APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 14
HCA/2017/386/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

HDJS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Paterson Bell (for Tod & Mitchell, Paisley)
Respondent: Gillespie AD; the Crown Agent

30 January 2018

General

[1] On 10 May 2017, after a trial at the High Court in Glasgow, the appellant was convicted on charges that, between 21 September 2013 and 23 October 2015 at an address in Paisley Road, Renfrew, in New Zealand and elsewhere, he did: (charge 2) take indecent photographs of children, contrary to section 52(1)(a) of the Civic Government (Scotland) Act

1982; (charge 3) distribute or show indecent photographs of children, contrary to section 52(1)(b) of the 1982 Act; (charge 5) on various occasions, sexually assault his daughter, born in 2010, by lifting up her top and exposing her naked private parts, touching her body while she was bent down with her buttocks in the air, and placing his hand on her naked body, contrary to section 20 of the Sexual Offences (Scotland) Act 2009; (charge 6) on various occasions cause his daughter to participate in a sexual activity by causing her to be naked in his presence, expose her naked body and private parts and adopt a provocative pose, contrary to section 21 of the 2009 Act; and (charge 7) on various occasions engage in sexual activity in the presence of his daughter, by exposing his penis and masturbating, placing his penis near to her buttocks and holding it near to her vagina and head, contrary to section 22 of the 2009 Act.

[2] The judge imposed an extended sentence of 10 years, of which the custodial element was 8 years.

Evidence

[3] The investigation of the appellant had started in September 2015, when the New Zealand police discovered that indecent images of children had been posted on a chat group called "pedoparents 2" on a social networking site. The user was traced and access to his Dropbox secured. This contained indecent video and still images, including naked photographs of a young child, later discovered to be the appellant's daughter. In some of these a male was shown with his penis exposed and in others he was masturbating. One of the images had been sent from an internet address at which the appellant was the subscriber.

[4] On 20 November 2015, the appellant's flat in Renfrew was searched. He lived there with his partner JLM and their two children, namely the complainer (then aged 5) and her younger brother. The late father of JLM, namely AM, had lived in the flat for about 18 months before his death in August 2015. A mobile phone was found. This contained images of the complainer in sexually explicit poses and being sexually assaulted by an adult male. They were similar to those in the Dropbox.

[5] JLM identified the complainer in some of the images showing the sexual abuse of a child. She spoke to the complainer referring to "dad" in one of the video images. Although none of the images showed the face of the photographer, JLM was able to identify the appellant as the male in some of the images from her familiarity with his physical appearance, notably his fingernails and his genitals. She identified the voice of the appellant on some of the video images recovered in New Zealand. In cross-examination she denied that AM had been left alone to care for the complainer at any time. AM was shown in one of the images on the phone (Paisley 7). He was naked from the waist up. The appellant had told her that he had taken that photograph. In cross, it was elicited that JLM had been friendly with a registered sex offender, namely EK, before she had moved to the Renfrew address. There was no notice of incrimination and no attempt to compare the image of AM with those of any male in the indecent photographs.

[6] Police officers testified that a male in the images had the same type of body hair, pubic hair and heavy-set build as the appellant. Items of clothing worn by the male in some of the images matched clothing recovered during the search. Rooms of the flat were identifiable from the images. A Google account with the email address of the appellant was found on the phone. The same email was associated with the New Zealand social

networking service using that device. JLM identified the phone as one which she had bought for the appellant.

[7] The appellant did not give evidence.

Judge's charge and jury's request

[8] Neither the Crown nor the defence had sought to persuade the jury that they could themselves derive any benefit from comparing any of the images, many of which had been displayed in court during the trial, with each other. The judge gave the jury directions specific to their consideration of the images as follows:

> "You're here as judges, not witnesses. You have to form a judgment about what the witness says the image shows, just as you would form a judgment about a witness telling you what they saw. ... [Y]ou have to form a judgment about what the witness tells you is in the images ...
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> ... [Y]ou'll have to decide, is the evidence you've heard about the images, does it support proof of the crime ... [Y]ou can take into account the interpretations by the witnesses, what they said in their evidence, but, importantly, you are not bound by it. You're not bound by the evidence of any witness. It's for you to assess.
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> ... [Y]ou're entitled to compare what you saw on the image, the quality of the picture, and what the witnesses said they could see ... [Y]ou have to ... consider what the witnesses said, because central ... to the Crown's case is the identification of the accused as the person in a number of the images."

[9] In the course of their deliberations, the jury returned to court to ask if they could see a number of images. The first was a book of photographs of the appellant, following upon his arrest in November 2015. During the trial the jury had been shown two of these photographs; one being a head and shoulders shot and the other a view being of his naked lower torso and thighs, including his genitals. The other items were three images taken from the mobile phone. The first was that of AM, which JLM had identified as that of her father. The second was of an adult male with a naked penis, showing a pair of child's pants

on the ground nearby. There was no identification of the male. JLM had not been asked to identify him. The final photograph was an image of an adult male, with his penis exposed and being held between the buttocks of a young child. The male in this photograph was not identified.

[10] Both the Crown and the defence submitted that it would not be appropriate for the jury to be given these photographs for the purposes of their deliberations. The concern of the Crown was that the jury might seek to undertake a comparison between the images of the appellant, AM and the indecent images in which there was no facial view. That exercise had not been undertaken by any of the witnesses. The jury had had ample opportunity to view the images when the witnesses had spoken to them. The solicitor advocate for the appellant shared the concerns of the Crown, that the comparison of the images which the jury had requested had not been explored in evidence and that the jury might embark upon such an exercise. The disturbing nature of the final photograph might have had a disproportionate effect upon the jury. Both the Crown and the defence were of the view that the jury had had the appropriate directions on the need to consider the evidence of what was contained in the images and that the jurors were not witnesses.

[11] The trial judge concluded that it was not appropriate for the jury to have the images. AM had not been incriminated. There was no view in the three indecent images that would allow a comparison to be made between them and those of AM or the appellant. Such a comparison had not been explored in evidence. The jury had seen the images on a number of occasions. The judge was also concerned that the jury were only requesting four, out of approximately 50, images which had been shown during the trial. She directed the jury again that they were judges and not witnesses and that they required to form their own conclusions about what was said in evidence about what the images showed.

Submissions

[12] The first ground of appeal was that the trial judge had erred in refusing the request by the jury. The images were real evidence which the jury could have used to establish the identity of the perpetrator, irrespective of any concurring or conflicting testimony. Following *Gubinas* v *HM Advocate* 2017 SCCR 463, the jury had been entitled to form their own view of whether the images showed the appellant or someone else, including AM. They provided the best evidence of the identity of the perpetrator. The jury had been deprived of the opportunity to carry out an essential assessment of the images. The second ground was that the trial judge had erred in directing the jury that they were judges and not witnesses and that they had to form a judgment about what the witnesses had told them, rather than form conclusions from the images themselves. The directions excluded the jury's own assessment of what the images showed.

[13] The advocate depute submitted that a jury did not have an absolute right to be given the productions during their deliberations. The parties had agreed that the images should not be given to them at that stage. There had been no incrimination, particularly of AM, nor had any witness been asked if AM had appeared in any of the images. The jury had seen the images during the trial. They had not been prohibited from assessing them. The judge had correctly exercised her discretion to withhold them.

[14] *Gubinas* v *HM Advocate* (*supra*) was distinguishable. There the jury had been asked to make a common sense assessment of whether what was shown in images was consensual or non-consensual sexual activity and, in particular, whether a particular gesture could be seen. In this case, what was shown in the images would not be familiar to the jury. They would have had to base their verdicts on whether the appellant's body could be identified in the

images; whether his clothing was shown; and whether the images were taken at the *locus*. The jury were not entitled to pursue a frolic of their own.

[15] In any event, no miscarriage of justice had occurred. The Crown case had not been periled upon a comparison. There were the circumstances that: (1) the complainer, who was undoubtedly shown in the images, was the appellant's daughter; (2) the *locus* shown was his flat; (3) the appellant was a "stay at home" father who had sole care of the complainer for significant periods of time; (4) the Renfrew flat images were on a phone which belonged to the appellant; (5) the New Zealand images were linked to his email address; (6) his clothing, as recovered from the flat, was shown in the images; (7) the complainer had spoken of her "dad" in one of the videos; and (8) the appellant's voice was identified in another.

Decision

[16] Whether a jury should be given productions for consideration during their deliberations is a matter for the discretion of the trial judge (*Hamilton* v *HM Advocate* 1980 JC 66, LJC (Wheatley), delivering the Opinion of the Court, at 69). The court will not interfere with the exercise of that discretion other than on the well-known conventional grounds for doing so. The judge must decide where the interests of justice, notably the fairness of the trial, lie. In doing so, the parties' views on the issue will be canvassed. Where both parties agree to a particular course of action, based upon reasonable grounds, it will only be in a quite exceptional case that an appeal against a decision acceding to both parties' request will succeed.

[17] It is worthy of some note *in limine* that in *Gubinas* v *HM Advocate* 2017 SCCR 463, the jury were not given access to the video for the purpose of an in-depth study. They were permitted to re-view the content to see if a particular gesture could be seen. That would be

something which, as that case determined, the jury could take notice of themselves in deciding issues of the credibility and reliability of those to whom its existence and significance had been put. In this case, the circumstances are different. The jury had images which undoubtedly depicted criminal acts perpetrated by the photographer. The head of the photographer was not shown in any image, so there would be nothing, by way of comparative study, which the jury could carry out under reference to the photographs of the appellant. They could hardly be expected to carry out their own comparison of the person's genitals as shown in the images and the photograph of the appellant's private parts (even assuming that this was a purpose of their request).

[18] In the absence of an obvious feature, this was a situation in which the jury would be bound to proceed on the basis of their view of the oral testimony, no doubt using any assistance from the images, rather than on their own empirical studies. Since there was no incrimination of AM, which was relevant to the central issue of the identification of the appellant from viewing the images themselves, the trial judge was entitled to direct the jury in the manner which she did. The witnesses had testified to seeing the complainer, the appellant, his clothes and his flat in the images, and to hearing his voice and the complainer's reference to her "dad". The judge correctly directed the jury that they had to assess that testimony, but that they did not have to accept it.

[19] Even if the court had considered that a misdirection had occurred, in light of the weight of this testimony, which was entirely uncontradicted, it would have been impossible to hold that any miscarriage of justice had occurred.

[20] The appeal is accordingly refused.