IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2024] EWHC 723 (Fam)

No. FA-2023-000307

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 14 February 2024

Before:

SIR ANDREW McFARLANE

(President of the Family Division)

(**In Private**)

B E T W E E N :

M — Appellant

- and -

(1) F

(2) A CHILD (by her Children's Guardian) — Respondents

MR M JONES KC and MR BRINDLE (instructed by Poole Alcock Solicitors) appeared on behalf of the Applicant.

THE FIRST RESPONDENT appeared In Person.

MR CAREY (instructed by Morecrofts Solicitors) appeared on behalf of the Children's Guardian.

J U D G M E N T

(Transcript prepared without the aid of documentation)

SIR ANDREW McFARLANE P:

1 This is an appeal brought in the course of what have sadly become very long-running private law proceedings. The proceedings relate to a little girl who is now over 3 years of age. Because I anticipate this judgment will published in some form or another, I propose to be very short in describing the detail. I also do not intend to put much of the detail of the evidence in the judgment because, reluctantly, I have come to the conclusion that the appeal must be allowed and it is for another judge now to take up the case without any spin put on the evidence by me in selecting one part of it or another. So if I do give focus to one aspect of the evidence or another, it is purely to illustrate why the appeal is being allowed, not because I think that part of the evidence is more important than any other, or that the judge that takes the case on should not form his or her own view of the evidence

2 The appeal comes on because a fact-finding exercise was undertaken in the course of the proceedings over the course of two or three days in October and early November 2023 before Recorder Shaw. The factual allegations made related to the time that the couple were together, which, whilst it was a short period, because it coincided with the Covid lockdown it was quite an intense period in the sense that they were probably far more together than would be the case in the ordinary course of life.

3 The allegations that the mother sought to have determined were categorised under seven different headings. In the event, three of those specific headings were not pursued at the fact-finding by counsel, Mr Brindle, who represented the mother, but the ones that were pursued were, first of all, that the father had been emotionally abusive and, indeed, had threatened to harm the mother and/or commit suicide himself at the time that the relationship was coming to an end in an incident that took place on 20 December 2020. Secondly, the mother complained generally about the father's sexual conduct during the course of the relationship where he would, she said:

> "...force me to engage in sexual activities against my will and tell me that it was my duty as a woman to satisfy his sexual needs."

Most specifically, she made particular complaint that on one day, 16 June 2020 that she was raped by the father.

4 Finally, and more generally, she complained that, overall, the father had pursued a course of conduct towards her which was controlling and coercive. It is right to record that part of the background was that the relationship between the couple came to an end almost on the day that the child was born and, indeed, the father has not ever seen his daughter during the intervening three years. The mother has a highly negative view of the father and she cannot contemplate him having any role in her young daughter's life. It is also the case that the mother had unhappily not enjoyed the best of mental health during her adolescence and early adulthood and was on medication at the time of the relationship, albeit that, for I think a significant period, she stopped taking the prescribed medication. It is also the case that there is an age difference between the couple of approximately twenty years.

5 The Recorder plainly engaged in detail in the fact-finding process. He, as he refers in his judgment, had the benefit of a very substantial number of statements and other documents, including text messages, written messages, photographs, and other communications between the couple during the time that they were together and thereafter. He heard oral evidence from the two parents and from the mother's own parents. In particular, the maternal

grandfather with whom the mother had a significant conversation about the incident that she claims took place on 16 June, the day after (inaudible) of 17 June.

6 The Recorder in the course of his judgment sets out a summary, and it is a good and clear summary, of the number of different descriptions of the fact-finding task and advice as to how it should be approached that had been handed down in judgments in the Court of Appeal and by High Court Judges in recent years. This is a busy area for the development of the law with the court trying to understand more clearly what its role should be and how it should go about it when determining allegations of abuse in the context of domestic abuse where the overarching allegation is one of coercive and controlling behaviour and, within that, there are specific factual allegations that are raised. This is not easy territory for a judge and this Recorder accurately and adequately summarised the relevant law.

7 The target of the proposed appeal is the Recorder's decision with respect both to the direct allegation of rape on 16 June and, more generally, the allegation of abusive sexual behaviour during the course of the relationship. Without giving undue detail in this public judgment, it is necessary to describe something of what the mother says about, first of all, the event on 16 June. She describes that she was pregnant with her expected baby by that time. The child was born some six months later. She was in the home occupied by the couple and the father simply demonstrated that he wished to engage in sexual activity and started to do so. She says at para.11 of her first statement:

> "I told him that I did not want to do it and he ignored me completely."

A bit later, after a description of how the activity moved on and how he began to force himself on to her in the course of sexual intercourse, she says:

> "I repeatedly told him to stop and that I didn't want to do this."

She then gives an account of how the incident ended.

8 It is right that the following day, and in particular on the following day in conversation with her father, the mother was openly questioning whether or not the incident that had taken place amounted to "rape" and the judge records the evidence about those conversations in detail.

9 More generally, with regard to the sexual relationship between the couple through much of their time together, in her second statement starting at para.13, the mother describes "many occasions" when the father would simply start behaving in a sexual way towards her when she did not want him to do that and he would simply insist, "That's what couples do." She gives some detailed accounts of that and gives another account of the incident of what she alleges was rape.

10 It is right that the father, in his statements, denies behaving in the way that is complained of and, in particular, in the course of his interview by the police he gives a very detailed account, as it seems, to the officers of the practical and physical impossibility of the actions that the mother describes having taken place on 16 June actually being physically achievable given the very cramped and tight size, and furnishing, of the living room, as she describes it, as taking place. It is not necessary for me to go into more detail about that because the point being made on appeal is succinctly put by Mr Michael Jones KC, who now leads Mr Brindle in prosecuting the mother's appeal. I propose to read out what the judge says about the incident on 16 June in the course of what is, I think, a reserved judgment, albeit one that was prepared seemingly against the clock and given the day after that the oral hearing had concluded. What the judge says is this from para.85 onwards.

"85. I deal firstly with the incident on 16 June.

86. There is no dispute that the parties had sexual intercourse, nor is there any dispute about the telephone conversations that the mother had the next day, particularly with her father, whose evidence about those conversations I accept without reservation.

87. What is in dispute is whether the mother consented or acquiesced, or whether she made it known and apparent to the father that she did not consent to sexual intercourse on that occasion, and whether there was a conversation afterwards as described by the mother saying, 'Did you just rape me?'.

88. I am quite satisfied that the father lied about there being no conversation and I prefer and accept the mother's evidence about the post-coital conversation. That evidence is supported by the account given by the grandfather in the phone call the following day and as I have already indicated, I accept his evidence without reservation as true, accurate, and reliable.

89. Given my finding that the father lied about the conversation, I remind myself that the father's lie does not automatically indicate that there must therefore have been a rape because the lie is just as likely to have been prompted by a fear that his denial of rape would not be believed.

90. Having considered all of the evidence, I am not persuaded that this was a rape. The mother's own hesitation to describe it as such and her search for confirmation of her own father the next day as to whether it was a rape or not does not, in my judgment, permit me to find, even on the relatively low standard of proof, that this was a rape.

91. As for the wider allegations of sexual activity throughout the relationship described in the mother's schedule as 'forcing her to engage in sexual activities against her will', again I [that must be 'am'] not persuaded on the evidence that that allegation is made out. This couple clearly had an active sexual life together. The mother had written down sexually explicit notes to the father, sent texts, and instigated and foreshadowed sexual activity throughout their relationship."

11 Generally, the Recorder's overview of the mother was that she had, to use my phrase, back-calculated her account of the father and the way he had behaved because of the growing negative feelings that she had towards him and her substantial regret over their time together which had developed as the months and years had gone on post-separation. In the Recorder's view she was looking now back with hindsight in a way which, he held, was not an accurate picture of how things had been at the time.

12 The criticism made by Mr Jones and Mr Brindle is simply this: that those few paragraphs in the judgment do not at all engage with or even refer to the mother's first-hand account of what she says took place in the room on the day when the sexual activity took place. I have already quoted from the mother's first statement in which she says that she said 'no' and that she did

not want him to proceed. The judge does not refer to that at all. Elsewhere, the judge finds that the mother was generally a fairly credible and accurate witness. It was necessary, in my view, for him to engage directly with her account of what took place irrespective of whether, later, she thought that what had taken place was or was not rape.

13 It is the behaviour that the court needs to look at between any couple in any fact-finding process. Was that behaviour abusive? Whether or not it can be categorised under one heading or another as 'rape' or 'sexual assault' is not irrelevant. Indeed, it is important, but it is not the end of the analysis. It is important for the court to understand, irrespective of any label, whether what had taken place was abusive and, judging by the two particular individuals before the court and of noting, especially here, that this mother had vulnerabilities, whether what took place was harmful to her in the context of the evidence as a whole.

14 Having referred to the evidence as a whole, essentially, that is the appellant's point of his appeal that it was incumbent upon the Recorder to analyse the allegation of rape in the context of the evidence as a whole. That would, of course, include the father's evidence about what happened in the room on the day and, for example, his account (no doubt given to the judge) of what he said to the police about how it just would not be physically possible. Just as the Recorder ignored the mother's evidence as to what happened during the event, the Recorder also ignored the father's account. So, with great reluctance, I am afraid it is just not acceptable for the judge to deal with this by simply saying:

> "There is no dispute that the parties had sexual intercourse."

The question for the court was how they behaved during the course of the intercourse, not whether it took place.

15 Mr Jones's other point, and it is really a manifestation of the overall criticism, is that the judge elevated the conversations that the mother had with the father and on the next day with her own father about whether or not it was rape, so that they became the sole factor or the sole determining factor in his overall analysis. I have already quoted from para.90 of the judgment, but the key phrase is that the Recorder regarded the mother's indecision about whether to categorise this as rape as being determinative in that he says that that "does not, in my judgment, permit me to find" that this was rape. I agree with Mr Jones, and the appeal is supported by Mr Carey on behalf of the child's guardian, that that elevation of that albeit relevant factor in the evidence to a status where the mother's indecision 'prevented' the judge from making any finding of rape was putting the matter far too high so as to make this neither a proper nor a sound method of analysis.

16 In coming to this conclusion, I have, as I hope I have made plain, a great deal of respect for the general proposition that a fact-finding judge has, in being immersed in the detail of a case over the course of two or three days in a way which is simply not open to an appellate court, and, in particular, seeing the couple in the court process, albeit the mother over a video link over the course of two or three days, a privileged position which allowed the Recorder on this occasion to have a highly informed view of all of the factors in the case. In addition, I particularly respect the substantial experience of this particular Recorder has in sitting as a judge in the family court. Despite those factors, which positively urge me not to allow the appeal, I am afraid that I must do so for the reasons that I have given.

17 The focus that I have attached to 16 June is not the end of the matter. For similar reasons, the Recorder's analysis of the more general allegations of abusive sexual activity throughout the relationship is less than adequate. It is dealt with in the course of five or six lines in one paragraph only, yet this was, in many ways, what the case was all about. Of all the allegations that were made, the significant overarching one that coloured the mother's

negative view of the relationship as a whole related to the way in which she said the father behaved towards her sexually and the question for the court was whether this was abusive. Clearly, part of that is whether she was consenting or not. Again, as I have indicated, unfortunately the Recorder's analysis was not sufficiently adequate for this court to allow it to stand.

18 So far as the further allegations that I referred to at the beginning in terms of the mother's list of allegations that were pursued before the judge, the judge did find that the father had behaved badly towards the mother at the end of the relationship. He gives an account of that. It is not necessary for me to read that into this judgment here, but he took the view that that was, in some ways, understandable given the tensions and given the straightforward emotional makeup of the father who did not want the relationship to end.

19 What I have said thus far is sufficient to determine the appeal and the fact that it should be allowed. I started the hearing by questioning Mr Jones with some precision about what the relevance of these findings is now in the context of a couple of who been separated for over three years, where there has, apart from the initial fallout at the time of separation, been no further difficulties between them and where the father has abided by the non-molestation injunction which is in place. Because of the mother's highly negative view of the father, because of her emotional and mental health vulnerabilities, this is going to be a difficult case for the court to resolve on welfare issues irrespective of any fact-finding and it is a live question for the court to consider now, because I am going to send the case back to the local court for determination, whether any further fact-finding exercise in relation to what happened during the couple's relationship when they were together is now necessary. All of the authorities which are well-known to the lawyers and, indeed, recited in part in the Recorder's judgment, stress that the purpose of the fact-finding is must not be simply to resolve issues between the couple. That is for them. The purpose of the fact-finding is to inform the ultimate welfare determination with respect to this young child's future relationship and whether it should start to become established with her father.

20 The father says with force and dignity to this court that he simply wants that process to move on now to the next stage and for him, he hopes, to meet his daughter. He says that he has no interest in being any trouble to the mother. He would be prepared to conduct himself as if the non-molestation order was in place for the rest of his life. His focus is solely on his daughter and he wishes to move on in that way.

21 I have asked Mr Jones to make sure that the mother knows that is what the father said. The mother is not at the hearing today (with my permission not to be here) and not only what he says but the way he said it. These are matters for her and for him in the end. They are the parents of this young child. They do not have to be locked in court proceedings and approaching matters in a forensic way as has been the case between them up until now. However, I do not underestimate the difficulties that the mother has and just as I have sympathy for the father's position, having read what I have read about the mother, I have sympathy for her as well.

22 So I am going to allow the appeal. I am going to direct that the case be sent back to be reallocated to a fresh judge. That reallocation will be undertaken by HHJ Steven Parker, the designated family judge for Cheshire and Merseyside. I am going to direct that a transcript of this judgment be drawn up on an expedited basis so that that is available for the local court when it gets to the case. It is not for me to say but it will be obvious that the need for the fresh judge to become engaged promptly and get on with the case is at a premium. I hope that matters will be resolved either to determine whether there should be a fact-finding

hearing or not, and if there is, to undertake it so that matters can be put back on the track despite the fact this appeal had to be allowed.

23 That is my judgment.

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This transcript has been approved by the Judge.