Neutral Citation Number: [2015] EWCA Crim 353

Case No: 201306115 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BASILDON CROWN COURT
His Honour Judge Graham
T20137099

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 11th March 2015

Before :

LORD JUSTICE McCOMBE
MR JUSTICE NICOL
and
HIS HONOUR JUDGE KRAMER QC
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

ANTHONY MILES	**Appellant**
- and -	
REGINA	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Stephen Rose (instructed by **Whiskers LLP**) for the **Appellant**
Mr Christopher Paxton (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 20 February 2015

Judgment
As Approved by the Court

Lord Justice McCombe:

(A) Introduction

1. On 1 November 2013 in the Crown Court at Basildon, after a trial before HHJ Graham and a jury, the appellant was convicted of four offences of sexual assault on a child (counts 1, 11, 12 and 13 on the indictment), two offences of rape of a child under 13 (counts 2 and 7), one offence of rape (count 3), three offences of assault by penetration (counts 4, 5, and 9), two offences of sexual assault (counts 8 and 10) and one offence of taking indecent photographs of children (count 15). He was acquitted of one charge of anal rape (count 6) and one charge of exposure (count 14).

2. On 25 November 2013 he was sentenced by the learned judge to terms of 4 years imprisonment on each of the counts of sexual assault on a child to be served concurrently, 15 years imprisonment (again to be served concurrently) for each of the offences of rape of a child under 13, 8 years imprisonment (concurrent) for each of the offences of assault by penetration, 4 years imprisonment (concurrent) for each offence of sexual assault and 1 year's imprisonment (concurrent) for taking indecent photographs. That gave rise to a total sentence of 15 years imprisonment. A Sexual Offences Prevention Order was imposed for a period 18 years.

3. He now appeals against conviction by leave of the Full Court, which gave such leave on limited grounds.

(B) Background Facts and the cases of the Crown and Defence

4. The persons against whom the offences were alleged to have been perpetrated were two girls, whom we shall call "X" and "Y". The appellant had married the girls' mother C in 2005. The offending in respect of X was alleged to have occurred between December 2008 and May 2012, when X was aged between 11 or 12 and 14 or 15 years old. These matters were the subject of counts 1 to 10 on the indictment. The charges in respect of Y were said to have occurred between April and June 2012 when Y was 12 years old (counts 11 to 14).

5. In June 2012 X said to a school friend that she had been raped by the appellant. That friend told her mother and the matter was reported to the girls' school and from there to the police. The appellant was arrested and his mobile telephone was seized. On that telephone there were 14 photographs which the Crown alleged were indecent (count 15). Four of the photographs were of X's exposed breasts. The other ten photographs included images of X naked. Others showed her with her legs apart and her underwear exposed. There were further photos of Y naked in the bath and some pictures of another younger sister (not the subject of any other charges) with legs apart and her underwear exposed.

6. Apart from founding the subject of count 15, the Crown relied upon the photographs as establishing that the appellant took a sexual interest in young girls, but for no other purpose.

7. The defence case was that the sexual activity alleged had not occurred; the photographs had not been taken by the appellant and, in any event, they were not indecent. He was a man of good character hitherto.

8. It is not necessary to say a great deal about the detailed evidence given by X and Y, having regard to the nature of the grounds of appeal. We do so only, for the sake of completeness, to give an overview of the nature of the allegations underlying the bare statement of the charges which we have already set out.

9. X said that the abuse of which she complained occurred at home when her mother was out at work; that was about two or three nights a week. Count 1 alleged oral sex performed by the appellant on her. Count 2 was an allegation of penetration of X's mouth by the appellant's penis. The first vaginal rape was said to have occurred when X was 13 years old; she said that it occurred on more than two occasions, the most recent (count 7) being about a month before she reported the matter to her friend in June 2012. The assaults by penetration were said to have consisted of insertion by the appellant of his finger into X's vagina. One such occasion was in June 2012 when she was taking a bath. On another occasion, X alleged, the appellant penetrated her vagina with a vibrator. The most recent act alleged was the appellant touching her breasts over clothing the day before she was interviewed by the police. She also gave evidence of the appellant taking her photograph on his telephone. X said that she had not reported the events for some time because of threats made by the appellant and her fear of splitting the family.

10. Y's allegations were of an incident on 1 June 2012 when she said the appellant had touched her vagina, inside and outside her clothing after he had helped her do her hair and before she went to bed. She spoke of other occasions where similar acts had taken place. Y said the appellant had not threatened her but she was worried about the effect any report would have on the family.

11. X's school friend gave evidence of X's complaint to her. At first she (the friend) had not believed what she was told. However, she said that it was repeated about two weeks later and she said that X had asked her not to report it because it would ruin X's family. She said that she had in the end told her own mother who reported the matter to the school.

12. The appellant did not give evidence at the trial, but a number of character references were read to the jury from others stating that the writers had had no concerns when the appellant was with their children.

13. The defence applied to exclude evidence of 10 of the 14 photographs obtained from the appellant's telephone. Those were the images other than the ones depicting X's exposed breasts. It was argued that the other photographs were incapable of being indecent and that, in any event, there was no evidence that the appellant had taken them, other than from their presence on his telephone. It was submitted that the photographs would have an unfairly prejudicial effect on the proceedings.

14. The judge refused the application and admitted the images, on the basis that they were capable of being indecent at the lowest level of the categories identified in *Oliver* [2002] EWCA Crim. 2766. He held that the photographs were evidence "to do with the alleged facts of the offence with which the defendant is charged" within the meaning of section 98 of the Criminal Justice Act 2003 and were not, therefore, "bad character" evidence for the other purposes of the Act. He tentatively expressed the view that they were also admissible as evidence to correct any false impression that only four photographs of young girls had been found. On the basis that the jury found

the photographs to be indecent the judge said they would be "admissible as evidence of propensity in showing a sexual interest in young girls", which was indeed the Crown's case. However, the judge's subsequent direction to the jury on this point went somewhat further than that and that direction forms one of the grounds of appeal before us. We return to it below.

(C) The Grounds of Appeal

15. With leave of the Full Court, the appellant (through Mr Rose of counsel, who appears for the appellant, as he did at trial) argues that the convictions are unsafe on two grounds. First, it is submitted that the judge erred in not excluding the ten photographs from the evidence, as being incapable of being held to be indecent. Secondly, it is argued that the judge erred in his direction to the jury as to the relevance of the photographs to the other charges on the indictment. As at trial, Mr Paxton appears for the Crown. At the conclusion of the hearing we complimented counsel on their able submissions and we do so again in this reserved judgment.

16. We take the grounds in the order set out above.

1) Admissibility of the 10 photographs/were they capable of being found to be "indecent".

17. Mr Rose first refers us to a number of features of the background to the photographs recovered. All the images had been deleted and were inaccessible thereafter to the user of the 'phone; 178 images, still on the memory card, were innocuous family photographs; hundreds of other innocuous photographs had also been deleted; three adult pornographic films were found which were not alleged to be unlawful; the 'phone was not "pin-locked" on analysis. Further, there was no child pornography on the family computer and no evidence of searches for such material on that computer. The evidence as to the appellant taking the photographs in issue was merely circumstantial and derived only from the fact of their having been taken with his 'phone.

18. Mr Rose relies upon the cases of *Oliver* (supra) and *Dodd* [2013] EWCA Crim 660 for the proposition that none of the photographs here in issue were capable of being regarded as indecent. He argues that the photographs of Y in the bath were classic examples of naked children in a legitimate setting and that the others appear to have been taken surreptitiously, which is inconsistent with erotic posing, which Mr Rose seeks to identify as a *sine qua non* of indecency for the purpose of the offences charged.

19. With respect to these arguments, we do not think that the cases cited were intended to re-define how questions of indecency were to be determined in jury trials. As set out in the current edition of Archbold at paragraph 31-108a p. 2937,

> "…the jury must consider two questions: (a) is it proved that the defendant deliberately and intentionally took the photograph and (b) if so, is it indecent? In deciding (b) the jury have to apply the test stated in *R v Stamford* [1972] 2 QB 391 at 398…of applying the recognised standards of propriety (… while the jury are representative of the public, it remains

> essential that they consider the question of indecency by reference to an objective test, rather than applying their subjective views to the matter)"

20. In *Oliver* the court was concerned to examine the Sentencing Advisory Panel's advice on sentencing for offences relating to obscene photographs of children. The Panel's advice had been supported by research from a project known as "the COPINE Project". The court accepted that the Panel's adoption of some of the categories of image indentified by the Project were appropriate definitions of levels of indecency for sentencing purposes, but the adoption of other categories were not.

21. In *Dodd*, which was an appeal against conviction by a jury of offences arising from the downloading of allegedly indecent images, the point in issue was that the jury had been given in their bundle of documents a summary of the photographs in issue which included the assertion that the images were "Level 1" and a schedule of six photographs on which each was described as "Level 1 seriousness". There was a further document put before them purporting to be the "COPINE scale" and another headed "RESTRICTED MATERIAL. Explanation of the COPINE Categories". Finally, there was a summary of each of the exhibits, beginning with the words "Level 1 image".

22. All this material, in the *Dodd* case, had the tendency to give the jury the impression that the images in issue were indecent at Level 1 as a matter of law and so withdrew from them the question of whether the images were indecent as alleged. The court was critical of the form in which the commentaries on the images had got before the jury in the manner in which they did. Further, the material produced allowed the police's opinion as to indecency to go before the jury. In this context, Hallett LJ, giving the judgment of the court in that case, said (in paragraph 24),

> "…most importantly, as far as the criminal justice system is concerned there is at present only one scale of indecency, the Oliver scale. If, therefore, the level referred to in the indictment was, as prosecution counsel asserted, and the judge endorsed, level 1 on the COPINE scale, they were plainly wrong. In so far, therefore, as the prosecuting advocate may have left the jury with the impression that they could get guidance on what constituted an indecent photograph from the COPINE scale, they were in significant error".

23. Mr Rose argues that this means that it was for the court to assess whether the images here in question fell within one or more of the categories identified in the *Oliver* case. Obviously, in a clear case, the images may not surmount the obstacle of being capable of sustaining a conviction if left to a jury properly directed. However, in our judgment, of more importance for the conduct of jury trials was what Hallett LJ said in the final sentence of the preceding paragraph (paragraph 23), namely:

> "It is for the jury to decide whether an image is indecent and only if the jury return a verdict of guilty is the level of seriousness of image relevant to the issue of sentence".

24. In our judgment, Mr Rose's submission that the images in this case failed as a matter of law to amount to indecent photographs makes the same error as the Crown made in *Dodd*, namely it seeks to remove from the jury their important function which is to determine the question of whether the images in issue are indecent or not. That question is to be decided by them and not by any pre-conceived categorisation of images into various levels, which is only useful for sentencing purposes once the jury have convicted the accused.

25. The judge directed the jury on the issue of indecency which they had to decide in the following terms (Summing-up Transcript pp.6C – 7A):

> "Let me say a few words about how you approach the question of whether they were indecent. I've put down there the basic legal formula, which is that "indecent" means contravening the standards of decency of ordinary and right-thinking people. So it is, if you like, an objective standard. It's not just what you individually thought of those photographs. It's a wider question of what would a right-thinking person think of those photographs. Would a right-thinking person think that those were indecent photographs? The test applies to the photographs themselves. So, for example, the intention of the photographer is irrelevant; whether they were taken covertly is irrelevant. In cases on photographs that have been considered by the Court of Appeal they have said that indecency or indecent photographs do not include for example nakedness in a legitimate setting, so a child on a beach. Similarly, to underline that, the surreptitious procuring of an image does not make it indecent. You have got to consider what the picture actually shows. Another way of putting it is: are these or are any of them a picture depicting an erotic image of a child, albeit with no actual sexual activity? So it is very much a live issue, an issue for you to consider.

In our judgment, that direction is entirely satisfactory and left before the jury the proper question.

26. We would add that we asked Mr Rose whether he was inviting us to examine the photographs so as to make an assessment different to that reached by the judge as to whether the images were capable of being "indecent". He said he was not asking us to do that. In such circumstances, it is impossible for this court to "second-guess" the judge's view on the question of whether the issue of "indecency" should be left to the jury.

27. In our judgment, the photographs were properly admitted in evidence and it was for the jury to determine whether they or any of them were indecent or not. We reject the first ground of appeal.

2) The judge's direction on the relevance of the photographs to the other charges

28. The direction in issue appears at pp. 8F-10A of the summing up, the contentious passage being at p.9A-C. It is as follows, with the passage in issue in our italics:

> "Now, the other matter is the effect of count 15 in relation to the other counts. A similar kind of principle applies to count 15, but the essential starting point before count 15 can have any influence on the other counts is that you would have to be sure that the defendant was guilty on count 15, in other words of those elements that he took the photographs and that the photographs were indecent. If you're not sure of either of those elements, then count 15 cannot be used in any way in relation to any other count.
>
> *So if you are sure that he took the photographs and that they are indecent photographs, then the prosecution argue that this evidence is relevant, because it establishes that the defendant has a propensity or a strong tendency to commit offences of the type with which you are concerned; that is, offences of a sexual nature directed towards young girls and these young girls in particular. If you agree with that, then the prosecution suggests it makes it more likely that the defendant committed the other offences on the indictment.*"
>
> The defence submit that even if he did take these photographs and even if they are indecent photographs, the other allegations are substantially different in character from the taking of photographs in that they involve actual physical sexual abuse. It is therefore for you to decide between those two competing arguments and decide whether count 15 does establish a strong tendency towards committing sexual offences against young girls. If it does establish that propensity, it is a matter for you to judge how far that assists you to resolve the question whether the defendant acted as alleged on the other occasions. Evidence of this sort of behaviour, other behaviour than the actual count you are considering, can only ever be part of the evidence in the case and its importance should not be exaggerated. It does not follow that just because a defendant behaved in a certain way on some occasions he did so on other occasions. Bad behaviour in taking those photographs, if that's what you find, and taking indecent photographs, if that's what you find, cannot alone prove guilt in relation to the other allegations on this indictment."

29. As already mentioned, the Crown never contended that the photographs were relevant to show any propensity to commit sexual *offences* on young girls, only that they might show that the appellant had a sexual *interest* in young girls.

30. For the appellant, Mr Rose submits that this was a misdirection which renders the convictions unsafe. In this regard, he refers us to this court's decision in *R v D, P and U* [2012] 1 Cr. App. R at **page** 97, a case involving the question whether evidence of possession of indecent photographs of children were admissible in evidence on charges of physical sexual abuse . In particular, he pointed our attention to paragraphs 6 and 7 of the court's judgment, given by Hughes LJ (Vice President) (as he then was) where one finds this:

> "6. Evidence that a defendant collects or views child pornography is of course by itself evidence of the commission of a criminal offence. That offence is not itself one involving sexual assault or abuse or indeed any sexual activity which is prohibited. It is obvious that it does not necessarily follow that a person who enjoys viewing such pictures will act out in real life the kind of activity which is depicted in them by abusing children. It follows that the evidence of possession of such photographs is not evidence that the defendant has demonstrated a practice of committing offences of sexual abuse or assault. That, however, is not the question for the purposes of gateway (d). The question under gateway (d) is whether the evidence is relevant to an important matter in issue between the defence and the Crown. Is it relevant to demonstrate that the defendant has exhibited a sexual interest in children?
>
> 7. It seems to us that this is a commonsense question which must receive a commonsense answer. The commonsense answer is that such evidence can indeed be relevant. A sexual interest in small children or pre-pubescent girls or boys is a relatively unusual character trait. It may not be quite as unusual as it ought to be, but it is certainly not the norm. The case against a defendant who is charged with sexual abuse of children is that he has such an interest or character trait and then, additionally, that he has translated the interest into active abuse of a child. The evidence of his interest tends to prove the first part of the case. In ordinary language to show that he has a sexual interest in children does make it more likely that the allegation of the child complainant is true, rather than having coincidentally been made against someone who does not have that interest. For those reasons, we are satisfied that evidence of the viewing and/or collection of child pornography is capable of being admissible through gateway (d). "

Hughes LJ also noted that the court must consider whether it is unfair to admit the evidence. He then addressed further the question of how the evidence of the photographs might be relevant in the context of alleged commission of physical contact offences. At paragraph 8, the Vice President said this:

> "8. The evidence with which we are dealing is evidence of propensity in the true sense of that word, by which we mean evidence of a character trait making it more likely that the defendant did indeed behave as charged. We are conscious that in the shorthand of the criminal courts the word "propensity" is sometimes applied, no doubt conveniently, to the case where there is evidence that the defendant has previously committed an offence similar to that which is now charged. Propensity may of course be proved by evidence of the previous commission of such an offence, and it may well be that that is the kind of propensity evidence most frequently adduced, but it

> is not limited to that kind of evidence. On the contrary, it may include any evidence that demonstrates that it is more likely that the defendant did indeed behave as he has been charged. It is however important that juries should be reminded that they cannot proceed directly from the possession of photographs to active sexual abuse. They must ask themselves whether this further step is proved so that they are sure. The exact direction will depend on the facts of each individual case. But it may be particularly important to remind the jury that the extra step does not follow and must be proved. "

31. Mr Paxton for the Crown argues that, in the passage of the direction after the section that we have italicised, the judge did sufficient to caution the jury that the taking of the photographs (if found to have been taken by the appellant) and the other allegations on the indictment were very different in character and that the photographs were only part of the evidence which should not be exaggerated. He had also directed the jury that they must consider each count on the indictment separately and that it did not follow that if the appellant behaved "in a certain way on some occasions he did so on other occasions". In this manner, Mr Paxton submits, the judge met the essence of the requirements outlined by Hughes LJ in paragraph 8 of the judgment in *D & ors.* (supra).

32. Mr Rose for the appellant, in contrast, submits that the judge failed to protect the appellant from the potential for the jury to gain the impression that if the appellant had taken the photographs he had a trait or tendency to commit rapes on children. Even with the judge's additional direction, he argues, that risk still remained. Moreover, Mr Rose reminds us this appellant was entitled to a good character direction, which was inevitably watered down by what the judge had said in the impugned passage in the summing up. Further, without the evidence of the photographs, this was a case of the jury's assessment of the appellant's evidence against that of the complainants and nothing else.

33. Mr Paxton agrees that the paragraph of the summing-up about which complaint is made went beyond the case that the Crown was making about the photographs in relation to the other counts in the indictment and to that extent it was an undesirable advance on the submissions made. However, he submits that, even if there was a misdirection, the convictions are nonetheless safe.

34. The most important feature of that submission is that, in contrast to the type of case considered in *D & ors*. (supra), this was a case where the photographs were not simply indecent pictures of children generally in the appellant's possession, they were photographs of the same girls who were the subject of the other counts on the indictment. Further, with regard to the four photographs whose admissibility into evidence was not contested, they were of that young girl with her top held up by a hand to expose her breasts. It was X's evidence that the appellant had taken those photographs. He had done so by holding her down and pulling up her top. So far as the other photographs which were referred to in count 15, we recall that the allegation was that the appellant had taken these as well (not merely that they were in his possession).

35. It is pointed out that the appellant did not give evidence at trial in the face of detailed and consistent evidence from the two complainants. The jury were entitled to draw an adverse inference from that, in accordance with the proper direction that the judge gave on the subject. The jury also returned two verdicts of acquittal (on count 6, anal rape, and on count 14 exposure). Mr Paxton submits, therefore, that they clearly did not rush from finding a propensity to commit offences, if they so found, to a conclusion that the appellant was guilty of all the charges. Moreover, he submits that the photographs were a small and discrete part of the case, calling for very short reference in the summing-up, in contrast to the extensive material arising for the complainant's evidence in chief and cross-examination.

36. In our judgment, having considered all these matters, these convictions are indeed safe. The judge did misstate the Crown's case as to the relevance of the photographs to the other charges on the indictment (apart from count 15) and it is unfortunate that this was not noticed and corrected at the time. However, we consider that the judge's direction as a whole did not distort the jury's consideration of the relevance of that material, when taken together with the subsequent passage warning them as to the small part it played in the case and that its importance was not to be exaggerated. As we have said, this was a case that was different from the subject of *D & ors*. Here the jury were faced with photographs of the very children against whom the other offences were said to have been committed, four of these depicted X in circumstances of significant indecency with the top of her clothing being lifted. Far more significant in the evidence were the accounts of the two girls, tested as it was in cross-examination, and in answer to which the appellant gave no evidence. The case against the appellant was a strong one and the most important issue was the jury's assessment of the veracity of complainants' account, in the face of the appellant's denials of the allegations in his police interview. Upon that evidence the jury reached its conclusions.

37. For these reasons, we dismiss the appeal.