IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3665 (Fam)

No. 2019/0100-RG18P51496

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 2 December 2019

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF A CHILD

Before:

MR JUSTICE HOLMAN

(**In Public)**

B E T W E E N :

K W — Applicant

- and -

S T — Respondent

MISS NATASHA MARCH appeared on behalf of the applicant father.

MR NICHOLAS WILLIAMSON appeared on behalf of the respondent mother.

J U D G M E N T

(A s a p p r o v e d b y t h e j u d g e)

MR JUSTICE HOLMAN:

1 In a judgment delivered on 14 June 2019, a circuit judge, sitting in the Family Court, held that a father had, on a single occasion, sexually abused his daughter by poking his finger into her vagina. The father now appeals from that finding to this court. I want to begin this short *ex tempore* judgment with two general observations. The first is that, in my view, this was an exceptionally difficult case for the judge, as will emerge, in particular because of the very young age of the child concerned. It is also a difficult appeal for me to decide upon. The second general observation is that any sexually abusive act by a parent upon his or her child is a very grave matter. But it is no less grave if a court makes an unreliable finding that sexual abuse has occurred. In the present case, a consequence of these proceedings is that there has already been no contact at all between this child and her father now for about 16 months. If the finding is reliable and stands, it will obviously have profound consequences for the relationship between this child and her father for the rest of her childhood and, indeed, possibly for the rest of her life. So the issues and stakes in a case of this kind are very grave ones.

2 The essential factual background is that the parents were married to each other. They have one child, a daughter, born on 25 August 2015. Following the separation of her parents, the child primarily lived with her mother but had regular staying contact with her father, both at weekends and for longer periods in holiday times. It was said by the judge that the relationship between the father and his daughter "is very child-centred" and generally the picture is one of a very happy relationship between them.

3 This child's third birthday was on Saturday, 25 August 2018. She spent that weekend in the care of her father. On Tuesday, 28 August 2018, a couple of days later, the mother reports

that the child said certain things to her (the mother), which I will more fully relate in a moment. That had the effect that there was an immediate report to the police, and on the same day, Tuesday, 28 August 2018, there was a physical examination of the child, organised and arranged by the police, by a doctor whom I will call Dr B. The initial report of Dr B was to the effect that she had seen some small lacerations within the vagina of the child which were consistent with, but in no way probative of, a sexually abusive act. The hymen itself was intact, which is why it has never been suggested that there was deep penetration, whether by a finger or any other object.

4 The police then considered whether or not to conduct an ABE interview and, as a first step, held two pre-interview sessions with the child. Those sessions were on 7 and 10 September 2018. The ABE interview itself took place on 21 September 2018, which was, by then, already over three weeks since the child had made the statements which triggered the whole investigation. I should make clear that I have not personally viewed the video or DVD of the ABE interview with the child, nor, in fact, have I read the transcript of it. The reasons for that, essentially, are that there was some blockage in the bundle for this hearing reaching me, and by the time I had it in my hands earlier this morning, I only had very limited time in which to pre-read, and I needed to be selective in what I did read. However, it is common ground that at no stage in the ABE interview did the child say anything at all indicative, or even suggestive, that her father had interfered with her in any way at all.

5 It is, however, said that during the course of the second of the pre-interview sessions, namely on 10 September 2018, the child did say or indicate some things indicative of her father having interfered with her. Unfortunately, that was not itself video recorded. The judge herself was to say that the context seems to have been a "confusing" one, and generally it seems to me that neither the judge, nor indeed I, could safely place much

reliance on anything said or done by the child during the course of that pre-interview session when the child was engaged in play with her mother.

6 As I have said, this all began with certain things which the mother says the child said to her on 28 August 2018. I narrate this by reading paragraph 23 of the judge's own judgment, where she said,

> "I turn, then, to the mother's evidence. Her evidence is set out first in a statement to the police in which she sets out the words that the child said to her, which I have already referred to, but I will do so again so that they are clearly recorded. The conversation was, 'Every time you go to your father's, you have diarrhoea and your bumby is sore.' That was said as the mother was changing her nappy. The response was, 'It's not my fault, it's my father's fault,' followed by the question, 'Does your father do something to you?' [I interpose. I use the word 'father' but it may be that the mother herself and the child using a more informal word such as 'dad' or 'daddy'.]
>
> The child answers 'Yes, my father gives me a sore bumby.' The mother asks, 'What do you mean, he gives you a sore bumby?' and the answer is, 'He puts his finger up my bumby.' That was repeated back to her because the mother says she was shocked, by saying 'He puts his finger up your bumby?' And then the answer is, 'Does it all the time' or 'Does it lots' and then 'My bumby hurts' and she is asked, 'Is it hurting?' and she answers, 'My bumby bleeds.'"

7 That passage, as I understand it, accurately records the whole of the primary evidence in this case that the father has done anything at all to the child. As I have said, there is only one other occasion dealt with within the judgment in which the child said anything at all, namely the confused situation at the second of the two pre-interview sessions. It is said that the mother has a DVD of the child making some statement many months later to another member of the family, but the judge declined to consider that, for reasons which she gave at paragraph 28 of her judgment.

8 The evidence of Dr B is not itself probative of any abuse at all. The most it amounts to is that there were features in the child's vagina which are consistent with an abusive act, but may have other explanations or causes.

9 I wish to make clear that the judgment of the judge is both very thorough and very well organised and set out. She very clearly, first, described the general factual history; second, recorded and commented upon the evidence of each of the several witnesses; and, third, beginning at paragraph 39, directed herself as to the law, and then analysed the evidence and facts of the case before reaching her final conclusion several pages later. The judge's directions to herself as to the law in regard to the burden and standard of proof are entirely correct. She also appropriately gave herself a Lucas direction in case either parent was considered to have told lies, and generally the approach of the judge to the case cannot be faulted.

10 Nevertheless, I have reached the reluctant but firm conclusion that the final conclusion of the judge that the father did on one occasion poke his finger into the vagina of his daughter is potentially unreliable and, in the context of an appeal of this kind, is wrong. It does not at

all follow that a finding of sexual abuse cannot be made in this case, and I will set aside the finding made by the judge on 14 June 2019 and remit the whole matter for fresh determination.

11 There is no single decisive reason or ground for that conclusion. Rather, there is an accumulation of reasons or factors about this case which, collectively, satisfy me that this grave finding is not currently reliable and cannot stand. I will now briefly list and describe those factors, in no particular order of weight.

12 The first very worrying feature of this case is that, although Dr B used a colposcope and made a DVD recording of her internal examination of the child's genitalia, that DVD has never been produced, and never been seen by either party's legal advisors, nor reviewed by any independent expert witness. It is, indeed, striking that at internal page 33 of the official transcript of the oral evidence of Dr B (now at bundle page A49), she was being pressed in cross-examination by Miss Natasha March, who appeared then as now on behalf of the father. Miss March was suggesting that there were other possible, non-abusive explanations for the observed marks both in the vagina and, indeed, also the child's anal area. Dr B answered,

> "Those questions you can address to an expert, which is very useful in court cases like this, giving expert opinion. I am a professional witness. This is a huge difference. I can only state what I saw during examination…"

13 It had, indeed, emerged that Dr B's primary speciality was in the field of respiratory medicine, and not gynaecological, or even paediatric, medicine. She has, however,

performed many genital examinations, both of adults and of children (although, as I understand it, none as young as this child) during the course of police inquiries.

14 At an earlier directions hearing on 24 April 2019, a different circuit judge had made an order to the effect that if Dr B intended to produce and rely upon any "image" of the examination during the course of her oral evidence, then she must produce it in advance. But there was not in this case, as there should have been, an earlier case management direction for the production in any event of any still images and/or DVD which existed. It must be stressed, in fairness to the judge at the substantive hearing, that when it did emerge during the course of the evidence of Dr B that she had made a DVD recording of her examination, there was no application on behalf of either parent for that to be produced at that stage, or for any adjournment. Miss March has emphasised today that the father, who is of very modest means (as probably is also the mother), has struggled to finance this case at all and would have been very reluctant to seek any adjournment. Further, as he had not by then seen his daughter for about ten months, he was desperate for the proceedings to conclude. So, it is hard to be at all critical of the judge at the hearing that there was not at that stage any adjournment, nor that she did not cause the DVD to be produced.

15 Nevertheless, viewing this case from my perspective today, it is a very considerable weakness that a DVD, which is known to exist, has not been produced and, indeed, has not been the subject of any independent view from an expert in this field. That is particularly significant as there is no doubt, from an overall reading of the judgment, and in particular paragraph 63 of it, that the outcome of the medical examination by Dr B was treated as critical by the judge in her overall findings and conclusion and, frankly, was probably decisive.

16 The second area of great concern about this case is that it all arises from a very leading or suggestive statement made by the mother. In saying that, I am not at all intending to be critical of the mother. She was merely spontaneously expressing her concern at what she saw when she was changing her daughter's nappy on 28 August 2018. But the fact is, as recorded in paragraph 23 of the judge's judgment, that it all began with the mother saying, "Every time you go to your father, you have diarrhoea and your bumby is sore." That, as it seems to me, was highly leading or suggestive by the mother, who may, unwittingly but inevitably, have planted in the child's mind a connection between going to her father and her bumby being sore. Curiously, at paragraph 24 of her judgment, which follows immediately after paragraph 23, the judge said,

> "It is right to say that within that conversation there is a leading question; that is 'Does your father do something to you?'"

17 Here, I am more critical of the judge. It may be that that question is the only leading "question" properly so called, but the judge's comment appears altogether to overlook at that point the very leading or suggestive observation by the mother (albeit not technically a question), with which the whole conversation began. This is compounded by paragraph 42 in the part of her judgment where the judge is actually analysing the evidence, where she said,

> "The disclosure was made following what might have been a negative comment about the father, 'You always come back from his contact with diarrhoea,' but that does very much depend on the tone of voice and I have no evidence of it. There is an element of leading in that discussion, but it is a limited element."

18 At that point in her judgment, the judge, with respect to her, appears completely to have overlooked that actually the whole conversation began by the mother referring not merely to diarrhoea, but also to the child's bumby being sore, which of course then goes to the heart of the whole issue.

19 This leads on to the third area of great concern in this case, namely the confusion as to what the child was actually referring to at any given time. As I have already quoted from paragraph 23 of the judge's judgment, the child's comment to her mother at that time was that her father puts his finger up her bumby. I have been told today that it is the position of the mother that this child used the word "bumby" to refer indifferently to her anus and to her vagina. However, in the answers in paragraph 23, the mother appears to have been using "bumby" to refer to the child's anus, since she, the mother, was linking it to diarrhoea. There is indeed nothing at all in the questions and answers as recorded in paragraph 23 to indicate with any clarity whether the child herself was talking about her father putting his finger up her anus or her vagina.

20 During the course of the pre-interview session with the child on 10 September 2018, things said to, and by, the child were noted as verbatim as possible by the assessing police detective constable. At internal pages 5 and 6 of his notes, now at bundle pages E38 and E39, the detective constable records the child referring to her "bumby" and saying, "Daddy hurts my bumby. He put his finger in my bumby." A little later, on internal page 6, the officer or someone is recorded as asking, "What is bumby?" She is recorded as answering, "Bumby is here," indicating her anus, and "Noony is here," indicating her vagina. It was immediately after that that the child referred for the first time ever to her father putting his finger in her vagina. She was asked, "Where does he put his finger?" and she answered, "Right in the noony, in the little hole." So, overall, given that the child with some clarity

used the word “bumby” in relation to her anus, and “noony” in relation to her vagina, on 10 September 2018, it seems to me very difficult to reach any reliable conclusion at all as to what she was stating had happened to her in her first conversation with her mother on 28 August 2018.

21 The fourth matter is one that I have already touched on, namely the essential unreliability of anything said or demonstrated by the child during that session on 10 September 2018. It all took place in the context of role play with her mother and, as the judge said, it is all rather confusing.

22 The fifth matter of concern is the judge’s treatment of the absence of any statement by the child during the ABE interview itself, indicating in any way that her father had interfered with her. At paragraph 48 of her judgment, the judge said,

> “I treat the failure to make the disclosures in the ABE interview neutrally; we do not have the best evidence we might have had, but I have to make my decision on what I do have. The absence of an ABE interview does not of itself mean that the allegation is not true.”

23 With respect to the judge, that passage is rather curious. First of all, there was an ABE interview. It may be that what she meant was “the absence of an ABE disclosure”, but to refer to “the absence of an ABE interview” is, as I say, most curious, when one did take place. It is, of course, correct that the absence of a disclosure or positive statement during the course of the ABE interview does not of itself mean that the allegation is not true. But, in my view, it was unwise and dangerous of the judge simply to treat as “neutral” the fact that on the occasion when the child was given an opportunity by appropriate open-ended

questioning to talk about what had happened to her, she did not say that anything had happened at all. That is not a "neutral" fact. It is a factor which, although not decisive, must go into the scales against the finding of sexual abuse.

24 The sixth matter follows on from the passage in paragraph 48 that I have just quoted. Not only then, but again in paragraph 52 of her judgment, the judge again refers, curiously, to "the absence of an ABE interview." That suggests to me that the first reference to "the absence of an ABE interview" at paragraph 48 cannot merely have been a slip of the tongue, but that it seems to have been in some way the view or perspective of the judge that, because the child did not in fact make any positive statement about her father in the ABE interview, this meant that there was an "absence" of an ABE interview.

25 The next and seventh area of difficulty in my view is the judge's analysis of the child's own level of understanding in paragraph 60 of her judgment. She there appropriately asked herself,

> "So then I consider the question of the child's understanding. What did she actually mean? How much understanding did she have? Could it have been a misunderstanding?"

26 The judge then discusses the evidence in terms of the child saying that her father put his fingers in her "bumby". She immediately continues by saying that later on the child said, "He puts his finger right in the noony, right in the little hole." But there is no consideration in that paragraph of the apparent jump from referring to her mother on 28 August in the language of "bumby", and referring in the presence of the police on 10 September in the language of "noony", when she herself told the police that each of the two words meant different things for her.

27 The next and eighth area of difficulty stems from the fact that the judge clearly made her final conclusion and decision pivot on what she called "the forensic findings." At paragraph 61 she said,

> "So, the third possibility I must consider is that it is an injury inflicted by the father, either accidentally or deliberately. I have to take into account when considering that the forensic findings which are clear and maintained throughout …"

28 At paragraph 63 she said,

> "The critical fact is that at the time a child who has no understanding of what she is saying, no malice, no reason to be able to show malice, makes a significant disclosure about her father putting his finger in her bumby and at that same time a forensic examination shows that she has injuries typical of child sexual abuse, albeit without full penetration."

29 It seems to me, on the basis of those two paragraphs, that the judge would not have found an abusive act proved on the balance of probability but for the so called "forensic findings." It seems to me, however, first, that there is a real risk there of elevating the "forensic findings" to a higher level of proof than it justified. The most that can be said in this case, as I understand it, is that there were signs in the vagina of the child consistent with, but in no way probative of, some penetrative act. Just as the absence of any physical finding in no way disproves many allegations of sexual abuse, so also, in the end, in the present case the physical findings are not probative at all. Further, as I have indicated, there are currently

grounds for concern about placing weight on the physical findings and observations of Dr B in circumstances when the available DVD has never been produced or seen, and no independent expert view has been brought to bear.

30 Ninth, it seems to me concerning in this case that the child is reported quite clearly as saying that her father "does it all the time" or "does it lots" and yet the judge quite clearly only found, on the balance of probability, an abusive act to have occurred on a single occasion. This is dealt with at paragraph 64 of her judgment where she said,

> "I am satisfied that it is more likely than not that the father inflicted the injury in the vagina, that he poked his finger up her bumby or bottom. There was no full vaginal penetration in accordance with the medical evidence from Dr B. I am not satisfied that it has been shown that it is more likely than not that it happened more than once, still less lots of times. This is the only reported occasion. The assertion is made spontaneously to the mother initially, but subsequently it is in answer to leading questions."

31 It seems to me that there are several difficulties about that passage. I quite understand the juridical process whereby a judge may be satisfied on the balance of probability of some facts but not of other facts, but it is difficult, if the child's reported account is clearly that something happened "all the time" or "lots", as it were to pick out some part of that account and not accept the rest. Further, the judge referred to "this is the only reported occasion." Her expression "reported occasion" also seems curious. The child herself was indeed not "reporting" any particular "occasion". Rather, she was saying it happens "all the time" or "lots." So, the specific occasion of the weekend of the child's third birthday was not in truth

"the only reported occasion". It was merely the only occasion which was followed by a swift and proximate medical examination.

32 Further, within paragraph 64, the judge refers to "the assertion is made spontaneously to the mother initially …" That may be true and correct in relation to the particular words "does it all the time" or "does it lots", but, as I have already explained, the entire conversation clearly begins with a highly suggestive and leading comment from the child's mother.

33 Tenth, and finally, it seems to me that nowhere in her judgment does the judge really consider what weight, if any, to attach to the sustained denials of the father that he had done anything abusive at all to the child. The judge considers the father as a witness. At paragraphs 35 to 38 of her judgment she clearly considered that the father's explanation that the mother may maliciously have made up statements by the child was not worthy or justifiable, but, more generally, there is nothing to indicate that the judge did not consider the father to be an honest and truthful witness. If he was apparently an honest and truthful witness and he resolutely and consistently denies that he has done anything abusive at all, that fact of itself must necessarily go into the scales against making a finding of sexual abuse by him, but I cannot see that when she came to perform her analysis and balance, the judge really did so consider it. This is linked with another aspect. At paragraph 14 of her judgment, the judge said,

> "No one has challenged the actual findings that Dr B made, namely the abrasions close to the anus and the three small lacerations around the vagina, and I accept that she made those findings …"

34 At paragraph 38, the judge said,

> "The father accepts the medical findings of the doctor; he accepts that they were found, he does not accept the cause for them. He was not able to offer any suggestion of an impact or an accidental cause …"

35 Realistically, given that the DVD had never been produced and that there had been no expert appraisal of it by an expert witness, the father inevitably had to "accept the medical findings of the doctor", for he simply had no other evidence to put in the scales against it. But there is a risk, to put it no higher, that in those passages the judge slipped into reversing the burden of proof. To say that the father "accepts the medical findings of the doctor" does not of itself prove anything at all.

36 So, for all these reasons, considered cumulatively, I am left at the end of today - and the time is now almost 5.25p.m. – with a deep misgiving that this judge, albeit faced with a very difficult case, has, or may have, made findings which are unreliable. Her judgment as it stands can properly be characterised as "wrong" and, in my view, justice, not only to this father but perhaps above all to this child, now requires that this whole matter is reconsidered afresh by a completely different judge.

37 For those reasons, I propose to allow this appeal. I will set aside the findings of fact made in paragraph 64 in particular of the judgment dated 14 June 2019. I will direct that there must be a re-hearing from scratch by a different judge and, indeed, by a judge other than myself.

38 There has been some discussion as to whether this case should not return to the Family Court in which it was previously heard, or should now be considered here at the Royal Courts of Justice by a High Court judge. Routinely, circuit judges and, indeed, district

judges in private law cases, consider allegations of sexual abuse of this kind. Nothing that I am about to say should be taken as the least support for a drift of this kind of case up to the level of the High Court. It does, however, seem to me that there are some exceptional features about this case and, in particular, the exceptionally young age of the child concerned. I personally cannot remember any case in which findings of sexual abuse of this kind have been made, fundamentally, simply on the basis of what a child, two days after her third birthday, has said. I do not say that it is impossible for such findings to be made, but in my view this must be regarded as an exceptional case and, for that reason, I will direct that the re-hearing takes place before a High Court judge here at the Royal Courts of Justice.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital