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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 13 November 2018

B e f o r e:

LORD JUSTICE HOLROYDE
MRS JUSTICE FARBEY DBE
HER HONOUR JUDGE WALDEN-SMITH
(Sitting as a Judge of the CACD)

R E G I N A

v

ARON G

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Mr D Leathley appeared on behalf of the **Applicant**
Mr S Foster appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: This applicant was convicted after a trial of three offences of rape of a child aged under 13, contrary to section 5 of the Sexual Offences Act 2003. There was initially a technical error in his sentencing which was corrected under the slip rule. The corrected sentences were concurrent special custodial sentences of 19 years, pursuant to section 236A of the Criminal Justice Act 2003, each comprising a custodial term of 18 years and an extension period of one year. In addition, a Sexual Harm Prevention Order ("SHPO") was imposed, to continue until further order.

2. The applicant applied for leave to appeal against conviction and sentence. The learned single judge who considered the applications on paper was troubled by the terms of the SHPO and referred that aspect of the application for leave to appeal against sentence to the full court. In all other respects the applications for leave to appeal were refused. The applicant has now renewed both applications. Mr Leathley appears on his behalf, Mr Foster appears for the respondent. Both appeared below.

3. The victim of the offences is entitled to the protection of the Sexual Offences (Amendment) Act 1992. Under the provisions of that Act, 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 her as the victim of that offence. This prohibition continues unless and until waived in accordance with section 3 of the Act.

4. For present purposes it is sufficient to summarise the facts of the offending in bald terms. The applicant was convicted by the jury of three offences of oral rape of his daughter, to whom we shall refer as L, during the period of some three years between 2011 and 2014. L was aged between three and six years at the time of the offences. The applicant’s relationship with L's mother lasted for about seven years from 2006. The offences charged in counts 1 and 2 of the indictment were committed at the family home. Count 3 charged an offence committed after the applicant had left the family home, was living in Wales and was being visited by his young daughter.

5. L described a number of offences, although only three were the subject of charges. Her evidence was that the applicant would tell her what to do. He would put his penis into her mouth and tell her to push it up and down until he ejaculated. She would spit the semen out onto a towel but on occasion accidentally swallowed it.

6. L disclosed the offences to her mother in 2016. The applicant was arrested. In interview under caution and in his evidence to the jury he denied any wrongdoing. He suggested that L's mother's family had put her up to making false allegations or alternatively that she had been influenced by seeing episodes of Emmerdale on television in which there was a story about parental rape.

7. In accordance with modern practice, L was cross-examined briefly and in careful terms which avoided any forceful allegation that she was telling lies. By their verdicts the jury were satisfied that L's evidence was truthful, accurate and reliable. They convicted of all three offences.

8. Before the summing-up, Mr Leathley had submitted that the trial judge should exercise his discretion to give a special warning about L's evidence. The judge, His Honour Judge Philip Parker QC, declined to do so. The first ground of appeal against conviction is that a special warning should have been given and that by declining to give it the learned judge exercised his discretion in a way which was not properly open to him. Mr Leathley relies on the decision of this court in *Makanjuola* [1995] 1 WLR 1345, [1995] 2 Cr.App.R 469. The applications for leave to appeal in that case had raised issues about the effect of section 32 of the Criminal Justice and Public Order Act 1994, which had abolished the former requirement of an obligatory warning to a jury about convicting the accused on the uncorroborated evidence of a person merely because that person was alleged to have been the victim of a sexual offence. The court in *Makanjuola* held that the judge did have a discretion to warn the jury about a witness if he thought it necessary, but that Parliament did not envisage such a warning being given merely because a witness was complaining of a sexual offence. The court laid down the following principles:

> "(1) Section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
>
> (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
>
> (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.
>
> (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
>
> (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.
>
> (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7) It follows that we emphatically disagree with the tentative submission made by the editors of Archbold in the passage at paragraph 16-36 quoted above. Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated.

(8) Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense."

9. Mr Leathley's submission is that there was an evidential basis for such a warning to be given in this case. It is to be found, he argues, in various features of the evidence to which we shall refer shortly.

10. A further ground of appeal against conviction contends that the judge's directions favoured the prosecution and his summing-up failed sufficiently to alert the jury to the risk that L's evidence might be unreliable because of childish imagination or suggestibility. Mr Leathley submits that these were important failings on the part of the learned judge because there were features of L's evidence which suggested a possible motive for her to give false evidence and/or which raised real doubts about her reliability. As to motive, he points to evidence that the parents had separated in unhappy circumstances, that there have been issues between them for example about the non-payment by the applicant of child maintenance, and that the attitude of L's maternal grandparents towards the applicant had been a hostile one.

11. As to reliability, Mr Leathley submits that some of L's allegations were implausible because she was alleging sexual abuse at a time when other adults were present in the house. There was a further issue as to whether on an occasion when she was visiting the applicant in Wales, L had struck a younger child, the child of a further relationship of the applicant. It was suggested that this had generated on the part of L a false accusation that the applicant had smacked her in punishment for the striking of the child.

12. Another aspect of Mr Leathley's concern, as is evident from his written submissions, is that L's video recorded interview showed L to be an engaging child. Mr Leathley is troubled that the appropriate restrictions imposed on cross-examination may have had the effect of causing the jury to think that the child's evidence was not seriously being challenged.

13. For the prosecution, Mr Foster has submitted in writing that the trial judge properly directed the jury, that there was no reason why any special warning was necessary or appropriate in this case, and that it cannot be said that the judge exercised his discretion in an unreasonable manner.

14. We have read and considered the summing-up. At an early stage the judge emphasised that the jury had to decide whether the witnesses they had seen and heard were truthful, accurate and reliable. He gave proper directions not to approach the evidence with any pre-conceptions and to assess both prosecution and defence evidence in the same way. At page 5A of the transcript, he told the jury to:

> "... please bear in mind that when sexual offences occur within the family or wider family and to a child, it may [well] be that the child does not realise the full implications of what has occurred or is reticent or reluctant to mention it to someone else in the family perhaps because she is being told not to do so. In those circumstances complaints may be immediate but it may not."

15. The judge observed that what L had told her mother initially was broadly consistent with the account which she later gave to the police, but he rightly directed the jury that L's complaint was not independent evidence of what was alleged to have happened. He went on at page 6E to give the jury this warning and direction:

16.

> "You may think that there are some inherent weaknesses in the evidence of a child of that age such as L. Such a child may not be able to deal with time or numbers of occasions as accurately as they an adult. Such a child may be more likely to guess at an answer than an adult, not because she is untruthful but because she feels obliged to say something. It is for you to consider her evidence bearing all these limitations in mind and if having considered these limitations you feel the defendant has been placed at a disadvantage, then you take that into account in the defendant's favour when considering whether the prosecution have made you sure of the defendant's guilt."

17. The judge further directed the jury that delay in making a complaint may make it more difficult for a defendant to answer an allegation and at page 7B he directed the jury:

> "... if having considered the defendant's position you accept that he has been placed at a material disadvantage by reason of the delay, then you factor in that problem when considering whether the prosecution have made you sure of the defendant's guilt."

Finally, the judge directed the jury to ignore the fact that as a child the applicant had twice received reprimands for offences of theft and to treat him as a man of good character. He gave a conventional direction as to the approach which the jury should take to that feature of the case.

18. We can see no basis for criticising any of those warnings and directions, which were correct in law and appropriate to the circumstances of the case. Nor can we see any ground for criticising the balance of the summing-up. In our view, the judge reminded the jury of the salient features of the evidence in an even-handed way. In particular, the judge reminded the jury about the applicant's evidence as to causes of tension between himself and L's mother, both at the time of and after their separation. He reminded the jury that the applicant in his evidence had described L as a mischievous child who was a good story teller. He expressly reminded the jury of the applicant's evidence that:

> "I think the family has been slagging me off and L has joined in. She is running with it. They know it is not true and she watches inappropriate tv."

We therefore find no substance in the complaints about the fairness or balance of the summing-up and we accordingly focus on the first and principal ground of appeal against conviction, relating to the judge's decision not to give any special warning. We emphasise that in this case Mr Leathley's submissions go beyond a complaint as to the balance and even-handedness of the summing-up of the evidence, and include a contention that the judge should have given the jury a warning as to a need for caution in approaching L's evidence. Mr Leathley submitted that the judge should have said something to the effect that although the jury could convict on L's evidence, there was no evidence from any external source which supported what she said and the jury may therefore wish to proceed with caution. Mr Leathley submits that should have been coupled with a reminder of the specific points made by the defence about anomalous and implausible features of the evidence.

19. In our judgment, taking the summing-up as a whole, it is clear that the judge did sufficiently alert the jury to factors which might cast doubt on the reliability and truthfulness of a young girl giving evidence against her estranged father whilst living with her mother following the breakdown in acrimonious circumstances of the adults' relationship. In the circumstances of this case we do not accept that anything more needed to be said. In particular, we cannot accept the submission that the judge, properly applying the principles stated in ***Makanjuola***, could only reasonably have exercised his discretion by directing the jury that it would be wise for them to look for some supporting material to back up L's evidence. The reality of this case is, as it seems to us, is that the principal features of it are features which not infrequently arise in cases of intrafamilial sexual abuse. Mr Leathley was of course entitled to make jury points about matters such as the impracticability of the conduct alleged, or the improbability of its having gone undetected, or the implausibility of particular features of L's evidence; and he was perfectly entitled to make his submissions to the jury about the possibility that L had been influenced against her father by other adults or by watching television programmes. But neither those nor any other points required the judge to exercise his discretion by giving a form of warning which Parliament in 1994 abolished as a mandatory requirement.

20. It is, in our view, quite impossible to argue that the approach here adopted by the trial judge was outwith the range of approaches reasonably open to him. For those reasons, we are not persuaded that there is any arguable ground of appeal against conviction.

21. Turning to sentence, it was common ground between prosecution and defence, and the judge accepted, that each of the three offences fell within Category 2A of the relevant guideline published by the Sentencing Council. For such offences the guideline indicates a starting point of 13 years' imprisonment and a range from 11 to 17 years. In categorising the offences in that way, the judge pointed to the particular vulnerability of the child and the gross breach of trust on the part of the applicant. He did not find it to be a case of severe psychological harm but observed, in our view correctly, that L

would never truly forget what had happened and that the experience of the court shows that offending such as this can come back to haunt victims over many years.

22. In addition to the step 1 factors which placed the offences into Category 2A, there were further aggravating factors considered by the judge at step 2 of the sentencing process: the offences were repeated; they were committed in L's home or in her father's home either in a parental bed or in her own bed; they involved ejaculation, which did not in the circumstances of this case give rise to any risk of pregnancy but which must have added significantly to the distress suffered by L; the applicant told her not to tell anyone and thereby procured her silence for a significant time; and the offence charged in count 3 involved a dreadful abuse of the applicant's contact with L at his new home following his separation from L's mother. To set against those aggravating factors the only significant mitigation was that the applicant fell to be treated as a man of previous good character.

23. The ground of appeal against sentence is that it was "wrong in law" on the basis that the custodial terms of 18 years fell outside the range given by the Sentencing Guideline. That submission misunderstands the guideline, which relates to a single offence. Here the applicant was to be sentenced for three offences. It was perfectly appropriate to impose concurrent sentences, but those concurrent terms had to reflect the gravity of the offending as a whole. Given that a single offence would have attracted a starting point of 13 years' custody, before consideration of the aggravating factors which here heavily outweighed the mitigation, there can in our judgment be no possible complaint about an overall custodial term of 18 years. The extended period of licence was required by law and no issue arises about that. It follows in our judgment there is no arguable ground of appeal against the special custodial sentences.

24. We turn finally to the matter which troubled the single judge, which did not form any part of the original grounds of appeal. The SHPO was poorly drawn. The schedule of prohibitions in the order was in the following terms:

> "The Defendant is prohibited from:
>
> Having unsupervised contact with persons under the age of 16 other than such as is inadvertent in the course of lawful daily life:
>
> (1) without the express permission of the social services department of the area where the child resides; and
>
> (2) with the consent of the children's parent or lawful guardian who has knowledge of his convictions and this order."

Mr Foster, acknowledging the deficiencies of the drafting, suggests that the SHPO should and could more appropriately be expressed as prohibiting the defendant from "having unsupervised contact with any person under the age of 16 (other than such as is inadvertent in the course of lawful daily life) unless he has: (1) the express permission of the social services department of the area where any such person resides; and (2) the consent of the person's parent or legal guardian who has knowledge of his convictions

and this order." Subject to that amendment, in the interests of clarity, Mr Foster submits that the order was properly made.

25. In the light of the single judge's observations, Mr Leathley now advances two arguments. First, he reminds us of the test in section 103A(2)(b) of the Sexual Offences Act 2003, namely that the court must be satisfied that an SHPO is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant or protecting children or vulnerable adult generally or any particular children or vulnerable adults from sexual harm from the defendant outside the UK. Mr Leathley places emphasis on an observation by the judge, in the course of his sentencing remarks, that he did not detect in the applicant a need for oral sex with young girls. Mr Leathley submits that in the light of that observation no SHPO was necessary at all. Alternatively, even if an order was necessary, it was disproportionate and oppressive to make an order which has the effect of prohibiting the applicant from ever cohabiting with a woman who has a child aged under 16 and which prohibits contact with boys as well as with girls.

26. Secondly, Mr Leathley submits that the terms of the order are not compliant with the familiar principles stated by this court in *Smith* [2012] 1 Cr.App.R (S) 82. That was a case concerned with the former statutory regime governing Sexual Offences Prevention Orders but simply principles apply to SHPOs. These principles include a requirement that in addition to being both necessary and proportionate, an order must be expressed in terms that are sufficiently clear for the offender and those who have to deal with him to understand exactly what is prohibited. An order is not necessary if it merely duplicates another statutory regime to which the offender is subject. Care must be taken in considering whether prohibitions on contact with children are really necessary. If such an order is really necessary, it is essential to include a saving for incidental contact such as is inherent in everyday life.

27. In relation to the first of Mr Leathley's submissions, it seems to us that the reliance on the sentence quoted from the sentencing remarks is misplaced. In the relevant passage of the sentencing remarks, the judge was reflecting on the issue of dangerousness. In that context he said:

> "In a sense all sexual offenders are dangerous but I do not detect in you a need for oral sex with young girls. You used her as she was available. You did not seek her out. At the same time you were using other grown women for sex and I believe that in those circumstances society can be sufficiently protected by the long sentence that will follow, a long period of licence and a Sexual Harm Prevention Order which will be very restricted of your behaviour, ordering you effectively to have no contact with any person under the age of 16 other than is inadvertent in the course of [lawful] daily life. So that will prevent you from ever cohabiting with a woman who has a child under that age or you living with a child of your own if you should ever produce any further children."

It seems to us that in that passage the judge is explaining in concise terms why, even if he had felt it appropriate to make a finding of dangerousness, he would not have felt it

necessary for the protection of the public to impose an extended determinate sentence. But the reason why he took that view was that the necessary protection would be provided by the combination of the length of the custodial term, the length of the licence period and the terms of the SHPO. Thus the sentence relied upon by Mr Leathley cannot be taken as any indication that no SHPO was necessary.

28. Further, we accept Mr Foster's submission that the order properly extended to boys as well as to girls in the light of the judge's observation to the effect that the applicant had made sexual use of his daughter because she was available and no doubt compliant at a particular time.

29. As to the second submission, we agree with Mr Foster that notwithstanding the words at the end of the passage which we have just quoted from the sentencing remarks, the terms of this SHPO do not prevent family life and are not, as Mr Leathley suggests, an absolute prohibition on the applicant living with any child. The order requires that before the applicant can associate with a child under the age of 16, other than by inadvertent contact in the course of daily life, he must inform the appropriate persons and obtain the necessary consents. The order does not preclude such consents being given. Thus understood, it seems to us that the order is compliant with the principles set out in *Smith*, is readily intelligible and is enforceable.

30. Unlike the single judge, we have had the opportunity to consider this matter with the assistance of specific submissions from both parties. Having done so, we are satisfied that there is no objection to the substance of the order.

31. We have considered the specific feature of the order that in relation to a child of the applicant, future contact with such a child before she or he attains the age of 16 might be desired by the child, sanctioned by the relevant social services department, but yet prevented by an absence of maternal consent. Should such a situation ever arise, it seems to us that it can be dealt with by the applicant seeking an appropriate variation of the order.

32. In the result, we refuse the renewed application for leave to appeal against conviction. As to the application for leave to appeal against sentence, we grant leave and vary the sentence to this very limited extent: we delete the terms of the SHPO as ordered below and substitute for them the following:

> "The defendant is prohibited from:
>
> Having unsupervised contact with any person under the age of 16 (other than such as is inadvertent in the course of lawful daily life) unless he has:
>
> (1) the express permission of the social services department of the area where any such person resides; and
>
> (2) the consent of the person's parent or legal guardian who has knowledge of his convictions and this order.

This Order shall have effect until further order."

33. In all other respects the appeal against sentence fails.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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