



Neutral Citation Number: [2021] EWCA Crim 689

Case No: 2020/00077/B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BLACKFRIARS CROWN COURT
HHJ Sullivan
T.2018/7005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2021

Before:

LADY JUSTICE MACUR
MRS JUSTICE CHEEMA-GRUBB
and
MR JUSTICE ANDREW BAKER

Between:

REGINA
- and -
MATTHEW BOLTON

Respondent

Appellant

Mr Benjamin Newton (instructed by Hodge Jones and Allen) for the **Appellant**
Ms Sarah Ellis (instructed by CPS) for the **Crown**

Hearing date: 15 April 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 09.30 on Thursday, 13 May 2021.

Macur LJ:

1. This is an appeal against conviction brought with the leave of the full court and which depends upon the admission of fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968 (“the 1968 Act”). Mr Newton, who was not trial counsel, appears for the appellant. Miss Ellis, who was prosecution trial counsel, appears for the respondent Prosecution which opposes the appeal.
2. On 17 October 2018 the appellant was convicted of nine counts of rape of a child and two counts of causing or inciting a child to engage in sexual activity. On 9 November 2018 he was sentenced to a total of 9 years imprisonment, and the other usual ancillary orders following such convictions were made.
3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, 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 that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s3 of the Act.

Background facts

4. All counts on the indictment related to the complainant, PJ. She was 16 at the time of trial. The appellant’s date of birth is 21 August 1993. He was 25 at the time of trial.
5. PJ was interviewed by police on 15 June 2016 when she was 13. She described how on occasions when she thought she was aged between 6 and 8 and the appellant was aged between 15 and 17, he penetrated her anus with his penis on about nine occasions, incited her to lick his penis and caused her to touch his penis. These incidents occurred in the appellant’s home which she visited from time to time to play with the appellant’s younger brother and at times when she was being cared for by the appellant’s mother.
6. PJ was unable to specify precisely when the abuse occurred, but she thought the first incident took place when she was 6 or 7 and there were a group of people at the appellant’s house, including her friends K and H, and their mothers. The adults were in the kitchen and the appellant took her into a bedroom, effectively secured the door and invited her to lick his exposed penis, saying it tasted like a lollipop. She refused and re-joined her friends.
7. She could not specifically remember when the other incidents occurred, but the appellant would penetrate her anus; it would hurt and afterwards when she went to the toilet she would bleed. Her mother had taken her to the GP and there was said to be a “tear or something”. She could not recall the last time the appellant had penetrated her, but it stopped when she was aged about 8.
8. He had also made her masturbate him by holding her hand onto his penis and moving it up and down. She thought it stopped because the appellant had a girlfriend who became pregnant, and he moved out to live with her. The last time she had seen the appellant was when she was 9 or 10.

9. PJ told one of her friends about the abuse in September or October 2015 and three others in January 2016. In June 2016, her mother found an envelope in her school bag marked “very, very private & confidential” addressed to a schoolteacher which read:

“Dear Miss B,

When I was about six something really bad happened to me...It was at my best friends house with his older brother who was about 16 or 17. It kept going for three years. I think he, umm, he basically put his penis in my bum and I didn't know it was bad until the beginning of year eight. My mum or dad or any other adult knows, so please don't tell anyone. I really don't know what to do. I don't feel safe...”

10. The appellant was arrested on 2 August 2016. He denied the allegations in interview.
11. At trial, PJ's video recorded interview was played as her evidence in chief. Formal admissions were made regarding her significant and longstanding involvement with Social Services and various counsellors, arising from the acrimonious relationship between her separated parents and during which she would have had the opportunity to disclose that she had been abused. Likewise with regards to 10 separate visits to her GP with various complaints of abdominal pain, and or sore rectum/perineum and occasional bleeding on defecation, commencing in December 2007 up to March 2011.
12. The evidence of Dr Haines, forensic physician, was also adduced before the jury in agreed facts. That is, he was not satisfied that there was any clear evidence to support the allegations made, since the presenting features were “more frequently caused by constipation” as had been recorded in the medical notes,
13. The appellant gave evidence. He remembered seeing PJ at his home on two or three occasions playing with his younger brothers but had had nothing to do with her. He lived at home with his mother and five brothers, and it would have been very difficult to be on his own with her as she alleged. It was a busy house and the brothers all shared bedrooms. He was in and out of the house and spent most of the time with his girlfriend and friends from school. He had been with his girlfriend, BK, since August 2008 when he was 15. The allegations against him were untrue.
14. The appellant's mother gave evidence on his behalf. She did not agree that PJ's visits to her home had been as frequent as she said and differed in her recollection to that of PJ's mother as to when they had started to visit her home. Two of the appellants brothers recalled PJ visiting the family home but said that the appellant was rarely there.
15. The appellant was convicted, as indicated above. Subsequently, he received a negative advice on appeal from trial counsel. The appellant's family instructed new solicitors to investigate further lines of inquiry, during the course of which statements were obtained from Ms L, Beth Keen and Venetia Dixon, the appellant's mother. The appellant's medical records were also obtained.

New Evidence

16. We proceed on the basis that the full court admitted the new evidence for the purpose of considering the application for permission to appeal. In these circumstances the only consideration for us is whether it appears the evidence affords any ground for allowing the appeal. (s 23(2)(b) of the 1968 Act)
17. Ms L, Ms Keen and Ms Dixon attended court for the purpose of cross examination. All three confirmed the contents of their statements, and in the case of Ms L and Ms Dixon the documents appended to them, as true and accurate to the best of their recollection.
18. Ms Keen was the appellant's girlfriend between 2007/8 and 2012/13. She said that she had moved into the appellant's home within a month of meeting him, which was very shortly after his motorbike accident which left scarring to his leg, and initially shared a bedroom with him and four of his brothers. After two years some of the brothers moved out, freeing up another bedroom which she then shared with the appellant and one of his brothers. She and the appellant had a "healthy sexual relationship", and she was never far from his side. They "didn't go anywhere without each other and [she] was always with him". They split up in 2012. She did not recall PJ nor having met her, but she did recall a party at which 'school mums' were present.
19. Ms L was mother to K, one of PJ's schoolfriends. She knew Ms Dixon as mother of T, the appellant's younger brother. She had gone to one get together at the appellant's home which other 'school mums' attended and which she could confidently date as post April 2010, and probably the beginning of the summer holidays, since she displayed the results of her recent surgery to the other mothers. She remembered PJ was also at the party and had complained at one stage that "the boys were not being very nice to her and shut her out of a bedroom". This was the only party she had attended at the appellant's home. She remembered seeing one of Ms Dixon's elder sons and his girlfriend at the party but could not identify them by name.
20. Ms Dixon recalled extensive works to her home which commenced at the beginning of 2011 and lasted for three months. The nature of the works meant that she would not allow visitors to the house, which was crowded with family and workmen.
21. We have seen photographs of the obvious scarring to the appellants inner thigh and records which reveal that the injury occurred in July 2007.

Appeal

22. There are three perfected grounds of appeal drafted by Mr Newton which neatly encompass his main arguments:
 - i) The gathering that the complainant identified as being when the first instance of abuse took place was in the spring/summer of 2010, not (as her mother asserted) in 2009, and therefore highly significant evidence relating to her complaints of anal pain and bleeding to her GP could not in fact be attributed to the allegations of anal rape.

- ii) The appellant's home address was subject to extensive renovation work in early 2011 during which time it is extremely unlikely that the alleged offending would have taken place, thereby further undermining the probative value of the medical records, and also diminishing the time period within which the ongoing offending was alleged to have taken place.
 - iii) The appellant was cohabiting and in a healthy sexual relationship with his then girlfriend Beth Keen throughout the relevant period, and in particular was in Ms Keen's company during the gathering that relates to Count 1.
23. The thrust of Mr Newton's argument is that the new evidence sharpens the focus on the nebulous picture left to the jury in so far as dates are concerned. He refers to that part of the judge's summing up to the jury in which she reminded them they did "not have to be sure of the exact date when [the alleged assaults] occurred, although it is quite right to say that any conflicts about dates and so on may help you in due course as to who is telling the truth".
24. He submits the new evidence is of great significance with regard to the medical evidence, that is PJ's visits to the GP and specifically in relation to complaints of perineal discomfort, and rectal bleeding. That is, if the first incident, which PJ described as non-penetrative, was established to have occurred in the summer of 2010, then any reference in the medical records that precede that date would be irrelevant to the jury's consideration, as would any at the times of the works being completed at the appellant's home. The combined effect of this evidence of Ms L and Ms Dixon means that only one medical entry on the list was potentially relevant.
25. He argues that it was 'inconceivable' that the jury would not have placed great weight on the medical records as corroboration of PJ's allegations "irrespective of Dr Haynes' opinion. It was the clear evidential position that PJ attributed bleeding and a tear to her anus with the sexual abuse she alleged against the appellant." The new evidence "did not sit well" with the prosecution narrative.
26. Further, the period during which the building works were ongoing eroded the time overall during which the alleged assaults could have occurred. PJ had not referred to this interregnum but had described the abuse as regular and on numerous occasions. A rough calculation assessing the intervals between the alleged assaults, bearing in mind the available time span, would mean they occurred approximately once every three weeks. This was unlikely in the extreme in view of the appellant's household and accommodation.
27. The medical evidence establishes that the appellant had a prominent scar on his inner thigh at the time of the alleged incidents although PJ did not mention it, although she did mention a tattoo which he only subsequently acquired. Mr Newton concedes that this point is a makeweight only to his other arguments in this appeal.
28. Ms Ellis argues that the new evidence does not, when seen in context of the evidence as a whole, have the effect contended for. She refers us to the complainant's evidence regarding the first incident which was hedged with uncertainty as to date. PJ said she could not actually remember the first time it happened. She thought there was "a group of us there", including

her friends and their mums. She did not recall the second occasion because the abuse was “kinda, like, ongoing.”

29. Miss Ellis contends that the evidence of the GP visits was adduced in corroboration of PJ’s evidence that she would experience rectal bleeding when she went to the toilet and had been taken to the doctors, but not to establish that the bleeding and possible tears were caused by the alleged assaults. Dr Haines’ evidence concluded that it was not determinative of the fact and was more likely caused by constipation. The judge summed the evidence up clearly, and with reference to the fact that on any account PJ’s visits to the GP with abdominal pain and possible constipation preceded the date of the first alleged assault. Therefore, “it is not ‘inconceivable’ that this would not have been taken as strong corroboration of PJ’s allegations.”
30. Ms Ellis submits that it is unsurprising that PJ would not refer to the period over which the building works were taking place if she did not visit the appellant’s home. The narrowing of the window of opportunity to commit such acts on a regular basis as alleged by the complainant did not undermine her evidence. Miss Ellis repeats the points she makes with regard to the date of the first allegation namely: the dates of any of the allegations were uncertain; the evidence of the GP visits during this period was, on the evidence, not determinative of sexual abuse.
31. Ms Ellis challenges the relevance of Ms Keen’s intimate relationship with the appellant as negating the likelihood of abuse. Her cross examination of Ms Keen before us was to essentially challenge Ms Keen’s recollection of being a constant presence at the side of the appellant.
32. Overall, Ms Ellis prays in aid the facts that PJ was extensively cross examined with a view to challenging her credibility and reliability, trial defence counsel making extensive reference to the emotional difficulties caused by her parent’s separation, the failure to disclose the abuse at the time to the numerous counsellors she saw, the asserted lack of opportunity for the appellant to commit the offences, her medical problems and relatively recent contact with the appellant’s younger brother. She submits that the judge had correctly directed the jury to the effect that the date of the offending was not a material averment in the indictment, “although it is quite right to say that any conflicts about dates and so on may help you in due course as to who is telling the truth”, the issue was simply whether the jury were sure that the act alleged had occurred, and in the case of anal penetration, prior to PJ’s 13th birthday.

Analysis

33. We are satisfied that all three witnesses were telling us the truth as they recalled it to be. We are satisfied that Ms L was a credible and reliable historian and accept her evidence without caveat. However, we doubt the reliability of Ms Keen’s recollection that she was always at the appellant’s side, not least by her candid disclosure of the circumstances surrounding her child’s conception. However, the evidence of Ms L corroborates her likely presence with the appellant at the ‘get together’ concerned. Further, we do not doubt her evidence of her intimate relationship with the appellant during some part of the pertinent time frame. The fact of the building works and their commencement and duration are undoubtedly established, and we

accept Ms Dixon's evidence as to the likely consequences for her and the appellant's household and their living arrangements during this time.

34. We note that the agreed facts put before the jury refer to GP visits from December 2007 to February 2016. The first reference to reported rectal bleeding was on 11 January 2010 and examination revealed "anus? Small tear but really NAD...per rectum not done. Watch for now and see if mixed with stool or recurrent." On 30 March 2010, the history was recorded as "sore per rectum area occ blood pain on defection. On 24 May 2010, the history given was "some perium pain after food OK although less than usual." On the 1 February 2011, the history was "some soreness and bleeding per rectum hard stool again.... declined exam...problem: anal pain". On 1 March 2011, the problem was recorded as "anal pain.... mum has seen fissure." The judge clearly highlighted that the visits preceding those specifically referred to above, place those visits referring to possible anal tears and fissures, in the context of complaints of abdominal pain and "large frequent motions", hard stools, working diagnoses of constipation.
35. Regardless of the reason given for the prosecution to adduce this evidence, we are obviously alert to its potentially 'prejudicial' effect to the defence case. We understand why trial defence counsel sought to exclude the evidence pursuant to section 78 of the Police and Criminal Evidence Act 1978 but would see no reason to dispute the exercise of the judge's discretion not to do so, she implicitly finding that it did not adversely affect the fairness of the proceedings. We note in this regard that Mr Newton specifically, and we think realistically, affirms that he does not contend that the admission of the GP records was erroneous.
36. Equally, we understand why after the GP records were admitted into evidence that trial defence counsel wanted to have the evidence of Dr Haines, adduced before the jury. The judge summed up his evidence by reading out his opinion, recorded in the agreed facts, in "its entirety" which made clear that he "was not satisfied there is any clear evidence to support the allegations" and indicated the more likely cause as constipation. The judge went on, "It is a matter for you to consider the evidence of Dr Haines, his conclusions, the significance of them, which you may feel amount to this; that abdominal pain and anal fissures are consistent with sexual abuse but they are also consistent with constipation and stress at home and an anal tear can be caused by an erect penis but equally, and more commonly, it can be caused by passing hard constipated stools". Mr Newton takes no point on the summing up, and specifically not in this regard.
37. We have carefully considered Mr Newton's well-structured, comprehensive, and focused arguments regarding the interplay of the medical records with the chronology of the allegations, set within the context of the new evidence which we accept. However, we conclude that the new evidence does not create a significantly different emphasis or background that renders the convictions unsafe. In some respects, it confirms PJ's uncertainty as to when the first incident occurred and the occasions of abuse thereafter.
38. The conspicuously fair summing up reminded the jury of the conflicting evidence of PJ's mother and Ms Dixon relating to the dates of PJ's visits to the appellant's home. PJ's evidence relating to the first non-penetrative incident, was sure in detail of the incitement, but clearly uncertain as to when it happened. That something may have happened to PJ that brought the occasion of the get together to mind is substantiated by Ms L's evidence that PJ complained

that the ‘boys were not being very nice to her’ but, in view of Ms Keen’s evidence that she was present with the appellant throughout this party, it seems that this incident may not have involved the appellant at all or therefore relate to the allegation involving the invitation to lick the appellant’s penis.

39. However, even assuming for the sake of Mr Newton’s argument, that this new evidence firms up the date of the first allegation rather than some unrelated disagreeable but nonsexual experience which PJ has subsequently overlaid or confused in time, it does not adversely reflect upon the way in which the jury were directed to regard the GP records and were thereafter reminded of Dr Haines’ expert opinion. In these circumstances we do not accept that it was “inconceivable” that the jury would not regard the medical evidence otherwise than in support of PJ’s allegations.
40. It appears to us, on the undisputed account provided in Ms Ellis’s skeleton argument, that the cross examination of PJ was suitably robust, extensive, and thorough. The jury were called upon to assess PJ’s veracity in the context of her own previous emotional difficulties, her substantial uncertainty and imprecision about when (she said) bad things had happened to her at the appellant’s hands, and the indisputable evidence relating to the cramped living conditions and the appellant’s ‘busy’ household. The period of time in which visitors were not allowed in the house takes the matter no further. The appellant had referred to the commencement and nature of his relationship with Ms Keen in his evidence before the jury. This evidence is incapable of contradicting or undermining the allegations made. The scar on his inner thigh is inconsequential in the context of PJ’s description of the assaults he committed.
41. For these reasons we dismiss the appeal against conviction.