Neutral Citation Number: [2019] EWCA Crim 878

Case No: 201705222 B2 &
201705223 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT CANTERBURY
Recorder Dias QC
T20160470

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MR JUSTICE LAVENDER
and
SIR JOHN ROYCE

- -

Between:

SCOTT JAMES GOLDFINCH	**Appellant**
- and -	
REGINA	**Respondent**

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- -

Mr Liam Loughlin (instructed by **Lawtons Solicitors**) for the **Appellant**
Mr Walton Hornsby (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 9 May 2019

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Approved Judgment

The Lord Burnett of Maldon CJ:

1. On 23 June 2017 the applicant was convicted at Canterbury Crown Court of indecent assault contrary to section 15 of the Sexual Offences Act 1956. On 28 July 2017 he was sentenced to six years and six months' imprisonment. His application for leave to appeal against conviction was referred to the full court by the single judge. At the end of the hearing we announced our decision to dismiss the application for leave to appeal against conviction (and the associated application to extend time). These are our reasons for doing so. The single judge refused leave to appeal against sentence. That application was renewed before us. We granted leave to appeal against sentence with the necessary extension of time. We heard argument on the substantive sentence appeal. We allow the appeal against sentence, quash the sentence of imprisonment of six years and six months and substitute a sentence of three years' imprisonment.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence which protect the identity of the victim and his sister. A second count on the indictment alleged gross indecency with respect to her. On that count the appellant was acquitted.

The Facts in Outline

3. The events in question occurred in 1996 when the appellant was 16. His victim was four years old. He was born in July 1992. The victim's mother was in a relationship with a half-brother of the appellant. The victim had a sister who was about eight. Both the appellant and another brother regularly acted as babysitters for the children.

4. On 17 September 1996 the victim's mother reported to the police that the boy had told them he had been sexually abused by the appellant. He had suddenly announced when sitting in the car that the appellant "made me suck his willy". When questioned by his mother he had said that it happened in the bathroom when the appellant was babysitting and that his sister came in whilst it was happening and said, "That's gross". A third sibling was in the flat but did not see what happened. He also said another person was present, whom he named as the appellant's brother. When the mother spoke to her daughter she just burst into tears.

5. The victim was video interviewed. In that interview he said he did not like the appellant and that he had been violent with him, but he made no allegation of sexual abuse. After the interview was over his mother asked him, in the presence of two police officers, why he had not told the police in the interview what had happened and he replied, "You mean he sucked my willy?" The appellant was interviewed and denied any wrongdoing. This outcome was conveyed to the victim's mother who was told that the case would not be going to court. She had a discussion with her partner about this which was overheard by the victim's sister, who then said that her brother's account was true. She added that the appellant had made her suck his willy too. A fortnight later she was interviewed. She was unable to say what happened but instead wrote it down. In that account she alleged that the appellant had made her put her hand on his penis. The appellant was again interviewed. He denied everything. On 27 November 1996 he was given written notice that no further action was being taken.

6. The account we have set out is taken from a summary document, known as "lotus notes", retained electronically by the police. It is apparent that at a time very close to the alleged incidents both the victim and his sister gave inconsistent accounts of what the appellant is said to have done. This document was read to the jury and copies given to them. The written account of the victim's sister was also exhibited and provided to the jury.

7. The statement of a fellow pupil at school, who was a close friend of the victim, was read to the jury. He explained that when he was 14 or 15, the victim had told him that the appellant had sexually abused both him and his sister. They talked about it on more than one occasion. The statement says that "we decided to pay [the appellant] back by cycling round his house and throwing eggs at it". That was on 11 March 2008. Another statement was read from a girl who was close to the victim when she was 13. She explained that on New Year's Eve in 2008 he told about being sexually abused when he was young. He did not go into detail but was emotional about it, his voice shaking. She had not seen him since early 2009. Of the content of the conversation, she could remember little detail. She added, "I recall him mentioning his step-father and this may have been the person who abused him, but I cannot be confident about it

8. The victim visited his local police station on 15 March 2015. He was then 22 years old and 24 at the time of the trial. He wanted the investigation reopened. His evidence was recorded on video and in due course played to the jury. The appellant was interviewed and maintained that the allegations of both the victim and his sister were all false. "They are now, and they were 19 years ago … There is no truth in them whatsoever."

9. Agreed facts read to the jury (and left with them in writing) confirmed the date of the egg-throwing incident. The transcript of the hearings shows that the jury were invited to amend the written version with which we have been provided, including by recording the victim's date of birth as July 1992 and not December 1992 as originally recorded. The Lotus notes were read at the same time. The core features of the victim's 1996 interview were set out in the agreed facts:

> "4. [The victim] in his interview said that he didn't like [the appellant], and that when he babysat used to slam him on the bed and against the wall, and against the ceiling. He also didn't like [the brother] and that [he] had described physical roughness. He made no disclosures of sexual abuse.
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> 5. He was asked "When [the appellant] babysat were you ever in the bathroom together? He replied "No. "Did [the appellant] make you do something to him? A: No. At the end of the interview (and outside the interview room), he was asked by his mother why he hadn't told the lady about [the appellant], to which he replied, "You mean he sucked my willy": this comment was made in the presence of two interviewing officers."

10. The officer in the case explained the origin of the notes on the Lotus log. The appellant gave evidence. He robustly denied that he had sexually abused either child.

In cross-examination he was asked whether there was any explanation he could give for the accusations made by the children, for example that they did not get on with him. He could not and did not say that he believed that they had been put up to it. He explained the other people he knew to be babysitters and suggested that the children may have been mistaken about who was responsible.

The Conviction Application

11. Mr Loughlin, who now appears on behalf of the appellant, submits that "there was a core failing" by trial counsel in failing to cross-examine the victim on the difference between his two accounts in the Autumn of 1996 that (a) the appellant had made him suck the appellant's penis; and (b) the appellant had sucked the victim's penis. Nor was he cross-examined about the detail of his initial account that his sister witnessed the incident. He also submits that counsel made a fundamental mistake in accepting, when cross examining the victim, that he might have been abused, albeit not by the appellant. What is more, it was suggested, contrary to previous counsel's recollection, that the strategy of raising the possibility that someone else had abused the victim was not discussed with the appellant. In the result, he submits that the conviction is unsafe.

12. The correct approach to appeals based upon the suggestion of incompetence of trial counsel was stated by Buxton LJ in *R v Day* [2003] EWCA Crim 1060 at [15]:

> "While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in *Thakrar* [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe."

13. It is the responsibility of the advocate to make forensic decisions and to devise strategy. Counsel is not merely the defendant's mouthpiece. See paragraphs [107] and [108] of *R v Farooqi* [2013] EWCA Crim 1649; [2014] 1 Cr. App. R. 8.

14. Privilege was waived to enable trial counsel to respond to the criticisms in the grounds of appeal. He accepted that he did not cross examine the victim on the inconsistency about whether it was he who sucked the appellant's penis or vice versa. But the point was before the jury. He took the view that the jury was likely to believe that the victim was abused by someone. That being the case it was an obvious course to investigate who that might have been. He investigated the possibility that it may have been the appellant's brother because the victim had said originally that he was present at the time. He also told the police that the brother had been horrible to him. Counsel investigated with the victim the possibility that it was his mother's partner

who was responsible because of the recollection, albeit imperfect, of the victim's 13 year old girlfriend that he had given her that impression.

15. We do not agree that it was incompetent on the part of the counsel to open his cross-examination of the victim with the observation that it was accepted that he might have been abused. The incontrovertible evidence was that as a four year old boy he had stated that the appellant had made him suck his penis. He gave his mother a clear account of where, when and in what circumstances it was said to have happened. Later he gave a different but closely allied account of abuse, after the police interview. There was no evidence of the boy living in an inappropriately sexualised environment. We do not forget that these events occurred long before the general advent of the internet and the ubiquity of pornography in some homes. Children of this age do not know about these things unless they have seen or heard about them. There was clear evidence that about ten years later the victim explained to two separate friends that he had been sexually abused. The appellant denied the offence but had shied away from his initial reaction that the children had been put up to it either by their mother or his own step-brother. There was no evidence which provided support for such an explanation. The background evidence showed that this was an extended family living and working closely together. The evidence that the appellant could give was that *he* did not abuse either child. But the inevitable question arose, in the event that the jury was sure that one or both of them was abused, then who did it?

16. Mr Loughlin accepts that had counsel put to the victim that his original account was a fabrication he would have received a straightforward denial. Whilst different counsel may have pressed the possibility that nothing had ever happened to this victim, we do not think that counsel can be criticised for the tactical decision he took. Moreover, the stance taken does not undermine the conviction.

17. The same, in our view, can be said of his failure to put to the 24 year old witness before him the inconsistency in the two accounts he gave when he was four. The inconsistency was before the jury in the Lotus notes and had been read to them. But it is also clear that there would have been no point in asking him to account for the contradiction because he could not remember what he said at the time. The much more striking contradiction in the victim's evidence was his denial when interviewed that anything had happened, as summarised in the agreed facts set out above. Counsel put to him the contradiction between his evidence that the incident occurred when nobody else was in the flat, and his account at the time that his siblings and the appellant's brother were present. He answered that he could not remember saying that. He could not remember the appellant or his brother at the time working in his mother's fast food business below the flat. He remembered that both had babysat. He had no recollection of being interviewed by the police when he was four. Counsel then asked, "And it goes without saying that if you don't remember the interview, you don't remember what you said?" He answered, "No". The victim had no current recollection of either the appellant or his brother being violent towards him. But when asked about what he had said at the time he simply repeated that he could not remember the exchanges at all. In his adult interview he had in fact said that he did not remember going to the police.

18. There is, to our minds, an air of unreality about questioning a 24 year old man about the detail of a conversation he had 20 years before. But, whatever the general

position, it is clear that this victim had no recollection of his visit to the police and no evidence could have been adduced relating to the contradiction.

19. Counsel attended the hearing of the application before us ready, if necessary, to give evidence about whether he discussed the broad tactical approach of exploring whether others could have been responsible for any abuse which occurred. Neither party pressed for that to occur. In our view they were right not to do so because the answer to the question would not have advanced the application one way or another. The decision was for counsel and there was no requirement to obtain the appellant's approval in advance.

20. None of the criticisms advanced of counsel demonstrates incompetence on his part, still less that the conviction is arguably unsafe.

The Sentence Appeal

21. The proper approach to sentencing for historical sexual offences, including of adults who committed offences when they were children, was authoritatively reviewed in *R v Forbes and others* [2016] EWCA Crim 1388; [2016] 2 Cr. App. R. (S) 44; [2017] 1 WLR 53. This court repeated the principles articulated in *R v H* [2011] EWCA Crim 2753, [2102] 1 WLR 1416, [2012] 2 Cr App R (S) 21 which were subsequently codified by the Sentencing Council in annex B of the Definitive Guideline on Sexual Offences published in 2013. That codification was approved save in one respect. Annex B, at point 9, had suggested that youth and immaturity at the time of committing the offence may be regarded as personal mitigation. Lord Thomas of Cymgiedd CJ, giving the judgment of the court in *Forbes*, explained that age and immaturity go to culpability: see paragraph [20].

22. In sentencing an adult for an offence committed when he was a child the court should have regard to, alternatively expressed as making a measured reference to, the current adult guideline for the broadly equivalent modern offence, adjust it to reflect any lower maximum sentence available and remember that it is dealing with the culpability of a young person.

23. In sentencing the appellant, the recorder recognised that the statutory maximum sentence for the offence of which he had been convicted was 10 years' imprisonment. He referred to the victim personal statement which set out the severe adverse consequences of the offending on the victim, which continue. He noted that the Guidelines dealing with offending against children take into account the inevitable serious impact upon them. But he considered that the impact in this case was exceptionally severe. The recorder noted the appellant's positive good character. By contrast the victim was very young and there was a breach of trust. Importantly, as it seems to us, the recorder explicitly recognised that the appellant was not a predatory offender but "this was a case of sexual experimentation by a teenage boy".

24. The recorder had regard to the Guideline for equivalent offences under the Sexual Offences Act 2003. Forcing a penis into a young child's mouth would be rape of a child under 13, contrary to section 5 of the 2003 Act. The evidence of force or coercion in this case was at the bottom end of the scale and so another offence which might be in play for comparative purposes would be causing or inciting a child under 13 to engage in sexual activity contrary to section 8 of the 2003 Act. The recorder

referred to a starting point of 11 years custody (with a range of seven to 15 years) by reference to the Guideline. That appears to be a reference to a category 2A offence for assault of a child under 13 by penetration, contrary to section 6 of the 2003 Act. Howsoever the conduct had been charged, an adult convicted of a single recent offence would very likely have faced a sentence of ten years or more. The maximum available for these offences is life imprisonment.

25. It is always very difficult to sentence in historic sex cases and all the more so when the offender before the court is a mature adult who committed the offence when a child. With respect, we consider that in this case the recorder failed to attach sufficient weight to two significant factors. First, that although the equivalent offences under the 2003 Act carry a maximum sentence of life imprisonment the maximum available for the offence for which this appellant was convicted was 10 years' imprisonment. Secondly, that the culpability in this case was that of a 16 year old boy whose single offence was the result of teenage experimentation. Each of these features individually would result in a significant reduction from any notional starting point for a recent adult offender. Applying the principles articulated in the cases of *Forbes* and *H* and the Guideline and its annex, and bearing in mind the mitigation referred to by the recorder, our conclusion is that the proper sentence in this case should be one of three years' imprisonment.

26. We quash the sentence of six and half years' imprisonment and substitute one of three years. The ancillary orders remain unaffected.