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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 20 October 2010

B e f o r e:

LORD JUSTICE HUGHES
(Vice President of the Court of Appeal Criminal Division)

MR JUSTICE OWEN

MRS JUSTICE THIRLWALL

R E G I N A

v

E.R.

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Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Miss E Nicholls appeared on behalf of the **Appellant**
Mr M Leeming appeared on behalf of the **Crown**

J U D G M E N T
(As approved by the Court)

1. THE VICE PRESIDENT: In November of 2009 this appellant stood trial on three counts of historic sexual abuse. By then the complainant was in her early 40s. Her complaints were of events which she said had happened when she was between the ages of about 11 and about 13 in 1977 to 1979, or thereabouts. She, the complainant, was the younger sister of the appellant's wife who was about five or six years senior to the complainant and, at the time in question, recently married to the appellant and pregnant with their first child. The appellant and the complainant's sister had lived with the complainant's family, although by the time in question they had found their own home not far away.

2. The allegations were of a maximum of ten separate incidents, charged all of them as indecency with a child. They took the not uncommon form of persuading her to masturbate him. They were said to be spread over something within two years. Those allegations had been first reported to the police only in February 2008, 30 years or so after they were said to have taken place. They had, however, according to a good deal of evidence, some realistically challengeable and some much less so, been mentioned by the complainant at various times between about the time that she said it had happened and the present day and a number of different people.

3. It was common ground that the appellant knew of the allegations at least in about 1994, which itself was 14 years before the police learned of them. The appellant's case at the trial was simply that nothing like it had ever happened. So the case is, like many of its kind, an unhappy one. It will have generated, we expect, conflict and doubt within the extended family. It is apparent that some members of it supported the complainant and others supported the appellant. None of that, sadly, is unusual.

4. Two applications made during the course of the trial give rise to the two grounds of appeal. First at the end of the Crown evidence, counsel for the appellant, Miss Nicholls, made an application to stay the prosecution. It was an application that she had no doubt intimated in advance and it was a convenient time to take it at the end of the Crown case. The judge refused that and the trial proceeded. Miss Nicholls's first ground of appeal is that he was wrong.

5. In the meantime, the Crown had made part of its case a report of a psychotherapist who specialised in counselling in cases related to child family abuse. On behalf of the appellant it has been contended that that evidence should not be admitted. The judge rejected that submission and that, and the ensuing treatment of that evidence in the summing-up, gives rise to the second ground of appeal.

6. We deal, first, with the application to stay. It was firmly grounded, as in many of these cases, on the passage of time between the events, if they had happened, and the trial. It was suggested that investigation of such circumstances as there were, and there were not very many, of the allegations was made very much more difficult by the passage of time and, of course, that memories had substantially faded. It was said that the opportunity for the appellant to defend himself was reduced to the point where there could not be a fair trial.

7. The judge rejected that contention. It is true that in passing he perhaps inadvertently referred to the jurisdiction to stay a prosecution in these circumstances as an "exceptional remedy which exists at the discretion of the court". That, of course, is not accurate. It is not a discretionary remedy. It is a matter of judgment for the judge whether a fair trial is possible or not. But that verbal slip apart it is quite apparent from his careful ruling, which ran to several pages, that he had in fact applied precisely the right test. He concluded that a fair trial was possible and we have no doubt at all that he was right. The trial process is designed to cope with the assessment of evidence of events many years previously. Of course the jury needs to be reminded that the passage of time can have its effects precisely on the kind of consideration which Miss Nicholls was advancing, but it is not the least uncommon for juries to grapple, and grapple entirely successfully, with cases of this kind. We have no doubt at all that the decision that the trial should proceed and be determined on its merits was the right one.

8. The admissibility of expert evidence question, however, gives rise to a matter of considerably greater difficulty. The Crown served as part of its case a 19 page statement from a lady called Julie Stirpe. Although she is not either a psychiatrist or a psychologist so that she has no medical qualification, or, indeed, any particularly academic qualification, she has a research degree in psychotherapy and is an experienced counsellor. She specialises it seems in cases where there has been or may have been family child abuse.

9. We are told that the reasons why this report was obtained and then served were these. First, there was the period of 30 years or so between the events, if they occurred, and the report to the police. The Crown wished to rebut the contention that the proper inference from that long delay ought to be that the complaints were false. Secondly, the Crown wished to rebut the assertion which had been made by the appellant in the course of his interviews with the police that the continued association within the family between the complainant and himself also showed the complaints to be false. She had come to stay for some months with him and his wife and, being on her way to becoming a hairdresser, she had routinely cut his hair.

10. As for the first, it is true, of course, that time had passed and that the period between the events and the report to the police was 30 years. The evidence which the Crown had available, and which came not only from the complainant but was corroborated by those to whom she had spoken, suggested that she had reported indecent behaviour on the part of the appellant (a) to her young friend, now Mrs R, in about 1978, (b) to her eldest sister-in-law in about 1983, (c) to her mother and the defendant's wife in about 1991 and (d) to her general practitioner and to colleagues at work some time in around 1994.

11. The complainant's explanations offered for the passage of time were, in effect, three-fold. First, she said, in effect, "This man is married to my sister. I did not want to risk destroying their marriage. He had told me that he would leave if I revealed what was happening." Second, "The family had to carry on. I did stay with my sister and therefore with the appellant for a while and I did cut his hair as I did other people's hair. That was because a scene could not be made about it. Family relationships needed to

carry on." Thirdly, when she did tell her eldest sister-in-law and, via her, her mother she was not, it seems, believed.

12. Those, we think we should say, are all very human experiences if true and they are, many of them, likely to be within the experience of a representative selection of the population, that is to say jurors.

13. We agree with Miss Nicholls that the principle of the admissibility of expert evidence can correctly be gathered from R v Turner [1975] QB 834. The decision is too well-known for us to make extensive citation but the principle is that expert evidence is admissible where it is likely to supply information and material which is outwith the jury's normal experience. It is, we think, true that it may well be that not all jurors will have experience of this kind of family abuse, neither themselves nor in others near them, and that they do need some assistance and warning when confronted with the kind of issue that the passage of time posed in this case.

14. The remedy for that need, however, is, and is now well understood to be, judicial warning and direction. Judges have for some time now been encouraged to give such help in a variety of situations, including in a number of different types of cases of alleged sexual offence. The reaction of women, and for that matter of men, to forced sexual contact, including rape, is wide. What inferences about willingness can or cannot be drawn from people's mode of dress or behaviour at parties or conduct in public houses is another. The reasons which may, we emphasise may, exist for long delay in reporting abusive events in childhood, especially within a family which is continuing, is a third.

15. In all these situations, and others, the patterns of possible behaviour are nowadays quite well understood and they represent a common experience about which judges are recommended to help and advise jurors. They must, of course, do it neutrally. They must do it without any assumption one way or the other; either that the allegation is false because it is so late, or that it is explained and truthful. Their warning and advice must be balanced as between the contentions on either side.

16. We agree with Miss Nicholls that the kind of warning which is given in these cases is not unlike the advice to jurors which is given in other situations. Identification cases represent one such group. There juries are warned about the danger of which they may not be conscious, that they may mistake a convincing and honest witness for one who is also accurate rather than wrong. Other examples could be multiplied. The warning that people may lie because even though they are innocent they do not think they will be believed and accordingly feel the urge to gild the lily is just another. It may not be obvious to jurors unless their mind is jogged to think about it. But once the point is explained it is very easily understood and jurors experience no difficulty then in focusing on the question of whether the identifying witness may be mistaken, even though convinced he is right, or the defendant may be lying even though innocent rather than because he is guilty.

17. In exactly the same way once jurors are warned not to deduce falsity from a delayed

complaint and once their attention is drawn to the possibility that other factors may explain the behaviour of the complainant, then they can focus on the question which matters, which, as in this case, is whether it is a false allegation which has been made late, or a true one which has not surfaced for the reasons which the complainant offers.

18. Juries do not need expert help to make that decision. If they are offered expert help, as they were in this case, that carries the danger that what would otherwise be a neutral judicial warning becomes an assertion or a proposition invested with special weight and validity because it comes from an expert, whereas the truth is that it is for the jury to decide.

19. A further danger is that, whereas the judge in warning the jury about the realities is well placed to balance the contentions on either side, expert evidence of this kind, and certainly this expert evidence in this case, may lack any kind of consideration of the appellant's contrary assertion. The evidence was devoted only to examination of the complainant's side of the story.

20. Lastly we would add that if expert evidence of this kind becomes routinely tendered one can expect that those who represent defendants faced by it are likely to feel the need themselves to seek expert advice of a balancing kind. The result of that would be to add to the length, the strain and the stress of the trial for everybody and to divert the attention from the witnesses who matter, who are the complainant, on the one hand, and the defendant on the other, together with any relevant additional witnesses.

21. All that, we are satisfied, is reason enough to say that expert evidence of this kind is simply unnecessary. It should not be employed unless there is something very unusual which really does mean that the evidence is directed to something which is quite outside both the experience of the jury and the ability of the judge to explain common understanding and common patterns of behaviour.

22. In the present case the statement of this psychotherapist more than amply demonstrates all the dangers that we have mentioned. Its content is wide-ranging, very general and extends well beyond the issues which the jury had to consider. It is not far off a lecture on the evils of child sex abuse. To deliver such a lecture is a perfectly legitimate task, but the place to do it is not in a trial where the issue for the jury is: 'did it happen or did it not?'

23. In fairness to the author of the report its contents were to some extent generated by the instructions which she was given, which included this request:

> "It is hoped that you will be able to comment on some of the coping mechanisms that sexual abuse victims employ in general."

24. Perhaps as a result the report contains, amongst other features, the following. First, two paragraphs at original paragraphs 2.5 and 2.6 explaining the prevalence of child sexual abuse. That may well be true, but it has nothing to do with the question of whether it has happened in this case.

25. At 2.10 appears the proposition that sexually abused children experience significant psychological distress and dysfunction. That also may well be true, but it has nothing to do with the question of whether that is what has happened here. It is an assertion of the damage that may be done if the offence has been committed.

26. Thirdly, at paragraph 2.12 the author adverts to the likelihood that the more "resilience factors" a child has, the better he or she is likely to be able to cope. That is a truism which has nothing to do with this case.

27. At paragraph 2.13 the author generalises upon the goals of the typical abuser. There are references to sexual predators, to the grooming of selected and vulnerable children and to methods of psychological and emotional distortion to control a child. All that does is to raise the temperature. Very little such behaviour was suggested here.

28. At paragraph 2.16 there are references in very general terms to the fact that an abuser may have instilled subtle or overt messages of control causing a distorted sense of self-value leading to the child developing negative core beliefs about themselves. There are, of course, such cases, though so far as we can see the complainant never suggested that she had suffered from a distorted sense of self-value.

29. At paragraph 2.23 there is a treatment of the undoubtedly known phenomenon, of the "trauma bond" in which an abused person may come to believe that she is reliant on the abuser, dependant on the relationship between them, and that it is easier to comply than attempt to disclose. There is no suggestion that any of that was relevant to the present case.

30. True it is that the reporting expert was told in her instructions this:

> "You are not expected to comment on the truthfulness or plausibility of what the witness said about the allegations."

31. The difficulty is that she was also asked, and asked specifically, to consider whether the complainant's behaviour fell within normal reactions or normal behaviour, and the inevitable result of answering the second question was effectively to give her opinion on the first. As a result, time and time again in the text of the evidence as it was given the expert gives as her opinion that the complainant's behaviour was entirely normal. That can only have been taken by the jury to mean that in the expert's opinion the explanation for the passage of time was a genuine one and that the allegations were true. The expert is entitled to her opinion on matters within her expertise but she was not entitled to give that opinion in court. That was the question for the jury.

32. We cannot avoid saying that this particular report, even with the limited editing which was achieved at the trial, reads to us as a powerful piece of advocacy on part of the Crown. It should never have been admitted. We emphasise that there was no need for it. We emphasise that it is important that juries should be reminded when it is suggested that the passage of time is a hallmark of falsity that it is not necessarily so and that there may be perfectly comprehensible human explanations for it even though

the allegations are true. The jury should be reminded that whether they are true is a decision for them in the case and for nobody else.

33. That that is the position was well-known by the time of this trial. Some months before it in R v D [2008] EWCA Crim 2557, this court under the Presidency of Latham LJ, the Vice President, had dealt with directly comparable warnings in a case of alleged adult rape. It had specifically identified the analogy between an identification or a lies warning and the kind of warning which will be helpful to jurors in this kind of case. It had particularly identified the valuable contribution made by His Honour Judge Rook QC via the Judicial Studies Board to assist judges in this kind of case, which had been published in May 2008 and was available on the JSB website.

34. The court had specifically identified as an example of the situation in which a judicial warning was wise the case of long delay allegations of child abuse. Judge Rook's lecture had contained this proposition:

> "A judge is entitled to make measured comments in the summing-up as to the reasons why it might take time for young complainants to make allegations of abuse in a case where late disclosure is relied upon to support a defence of fabrication."

He had then gone on to set out in some detail the decision of this court in MM [2007] EWCA Crim 1558 and the full text of the trial judge's warning in that case which this court had approved. Now, we add, that can conveniently and helpfully be read with the balancing decision of this court in Breeze [2009] EWCA Crim 255 in which, whilst the judge had been quite entitled to administer a warning, he had failed to apply to it the necessary balance.

35. This is enough to dispose of this case. We think we should also say that we do agree with Miss Nicholls' submission that, no doubt unintended, one effect of the admission of this evidence was a consequentially somewhat distorted summing-up, despite, no doubt, the efforts of the judge to avoid it. Having admitted the evidence, the judge found himself devoting no less than three pages to what was substantially a verbatim quotation of many of the parts of the expert's report. Moreover, at a number of points in his overall summary of the case he found himself punctuating his description of the issues by adding "but, members of the jury, Miss Stirpe has something to say about that" which at least carried the risk of giving additional weight to what had been admitted. That is perhaps especially so of this passage:

> "The defence make the criticism that these offences were not reported any earlier because, if these events had occurred, they would have been reported and what they are saying is, that they were not reported because these allegations have been fabricated ... In relation to that, once again I shall remind you of the evidence of Miss Julie Stirpe that, when children are abused, they are often confused, sometimes they do not even appreciate what is taking place is wrong and, even when they do, they have confused emotions, sometimes they suffer from trauma, sometimes they are simply confused and do not enough confidence and courage, or

do not think that they will be believed if they were to report, so all those matters, members of the jury, you will have to bear in mind."

36. That, of course, was all in addition to the necessity to give some help on the role of an expert, which, once again, involved a further summary of the evidence which had been given.

37. We do appreciate the difficulties in the summing-up, but they only arose because the evidence was admitted when it should not have been. This problem simply would not have arisen if the judge had taken what we are satisfied must be the normal course, which is himself to warn the jury in a neutral and balanced way somewhere in the early part of the summing-up, along with such other advice as he gives on the approach to the evidence. Judges do not have to devise such warnings for themselves. There is ample help in Judge Rook's lecture and now in the March 2010 edition of the Bench Book. Those do not, of course, need to be followed slavishly but are available if needed for judges' assistance.

38. Where does that leave this case? This may well have been a strong case. Alternatively, it may have had flaws which undermine it. We do not sit here to decide whether it was a good case or a bad case; only a jury can do that. Our task is to say whether there was evidence before the jury which should not have been -- there was -- and whether, if there was, there is a real risk that their decision may wrongly have been affected by what should not have been there.

39. On the facts of this case, given the contents of the report, we are quite clear that not only should the evidence not have been admitted, but that there did exist a plain risk that it may have affected the jury's decision. There is no way in which we can know what the jury's decision would have been without it. The consequence of that is that the only conclusion to which this court can come is that this conviction is not safe and must be set aside. Accordingly the appeal against conviction is allowed.

THE VICE PRESIDENT: Mr Leeming.

MR LEEMING: My Lord, so far as a retrial is concerned, my learned friend, Miss Nicholls, will have some submissions to make. She touched upon them earlier about the question of the further delay that has happened since --

THE VICE PRESIDENT: What is your application?

MR LEEMING: My Lord, my application is for leave to prefer an indictment and to proceed to a re-trial.

THE VICE PRESIDENT: Let us see what she says.

MISS NICHOLLS: My Lord, I do object to that application. Perhaps I can put it in bullet points? First of all, at the first hearing of course the case was old, but I have heard your Lordship, that you would not have stayed the matter for the age. But what I do submit now is that the position has been created solely by the Crown seeking to introduce evidence, which, in my submission, was patently inadmissible. Your

Lordship knows the stance that I took from the very beginning in this matter, which is that I did not seek alternative defence experts because I was of the view that it was inadmissible evidence. The Crown did not need to introduce it. I would tentatively agree that on the basis of the evidence they had, they had a good case. They, I submit, chose to introduce that evidence. It would now be unconscionable and unfair to make this defendant be subjected to a retrial especially now that he has served his sentence and on the other side the complainant not only has now had her day in court but has taken her story to the newspapers and it was blazed all over the local papers after the trial. So in those circumstances I submit it would be unfair for this matter to proceed to a re-trial.

(**Pause While The Bench Conferred**)

THE VICE PRESIDENT: We are quite satisfied that this case ought to be retried.

The necessary technical directions are as follows. Having allowed the appeal and quashed the conviction, the defendant is to be retried on the counts contained in the original indictment. A fresh indictment must be served and he must be rearraigned on it within two months of today unless this court directs otherwise. Where was the trial? Manchester, wasn't it? Any difficulty about going back to Manchester? Lots of courts in Manchester.

MISS NICHOLLS: There are, yes.

MR LEEMING: No, difficulty, my Lord.

THE VICE PRESIDENT: The retrial will take place in Manchester unless the presiding judges of the Northern Circuit direct otherwise.

MR LEEMING: My Lord.

THE VICE PRESIDENT: Now, he has completed his sentence so there is no need for any direction concerning remand?

MR LEEMING: No.

THE VICE PRESIDENT: We make an order under section 4(2) of the Contempt of Court Act 1981 that there be no reporting of these proceedings until after the conclusion of the retrial in order to protect the integrity of any second jury. Thank you very much for your help, both of you.

THE COURT ASSOCIATE: I don't know whether he should be remanded on conditional bail.

THE VICE PRESIDENT: Yes, I suppose you are right. I think technically the proper order is that he is remanded on bail unconditionally. He has to appear.

MISS NICHOLLS: He has.

THE VICE PRESIDENT: Unconditional bail. Another direction, the application for a representation order be made to Highbury Corner Magistrates' Court. Yes. Thank you very much.