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IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101269/B4
NCN [2022] EWCA Crim 1110

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 12 July 2022

Before:

VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE HOLROYDE)

MR JUSTICE SPENCER

MRS JUSTICE HILL DBE

REGINA
v
HASHIM HUSSAIN

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MR N CLARKE appeared on behalf of the Applicant.

J U D G M E N T
(Approved)

1. THE VICE PRESIDENT: In April 2021, following a trial in the Crown Court at Manchester (Minshull Street), this applicant, Hashim Hussain, was convicted of four offences relating to indecent photographs of children. His application for leave to appeal against those convictions was refused by the single judge. He now seeks an extension of time in which to renew the application to the Full Court.
2. His brother, Muhammad Hussain, was convicted of a number of other offences. Muhammad Hussain's application for leave to appeal against conviction was refused by this Court, differently constituted, in a judgment which is published under neutral citation number [2022] EWCA Crim 399.
3. The victims of these offences 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 the victim of these offences. For consistency with the judgment in Muhammad Hussain's case, we shall refer to them as "C3" and "C4".
4. On counts 18 and 19 of the indictment the applicant was convicted of taking indecent photographs of C3, contrary to section 1(1)(a) of the Protection of Children Act 1978; and possession of indecent photographs of a child, namely C3, contrary to section 160(1) of the Criminal Justice Act 1988. The subject matter of those counts was a short video, recorded on the applicant's mobile phone, which was particularised in the indictment as showing "a category B moving image of a female child aged 16 years, namely [C3] exposing her breasts, an adult male sucking on her breast whilst being cheered on by others present at the scene".
5. On counts 20 and 21 the applicant was convicted of a similar pair of offences relating to the making and possession of a longer video particularised as "a category A moving image, showing a 17-year-old female, namely [C4] having sexual intercourse with a male whilst being cheered on by others present at the scene".
6. The shorter video appears to have been filmed outdoors at night. It has a sound track which records C3 asking for confirmation that the light shining on her was merely the flashlight of the phone, from which it might be inferred that she did not wish to be filmed. One of the men present falsely confirmed that it was only the flashlight.
7. The longer video, also with a soundtrack, was filmed in a kitchen. A number of young men and a young woman other than C4 were present. One man can be seen with his penis in C4's mouth while she was being penetrated from behind by another man.
8. The jury were shown this longer video and were then shown a slow motion version of it. The prosecution put forward a clear case as to the identity of each of the men present. In the slow motion video the figures were colour coded and a text panel next to the imagery named them in accordance with the prosecution case. The officer gave evidence as to the basis on which he asserted who was who, principally by reference to their clothing and footwear. In the applicant's case the officer particularly pointed to a wristwatch which he said could be identified by other photographs which showed the applicant wearing it.
9. The applicant did not admit that he had made that video. Mr Clarke, then as now representing the applicant, submitted to the trial judge (Mr Recorder Lasker) that the officer should not be permitted to give evidence purporting to identify the applicant as the cameraman. He accepted that the jury could be invited by the prosecution to infer the

applicant's identity from features such as the wristwatch. But, he argued, the inclusion of the text accompanying the imagery amounted, in effect, to the officer presenting as a fact the very issue which the jury had to decide.

10. Prosecution counsel opposed that submission, arguing that the annotated slow-motion video was no more than a presentational aid of the kind permitted by this court in R v Jurecka [2017] EWCA Crim 1007; [2017] 4 WLR 205.
11. The judge permitted the prosecution to play the video, which he said was "merely intended to make it clearer to the jury firstly, what is being recorded, and secondly, to explain the nature of the prosecution case". Following that ruling the applicant did not challenge the evidence, including from his co-accused, that he had recorded the video. He did not, however, formally admit that fact.
12. At the conclusion of the prosecution case, Mr Clarke submitted that the applicant had no case to answer on any of the counts, on the ground that there was no evidence to prove that the applicant knew or suspected that either C3 or C4 was under the age of 18. The judge rejected that submission.
13. The applicant did not give evidence. No criticism is or could be made of the terms in which the judge directed the jury as to the applicable law.
14. Section 1(1)(a) of the Protection of Children Act 1978 provides, subject to certain exceptions which are not material to the present case, that:

> "It is an offence for a person to take... any indecent photograph... of a child."

15. Section 160(1) of the Criminal Justice Act 1988 provides, again subject to immaterial exceptions, that:

> "It is an offence for a person to have any indecent photograph... of a child in his possession."

16. Thus it is a common feature of both offences that the prosecution must prove that the photograph, or video concerned shows a child, that is a person aged under 18, and that it is an indecent image of the child.
17. In summing-up the judge directed the jury in accordance with the decision of this Court in R v Stamford [1972] 2 QB 391; (1972) 56 Cr App R 398, telling them that:

> "Whether an image is indecent is a matter for you, the jury, to determine. In doing so you should apply the recognised standards of propriety in our society, and consider whether right-minded people would regard it as indecent."

18. Mr Clarke puts forward two grounds of appeal. First, he submits that the judge was wrong to permit the prosecution to adduce the slow-motion video showing C4, in particular because of the annotation of it which named the cameraman as this applicant. He repeats the submissions which he made to the judge, and adds that the applicant was to an extent "forced" by the judge's ruling to accept that he had recorded the video. Secondly, Mr Clarke challenges the ruling that there was a case for the applicant to answer. Following further research since the trial he accepts that relevant case law, in particular R v PW [2016] EWCA Crim 745; [2016] 2 Cr App R 27 at paragraph 31,

establishes that on a charge of taking an indecent photograph, it is not necessary for the prosecution to prove that the photographer knew or believed that the subject was a child. He therefore concedes that the judge was correct in law to reject the submission made at trial. But, he submits, the judge fell into error for a different reason.

19. Mr Clarke draws attention to the fact that at the time when Parliament legislated for these offences, a child was defined as a person aged under 16. That definition accordingly coincided with the statutory provision as to the age of consent. Since legislation in 2003 however, the definition of a child extends, as we have said, to those aged under 18. Mr Clarke submits that this produces an anomalous result, because it criminalises the photographing of activity by a 16-year-old or 17-year-old which is in itself lawful. He argues that case law such as R v PW involved photographs showing unlawful or, as he puts it, potentially unlawful activity. In the present case, in contrast, the prosecution did not allege that the sexual activity shown in the videos was not done with the consent of C3 or C4. He therefore submits that a definition of indecency based on the Stamford test is no longer correct when the imagery depicts activity which is not in itself unlawful.
20. These submissions are resisted by the prosecution in a Respondent's Notice.
21. We should add that, in the light of a relevant ruling by this Court in Muhammad Hussain's case, a third ground of appeal which was originally pleaded is no longer maintained.
22. An explanation has been put forward as to why the notice of renewal was not lodged in time and an extension of time of approximately 7 months is sought. The explanation is not entirely satisfactory, but it is clear that the applicant is not personally at fault. We therefore focus on considering the grounds of appeal on their merits.
23. We are grateful to Mr Clarke for his submissions, all the more so because he has been good enough to act *pro bono*. Like the single judge, however, we are unable to accept them. As to the first ground, the judge did not fall into error, or even arguable error, in permitting the prosecution to present their case as they did. In R v Jurecka, this court confirmed that working documents may be placed before the jury by one party to a trial, provided that the nature and source of the document is made clear and the jury are reminded, where appropriate, that the document is not agreed. The court said that such documents should be confined to a convenient reminder to the jury of the facts relied upon by the party concerned and, "in brief and neutral terms", the inferences which the party contended could be drawn from those facts.
24. Here, the prosecution case was that the features of clothing etc enabled the jury to be sure of the identities of those shown in the video and of the cameraman who was recording the activity. It was perfectly permissible for the prosecution to colour code the men shown in the slow motion video and to explain the features relied on to identify them, and the cameraman. Many cases involving photographic evidence, for example, CCTV footage, are presented in a similar way. It is difficult to see how else the prosecution could intelligibly have presented their case here. Where identification is not admitted, it must of course be made clear that a video of this kind is merely a presentation of the prosecution case and that it is for the jury to decide whether they can be sure that an alleged identification is correct. If specific contrary arguments are put forward, for example, that a particular garment shown in one frame is not the same as a garment shown in another frame, or that footwear said to match that of D1 in fact matches that worn by D2, the issue should be clearly identified for the jury. But it is, with respect,

unrealistic to suggest that the applicant's case would have been unfairly prejudiced merely because a presentational aid, used to explain why the prosecution contended that individuals could be identified, included texts stating the names which the prosecution ascribed to the colour-coded figures. The showing of the slow-motion video did not prevent the applicant from maintaining his stance of non-admission of being the cameraman. He makes no complaints about the terms in which the judge directed the jury in this respect.

25. As to the second ground of appeal, and the submissions made in support of it by Mr Clarke this morning, we can see no basis on which it could be argued that "indecent" must in these statutory provisions be taken to mean "unlawful". Nor can we see any basis on which it could be argued that, if the imagery concerned shows lawful activity, the Stamford test should be abandoned either generally, or at least where imagery depicts a child aged 16 or 17. In the course of oral submissions this morning, Mr Clarke moved towards limiting his submission to the latter type of imagery. However, the logic of the argument would seem to lead to a much broader submission that a jury, applying current standards of propriety, should no longer be entitled to regard imagery as indecent if the sexual activity depicted was consensual and not in itself unlawful.
26. Insofar as Mr Clarke sought to strengthen his argument by referring to the fact that filming of sexual activity is more widespread now than it was in 1972, the answer lies in the fact that the conventional direction in accordance with R v Stamford caters for changes over time in the prevailing standards of propriety and decency.
27. So far as children aged 16 or 17 are concerned, we do not accept a submission that Parliament has inadvertently created the anomaly which Mr Clarke suggests. On the contrary, there may be thought to be good reason to criminalise the filming of sexual activity by a child aged 16 or 17 which is not in itself criminal. The need to protect children against themselves, and the ease with which imagery once recorded can be distributed throughout the life of the child concerned, are obvious considerations which could lead to that conclusion. Moreover, Mr Clarke helpfully told us that in the detailed provisions relating to notification requirements, Parliament has chosen to make specific provision in relation to cases involving victims aged 16 or over but under 18.
28. But in any event, even if there be an anomaly, it is for Parliament to correct it and not for the courts to endeavour to do so by placing a strained interpretation on the word "indecent".
29. In the course of argument, we were not persuaded by Mr Clarke that it would be practicable to draft an appropriate direction in accordance with his argument, not least because it seemed to be contemplated that the jury would have to consider whether there was an absence of consent on the part of the victim, even though no non-consensual activity was alleged.
30. For those reasons, which are essentially the same as those given by the single judge, we are satisfied that there is no arguable ground on which it could be suggested that the applicant's convictions are unsafe. It follows that no purpose would be achieved by granting an extension of time. Accordingly, grateful though we are to Mr Clarke for his submissions, the renewed application fails and is refused.

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