Neutral Citation Number: [2019] EWHC 3177 (Fam)

Case No: NE18P01829

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Newcastle Combined Court Centre
The Quayside
Newcastle-Upon-Tyne

Date: 21/11/2019

Before:

THE HONOURABLE MR JUSTICE COBB

- - - - - - - - - - - - - - - - - - - -

Between:

F	**Appellant**
- and -	
M	**Respondent**

- - - - - - - - - - - - - - - - - - - -

F v M (Appeal: Finding of Fact)

- - - - - - - - - - - - - - - - - - - -

The Appellant (F) in person
Miss Claire Brissenden (instructed by **Paul Dodds Law**) for M, the Respondent

Hearing dates: 21 November 2019

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public.

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child (N) and members of the family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. This is an appeal brought by a father ('F') against a determination of fact made by Her Honour Judge Scully (hereafter "the Judge"), at the conclusion of a fact-finding hearing which she conducted, in *Children Act 1989* private law proceedings, in May 2019. The proceedings concern the parties' two-year old child, N.

2. By his appeal, F challenges the following judicial finding:

> "On [date] 2016, at the father's property, an act of sexual intercourse commenced between the parties, to which they were both in agreement. At some point during intercourse, the mother changed her mind, whether because of discomfort or the fear of ejaculation or both. The mother told the father to stop and not to ejaculate inside of her. I find that he did not do so, and by then the sexual act had ceased to be consensual. In failing to stop and failing to withdraw before ejaculation against her wishes, by the definition in the Act, the father perpetrated a rape upon the mother."

The "Act" referred to in the final sentence of the Judge's finding above is a reference to the *Sexual Offences Act 2003*.

3. By the Appellant's Notice, F presents altogether nine Grounds of Appeal, which in combination seek to challenge the finding that he "raped" the mother.

4. Permission to appeal was granted, on the papers, by Cohen J on 29 October 2019; he considered that F's case was arguable, reasoning his decision thus:

> "…
>
> (2) The Judge's essential finding is that the [F] ejaculated whilst having consensual intercourse with [M] when he knew that she did not want him to ejaculate as she was not taking contraceptive precautions. He thereby raped her.
>
> (3) [F]s evidence is that he intended to withdraw in time but misjudged things. The Judge made no finding that this was other than accidental.
>
> (4) *Sections 1* and *79(2)* of the *Sexual Offences Act 2003* define rape but commentary in *Archbold* at para.20.23 is suggestive that rape only occurs in such situations when the man intends to ejaculate inside the woman despite her objection.
>
> …"

I point up at this stage because it is important (I return to this at [17] below) that, contrary to Cohen J's reprise of the "essential finding" in his point (2) above, at the time the father ejaculated, the intercourse had on the Judge's finding "ceased to be consensual".

5. F's application for permission to appeal was, as it happens, issued out of time (*FPR 2010 rule 30.4(2)*). Although Cohen J did not explicitly grant F permission to appeal out of time, I have been prepared to hear the appeal; I understand that F had experienced some difficulties in obtaining the judgment transcript before he could finalise his appeal documents.

6. F has presented his argument on appeal in person, and has done so with care and clarity. Ms Brissenden, who conducted the hearing before the Judge on behalf of M, has appeared again on this appeal on her behalf.

The fact-finding hearing

7. The fact-finding hearing conducted by HHJ Scully was itself a re-hearing, following a successful appeal by the mother against determinations made by a district judge in the Family Court sitting at Newcastle, itself following a fact-finding hearing. For the purposes of the hearing under review now, the Judge heard evidence from the parties themselves; she had read an extensive print-out of the sequence of text and WhatsApp messages passing between the parties over many months; she had viewed the Achieving Best Evidence interview of M, and she had listened to the audio recording of the police interview of F. She had reviewed the police disclosure, although she described this as "poor and … incomplete".

8. The fact-finding hearing was set up as a necessary prelude to a welfare determination in the context of F's application for a Child Arrangements ('spend time with') Order (*section 8 Children Act 1989*). The specific issue of fact to be determined was whether the act of sexual intercourse between F and M in 2016 had been an assault; integral to this question was whether the sexual act had been consensual or not. The child who is the subject of the proceedings was born as a result of the act of sexual intercourse which was at the centre of the Judge's finding.

9. The ultimate issue before the Family Court in this case will be the future contact arrangements for F and the child, N, in N's best interests. Given the allegation in this case, there was clearly an issue as to whether F would be likely to provide safe parenting to N.

10. Let me say at once that I am satisfied that it was entirely proper for F to have launched his appeal against the fact-finding outcome at this stage rather than waiting for a final order in the *Children Act 1989* proceedings; the finding under challenge directly "concern[s] the issue upon which the determination of the whole case ultimately turns": see the judgment of Macur LJ at [21] in *Re M* [2013] EWCA Civ 1170 and Dame Elizabeth Butler Sloss P in *Re B (A Child) (Split Hearings: Jurisdiction)* [2000] 1 FCR 297, [2000] 1 FLR 334, CA.

Background facts

11. The outline facts can be collected from the judgment, and I summarise them briefly here. The mother met the father at a fast-food outlet in Newcastle, where he worked. In the days which followed their meeting they exchanged text (SMS) and WhatsApp messages. F invited M to his home for a meal. Text exchanges at the time suggested that this may develop into a "sex session". M indeed went to F's home as arranged. F cooked a meal. M ate little. It is common ground that after the meal F and M had sexual intercourse.

12. M's case before the Judge was that after a short time engaged in the sexual act, she told F that she did not want to continue; the Judge recorded that the mother had said "stop, stop, stop, stop", and later (when he continued undeterred) that she did not want him to ejaculate inside her. F, for his part, denied that M had ever asked him to 'stop' while engaged in sex; his case is that prior to the initiation of sexual intercourse they had agreed that he would not ejaculate inside her vagina, but that otherwise M said nothing during the act of sex. It is of course accepted that F did ejaculate inside M's vagina.

13. M's case was that the couple went on to engage in penetrative sex (though not to orgasm) at least once or possibly twice more; the mother's case was that it was "consensual in that she had not said no, as she did not see that there was any point" (per judgment). Curiously, F denies that the parties had sexual intercourse more than once.

14. Following the mother's visit to the father, the couple continued to contact each other by SMS / WhatsApp. The Judge reviewed those messages in her judgment, noting that on the same day as the sexual encounter there was a message from M to F, which reads; "the fact that I asked you to stop several times and you didn't listen when I said 'don't come inside me'". Later text messaging includes M saying "I told you I didn't want to; I told you to stop; I told you not to come in me…", and shortly after N was born "when a girl says 'no, stop' don't do something, you should respect her, not do what you did…". Other messaging between the parties contained a range of discussions focusing on practical and domestic arrangements for the child, financial maintenance, and contact.

15. It should be noted that F has not been charged with any offence arising from the events surrounding the parties' sexual encounter.

The Arguments on appeal

16. F contends that the finding of rape is unsound and should be set aside. He complains that the Judge had failed to consider adequately or at all the inconsistencies in M's accounts of the events in question (when comparing her accounts to the court and in the Achieving Best Evidence interview), and in particular the oddity of her case (which as I say he denies) that they had gone on to further sexual activity after the alleged rape. He submitted to me in oral argument at this appeal hearing that M's case "does not add up". F's case was and is that M had consented throughout the sexual intercourse; he maintained before the Judge that ejaculating inside the mother was "an accident" and complains that the Judge made no determination of whether he had accidentally or intentionally ejaculated inside the mother. Specifically, in this

regard he submitted (both in writing and orally at the appeal), reliant I believe on the comment of Cohen J from the order granting permission:

> "By virtue of the *Sexual Offences Act 2013* (sic.) by which [the Judge] based her judgment on (sic.), ejaculation could never translate to a rape."

17. Ms Brissenden contends that the finding is unassailable. She contends that the Judge has considered all relevant matters and that she was entitled on the evidence to reach the finding that F had "raped" M. Ms Brissenden argues that the Judge's clear finding that M had told F to "stop" part-way through sexual intercourse materially converted the consensual activity into non-consensual activity; she relied on the fact that rape is defined as the intentional penetration of the vagina without consent (and where the person does not reasonably believe that the other consents) and that, importantly, "penetration is a continuing act from entry to withdrawal" (*section 79(2) Sexual Offences Act 2003*). She submits that the evidence concerning F's ejaculation was not in fact relevant to the finding of rape, and that in granting permission to appeal, Cohen J must have misread or misinterpreted the Judge's judgment in this regard; she points out that Cohen J had apparently read the judgment as indicating that at the point of ejaculation the sexual activity was otherwise 'consensual' whereas the Judge's conclusion was that at that time, the sexual activity had "ceased to be consensual" (see [2] above).

Discussion

18. Without, I believe, diminishing the scope or force of the F's arguments, I distil F's grounds of appeal into two essential complaints:

    i) That the Judge was wrong to find as a fact on the evidence that the sexual intercourse was other than consensual; her finding was contrary to the weight of the evidence and fails to reflect the inconsistencies in M's accounts;

    ii) That the Judge was wrong to describe the act as 'rape' because F had only accidentally, not intentionally, ejaculated inside M's vagina.

    I address these points discretely below.

Appeal against the finding of fact

19. Appeals against findings of fact are notoriously difficult. As an appellate court I would only be able to say that the Judge who has conducted a fact-finding exercise had erred materially if the answer was "demonstrably contrary to the weight of the evidence" or the "decision-making process can be identified as being plainly defective so that it can be said that the findings in question are unsafe" (see Mostyn J at *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211).

20. Moreover, the fact-finding Judge here has had a considerable advantage over me in seeing and hearing these parties give their evidence: see *Piglowska v Piglowski* [1999] UKHL 27, [1999] 3 All ER 632, [1999] 1 WLR 1630, and *Biogen Inc v Medeva plc* [1997] RPC 1, discussed further in *Re A (Children)* [2015] EWCA Civ 1254 (see in particular Lewison LJ at [37-40]). It is apparent from the judgment that the Judge

plainly formed mixed views of the reliability and truthfulness of *both* parties, which she properly set out in her judgment and apparently weighed in reaching her final conclusion.

21. In this regard, it is notable that the Judge broadly accepted, as F contends in this appeal, that in some respects M had been an unsatisfactory witness; the Judge explicitly records "I am unable to agree that she has been entirely honest and frank with the court or indeed with the police". The Judge rejected M's evidence about when she first knew what rape was (i.e. more than a year after this incident; M had said that she had previously assumed that rape was always associated with threats or violence). The Judge recognised that she found aspects of M's evidence difficult to reconcile, and highlighted its various internal inconsistencies. The Judge found that it was surprising that M had alleged, somewhat against her own interests, that there had been a second or third sexual act (i.e. after the rape) which F denied. The Judge fairly recorded that "[M] really has nothing to gain by admitting that there was a second sexual event" and recorded that in admitting this further event, in fact it somewhat "adds to her credibility".

22. The Judge concluded that the father, too, was not telling the truth in his account of the incident that day, and in other respects his evidence was "confusing".

23. These important points were plainly weighed in the balance in reaching her final determination. The Judge had earlier given herself an appropriate direction under *R v Lucas; R v Middleton* [1981] QB 720. The Judge also directed herself appropriately as to the burden and standard of proof.

24. I am satisfied that the Judge carefully evaluated the evidence laid before her. The judgment is detailed and thorough. Having focused on the evidence specific to the act of sexual intercourse, the Judge analysed thoroughly the contextual evidence, including the communications between the parties, for some indicators of the truth. The Judge was, it appears, particularly struck by the consistency of M's repeated references over a period of time (in SMS/WhatsApp messages) to the fact that she had pleaded with F to 'stop' when they were engaged in sexual intercourse. She was equally unimpressed with F's denial of this. While acknowledging that "the Court will never know precisely what took place in [F]s bedroom on [date], only the parents know that", she reached conclusions which, in my judgment, corresponded with a strong consistent strand of the evidence.

The Judge was wrong to describe the act as 'rape'

25. The crucial part of the finding under challenge is this sentence:

> "In failing to stop and failing to withdraw before ejaculation against her wishes, by the definition in the Act, the father perpetrated a rape upon the mother."

The finding is, arguably, slightly unfortunately worded. Inadvertently the Judge may have given the impression that she was relying on the fact that F ejaculated inside M's vagina as part of the proof of rape. This, it appears, caused Cohen J, when considering the grounds of appeal, to draw attention to an editorial note from *Archbold's Criminal Pleading Evidence and Practice 2020*, in the context of *section*

74 of the *Sexual Offences Act 2003* ("a person consents if he agrees by choice, and has the freedom and capacity to make that choice"), which reads as follows:

> "… the "freedom" to make any particular choice must be approached in a broad common sense way; where, therefore, a woman consents to penetration on the clear understanding that the man will not ejaculate within her vagina, if, before penetration begins, the man has made up his mind that he will ejaculate before withdrawal, or even, because "penetration is a continuing act from entry to withdrawal" (*section 79(2)*), decides, after penetration has commenced, that he will not withdraw before ejaculation, just because he deems the woman subservient to his control, she will have been deprived of choice relating to the crucial feature on which her original consent was based, and her consent will accordingly be negated."

26. As earlier indicated (see [16] above) F has adopted this argument at the hearing of the appeal before me.

27. On my reading of the relevant annotation (reproduced in [25] above), the woman's consent will be negated if her consent to sexual intercourse has been conditional on there being no ejaculation and the man has made up his mind either before, or during the act of penetration, to ejaculate inside the woman. In this case, the Judge's conclusion that M had been raped did *not*, however, depend upon a finding that the M had given conditional consent to penetration (i.e. "on the clear understanding that the man will not ejaculate within her vagina" but that F had made up his mind to do so). The Judge's conclusion was founded on the fact that part-way through the sexual act, M ceased to consent to the act ('stop, stop…') *and had made this known* to F by requesting that he 'stop'. It is therefore not material to her finding of rape that there had been any discussion about ejaculation before the act of sexual intercourse (if there had been), nor that F had in fact ejaculated inside M's vagina. In short, as soon as M had withdrawn her consent to the sexual intercourse during the act, F's continued penetration of her became a serious sexual assault, which in the criminal law would, within the meaning of the *Sexual Offences Act 2003*, be rape.

28. The Judge had, at an early part of the judgment, properly recognised the difference between the role of a family court and that of a criminal court; she had nonetheless looked across at the statutory definitions of the offence of rape under the *Sexual Offences Act 2003* in assisting her to form or test her conclusion (specifically *section 1*, *section 74*, and specifically *section 79(2)*). The issue of consent, one of the necessary ingredients in determination of the offence, was – at the permission to appeal stage – given further prominence by Cohen J. This was in turn picked up and repeated by F in his skeleton argument and in oral argument before me, and he, like Cohen J drew attention to the editor's narrative note from *Archbold* (see [25] above).

29. There is a risk in a case such as this, where the alleged conduct at the heart of the fact-finding enquiry is, or could be, of a criminal nature, for the family court to become *too* distracted by criminal law concepts. Although the family court may be tempted to consider the ingredients of an offence, and any defence available, when considering

conduct which may also represent an offence, it is not of course directly concerned with the prosecution of crime. On the contrary:

> "In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established." *Re R* [2018] EWCA Civ 198 at [62]

Quite irrespective, therefore, of whether F has committed the offence of 'rape' or is otherwise criminally culpable, there is a range of reasons why the circumstances of N's conception may ultimately be relevant to future child arrangements. Specifically, it was regarded at an earlier case management hearing (and I agree with this direction) that it would be important for there to be a determination of whether F's conduct towards M in the sexual act by which N was conceived was 'violent or abusive', and in turn whether that conduct would be likely to be relevant in deciding whether to make a child arrangements order (see *PD12J FPR 2010, para.4, para.5,* and see further *para.7* [i.e. does the statutory presumption apply having regard to any incident of domestic abuse?]).

30. In this regard, it may be a timely opportunity to revisit what the Court of Appeal said in *Re R* [2018] EWCA Civ 198. This was a case in which all parties before the court readily accepted that the structure and substance of criminal law should *not* be applied in the Family Court, a view with which the majority of the Court of Appeal agreed. McFarlane LJ said at [65-67]:

> "[65] … criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the Family Court. Given the wider range of evidence that is admissible in family proceedings and, importantly, the lower standard of proof, it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'. …
>
> [66]. Looked at from another angle, if the Family Court were required to deploy the criminal law directly into its analysis of the evidence at a fact-finding hearing such as this, the potential for the process to become unnecessarily bogged down in legal technicality is also plain to see. In the present case, the judge's detailed self-direction on the law of self-defence, and the resulting appeal asserting that it was misapplied, together with Miss Venters' late but sound

> observations about the statutory defence of 'loss of self-control', are but two examples of the manner in which proceedings could easily become over-complicated and side-tracked from the central task of simply deciding what has happened and what is the best future course for a child. It is also likely that the judges chosen to sit on such cases in the Family Court would inevitably need to be competent to sit in the criminal jurisdiction.
>
> [67] … it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts. As my Lord, Hickinbottom LJ, observed during submissions, 'what matters in a fact-finding hearing are the findings of fact'. Whilst it may not infrequently be the case that the Family Court may be called upon to re-hear evidence that has already been considered in the different context of a criminal prosecution, that evidence comes to the court simply as evidence and it falls to be evaluated, in accordance with the civil standard of proof, and set against whatever other evidence there may be (whether heard by the criminal court or not) for the sole purpose of determining the relevant facts."

Conclusion

31. Having heard, read and considered the arguments on this appeal carefully, I am satisfied that

    i) The Judge's finding which I have set out at [2] above was not "demonstrably contrary to the weight of the evidence" (see [19] above); on the contrary, it seems to me that the Judge was amply entitled on the evidence to reach the conclusion that the sexual intercourse between M and F in 2016 became non-consensual and therefore a serious sexual assault;

    ii) There is nothing in the Judge's decision-making process which can be identified as "plainly defective so that it can be said that the findings in question are unsafe" (see [19] above); indeed, I am satisfied that the Judge appropriately reviewed all of the available material, and faithfully recorded in her judgment all of the points for and against her ultimate conclusion;

    iii) It was in fact immaterial to the Judge's conclusion, or the identification of potential future risk, whether F had or had not ejaculated inside M's vagina, given that M had objected to F's continued penetration of her; F's focus on that issue in the appeal was in my judgment misplaced;

    iv) F had perpetrated a serious sexual assault on M. While there are powerful reasons why in the family court the Judge's description of events and behaviour should not strongly adhere to criminal law concepts and language (see [29]/[30] above), F has failed in this appeal to persuade me that the judge

was wrong to refer to the assault, by reference to the *Sexual Offences Act 2003*, as 'rape'.

32. In the circumstances, the appeal must be dismissed.

33. That is my judgment.