IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation: [2024] EWCA Crim 343

CASE NO 202300165/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 21 March 2024

Before:

LADY JUSTICE MACUR DBE
MR JUSTICE GOOSE
MR JUSTICE NICKLIN

REX
V
B.A.A.

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR L BREMRIDGE appeared on behalf of the Appellant
MR D SCUTT appeared on behalf of the Crown

J U D G M E N T

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981. IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

LADY JUSTICE MACUR:

1. This judgment is subject to an order made pursuant to section 4(2) of the Contempt of Court Act 1981, postponing publication of any report of these proceedings until the conclusion of the retrial which is to take place in July 2024. We make clear that this restriction applies to each and every count on the indictment.
2. Also, this is a case in which the provisions of the Sexual Offences (Amendment) Act 1992 apply. Under those provisions where a sexual offence has been committed against a person, no matter relating to that person shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify that person as a victim of the offence or offences. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
3. On 19 December 2022 the appellant was convicted of indecent assault, contrary to section 14(1) of the Sexual Offences Act 1956. The jury were unable to reach verdicts on seven other counts, namely counts 1 to 5 and 7 to 8 of the indictment and were discharged. The applicant, as we have indicated, is due to be retried on those counts in July 2024.
4. He appeals against conviction with leave of the full court.

Background facts

5. In November 2018 the complainant told police that her father (the appellant) had sexually assaulted her between the ages of 11 to 17. ABE interviews were recorded on 21 December 2018 and 21 January 2019. The nature of the allegations she made were used in framing the indictment to which we refer below.

6. The appellant was interviewed about those allegations on 12 March 2019. He denied the complainant's allegations and read a prepared statement into the interview. In that statement he agreed that on holidays from approximately 1995 he had applied suncream to the complainant's back and legs at her request. He then went on to say:

> "[The complainant] would sometimes be topless for this. I also applied the cream to the side of her buttock area and her shoulders. I would also be asked to apply after-sun cream after her bath or shower in the evening. Draped in a towel, she would find me, return to her bedroom and then remove the towel and lie on her tummy on her bed. Normally she would retain her towel to cover her lower part, her lower body, or wear pants, but sometimes she would be naked. I would apply cream to her shoulders, back and buttock area and the backs of her legs. This was a daily occurrence on holiday and, I believe, occasionally at home. I did nothing to avoid these situations, and I now regard it as being poor judgment. I think I regarded her nakedness on those occasions as inappropriate, and, although I felt uneasy, I did nothing to discourage it. I do remember that on occasions I told her to ask J to undertake this task for her, but she would insist that it be me. Over time, [the complainant] made fewer requests for my involvement and became more disciplined about covering herself. I cannot recall any particular discussion about this change. It just happened. I believe she also now considered it to be inappropriate."

7. The indictment charged as follows:

Count 1, single incident, massaging breasts when the complainant was aged 11.

Count 2, single incident, massaging the bottom when the complainant was aged 11.

Count 3, multiple incidents, on at least five occasions between 17 August 1990 and 16

August 1995 massaging breasts.

Count 4, multiple incidents, at least five occasions between the same dates, massaging bottom.

Count 5, multiple incidents, at least five occasions between 17 August 1995 and 16 August 1997, massaging breasts.

Count 6, multiple incidents, at least five occasions between the same dates, massaging bottom.

Count~7, single incident, massaging breasts on a camping trip.

Count 8, single incident, massaging bottom on a camping trip.

8. The indictment was representative of three distinct periods: the first when the complainant was 11 years old (counts 1 and 2), the second when she was aged between 11 and 15 (counts 3 and 4) and the third when she was aged 16 to 17 (counts 5 and 6).

9. The prosecution opened its case high, describing the appellant as having a "sickening fascination" with the complainant's body. It was said that the appellant made the complainant undress in front of him at bedtime and, while she was face down with him over her, he would give her what she described as massages during the course of which he would deliberately touch her breasts and her bottom. This mostly happened at home when her mother was out. Sometimes whilst on holiday he wanted her to be topless, insisting on it. On at least one occasion he videoed her topless when they were alone. It had also happened on two camping trips that she could remember, which her mother did not attend. She shared a tent with her father and the massaging activity took place there too.

<u>The trial</u>

10. In the ABE interviews played to the jury, the complainant said that there were various

incidents of the appellant massaging her breasts and bottom for which there was no explanation. In her first interview she mentioned the application of sun cream when she had been 11 or 12 on a family holiday in Portugal. She did not mention any further such incident in the second interview and neither of these matters was pursued by the interviewing officer. However, in cross-examination, when Mr Bremridge put the appellant's case to her, she said, in relation to what had been a final family holiday in Corfu when she was 16, that when applying after-sun lotion the appellant would touch her breasts and bottom.

11. The appellant gave evidence denying this. Mr Bremridge has candidly acknowledged that in hindsight he should have clarified the appellant's position with regard to his account in interview of where he had applied the sun cream and after-sun lotion. However, for whatever reason he did not do so.

12. Also admitted into evidence was a letter written on 26 August 2015, albeit dated 2016, from the appellant to the complainant which read:

> "Dear [complainant].
>
> [The complainant's sister] has told me of your conversation over the weekend and I have also told Mum. I am truly sorry for my inappropriate behaviour all those years ago and I ask for your forgiveness. I had hoped that over the years our devotion and love for your children and our support for you all would have gone some small way to begin to draw a line under the past and build a new relationship for the future.
>
> It is clear, nevertheless, that your hurt has resurfaced and I very much regret this. When we've been away with you and your family over the years, we've had some really good times. I know you've said in the recent past that we always had fun together. It did genuinely feel that way in Majorca recently, but clearly this was not the case, and you were hiding your true emotions. I would like to say that I've always given your children the very greatest respect and I hope that in this regard at least, neither you nor [the

> complainant's husband] have had the slightest pause for concern.
>
> Whatever happens, I sincerely hope that Mum can reconnect with you in the near future. This issue has nothing to do with her, and you know that she loves you all dearly. I accept and understand that whatever your decision, it is very unlikely that I will see you, [your husband] or the children any time soon and this is a heavy burden I will have to carry.
>
> I will arrange for Mum to answer the phone in future, and I will disappear for any Facetime so that you and the children will avoid me, so please stay in touch with Mum. Above all else, I wish with all my heart that you and [your husband] continue your lives together and as wonderful parents to your three children.
>
> Dad."

13. Mr Scutt for the prosecution cross examined the appellant about the application of suntan lotion, suggesting that it was "another opportunity to touch" the complainant. He questioned the appellant about the "inappropriate behaviour" he had referred to in the 2015 letter, asking whether the appellant suggested that " putting sun cream on a child is inappropriate behaviour?". He continued:

> "This was nothing to do with putting sun cream on. This was nothing to do with washing her hair. This was you sexually abusing her as she has told us, wasn't it,?
>
> ...
>
> Did anyone say to you or comment on the fact that you would take her to a room alone in a villa and put sun cream on her? Did anyone comment on that?

A. No.

> Q. So what's your justification for thinking that that was inappropriate?

A. Because at the time I didn't think much of it."

...

Q. And these massages were your way of getting to touch her?

A. I would disagree with the word massaging as well, I was applying sun cream and after sun, there was no massaging involved."

14. Subsequently in his closing speech, Mr Scutt said that the appellant's concession regarding the sun cream application was simply to explain away the letter. He said to the jury:

> " It makes absolutely no sense to create that document [referring to the 2015 letter] if [his] only concerns were really about hair washing or applying sun cream."
>
> …If those were the allegations they'd be laughed out of court. He'd know that, anyone would know that. Of course, if his concerns are darker, if the fear is that at some point [the complainant] will come out with the truth about him then the document makes sense, doesn't it? It makes complete sense. But it makes no sense if his only concern is hair washing and sun cream."

15. That is, we summarise, he did not invite the jury to find that the application of sun cream was an occasion used to sexually assault the complainant, albeit that he cross examined the appellant on the point. Mr Scutt was clearly inviting the jury to convict the appellant on the basis of her account of the repeated incidents of massaging her breasts and bottom, mostly at home and when her mother was out.

16. The judge produced a written route to verdict which had been agreed by both counsel prior to being handed to the jury. There is rightly no criticism of the judge's directions in law, or otherwise, save as we indicate below.

17. After retirement the jury sent a note. It read:

> "Can we establish more dates around the holidays in the 1990s to 1999. Ages she might have mentioned that sun cream was being applied."

18. The judge having discussed the matter with counsel gave the answer:

> "Well, the answer is that the evidence was to the effect that generally there was a holiday once per year, but it was not always abroad. The only date we have from the evidence was one in June 2015. But otherwise it was generally every year, not always abroad. And there are no specific dates for them.
>
> And so far as the attribution of application of sun cream is concerned, there is no specific age that is attributed to that application of sun cream. What is clear from the evidence is that it happened on holidays and [the appellant] gave evidence that the age was 13 on one occasion, but it does happen on more than that one holiday, it happens on other holidays as well, effectively."

19. The jury convicted the appellant on count 6, as indicated above.

Appeal

20. There is a single ground of appeal, namely that the conviction is unsafe on the basis that no reasonable jury applying their minds properly to the facts of the case could have convicted on count 6 alone: see Durrant [1972] 56 Cr.App.R 708.

21. Mr Bremridge summarises the prosecution case as indicted to be: the appellant indecently assaulted his youngest daughter from the age of 11 in August 1990 until a date shortly before her 18th birthday in August 1997. She alleged that from the age of 11 there were weekly massages when the appellant would come into her bedroom at the family home as she changed and would massage her breasts and bottom (counts 1 and 2). The complainant described this as continuing on an almost weekly basis until she attempted suicide by taking an overdose in September 1996 when the complainant was 17 years old. She described the attempted overdose as the time she told the appellant "No more". The complainant however told medical staff that she took an overdose due to exam stress.

Counts 3, 4, 5 and 6 are all multiple incident counts reflecting the same conduct, namely massaging breasts and bottoms, indicted separately, between the ages of 11 to 16 (counts 3 and 4) and then 16 to 18 (counts 5 and 6). Counts 7 and 8 are the specific counts of massaging the complainant's breasts and then bottom on a camping trip. Except for the camping trips, all the conduct indicted was alleged to have occurred within the family home at a time when the appellant was alone with the complainant.

22. As well as the counts alleging indecent assault, the complainant also described a background of generally inappropriate behaviour which was not indicted. It included the appellant walking into the bathroom when his daughter was using the bath or shower and insisting that she go topless when on family holidays. The complainant described times when on family holidays abroad the appellant would insist on applying sun cream and after-sun. During her video interview it was never alleged that the appellant did so to her naked breasts or her bottom.

23. In cross-examination the complainant said for the first time that the appellant had touched her "boobs" and her bottom when applying after-sun lotion on family holidays. The evidence of recent complaint to her boyfriend and a university friend that was adduced had nothing to do with the conduct alleged in count 6. The 2015 letter was said to be triggered by the complainant's sister informing the appellant in August 2015 that the complainant had told her of the appellant's conduct and behaviour but the disclosure did not relate to the facts of count 6. The letter did not refer to any such particulars.

24. Mr Bremridge submits that the jury question suggests that undue weight must have been placed on the document that the appellant read to the police in interview regarding application of sun cream to the side of the complainant's buttock. He emphasises that it was not the prosecution case that the application of sun cream and/or after-sun lotion

amounted to an indecent assault. The first time the complainant had ever alleged that her bottom had been touched in the application of sun cream was in answer to a question put in cross-examination. However, if the jury had attached any significant weight to her answer, namely "he did touch my boobs and my bum", the jury would be expected to convict on count 5 also, relating to the massaging of the breasts. They did not.

25. Mr Scutt accepts that a failure to reach to reach a verdict on other counts on the indictment can be analogous to an inconsistent verdict : see Formhals [2013] EWCA Crim 2624. However, as per Davies LJ:

> "Overall in this context what the Court of Appeal ultimately has to consider is whether or not a conviction is safe.
> …
> It will be a rare case indeed where a failure to reach a verdict can be said to be logically inexplicable when contrasted with or set against a verdict or verdicts which have been reached. If such an argument is to be run, it will have to be run in cases which will call for the closest scrutiny by the court. Moreover, such an argument has to be run in circumstances where the principles applicable to inconsistent verdicts (in the true sense of the words) are — as has long been established — themselves very tightly prescribed ... The bar is thus set high for the application of the principle of inconsistent verdicts. It can be set no less high, and perhaps is set higher, where the attempt is to compare and contrast a verdict of guilt with a failure by the jury to agree."

26. Mr Scutt concedes that the prosecution case was opened in accordance with the complainant's Achieving Best Evidence interviews in which she did not specifically say that the application of sun cream by the appellant to her body whilst on holiday had involved the touching of her breasts or buttocks. However, when cross examined by Mr Bremridge " that in applying after-sun as he did, your dad never touched your boobs, he never touched your bum" , she said "he did touch my boobs and my bum." Those answers became evidence in the case for the jury to consider. The basis for the

conviction on count 6 was highly likely to have been the combination of the complainant's ABE interview in which she makes a passing reference to the suntan lotion being applied on one holiday, her answer in cross-examination as indicated above and what was said by the appellant in interview taken in the context of the 2015 letter.

27. The most obvious interpretation of the jury question is that they were interested in holidays and the application of sun cream. The jury was not directed to ignore holidays or the application of sun cream. The question was answered as fully as possible.

Discussion

28. As this appeal has progressed, the focus of the appeal has become less about 'inconsistent verdicts' and more centred upon the judge's direction to the jury.

29. The written route to verdict, incorporated within the oral directions, both given to the jury prior to both prosecution and defence closing speech, states that:

> "Before you can find [the appellant] guilty of indecent assault, you must be satisfied so that you're sure of the following, i) that [the appellant] assaulted [the complainant] by intentionally touching her, by massaging her on the stated part of the body, breasts or bottom, whichever count you're dealing with, and ii) that the touching was indecent, in that right minded persons would consider the conduct indecent simply by reason of the act involved and the circumstances in which it occurred. <u>If they happened as alleged, the Defence accepts that the acts as alleged in the indictment would amount in themselves to indecent assaults, so there is no argument as to whether massaging and touching breasts or bottom is indecent behaviour.</u> Therefore, if you're sure that the physical acts took place as alleged by [the complainant], then such physical acts amounted to indecent behaviour. So in respect of each count, the question for you is are we sure that [the appellant] did the physical act alleged in the particular count in the specified period." (emphasis provided)

30. Mr Bremridge acknowledges that the judge correctly identified the ingredients of an indecent assault. However, he submits that the concession that he made, as underlined

above, was made absent any consideration of the evidence relating to the application of the suntan lotion or after-sun lotion, for that was not the prosecution case.

31. In response, Mr Scutt concedes that if proper regard had been had to the evidence which had been given then the defence concession may not have been so broad if it was made at all, but submits that the fact remains that the judge's directions were correct. The jury had been directed of the necessity for the prosecution to prove intentional touching which was 'indecent' as defined. The complainant was not complaining of the 'innocent' application of sun tan lotion or accidental touching. We agree.

32. We have no doubt that the prosecution emphasis was upon the allegations made by the complainant when she was interviewed by the police. Neither the police officers conducting the ABE interviews, nor prosecution counsel during the complainant's evidence-in-chief asked for amplification about the appellant's application of suntan lotion. However, the complainant gave evidence of such incidents in response to a question asked in cross examination and it became evidence in the case. The issue for the jury was the complainant's credibility on the issue of deliberate and indecent touching.

33. The appellant had denied intentional touching in the context of indecency when applying sun tan lotion or otherwise. The jury were unlikely to have misunderstood the 'concession' referred to above, as otherwise contradicting his evidence on this point.

34. The judge correctly directed the jury as to the functions of judge and jury, the burden and standard of proof, the separate consideration of the counts on the indictment and the ingredients of the offending charged. The jury were in charge of the defendant in relation to the whole of the evidence and were not bound by the prosecution case.

35. There was evidence, as indicated in [26] above, which would entitle the jury to reach a verdict on count 6 regardless that no verdicts were returned upon the other seven counts.

The verdict was not perverse , nor do we regard it to be unsafe.

36. The appeal is dismissed.

Mr Scutt, are there any further applications?

MR SCUTT: In respect of the reporting restriction, I am told, and I entirely accept by your learned Associate that it applied only to those out with counts 6. I think that has been corrected.

LADY JUSTICE MACUR: It has been corrected. It is very, very important that when this case comes before the new jury that they are not in any way alerted to what has been going on in this court or elsewhere and of course it is a matter for the judge in that trial as to what shall be done in relation to count 6. We make no comment whatsoever about that. We do see from the transcript of the full court hearing that Mr Bremridge indicated that he would be making an application if this appeal failed in that regard but that is a matter for the trial judge.

37. MR SCUTT: Agreed. Thank you, there are no further applications.

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Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk