



Neutral Citation Number: [2019] EWCA Civ 184

Case No: B4/2018/2948

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF CIVIL AND FAMILY JUSTICE CENTRE
Her Honour Judge Edwards
CF18C00805

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2019

Before :

LORD JUSTICE GROSS
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ROSE

Between :

K (Children)

Paul Hopkins QC and Dominic Boothroyd (instructed by Howells Solicitors) for the Appellant Father
Claire Wills-Goldingham QC and James Lewis (instructed by Vale of Glamorgan Council Legal Services) for the Respondent Local Authority
Colin Douglas (instructed by Nicol Denvir & Purnell Solicitors) for the Respondent Mother
Matthew Barry (instructed by Robertsons Legal Limited) for the Respondent Children through their Guardian

Hearing date: 13 February 2019

Approved Judgment

Lord Justice Peter Jackson :

1. The central question on this appeal is whether Her Honour Judge Edwards was wrong to conclude that the appellant father had sexually abused his 6-year-old daughter. The father contends that the evidence was inadequate to support the judge's findings.
2. At the end of the appeal hearing we informed the parties that the appeal would be dismissed. This judgment contains my reasons for this decision.

Background

3. Until March 2018, Anisa (as I shall call her) lived with her parents and 13-year-old sister, Sara. Outwardly, the family appeared to have many strengths. It was respected in the community, and in particular at the mosque. Anisa's school reports showed her to be an intelligent little girl who was doing well. However, on 11 March 2018, while staying with her grandparents, she smeared faeces in the bathroom, and she did the same the next day on returning to the family home. Then, on 15 March, while attending a regular class at mosque, Anisa made allegations of physical and sexual abuse against her father to a teacher, Ms K. This led to a referral to social services and the police, and to the father moving out of the family home that evening. Since then, the mother has continued to look after the children.
4. In due course the local authority took care proceedings and in October Judge Edwards conducted a fact-finding hearing over the course of four days. Her reserved judgment was given on 6 November. Permission to appeal was granted by Baker LJ on 21 December.
5. The professional intervention in this family showed that all was far from well in the home. The threshold findings made by the judge were that:
 - (1) Anisa had suffered significant physical harm by virtue of her father causing bruising to her side and by grabbing her by the hair on 13 March, and by losing his temper with her and physically chastising and restraining her on previous occasions.
 - (2) Anisa had suffered significant sexual harm by virtue of her father (a) indecently assaulting her and (b) grooming her for his sexual needs on occasions before 13 March 2018.
 - (3) Sara was likely to suffer significant emotional harm by being in the family home when the father was treating Anisa in this way, when domestic abuse was occurring between the parents, and when the mother was not protecting Anisa from physical harm inflicted by the father.

- (4) Anisa had suffered significant emotional harm by virtue of being the subject of physical and sexual harm at the hands of her father, and by the mother being aware of the physical harm (but not the sexual harm) but being unable to protect her from that or from exposure to domestic abuse in the family home.
6. The threshold document records eleven specific findings made in the course of the judgment. The only one that needs to be mentioned now is number 8: “Father has been sexually aroused at contact”, a finding that depended upon observations made by workers at the contact centre.
7. The parents had denied any of this and presented family life as being quite normal, but neither of them appeals from threshold findings (1), (3) and (4). The father now appeals from finding (2), and can be taken to challenge the consequential reference to sexual harm in (4). The mother does not seek to play any part in his appeal, which is opposed by the local authority. The Children’s Guardian, who had expressed reservations about finding (2) at trial nonetheless submits that the judge was entitled to make the findings she made.

The evidence

8. The judge read 700 pages of evidence, viewed the DVD recordings of Anisa’s ABE interview, the father’s police interview, and police body cam footage, and heard from twelve witnesses.
9. It is necessary to look in more detail at the evidence relating to the finding now under appeal. There were two separate strands to this evidence: the investigation into Anisa’s statements to Ms K, and the accounts of the workers who had been supervising the father’s contact.
10. Anisa’s statement to Ms K was made when they were sitting together in the mosque. This was because Anisa had been unable to bend during prayers due to pain in her back. She told Ms K that her father had hit her by pushing her across a sofa because she could not find the TV remote and that at night time he had come into her room before dawn and lain on top of her and hit her with a stick. She had never seen a stick but she could feel it. Anisa demonstrated how her father had hit her by opening her legs whilst she was lying down and putting her hand between her legs and referring to her “pee-pee hole”. Ms K asked, “What do you do?” Anisa responded, “I just freeze. I don’t move...” and she demonstrated this.
11. The mosque made a referral to the police and social services. Late in the evening of 15 March, during a joint visit to the home by a police officer and a social worker, Anisa was spoken to with and without her mother present. The visit was recorded on body cam. Anisa was extremely quiet and guarded. She said she missed her father, and that he had caused a bruise on her side, but only because she had kicked him first. Seen on her own, she said that: “My mum said I’m only allowed to tell you about my bruise because that’s why my daddy is in prison. I can’t tell you about anything else.” She then wrote: “My dad pushed me on the sofa. In my bedroom my dad he came to my

room and he squashed me on the wall. But I still love him. I told a teacher. I was screaming for my mummy.” Anisa also described her father getting into her bed and pulling her onto his lap in bed. He had broken her bed. However, she denied describing any incident with a stick or with her “pee-pee hole” and called Ms K “a liar”.

12. On 16 March, a child protection medical took place. A bruise to Anisa’s left flank was identified as likely to have been an inflicted injury, while genital examination was unremarkable.
13. On 20 March, Anisa was seen at school by the social worker and a different police officer. She described her mother locking herself and both children into her room when her father is angry. She said that her father hits her on her back and her mother does not like it. He also pulled her and Sara’s hair. She again said that she had never said anything about a stick or about her “pee-pee hole”. However, she complained about her father lying on her bed and said: “Dad got into my bedroom and tried to massage my leg because it was hurting. He asked if I wanted to sit on his lap and I said yeah and...” On the same day Sara was seen at school, but she was too upset to speak.
14. On 27 March, Anisa was interviewed under ABE conditions. She described an argument over the remote control. She talked about her father pulling her and Sara’s hair. She denied telling Ms K anything about her daddy lying on her or saying anything about her “pee-pee hole”.
15. Finally, on 24 April, Anisa was seen again by the social worker and a police officer. Nothing of any significance was gained by this discussion.
16. The judge closely analysed the process by which Anisa’s account was investigated and was highly critical of almost every aspect. The home and school visits were poorly planned. The ABE interview was “shambolic” and the entire investigation was defective in these ways:
 - (1) A lack of leadership and blurring of responsibilities
 - (2) Introduction of too many police officers to the children
 - (3) Too many meetings and unplanned interviews not properly documented
 - (4) Rapport-building by officers who would not conduct the ABE interview
 - (5) Inadequate consideration of an intermediary assessment at the outset
 - (6) Failure of the social worker to keep case recordings
 - (7) Failure by officers to review the initial interview recorded on body cam
 - (8) Failure to adhere to 2011 ABE interview guidelines.

The judge said that “I am in no doubt that if there was any prospect of [Anisa] making any further statements or allegations, that prospect evaporated on 27 March 2018 if not before then”. She was also highly critical of the final meeting, describing it as a lesson

in “how not to conduct an interview”. Questioning was inappropriate and repetitive, the child’s cues were ignored and there were constant interruptions and mistakes.

17. The judge then reviewed the evidence of Ms K, the contact centre workers and the parents. She described the evidence of Ms K as “the cornerstone for the Local Authority’s case”. She noted her initial concerns in relation to this witness, and in particular that she had failed to provide the local authority with a Children Act statement, but having seen her give evidence she concluded: “I am in no doubt that she was a truthful, honest and trustworthy witness – cross-examination only served to reinforce the quality of this witness’ evidence and the remarkable way in which she managed the situation”.
18. The judge considered the evidence of the contact centre manager and a contact centre worker about a contact occasion on 28 August, when they each said that they had briefly seen the father with what they thought was an erection.
19. The judge described the mother’s evidence. She noted how little written evidence she had provided, but that even this contained discrepancies. Her account of how Anisa had sustained the bruise and when she had first seen it was not credible and she had failed to challenge the father about it. It is not plausible that she had simply forgotten about Anisa’s smearing. The judge considered that a script had been agreed between the parents to minimise concerns of domestic abuse and that the mother gave the impression that she was tailoring her evidence to fit the father’s. She concluded “Overall, [the mother’s] evidence was unpersuasive, unsatisfactory and in many respects, unreliable. I did not feel I could rely on her account of events and at one stage, I considered warning her that her evidence could lead to her inclusion as a possible perpetrator in relation to [the] bruise. However, given [Anisa]’s clear evidence that it is [the father] who is angry in the household and given [the mother]’s limited acceptance of domestic abuse (even if she does not recognise it as such), I did not consider it necessary.”
20. As to the father, the judge stated that she found his evidence and demeanour to be “very troubling”. In a comprehensive review, she found his explanation that the bruise was caused by Anisa being restrained during a temper tantrum not credible. She described him as clearly lying in his written and oral evidence, with an ability to remain calm and composed even when giving a description that could not possibly be true. He showed no remorse or empathy towards Anisa. In relation to the sexual abuse allegation, he claimed that it may have come from some troubled aspect of her past, or to have been manufactured by Ms K for her own purposes. He claimed Anisa had no knowledge of sexual matters and could not have described such things happening to her. His account as to how often he had entered her room had changed. The judge noted that the father was very challenging, especially towards women, while at other times displaying apparent humility and obsequiousness. Psychological assessment however did not indicate a sexual attraction to children.
21. The judge finally and sympathetically considered Sara’s position and letters she had written to the court.

The judge’s reasoning

22. The judge gave herself a clear series of directions, with underlying authorities, concerning all the legal principles engaged in this case:
- (1) Burden and standard of proof.
 - (2) *Lucas* direction on lies.
 - (3) Specific principles relating to allegations and sexual abuse:
 - a) No case of sexual abuse without probative medical or direct physical evidence is to be regarded as straightforward.
 - b) Children are poor historians and many are suggestible. The greatest care must be taken to minimise the risk of obtaining unreliable evidence from a child.
 - c) The 2011 revision of the ABE guidance should be followed.
 - d) The need to analyse and acknowledge deviations in ABE practice and consider whether the flaws are so fundamental as to render the interviews unreliable. Material can be cogent despite deviations in the interview process.
 - e) The need for careful assessment of hearsay evidence of what a child has said, particularly where it is the only evidence.
 - f) The need for additional caution when relying on a statement made outside an ABE interview or following earlier unrecorded questioning.
23. I next turn to the judge's reasoning in support of her findings. As to matters not now under appeal:
- (1) "I am satisfied that [Anisa] made a complaint that the bruise was inflicted on her by her father when he was angry. She has maintained this allegation consistently... [The father] has deliberately lied about this incident and has given several different accounts. His final account makes no sense and is implausible. I find that he has lied because there is no innocent explanation that he can give. He knows that he has lost his temper, as described by [Anisa]."
 - (2) "I am satisfied that on or about 13 March 2018 [the father] lost his temper and in anger, he grabbed her by the hair and pushed her. During the course of this incident, [Anisa] sustained the bruise shown at J1(2). This was a significant bruise which [the mother] sought to minimise in her evidence. Neither parent has been able to provide an acceptable or reasonable explanation as to how the bruise was caused. Both were present. Neither has been open and honest about the circumstances surrounding the incident. [Anisa]'s injury was not an accident and it was caused by [the father] using excessive unreasonable force against her. It is likely that [the father]'s anger and loss of control was something that occurred regularly in this household."
 - (3) The father "did not want to admit he wasn't coping whilst [the mother] either didn't want to or couldn't. In those circumstances, both hid [Anisa]'s injury."

- (4) Sara “would have been aware of how [Anisa] was treated. There was a risk that it was likely to cause her emotional harm to see her younger sibling treated in that way.”
 - (5) The methods used by the father to restrain or discipline Anisa were wholly unacceptable.
 - (6) “I have been concerned about [the mother]’s propensity to tailor her evidence to assist [the father’s] case. [She] is isolated within her home for long periods of time and it is difficult to gauge if that is through choice or because of coercive control... I find that on at least two occasions, [she] locked herself and the children in an upstairs bedroom to protect them from [the father]’s anger and his behaviour. I also find that on other occasions, arguments between the parents became so heated that the girls locked themselves away upstairs for their own safety and well-being. Neither parent has been open and honest about the number or nature of these incidents and they are likely to have been numerous.”
 - (7) The father has been overly critical of contact workers and the social worker. The mother has challenged medical records and reports without reasonable cause. “All of these matters will have added to these children’s distrust of authority. This was a contributing factor but not the sole cause for [Anisa]’s struggle to engage with an ABE interview and for [Sara]’s refusal to speak to police and social workers. Children who are already suffering or at risk of suffering significant harm are at risk of suffering further emotional harm if they feel they cannot turn to outside authorities for help and if the message they receive is that these matters must remain within the family.”
 - (8) “The “evidence” put forward by [the father] to discredit his daughter adds to the picture of a household that does not encourage openness and honesty. I could not detect any empathy from either parent for [Anisa].”
24. Then, as to the allegations of sexual assault, the judge set out her reasoning in this way:
- (1) She was satisfied that Anisa did make the complaint of sexual abuse to Ms K.
 - (2) As to Anisa’s refusal to repeat the allegation and denial that she made it in the first place: “This is not a retraction in the true sense of the word... Her inability to repeat her allegation is explained by her knowledge of the consequences for her family and for herself. This acted as a bar to any further disclosure... This is a child who has not been believed by her family and has not been supported in the allegations she makes.”
 - (3) “Usually an initial account would not provide sufficient evidence because very little detail is given. In this case the account is detailed and reliable.”
 - (4) The allegations are true for the following reasons:
 - (a) Anisa is a little girl who knows the difference between truth and lies.
 - (b) She understood the seriousness of the allegations and that they were far more serious than her allegations of physical abuse.

- (c) The description she gives of her father coming into her bedroom before dawn and coming into her bed is inherently improbable and cannot be explained unless what she says is true.
 - (d) The father had the opportunity and had been in her bed on at least one occasion before because he broke the bed slats.
 - (e) The father had lied about his involvement in Anisa's day-to-day care and about going into her bedroom.
 - (f) He has been sexually aroused in contact on at least two occasions.
 - (g) He had lied about how Anisa sustained her bruise.
 - (h) Anisa's behaviour in March is consistent with the allegations, as is the improvement in her behaviour noted by school in recent months.
- (5) Thus, "the only probable reason for [Anisa] to make these allegations is that they are true. The evidence survives the level of scrutiny required by the standard of proof which includes an examination of the plausibility of the denial of the allegation."
- (6) There was insufficient evidence to make a finding that the 'stick' referred to was the father's penis or that any penetration had taken place. However, "whether it was a penis or some other implement, placing it on or near the genitalia or hitting her there with it constituted an indecent assault which occurred more than once". The father's behaviour was driven by his desire to satisfy his sexual needs.
- (7) Anisa's desperate and angry behaviour at bedtime and smearing and urinating may also be linked to her abusive experiences and requires careful exploration.
- (8) The father is likely to have groomed Anisa for sexual abuse. She describes "something other than the usual innocent, loving parent and child interaction." In an addendum to the judgment the judge outlined how the behaviour had escalated and how it was likely to have continued.
- (9) The mother cannot be held to have known about the sexual abuse but she had failed to protect the children from the domestic abuse in the household.
25. In relation to the contact centre incidents, the judge found that on 28 August the father had an erection on two separate occasions during the contact session and that he continues to become sexually aroused when Anisa sits on his lap.

The arguments on appeal

26. On behalf of the father, Mr Paul Hopkins QC, leading trial counsel Mr Dominic Boothroyd, takes no issue with the judge's statements of law. Their contention is that the judge went beyond what the evidence allowed.
27. In relation to Ms K, it is said that the judge wrongly relied on her evidence when:

- (1) It was the only evidence to directly support the allegation. It arose from a degree of questioning by Ms K. It was not repeated under controlled conditions.
 - (2) The allegation was retracted by Anisa later the same evening and consistently since then she has persisted at the same time in serious physical allegations against her father.
 - (3) The accompanying investigation was defective.
 - (4) There were a number of additions and variations between the accounts given by Ms K in a note written at the time, in her police statement later that evening, and in her oral evidence in October. The judge failed to deal adequately with these matters, which Mr Hopkins took us through in detail.
 - (5) Accordingly, the entire process based on Ms K's evidence is tainted.
28. Regarding the contact workers, the judge should not have reached the finding she did. There were issues about the compatibility of the accounts given by the two workers. The material is no more than speculative. The judge fell into the error of using it to bolster her main findings. If the finding is set aside, it calls the central findings into question.
29. On behalf of the local authority, Ms Claire Wills-Goldingham QC and trial counsel Mr James Lewis respond that the judge's legal direction and the trial procedure cannot be challenged. The central allegation was spontaneously made to a neutral person who did not expect it. While Anisa has not repeated the sexual abuse allegations, the judge's findings contain an explanation for that. In particular, she said (again spontaneously) on 16 March that her mother had said she was only allowed to talk about the bruise. The deficiencies in the investigation do not detract from the main allegation. The judge clearly had in mind the difficulties in relying on the evidence of Ms K but directed herself appropriately and was entitled to reach the findings she did based on the credibility of Ms K and the parents. She took into account all of the issues now raised by the father.
30. Ms Wills-Goldingham also argues that the contact workers saw what they think they saw and the judge was entitled to rely on their evidence. But even if that finding fell away, the central findings would be unaffected.
31. The mother and the Guardian were represented before us, although neither made any substantive submissions. It is a little surprising that attendance was thought necessary, particularly as the court had indicated, having read their written submissions, that it was not required.

Conclusion

32. This court will rarely even contemplate reversing a trial judge's findings of primary fact. As Lord Neuberger said in *In re B (a child)* [\[2013\] UKSC 33](#) at [53], this is because:

"... the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is

only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.”

33. In my view, this appeal fails this rigorous test, for these reasons:
- (1) HHJ Edwards gave herself a model legal self-direction and applied it to the evidence in a clearly-reasoned judgment.
 - (2) I do not accept Mr Hopkins’ submissions that the judge should have placed weight on differences between the three accounts given by Ms K. A fair analysis of her evidence shows that her account contained a consistent core, with variations of a kind that inevitably occur when a witness is retelling an account to different people at different times.
 - (3) It is true that the evidence of sexual abuse was more limited than is often found, and that it depended on a hearsay account that was not susceptible to objective checking. The judge therefore approached it with proper caution. Once she had accepted it, as she was entitled to do, there was a clear basis for her finding that Anisa had made statements implicating her father in both physical and sexual abuse.
 - (4) At that point the judge’s task was to consider why Anisa had made her statements. Was it because it was true, or for some other reason? The father had suggested that Anisa might have had unacknowledged psychological difficulties, but there was no evidence to support this. He also suggested that Ms K had made up the allegations and was “mentally ill” but that case was not pursued at trial. The judge dismissed these possible explanations and her conclusion – that the only probable reason for Anisa to say what she did was that it was true – was one that was clearly open to her on all of the evidence.
 - (5) The judge also rightly cautioned herself that an initial account will usually be insufficient for proof because it lacks detail. Here she found that the account given by Anisa to Ms K contained a level of detail that rendered it reliable.
 - (6) Mr Hopkins rightly does not argue that Ms K’s evidence, if reliable, would as a matter of principle be incapable of sustaining the findings. In each case the court’s task is to weigh up the whole of the evidence, whatever it might be. There is no rule that dictates when findings may or may not be made. What is necessary is that the evidence is thoroughly tested and forged into a solid chain of reasoning, whether that leads to the acceptance or the dismissal of a disputed allegation. In the end, what matters is not the volume of evidence but its quality.
 - (7) The unfortunate shortcomings of the investigation shed no light on the central issue in circumstances where the allegation was made prior to the investigation.
 - (8) In reaching her conclusion the judge looked to the evidence as a whole, including the mother’s relative ineffectiveness as a protective force, and the damaging credibility findings she had made on non-sexual matters.

- (9) Crucially, the judge was entitled to form a reasoned view on the credibility of the father. Had she formed a more positive view of his character and credibility, she might have found Anisa's statement on its own insufficient to prove the allegation. But her assessment of the father did nothing to reduce the likelihood that it was true, indeed it made it more probable.
34. For these reasons, I consider that the judge was entitled to find that the recipient of the Anisa's confidences was a reliable witness and that the child had truthfully unburdened herself to her before clamming up to others. The judge's chain of reasoning was secure in relation to her central finding of fact and the appeal must therefore fail.
35. The only point where I would depart from the judge's treatment of the case concerns the finding in respect of the contact centre (finding number 8). Having reviewed the evidence on this issue, which includes the transcripts of the evidence of the contact centre workers, I have concluded that it is too uncertain to form a sound basis for the finding. It was on any view a peripheral aspect of the case and it did not play a significant part in the judge's reasoning in relation to the central finding. I would therefore propose that this single finding be set aside. In doing so, I am not in any way doubting the good faith of the workers who described what they believed they saw, but am looking narrowly at a disputed finding that can have no bearing on the ultimate outcome of the proceedings.
36. I would therefore dismiss the appeal, save for the deletion of finding number 8, and the matter can now return to the judge for her to make any necessary welfare decisions.

Lady Justice Rose

37. I agree.

Lord Justice Gross

38. I also agree.
-