Neutral Citation Number: [2010] EWCA Crim 1693

Case No: 2010/00313/B2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM Inner London Crown Court**
**His Honour Judge Mervyn Roberts**
**T20090454**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2010

**Before :**

**LORD JUSTICE LEVESON**
**MR JUSTICE RODERICK EVANS**
and
**HIS HONOUR JUDGE MICHAEL STOKES Q.C.**
**Sitting as a Judge of the Court of Appeal (Criminal Division)**

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**Between :**

| | | |
|---|---|---|
| | **HG** | **Appellant** |
| | **- and -** | |
| | **THE QUEEN** | **Respondent** |

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

**Mr E. Vickers** (instructed by the Registrar of Criminal Appeals) for the Appellant
**Mr J. Boothby** (instructed by the Crown Prosecution Service, London) for the Crown

Hearing dates : 9 July 2010

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Judgment
As Approved by the Court



**Lord Justice Leveson :** 1. On 26 November 2009 at the Inner London Crown Court before His Honour Judge Mervyn Roberts and a jury, this appellant was convicted by majority verdict of sexual assault upon "L", a child under the age of 13 years, contrary to s. 7(1) of the Sexual Offences Act 2003 ("the 2003 Act") and meeting L following sexual

grooming contrary to s. 15(1) of the same Act; he was acquitted of four other offences of sexual assault upon the same child. On 17 December, he was sentenced to terms of 12 months for assault and 4 years imprisonment concurrent for the grooming offence; he was also made the subject of a Sexual Offences Prevention Order for a period of 5 years. This appeal against conviction for the grooming offence only is brought with leave of the single judge.

2.In order to understand the way in which this appeal is put, it is necessary to rehearse the background which includes some of the detail of the offences in respect of which the appellant was acquitted. At the time of these allegations, L was 12 years of age and known to be that old because she was friendly with a similarly aged daughter of the appellant. The two families, both of whom formed part of the Colombian community in London, were close and socialised: they had planned to go on holiday together. In short, on five occasions (19, 20, 21, 22 and 24 March 2009), L alleged that the appellant had sexually assaulted her, initially with inappropriate kissing which progressed to touching her vagina and breasts underneath her clothing until the last occasion, when the appellant had picked her up from school, taken her to her home when neither of her parents were expected to be there and further assaulted her, being interrupted when L's mother unexpectedly came home. The appellant's case was that the allegations were completely false and that, on the last occasion, he had found himself in a potentially compromising position without the slightest intention of assaulting L. It was this last incident that led to the appellant's convictions.

3.Condescending to a little more detail, at about 9.30 pm on Thursday 19 March, the appellant visited L's home to help her father arrange car insurance. The family were asleep but L answered the door in her pyjamas. She said that there was a conversation when he told her he had been dreaming about kissing her and he then did so; at one stage she said that he touched her vagina and thighs over her pyjamas. The appellant agreed that he had visited the house on that day and that L had answered the door in pyjamas; she grabbed his hand and said that her mother was coming. He denied kissing her.

4.On Friday 20 March, the family visited L's family. L alleged that the appellant spoke to her about the previous night and kissed her, took her out to his car and kissed her again only stopping when his son came out of the house; at one stage, he also put his hand inside her underwear. Later, the appellant asked L to help him open a Hotmail account and suggested that they should have a code to text each other; later she received a text which, translated, read "I really like you darling". As to this allegation, the appellant agreed that he had visited the house to collect his wife but he denied kissing her inside or outside; neither did he suggest any text code or send a message. He normally left his mobile on the table and L used it to listen to music. The suggestion was made that L had herself sent the message from his phone.

5.We can deal with the next two allegations together. On Saturday 21 March, they had all gone to Stockwell for a barbecue and L alleged that the appellant had suggested that she and another friend come to their house for a sleep-over with his daughter. He invited her for a walk, but then his sons joined them. Later, in the garden, he kissed her and, on this occasion, she kissed him back. The following morning, when L awoke and went to the toilet, the appellant was in the bathroom, brushing his teeth; he invited her in, kissing and touching her. The appellant denied kissing her on the Saturday; she had joined him on the walk of her own volition but because he was concerned about his behaviour, he

had invited his sons along. She had suggested the sleep-over and he did not kiss her then or on the Sunday; he was extremely hygienic and would not even have kissed his wife unless she had brushed her teeth. Further, he was surprised to see her at the bathroom door and did not like the way she was behaving. That concern stretched into the following day when he ate a meal at L's house and she asked for his help to open an e mail account and also asked for £10 to top up her mobile phone.

6. The final incident, on Tuesday 24 March, involves more serious allegations. L said that she spoke to the appellant by phone and it was arranged that he would collect her from school and take her home. He waited for her near a small park because there were too many people around for him to come right up to the school. Once in the car, he kissed her and they talked before driving to her house; she was concerned not to be late, because it was her parents' practice to phone to check that she had arrived safely. In her evidence (but not in her original interview) she said that they kissed in the back of his car and that he put a jacket between the two seats so no one could see them.

7. When they arrived at L's home, she said that the appellant parked a little distance away and told her to check if anyone was home. When she signalled that the house was empty, he joined her. They went to her bedroom where he kissed her and touched her vagina but she told him to stop as she was having her period. He carried on kissing on the bed, removed her jumper and socks, unbuttoning her shirt so that he could touch her breasts. He asked her if she had ever had sex and she told him she had not. He closed the bedroom door but then L heard a noise and realised her mother was home. The appellant then hid behind her bed.

8. The story is taken up by L's mother who had come home early from college and been surprised to find the front door locked from the inside. She knocked and L said she was coming. When the door was opened, L was in a nervous state and her shirt was open. She asked L why she had locked the door and did not accept the answer she was given. She went to L's room and saw the appellant's leather jacket on the floor; in the pocket were car keys, bank cards and two condoms. She discovered the appellant hiding under the valance and when she challenged him, he said he knew it was wrong but he needed to go to the toilet; he pleaded with her not to call the police as they would give him 10 years. She called her husband and the appellant's wife (who also asked her not to call the police). L's father arrived and was extremely angry, threatening the appellant with a knife. The police were called and the appellant was arrested; when interviewed, he made no comment, later explaining that he relied on legal advice in that regard.

9. The appellant's account of this afternoon was that he had received a text from L asking him to call, which he did because he thought she wanted to discuss something important with him. Initially, he had refused to collect her from school but, after a further call, he relented because L's father was going to provide him with some money for their planned holiday; he thought that she wanted to discuss something private that she could not discuss with her parents' given their reaction to a large phone bill that she had run up after a holiday in Colombia. He picked her up away from the school to avoid the traffic and although she initially sat in the front of the car, he told her to move into the back because he did not let children sit in the front. He denied kissing her there or putting up his jacket to conceal their presence.

10. The appellant had thought that L's parents would be present when they arrived at her house and needed to use the toilet. L invited him in but initially he declined. L reassured him that her mother was at home so he told her to go in first and he would follow. When he found out that L's mother was not present, he felt worried. L took off her tie and jumper and tried to hug him; he was shocked and pushed her away. She told him not to be scared but he said "If the police find out, what are they going to think". It was then that he heard someone at the door and L pushed him into her bedroom, throwing his jacket from the hall into the bedroom as he tried to hide. He said that he told L's mother that she should not think that anything had happened because it had not: he had only gone into the house to use the toilet. The condoms were to use with his wife; they were going on holiday and they could not put them in the suitcase as the children might see them.

11. The appellant's wife confirmed his account in relation to the condoms, saying that she had seen nothing strange or untoward in the preceding days; L was a very tender and affectionate towards the appellant. She had always greeted him with a hug and a kiss on both cheeks which she did not consider inappropriate.

12. The judge rightly directed the jury that the counts had to be considered separately and that their verdicts did not have to be the same. He correctly defined sexual assault and went on to define the last count (which he described as sexual grooming) in these terms:

> "What that ... requires the prosecution to establish is this: first of all, that the defendant is a man of 18 or over. Well, he plainly is, there is no issue about that. That he met or communicated with [L], a child under the age of 16. No issue about that. He did meet and communicate with her. She is under the age of 16: she is, in fact, 12. That he did that on at least two earlier occasions. No issue about that, members of the jury, he did. That having done so he intentionally met and communicated with her ... not reasonably believing that she was aged 16 or over, and, at that time, intended to commit a relevant offence.
>
> Now the intentional meeting and communication refers to the Tuesday. There is no doubt that he did intentionally meet with her. ... Whether the meeting at the school was instigated by him or by her, there was a meeting and it was an intentional meeting and there was communication between them, and that was clearly intentional as well. No issue about that.
>
> At the time he did that, again there is no issue, he did not reasonably believe that she was aged 16 or over. He admits, of course, that he knew perfectly well that she was a child of 12. So what we are looking at in this count and there the issue comes from is whether, when he did that, he intended to commit a relevant offence."

13. The learned judge then described what he meant by a relevant offence, identifying the prosecution case as an intention to go beyond the sexual assault alleged "hence the attempt to, say the prosecution, undress her, [in] which he was interrupted by the mother and to use the two condoms that were found in his possession". He put the case as an

intention to go further than the kissing and touching.

14. In the event, the appellant was acquitted on the first four counts of the indictment and committed only on the two remaining counts. In his skeleton submission, Mr Edmund Vickers, for the appellant argued that the grooming count should not have been left to the jury following the acquittals on the four assault charges because that conviction was inconsistent with the other verdicts. In any event, the judge's summing up did not anticipate such a scenario, his direction in relation to the grooming count was deficient and that conviction was unsafe. In argument, these submissions developed to the position in which he accepted that the Crown did not need to prove covert sexual grooming at earlier meetings.

15. Against that background, it is important first to start with the terms of the statute. The heading to s. 15 of the 2003 Act is "Meeting a child following sexual grooming etc" and s 15(1) provides:

> "A person aged 18 or over (A) commits an offence if –
>
> (a) A has met or communicated with another person (B) on at least two occasions and subsequently –
>
> (i) A intentionally meets B,
>
> (ii) A travels with the intention of meeting B in any part of the world or arranges to meet B in any part of the world, or
>
> (iii) B travels with the intention of meeting A in any part of the world,
>
> (b) A intends to do anything to or in respect of B, during or after the meeting mentioned in paragraph (a)(i) to (iii) and in any part of the world, which if done will involve the commission by A of a relevant offence,
>
> (c) B is under 16, and
>
> (d) A does not reasonably believe that B is 16 or over."

16. On the face of it, the fact that the description of the offence in the heading is "meeting a child following sexual grooming etc" might be taken to suggest that the behaviour antecedent to any arranged meeting must itself be sexual in nature. The phrase "sexual grooming", however, does not appear in the section and although the origin of the offence might have been a concern that paedophiles could use the internet to contact and groom children, the language of the provision is far wider than 'virtual' sexual contact. Thus, the only requirement prior to the intentional meeting during which A (over 18) intends to do anything to B (under 16) which, if carried out, would involve the commission by A of a relevant offence is meeting or communication "on at least two occasions". There is absolutely no requirement that either communication be sexual in nature. As the editor of Smith and Hogan, Criminal Law (12th edn.) observes (at para. 16.5.6.1), this reflects the fact that persons in this position will (or, as we add, may) seek to secure the confidence of their target by discussing innocuous issues in earlier conversation. Indeed, at that time, B need not necessarily be a sexual target at all; the

word "etc" clarifies that the heading should not be used to derive the conclusion that the earlier meetings need be sexual. The aim of the statute is to penalise those who use a relationship which they have developed (whether innocently or otherwise) as a platform from which to launch sexual offending.

17. We turn to the all important intended meeting. The statute visualises the commission of an offence whether or not that meeting takes place; it is sufficient if, with the intention of meeting, A travels to B or B travels to A. In each case, however, A must intend to commit a relevant (sexual) offence. Thus, either when A travels to B, waits for B to arrive or at the moment of meeting, A's sexual intention must be proved. It is not enough that, during the course of a meeting, started without any such intention, A then decides to take advantage of the situation and commit an offence: the crime then will be the commission of or the attempt to commit that offence. The offence contained within s. 15 is not engaged.

18. Turning to the facts of this case, therefore, the acquittal of the appellant on the first four counts is irrelevant (save for the impact that the jury doubtless considered in relation to the credibility of L). Putting the earlier allegations to one side, there was more than a substantial body of material corroborating L which justified the jury reaching the conclusion (if they so wished) that the appellant had travelled to collect her from school and picked her up, intending to commit a sexual assault. The presence of the condoms in the appellant's pocket, his willingness (notwithstanding his professed concerns about L) to enter the house, the fact that the door was locked from the inside, the disarrangement of L's clothes so soon after his arrival and his conduct (including what he said to L's mother) are all potentially supportive and more than sufficient to allow that inference to be drawn.

19. The appeal therefore turns on whether the judge left the case to the jury on the correct basis. Stripping out the conceded elements of the offence from the direction which we have set out above, he said (the emphasis being ours):

> "... he intentionally met and communicated with her ... , and, <u>at that time</u>, intended to commit a relevant offence.
>
> Now the intentional meeting and communication refers to the Tuesday. There is no doubt that he did intentionally meet with her. ... Whether the meeting at the school was instigated by him or by her, there was a meeting and it was an intentional meeting and there was communication between them, and that was clearly intentional as well. ...
>
> .. So what we are looking at ... is whether, <u>when he did that</u>, he intended to commit a relevant offence."

20. Thus, not once but twice, the learned judge directed the jury to focus on the time of the intentional meeting; he further specifically directed their attention to the place of the meeting namely L's school. The emphasised phrases "at that time" and "when he did that", are, in our judgment, perfectly clear. In the circumstances, the jury reached a conclusion which was open to them on the facts, having been appropriately directed as to the law. This appeal is dismissed.