Neutral Citation Number: [2020] EWCA Crim 1343

Case No: 2020000068, 2020000131, 2020000071, 2020000133 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHAMPTON
HIS HONOUR JUDGE ROWLAND
T20197031

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2020

Before :

LORD JUSTICE BEAN
MR JUSTICE ROBIN KNOWLES
and
HIS HONOUR JUDGE AUBREY QC

- -

Between :

RICHARD TOWNSEND & **MARK ANDREW METCALFE**	**Appellants**
- and -	
R	**Respondent**

- -
- -

Henry Blaxland QC for the **Appellant Townsend**
Michael Phillips for the **Appellant Metcalfe**
Andrew Houston for the **Respondent**

Hearing date: 15 October 2020

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Approved Judgment

Lord Justice Bean:

1. On 10 December 2019 the Appellants Richard Townsend and Mark Metcalfe were convicted in the Crown Court at Southampton of a number of sexual offences following a trial before HHJ Rowland and a jury.

2. The two identified victims were brothers and were also nephews of Townsend. We shall call them TS and OH (although only OH is entitled to anonymity and the usual reporting restrictions under the Sexual Offences (Amendment) Act 1992, since TS has died). Counts 1-5 charged Townsend with indecent assaults on TS, who was born in June 1986, between 2000 and 2002. Counts 6-15 alleged various offences against OH, who was born in October 1990; the earliest was alleged to have taken place at some point between 1996 and 1999 and the latest at some point between 2004 and 2006. In the case of count 9 the allegation was of indecent assault by anal penetration and was made against both defendants. All the other charges in this group were against Townsend only. The most serious was count 13, an allegation of rape of OH. Counts 16 and 17, laid against both defendants, alleged sexual assault on an unknown male: we will return to these counts later. Counts 18-19 charged Metcalfe with downloading child pornography.

3. The jury convicted on all counts except 10, 12 and 15, which were alternative charges on which no verdict was taken, and counts 18-19, on which Metcalfe was acquitted.

4. Both appellants appeal against their convictions on counts 16 and 17 by leave of the single judge. They renew their applications for leave to appeal against conviction on all the other counts on which they were convicted (in Metcalfe's case only count 9), and their applications for leave to appeal against sentence, following refusal by the single judge..

5. Townsend and Metcalfe had been in a relationship since the late 1980s. The mother of both complainants was the sister of Townsend. The number of children in the family home was a catalyst for TS and OH going to stay from time to time with the appellants. The appellants moved to Southampton in around 1998.

6. TS committed suicide on 23 September 2019, shortly before the trial of the Appellants was due to start. He had been interviewed on video a number of times. The prosecution applied successfully to admit his recorded evidence under the hearsay provisions of the Criminal Justice Act 2003. Without it, the prosecution could not have established a case to answer on counts 1-5. OH gave live evidence before the jury.

7. Counts 16 and 17 were added by amendment. They are based on a video referred to at trial as the "sex tape". The clip is 8 minutes long, and is preceded by some innocuous footage of classic cars in a field. It shows Metcalfe masturbating an unknown male and also performing fellatio on him for two short periods at the beginning and end of the clip. A duvet covers the unknown male from the waist area upwards. His trousers and underwear are by his ankles and he is wearing trainers. He has an erection but is motionless for the entire 8 minutes.

8. The prosecution's case as charged in counts 6 and 7 of the original indictment was that the indecent assault shown on the sex tape was on TS, on a date between June

1999 and June 2002. This became unsustainable when the defence examined the film and found that it was date-stamped 7 August 2005, a date on which TS was not visiting the Appellants' home. The prosecution accepted that they could not demonstrate that the film depicted TS. Accordingly, at the start of the trial, they sought to amend the indictment replacing those two counts with new allegations of sexual assault (which became counts 16 and 17) on an unknown male on or about 7th August 2005. There was and is no dispute that the film was made by Townsend and that it showed Metcalfe engaged in the sexual activity. The defence case was that the person on whom Metcalfe was performing the sexual acts was over 18 and a willing participant.

Grounds of Appeal - Counts 1-15

9. The grounds on which the single judge refused leave and which are now renewed are as follows: firstly, that the evidence of TS was so unconvincing that the judge should have directed the jury to acquit Townsend on counts 1-5 of the indictment in the exercise of his discretion under s.125 of the 2003 Act. Secondly, that the effect of such an acquittal of Townsend on counts 1-5 would have been that the evidence of TS was inadmissible in respect of the counts concerning OH and, as a consequence, all the convictions on counts 6-14 were unsafe. Thirdly, that the judge wrongly failed to direct the jury to consider the significance of the admitted fact that TS wrongly identified himself on the sex tape and the consequences of this for his credibility.

10. In his ruling on hearsay Judge Rowland referred to the leading case of *Riat* [2013] 1 WLR 2592. He referred to the six questions listed in paragraph 7 of the judgment of this court delivered by Hughes LJ and noted that at paragraph 8 it is made plain that although there is no rule that where the hearsay evidence is the sole or decisive evidence it in the case it can never be admitted, the importance of the evidence to the case against the accused is central to the decisions made.

11. There was, of course, no dispute that TS was dead and thus that s.116(1) and s.116(2)(a) were satisfied. The next question was what material could help to test or assess the hearsay.

12. The judge noted that it was possible for the defence to put before the jury the inconsistencies in TS' account and the absence of detail in parts of his story. He also noted that there were a number of items of evidence supporting the prosecution case independently of the hearsay evidence of TS. These included previous convictions of Townsend for sexual offences and his possession of photographs of TS naked from the waist up.

13. There were also chatroom exchanges in 2017 which the prosecution submitted amounted to confessions to sexual abuse of his two nephews. The defence response to this was that the exchanges were as consistent as with sexual fantasy as with a confession. There were discrepancies between the ages of the complainants and of the boys mentioned in the chatroom exchanges. The judge adopted the "potentially safely reliable" test referred to in *Riat* and observed that "it is difficult to see what could be more powerful supporting evidence than a confession made freely".

14. The judge dealt in considerable detail with what was described as the "evolution" of TS' evidence about the sex tape. TS said in his second interview that he recognised

the flowery curtain of the back bedroom and said that the trainer shown in one still could have been of the kind he wore as a teenager. In his third interview he said he had found the tape, intended to record himself skateboarding, years ago, checked the tape to see whether he was going to be recording over anything, found footage of classic car shows, and then a short clip of what he assumed to be himself lying on a bed having oral sex performed on him. In a further interview a year later he confirmed that the recording was the one he had stumbled across many years before.

15. The judge noted the defence contention that TS had given context to his finding of the recording, skateboarding, which cannot have been true. It was implausible to suggest he would have been skateboarding in 2005. He describes a camcorder which was inconsistent with the Canon camcorder bought by the defendants in November 2004 on which the recording was made. None of these issues could be canvassed with TS in cross-examination.

16. The judge set out the prosecution response to these points in his ruling:

> "68. P respond to what they call a broad suggestion TS has lied about the recording. They do not accept he has lied or that there is anything untoward about this issue. They point to the fact that TS was given very limited information in his second interview about the recording. The information about classic cars was not fed to him. Importantly, in his third interview TS gave information about what was on the recording that he could only have known if he had watched it. He said it showed someone walking around a classic car show and panning across cars in a field.
>
> 69. P submit it is not surprising that TS came to the conclusion it was him in the recording. It took place in the same room as he alleged and the activity was striking similar in the sense it shows a young male with the duvet pulled up. P invite a safe inference to be drawn that TS saw the recording after 7.8.05 at a time when he visited the Ds. There is evidence that he continued to visit Ds until the summer before he went to college.
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> 70. In my judgment the high point of the Ds' objection is lower than they assert. I cannot find there is the inescapable conclusion that TS has lied about the recording. At its height there is evidence that TS has made a genuine but understandable mistake about his being in the recording. Equally it is safe to draw an inference that TS was wrong about when he said he viewed it. This is understandable given the lapse of time. There is, however, cogent evidence that he had watched the recording at a point in the past. If Ds wish to pursue a suggestion TS was shown it at a time before his fourth interview, then they can explore that with the investigators. Equally, the jury can assess TS's reaction in his fourth interview when he was shown the start of the recording.

> 71. I reject the submission that TS has told lies in relation to the recording or that he is so unreliable on the issue that this the hearsay in relation to it falls foul of the *Riat* test. Consequently, there is no need for me to consider any knock-on effect for the rest of TS's account. The defence are in a position to put before the jury the chronology relating to the recording. They are able to cross-examine the investigators.

17. The judge accordingly ruled that the evidence could be admitted.

18. At the conclusion of the prosecution evidence (save for some immaterial items) the defence applied to the judge for a ruling under section 125 that the evidence of TS was unconvincing and that the jury should be directed to acquit Townsend on counts 1-5 of the indictment. The judge rejected the application. In his careful and detailed written reasons for doing so, he accepted the prosecution submission that "there is abundant support for the reliability and credibility of TS' account which means that the potentially safely reliable test in *Riat* is still satisfied". At paragraph 12 of the s.125 ruling he said:-

> "Having now heard all the evidence in the case, save for minor sweepings, I am not driven to the inescapable conclusion that TS has lied about the sex tape. In my judgment there were opportunities for TS to have seen the tape after it was made. His reaction to viewing it in his fourth interview was stark. There are myriad supporting areas of evidence which satisfy the *Riat* test. Given that conclusion, the primary defence submission fails. If I am wrong about that conclusion the secondary prosecution submission is that relating to retrospective tainting. Even if TS has lied about the sex tape does that mean everything he has said before that lie has to be disbelieved? The answer to that question is no. The sex tape is an important issue in this trial but it is not determinative. The test is that set out in section125. Is the hearsay so unconvincing that I ought to stop this case now? The answer is no."

19. Mr Blaxland QC submits that TS had clearly lied about the sex tape. He argues, as he did before the judge, that "it was such an obvious lie" that it discredited the evidence of TS as a whole and "that no rational tribunal could conclude that what he said about finding the tape was true".

20. As the judge noted, and as emphasised by Hughes LJ at paragraph 28 of *Riat*, the exercise arising on a section 125 application is different from the ordinary "half time" submission of no case to answer applying *Galbraith*. The judge's careful rulings reflect this fully. Despite Mr Blaxland's best efforts we consider that the judge's reasoning is impeccable. It was for the jury to say whether the fact that TS had originally - wrongly - identified himself as having been shown in the sex tape undermined his credibility: or, putting it another way, whether he had been lying or merely mistaken.

21. Mr Blaxland also took issue with the judge's finding in his ruling that there were many items of evidence supporting the reliability and credibility of TS' account.

Prominent among these, as Mr Houston pointed out in his Respondent's notice and in oral argument, was the fact that in August 2017 Townsend apparently confessed in an internet chatroom, in which a video had been shown of the rape of a child, to having abused his two nephews when they were aged between 8 and 11. Mr Blaxland submits that internet chatrooms often thrive on fantasy. That may be so, but whether these chats were mere fantasy was an issue for the jury to evaluate.

22. Other matters identified by the judge as making the evidence of TS "potentially reliable" included his confession to OH in November 2017; TS' complaints to a doctor and a social worker; sexually suggestive topless photographs of TS, then aged about 13, that had been taken by Townsend in Metcalfe's presence. Townsend's admitted sexual interest in young boys as evidenced by a book containing nude photographs; and the finding of a hole in the wall just above the spare room skirting board which was consistent with TS' memory of finding a webcam cable that connected with the defendant's bedroom.

23. The judge's decision on whether TS' hearsay evidence was "unconvincing" within the meaning of section 125 required an assessment of the relevant potentially reliable evidence as a whole. The judge was right to rule that the hearsay evidence did not "fall foul of the *Riat* test" and that he should reject the defence application under section 125.

24. The third ground of appeal was not pursued in oral argument, and we need say no more than that we can find no error in the way the judge directed the jury.

25. Accordingly we refuse the renewed application by both Townsend and Metcalfe for leave to appeal against conviction (other than on counts 16-17) on the grounds refused by the single judge.

Grounds of appeal – Count 16 and 17

26. These argued that the judge should not have permitted the indictment to be amended by the addition of counts 16 and 17; and should not have permitted the prosecution to adduce expert evidence about the age of the unknown male shown in the video.

27. The judge ruled, and in our view was right to do so, that there was at least a *prima facie* case that footage of an unknown adolescent with his face covered, not moving a muscle, during 8 minutes of sexual activity being performed by Metcalfe, could amount to a sexual assault. It was for the jury to decide whether the unknown male shown on the sex tape was (in the prosecution's words) frozen into submission or genuinely consenting. As for the expert evidence about age, the prosecution did not have to prove that the unknown male was under a particular age: their case was simply that the younger the male was, the less likely he was to be consenting to masturbation and fellatio and the more likely he was to be submitting involuntarily. The expert evidence of Dr Erhardt was adduced to rebut the defence case that the male was a willing adult participant.

28. Mr Blaxland and Mr Phillips submitted that the evidence of Dr Erhardt was inadmissible according to the decision of this court in *Land* [1998] 1 Cr App R 301. In that case it was argued that the defendant's conviction of possessing indecent photographs of children contrary to section 1(1)(c) of the Protection of Children Act

1978 could not stand because (i) the prosecution could not prove that the defendant knew that the person photographed was under 16 (an issue which does not arise in the present case) and also because (ii) the prosecution had failed to adduce expert evidence that the person in the photograph, whose identity was unknown, was aged under 16. This court, in a judgment delivered by Judge LJ, rejected both grounds. As to the second, the court said this in 306b:-

> "We can see no basis for concluding that in the absence of paediatric or other expert evidence the jury is prevented from concluding that [an] indecent photograph depicts a boy or a girl under the age of 16.
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> The judge directed the jury that in deciding whether it was proved that the photographs were of a child:
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> > "You can do no more than use your own experience, your judgment and your critical faculties in deciding this issue. It is simply an issue of fact for you, the jury, to decide what you have seen with your own eyes…"
>
> In our judgment this direction is not open to question. In any event such expert evidence tendered by either side would be inadmissible. The purpose of expert evidence is to assist the court with information which is outside the normal experience and knowledge of the judge or jury. Perhaps the only certainty which applies to the problem in this case is that each individual reaches puberty in his or her own time. For each, the process is unique and the jury is as well placed as an expert to assess any argument addressed to the question whether the prosecution has established, as it must before there can be a conviction, that the person depicted in the photograph is under 16 years old."

29. The ratio of *Land* is firstly that the prosecution did not have to prove that the defendant knew that the person depicted in the indecent photographs was a child under 16, and secondly that the conviction was not rendered unsafe by the prosecution's failure to adduce expert paediatric evidence to that effect. The passage beginning with the observation that "in any event such expert evidence tendered by either side would be inadmissible" is *obiter*, though from a judge of great criminal experience. It is not easy to construe. Judge LJ cannot have meant that expert evidence about the age of an individual is always inadmissible: as Mr Blaxland accepted, there are many types of criminal case in which such evidence is routinely given.

30. It is unnecessary for us to decide whether expert evidence as to the age of a person shown in a photograph or series of photographs is inadmissible in the normal case where the subject's face is included in the photograph or in some of a series of photographs, or in a film. It may be said that jurors, like anyone else, are used to seeing people in real life or on film or in a photograph and reaching a conclusion about that person's age. But it is not a matter of normal experience to be asked to assess a person's age from a film or photograph which shows only the lower half of

their body. We conclude that the judge made no error of law in allowing Dr Erhardt to give expert evidence.

31. Mr Blaxland makes a further point that Dr Erhardt based his evidence partly on a method of assessment known as the Tanner Scale which has now been disavowed, at least to some extent by its original author. But that fact was before the jury and, as in any other case, they were free to disregard the opinion of Dr Erhardt if they did not accept his evidence.

32. For these reasons the appeal against conviction on counts 16 and 17 by both defendants is dismissed.

Sentence

33. Both applicants renew their respective applications for leave to appeal against sentence after refusal by the single judge.

34. Townsend is now 58 years of age. He had one previous conviction relating to five offences of taking indecent photographs of a child or assisting in the commission of such an act, the offences being committed in 2017. In March 2018 he had been sentenced to a total of 2 years imprisonment suspended for 2 years

35. In the present case Townsend received an extended sentence of 23 years imprisonment, the custodial term being 18 years and the extension period 5 years. That sentence was imposed in respect of Count 13, a charge of rape of OH when he was aged 13 or 14, but reflected the totality of the offences of which he had been convicted; the judge passed concurrent sentences on the other counts of which he had been convicted. Mr Blaxland rightly, and realistically, does not take issue with the structure of the sentence nor with the total figure of 18 years in custody. The sole issue argued before us was dangerousness.

36. The judge did not consider it necessary to adjourn for a report to consider the issue of dangerousness. He noted that it was not obligatory for him to do so and in the circumstances of the case he did not consider it necessary. He found that there was a significant risk that Townsend would commit further specified offences and by doing so, would cause serious physical or psychological harm to one or more people. He was found to be dangerous due to the nature of the convictions and their circumstances, combined with his activities in the zoom chatroom. The judge stated that in his view Townsend's predilection had not gone away since he ceased abusing his victims and that his actions in trying to discourage TS and OH from complaining were highly manipulative and dangerous. He concluded that there was "a significant risk you will revert to contact offending, based on that Zoom evidence and what I saw of you during your trial" and that "a determinate sentence would not be sufficient to protect young boys from the risk of serious harm presented by you".

37. It is submitted on behalf of the applicant Townsend that the learned Judge's finding that the applicant was dangerous was not warranted and it was wrong for the court to have imposed an extended sentence. It is further submitted that the Judge was wrong to have rejected the defence submission that a report should be obtained to assist with the determination of dangerousness.

38. In most cases of this kind it is desirable to obtain a report on the issue of dangerousness; indeed, there is an obligation to do so pursuant to section 156(3) of the Criminal Justice Act 2003 unless (subsection (4)) the sentencing judge is of the opinion that it is unnecessary to obtain a report.

39. In this case we are satisfied that it was not unreasonable for the judge who had presided over the trial to form the opinion that a report was not necessary. The judge, having presided over the trial, was best placed to make such a finding of dangerousness. In particular, having regard to the nature and circumstances of the offences, and the fact that Townsend had admittedly had in 2017 a sexual interest in young boys (while stating it did not extend to contact offences), the judge found that "his predilection has not gone away".

40. The judge further considered whether a long determinate sentence would be sufficient to protect young boys from the risk of serious harm. He found that a determinate sentence would be insufficient. The judge made such a finding in the knowledge that he was imposing an indefinite Sexual Harm Prevention Order. We are of the view that the learned judge was not wrong to make the assessment he did.

41. Metcalfe, a man now 57 years old and of previous good character, was sentenced to 4 years imprisonment in respect of Count 9 (indecent assault on OH by anal penetration), and 3 years imprisonment in respect of Counts 16 and 17, concurrent with each other but consecutive to the 4 years on Count 9. Mr Phillips does not and could not take issue with the imposition of consecutive sentences in principle, but submits that the judge failed to have due regard to totality, or to his client's previous good character.

42. It is right that the offences under counts 16 and 17 have a starting point of 2 years custody under the relevant Guideline, and that the judge's sentence was above that starting point. But as against that, the starting point for the assault by penetration offence the subject of count 9 was 8 years. While it may be that the sentences imposed could have been structured differently, in our judgment it is not arguable that the total sentence of 7 years imposed on Metcalfe was excessive or disproportionate.

43. Accordingly both the renewed applications for leave to appeal against sentence are refused.