Neutral Citation Number: [2022] EWCA Crim 925

Case No: 202102775 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SHEFFIED
Mr Recorder Coupland
T20167046

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2022

Before :

LADY JUSTICE THIRLWALL
MR JUSTICE GRIFFITHS
and
MR JUSTICE SWEETING

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Between :

AHC	**Appellant**
- and -	
Regina	**Respondent**

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- -

M D Barlow instructed on behalf of the **Appellant**
N Rasiah instructed on behalf of the **Respondent**

Hearing dates : 12.04.2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, release to the National Archives. The date and time for hand-down is deemed to be 11:00am on 5 July 2022.

Lady Justice Thirlwall :

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 s.3 of the Act.

1. On 31st October 2016 at the Crown Court at Sheffield, the appellant, now 78 (DOB 24 March 1944), was convicted after a trial of 16 sexual offences on a 19 count indictment. The offences were a mixture of specific, sample and multi incident counts. He was acquitted of counts 7, 8 and 12. Until these convictions he was a man of good character.

2. The appellant was sentenced to 12 years imprisonment in total. Ancillary orders and a victim impact surcharge were imposed.

3. This is his appeal against conviction which he brings with the leave of the full court who granted an extension of time of 1735 days.

The Evidence

4. There were three complainants: C1, the appellant's daughter, C3 and C2, step granddaughters. C1 was the victim of counts 1-6 and 9-11. The offences occurred during the mid-1980s. In her evidence (contained in an ABE interview upon which she was cross examined) she said that when she was between 12 and 15 years old her father would "play fight" with her. Her father would pinch her nipples. He did so repeatedly. Initially she thought it was part of play fighting but as she got older, she realised it was not. At the age of 15 she snapped and told him to stop, which he did. This conduct was the basis of counts 1-3 which were sample counts of indecent assault contrary to Section 14 of the Sexual Offences Act 1956.

5. Counts 4-6 inclusive (also offences of indecent assault under the 1956 Act) took place when C1 was between 13 and 15 years old. Counts 4 and 6 were sample counts. Count 5 was a multiple count. The appellant would regularly touch her vagina, over her clothing whilst watching television with him on the sofa. She would fall asleep and would be woken by him stroking her legs. She said he never touched her skin.

6. C1 was also the complainant on counts 7 and 8, both offences of indecency with a child of which the appellant was acquitted. She said that she had heard but not seen the appellant masturbating in the doorway of her bedroom when she was in bed at night.

7. Counts 9-11 were all offences of indecent assault, counts 9 and 11 were sample counts, count 10 was a multiple count. It was C1's evidence that when she was 14-15 years old her father would pull the waistband of her knickers away from her body and drop £1 coins into them. He then waited and watched while she fumbled about to retrieve the money.

8. The victim of counts 13 to 19 inclusive was the appellant's granddaughter, C3 who was assaulted by him between 2010 and 2012 when she was aged between 13 and 15. Her evidence in chief was contained in an ABE interview upon which she was cross examined.

9. Counts 13 and 17 were sample counts, Counts 14,18 and 19 were multiple incident counts and Counts 15 and 16 were specific counts. It was C3's evidence that the appellant would collect her and her brother every fortnight and take them swimming either in Barnsley or Doncaster. On the way home he would park in a layby off Ridgeway Road in Rotherham, pull her trousers down to her mid-thigh and put his fingers into her vagina. During these events her brother was asleep in the back of the car. These facts formed counts 13 and 14. In cross examination she accepted that when she had watched her ABE interview through again, she had said that the appellant had not put his fingers into her vagina, they were on the outside. In evidence to the jury she confirmed that she had said that, and that as she now remembered it the appellant did not put his fingers inside her vagina.

10. On other occasions the appellant would expose his penis and try to get her to touch it by sliding his hand over hers. On one occasion her hand made contact with his penis (counts 15 and 16). On a different occasion he took photographs of her vagina with his mobile phone (count 17).

11. There were occasions when C3 and her family went to their grandparents' home for Sunday lunch. After lunch C3 would lie on her grandfather's lap in the living room. He would place a pillow over her vaginal area and play with her vagina. This was under her clothing, but he did not place his fingers inside her vagina. This took place on 2 or 3 occasions when she was aged 13 or 14. Those were the facts of counts 18 and 19.

12. The prosecution called C3's boyfriend who gave evidence that some months before C1 had spoken to S1, C3 had confided in him that her father had touched her when she was a child. There were inconsistencies between the witness's account of the disclosure and that of C3 which were explored in detail before the jury.

13. Matters had come to light during the preparations for the funeral of C1's mother, the appellant's wife. She had been talking to S1 and had broken down. She told him that their father had abused her as a child. He was not surprised by this and encouraged her to go to the police, which she did the next day. S1 asked his daughters whether their grandfather had done anything to them. As a result, they too went to the police.

14. S1 gave evidence about two events, one in Corfu and one in Norfolk decades later. He told the jury that while on a family holiday in Corfu in 1985 he shared a room with C1. One night he saw his father, the appellant, come into the room, remove his underwear, and get into bed with C1. He pushed himself against her and rubbed himself against her body. Although there was a thin sheet on the bed, he could see what his father was doing. 20 years later, the family were on holiday on a boat on the Norfolk Broads. S1 was there with his children as were his parents. He heard his father get up. When his father did not return to his berth S1 got up to see what was happening. He went into the children's bedroom and saw the appellant putting [S1's son] back into bed. His father said that his son had fallen out of bed. As S1 left the room he found a video camera on the floor. He challenged his father who denied any wrongdoing. He viewed video film on the camera and saw a short clip of his father sitting on S1's son's bed dressed in shorts and a T shirt. His shorts were pulled down, he had his hand in his groin and was masturbating in the direction of C2.

15. It was the appellant's case that S1 and C1 had fabricated the allegations against him because they were annoyed to have been left out of their mother's will. He said that he

and his wife originally had wills which divided their estate between their four children. He then suggested to his wife that the survivor of the two of them should decide what to do with their money. His wife had agreed to that, he said. He said this was before she was diagnosed with cancer in 2009. This was the reason false allegations were made by S1 and C1 who had then persuaded C3 to make false allegations against him. It does not seem to have been suggested that C2 was fabricating her allegation, which in the event resulted in an acquittal.

16. C1 and C3 were comprehensively and robustly cross examined about fabricating the allegations (and the appellant's denials were put to them). C1 said she did not know what was in her mother's will. She denied seeking to influence either of her nieces to make complaints against her father. She accepted that she and he had fallen out shortly before her mother had been diagnosed with cancer. He had given her mother an ultimatum, she said. Either she would side with her daughter or her husband. She had chosen her daughter. From then on, although they did not separate, her parents lived separate lives, with the appellant spending more and more of his time in their home in Spain.

17. C1 dealt very firmly with the cross examination. She said she had not mentioned what had happened with her father because of concern for her mother. She was asked why, once her mother had chosen her over her father, she did not tell her then about the abuse. "I could have told her then, what? when she's been going through cancer an everything, you think I'm gonna tell her, Oh by the way, my father used to sexually abuse me" As to the allegation that she had caused her nieces to make false allegations against her father she said, "what, and drag my nieces into it as well….It's a load of rubbish. I was devastated that it had happened to C3. I felt like I had let it happen, because I never said anything."

18. C3 denied fabrication and made it clear that she had not wanted to go to the police. What she had said in the ABE interview (subject to the change she had made about the touching being outside and not inside her vagina) was all true.

19. The appellant denied all the allegations. He was asked about the incident on the Norfolk broads. He recalled an incident when the boat had been bumped and S1's son had fallen off his berth. He pointed out that S1 said nothing about what he now said had happened. The appellant denied having made a video recording in the bedroom that evening. He denied S1's allegation about the Corfu holiday.

20. He called a number of character witnesses who spoke in glowing terms of his qualities.

21. The recorder discussed his directions of law with counsel. There was no disagreement about the final version. The prosecution did not seek to rely on the cross admissibility of the evidence of one complainant in support of the evidence of another. The recorder was not asked to give any directions beyond those he proposed, which included a standard direction on separate consideration of counts.

THE APPEAL

22. The full court granted leave to appeal on two grounds: firstly, that the recorder's direction to the jury on separate consideration of the counts on the indictment was defective in the light of the way the case was presented to the jury and the number of

complainants. Secondly, that evidence of bad character was led before the jury and no direction was given to the jury as to how to approach it.

23. There was no application to renew the application for leave to appeal on Grounds 3 and 4, both of which were unarguable.

Ground 1

24. Mr Barlow argues that since the prosecution did not seek to rely on cross admissibility it was incumbent upon the recorder to direct the jury that they were not permitted to rely on evidence from one complainant about one set of offences in support of the evidence of another complainant about different offences. It was not sufficient to give the standard direction to consider the evidence on each count separately. He relies on the decision of this court in **R v Adams [2019]** EWCA Crim 1363.

25. It is useful to consider the case of **Adams** along with the case of **R v H [2011]** EWCA Crim 2344 to which the court in Adams referred. In **H** the defendant was convicted of sexual offences against three boys at different times. The prosecution did not seek a direction on cross admissibility. On appeal the court considered it was sufficient that the trial judge had given a more or less standard direction on separate consideration of the counts. A similar direction had been given in **Adams,** a case in which there were two complainants, one male, one female, both of whom had played in a brass band of which the defendant was the leader. The trial took place many decades after the offences took place. The defendant was convicted of sexual offences against both of them. In **Adams** this court did not think that the standard direction was sufficient where the crown had not sought a direction as to cross admissibility. At [20] Leggatt LJ giving the judgment of the court said in respect of the decision in **R v H** "We are bound to say that we have difficulty in understanding why [the standard direction] was thought adequate in circumstances where it did not appear that any ruling had been given that evidence was cross-admissible. But we agree with the observation at paragraph 31 of the judgment in that case that: "Everything depends on the directions and facts of a particular case, and the danger that the jury might seek to use the evidence of one complainant as evidence of his guilt on counts concerned only with another complainant"." At [21] the court considered that "had the prosecution sought to argue that evidence of each complainant was admissible in relation to the allegations made by the other because it reduced the likelihood of innocent explanation, we anticipate that the evidence might properly have been admitted on that basis. " The court continued "But no such ruling was sought or given and, unless the procedure for admitting evidence of bad character is to be treated as a complete dead letter, that meant that the evidence was inadmissible, and the appellant was entitled to have the cases decided on the basis that evidence on each count was inadmissible in relation to other counts. That in turn made it necessary for the judge so to direct the jury." The court considered in that case that the failure to give such a direction made the appellant's convictions unsafe.

26. Mr Barlow submits that this case is on all fours with **Adams**. It follows, he submits, that in the absence of a direction beyond the standard, the convictions must be quashed.

27. There are some similarities between this case and **Adams** and between this case and **H**. This case is not on all fours with either. Our task is to consider the facts and

circumstances of this case, including the conduct of the defence and the recorder's directions in order to decide whether the convictions are unsafe.

28. Where the prosecution seek to rely on cross admissibility the judge is required to give a direction to assist the jury on their approach. Where there is no reliance on cross admissibility there is no automatic requirement for a direction in addition to the standard direction on separate consideration. The court in **R v H** concluded on the facts of that case that the standard direction was sufficient, accompanied as it was by a separate summing up of the evidence in respect of each complainant.

29. The direction in this case was short: "You must consider the case against and for the defendant on each count separately. Whilst your verdicts may be the same – either guilty or not guilty – the evidence on each count is different and your verdicts may be different depending on how you view the evidence." This was followed by a succinct explanation of the different types of count and then an explanation of the offences themselves and the status of evidence of complaints. All of this was clear, as was the explanation of the way in which matters relating to sexual misconduct may come to light, and how complainants behave.

30. The recorder's summary of the evidence was relatively lengthy, he explained, because the trial had been rather disrupted, and he considered it important that all the issues were set out for them. He told the jury that he would deal with the witnesses in indictment order rather than the order in which they were called to assist them going through the indictment. "I'm going to start with C1 who, of course, deals with Counts 1 to 11". There then followed a comprehensive and balanced account of the evidence of C1, including all the cross examination and how she had dealt with the allegations of fabrication. The recorder adopted the same approach to C2, reminding the jury that the relevant count was count 12 and of the fact that "if you're not sure that what she found on her was semen the following morning, then that count has to be a verdict of not guilty". The judge also reminded the jury of the cross examination about the way in which she had come to make her complaint, again in detail, so that it was clear to the jury that there was an issue about the circumstances in which the allegations were made.

31. When turning to C3 the recorder said "the next witness in relation to your indictment was C3 and as you know her counts are Counts 13 to 19. He then rehearsed her evidence in detail, including the circumstances in which she had come to make her complaint to the police. The summary of the evidence of the three complainants occupies over 14 pages of the transcript.

32. Next the recorder set out the evidence of S1 in respect of Corfu and Norfolk and of the circumstances in which C1 had confided in him at the time of their mother's funeral. He had told her that he had known what she was going to say because of what he had seen all those years earlier. He had then told his daughters what C1 had said and asked them whether the appellant had touched them. C3 said "why do you think I hate him so much" and then told him what she was later to tell the jury. C2 said nothing had happened to her but after a while recounted the incident which formed count 12 on the indictment. The recorder reminded the jury of what was obviously very robust cross examination of S1, not least the fact that he had said nothing after either of the incidents and allowed his own daughters to see the appellant over many years. He was also tested rigorously in respect of how C1 and his daughters had come to make their complaint to the police. He denied putting his daughters up to what to say.

33. The recorder's summary of the defence was detailed and balanced. In addition to his denials, it included all the appellant had said about the allegations being fabricated and the suggested reasons for this, along with the assertion that C1's evidence in the interview and in court as all an act. As for C3 he could not explain why she had said what she had said and suggested that her father was behind it. None of what she said was true. It was all made up. His son's evidence was all a lie.

34. The recorder then reminded the jury in detail of the live and read good character evidence from friends, relatives, all of whom knew the appellant well, some for many decades. He then summarised the positions of prosecution and defence including, again, the allegations of fabrication. Finally, he checked with counsel that there was nothing of importance he had failed to mention. There was nothing.

35. Having reviewed the transcripts of all the evidence and of the summing up we are satisfied that the jury would have understood clearly what evidence was relevant to which offence and there was no need for any additional direction of the type contended for by Mr Barlow. We are fortified in that conclusion by the acquittals. Count 12 was the only offence in respect of C2. The jury did not seek to rely on evidence from other complainants in that regard. The acquittals in respect of two counts where C1 was the complainant are further support for our conclusion. We reject this ground of appeal.

Ground 2

36. The evidence referred to in the second ground was the evidence from S1 about Corfu and the Norfolk Broads and evidence from C1 about her father coming into (and then leaving) her house late at night when she was in her late 20s. This last incident was of peripheral, if any, relevance to any issue in the case and Mr Barlow did not seek to develop arguments about it in his oral submissions. We say no more about it.

37. Mr Barlow does not complain that the evidence was inadmissible. His complaint is that there was no direction to the jury to assist them in how to approach it. He submits, and we accept, that the evidence about Corfu and Norfolk was evidence of bad character. We reject the prosecution submission that this evidence came within section 98 of the Criminal Justice Act 2003. It was not to do with the facts of the offences on the indictment.

38. There was no discussion about how the evidence was to be treated and whether any direction was needed. It appeared to this court that the appeal on this ground must involve a direct attack on the conduct of defence counsel who had not objected to the evidence being adduced, had agreed the directions and not made any submissions about the summing up being defective. In answer to a question to that effect Mr Barlow said that he did not wish to be unkind. The letter to trial counsel, sent under the McCook procedure suggested that there was no criticism of her conduct, the target of the criticism being the trial judge. In the event, counsel had left the Bar and sent no substantive response.

39. It is important to record that the evidence from S1 was before the jury by agreement or at any rate without objection. We can understand why defence counsel took that course; it was the appellant's case that S1 and C1 had put their heads together because of being left out of their mother's will (something they both denied). S1's account of the event in Corfu was not supported by C1, who could not remember it. S1's account of the

Norfolk event led to the very effective cross examination of him about why he had not acted at the time of the event, given what he supposedly knew from 1985 and given that his own daughter was the apparent target of the appellant's behaviour. It was also plain that S1 was very much involved in ensuring the complainants went to the police. All of this was helpful to the appellant's case and defence counsel effectively exploited the weaknesses in his evidence and his inconsistencies. A decision having been taken not to object to that evidence it is not open to fresh counsel to seek to impugn that decision. In fairness to Mr Barlow, he did not seek to go behind that decision or to argue that counsel had been incompetent in her conduct of the case. His submission was that the recorder failed to direct the jury about how to use the evidence of the Norfolk and Corfu incidents. He submitted that the recorder should have given a bad character direction "with all the protections that affords" but Mr Barlow was somewhat reticent about precisely what the recorder should have said. He submitted that the evidence was capable of establishing propensity. It follows, in our view, that the recorder should have directed the jury that if they were sure of the evidence, they could use it in support of the evidence of the complainants. He should also have directed them that they should not convict on the basis of the bad character evidence alone. He did neither.

40. The question for us is whether that omission renders the convictions unsafe either on its own or taken in combination with the direction on separate consideration. We are satisfied that it does not. The evidence from C1 and C3 was strong on all the counts of which the appellant was convicted. Strikingly the jury did not use the evidence of the Norfolk incident to bolster the account of C2 on count 12, of which the appellant was acquitted. Nor did they use the evidence of the Corfu incident to bolster the evidence of C1 on counts 8 and 9. They convicted on the evidence of the complainants. It follows that we reject ground 2.

41. The appeal is dismissed.