake that added to the criticisms of her evidence and would have operated in your favour. The judge directed the jury on the history of your connection to the family. The errors or differences in emphasis could not have altered the position that the jury must have been sure of your guilt, as they were properly directed, before they could convict.
>
> The areas you identify are not 'profound' and would not arguably have contributed to your being convicted against the weight of the evidence. The jury were properly directed about the need to assess the evidence before relying upon it to reach their conclusions.
>
> In any event there was an opportunity to correct points before the jury retired, these issues were not at the time.
>
> The jury approached their task properly, they were capable of analysing the evidence and assessing it fairly. They acquitted you of one count because they could not be sure of your guilt.
>
> This application is more than 5½ years late. There is no basis to grant the very lengthy extension of time."

11. In response to the single judge's decision, the applicant has submitted as follows.

12. In relation to ground 1, the applicant says that the single judge did not explain why the counselling report does not prove unreliability, and that her decision contemplates a possible dispute over the content of that report which, he contends, would only have added before the jury. As to that, confusion in the complainant's accounts over time, as to whether the rape as a child that she alleged was when she was about 11 years old or in her mid-teens, as stated in count 8, was before the jury. It would have added nothing for them to know that she may have given the younger age in a counselling session. We agree with the single judge that the greater potential importance of the counselling report was its record of the complainant giving a description of a pattern of abuse by the applicant, over a period of many years, that was broadly consistent with the prosecution case, to an independent third party who is not any part of the criminal justice system. The decision

by the defence not to put the counselling report in front of the jury is understandable and does not arguably cast doubt on the safety of the jury's verdicts.

13. In relation to ground 2, the applicant says there is here an issue for the Supreme Court to consider. He says that a defendant should be kept informed and be involved in counsel's decisions, even if they only concern points of law, given that defendants cannot appeal based on a wish to change tactics. As to that, there is no relevant point of general importance here. The ABE interview record was edited to keep it relevant to the charges being tried and to avoid prejudice to the applicant. It was reasonable for the defence to take the view that the prejudice to the applicant of the reference to an assault by him on his sister outweighed any possible support, which would have been tenuous at best anyway, it might have given to the defence of fabrication on the sexual offence allegations.

14. In relation to ground 4, the applicant says he did not have an opportunity to go through all the material in the case, as suggested by the single judge. As to that, we see no reason to suppose that the applicant did not have that opportunity, although whether he asked or would have been interested to go through all the material personally, rather than trust his defence was in good hands through his solicitors and counsel, may be a different point. What matters is that, in our view, there is no basis for a complaint that the evidence in the case was not properly considered or that the applicant's defence was not adequately prepared and presented at trial.

15. In relation to grounds 5 to 9 compendiously, the applicant argues that it is not logical to propose that the judge's error would have operated in his (the applicant's) favour. As to that, the applicant's responsive comment concerns only ground 5, the possible mistake by the judge in saying, when summing-up, that the complainant's disclosure to her mother

had not referred to rape at all, rather than only that it had not referred to the alleged rape when she was an adult. The jury were directed in normal and correct terms about how to approach a consideration of failures to complain in cases of alleged sexual offences. Subject to proper caution as to the weight to be attached to the point in line with that direction, a failure to mention the childhood rape when the complainant disclosed to her mother other sexual abuse by the applicant would tend by nature to assist the defence. That is the single judge's logic for saying that, if it had any impact, the judge's possible error in the summing-up would have operated in the applicant's favour.

16. Finally, the applicant says that evidence supplied by Social Services, relating to when one of the foster children referred to in the case was with the complainant's grandmother, indicates that the complainant could not have shared a room with that particular foster child during 1999 to 2001, when the initial alleged incidents of abuse were supposed to have taken place. He notes that he mentioned this in a response to a Respondent's Notice that had been served in this application, and that that piece of evidence was not mentioned by the single judge.

17. That foster child was placed with the complainant's grandmother in April 2001, so his foster period with her in fact overlapped with the indictment period for count 3. We do not think any failure to draw out the specific detail of when that foster child may have been in the same room as the complainant means that her account was not adequately tested at trial to do justice to the defence.

18. We have considered for ourselves all that the applicant has said in support of his proposed appeal. Having done so, however, we agree with the reasons given by the single judge. We have just explained why we do not consider there is any force in the applicant's criticisms of the single judge's decision. Overall, there is no realistic prospect

of success for an appeal against the applicant's conviction. His renewed application for leave to appeal is therefore refused.

19. The applicant is not now in custody. The question arises whether to make an order, under section 18(6) of the Prosecution of Offences Act 1985, that he pay reasonable costs of the transcripts in this case which we are informed is £72.96. We have considered the possibility of making such an order, but we do not judge it right to do so in this instance, given the amount involved and the likely cost of seeking to recover it.

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

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