Neutral Citation Number: [2011] EWCA Crim 916
Case No: 201005872 C3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Wednesday, 23 March 2011

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE MACKAY

MR JUSTICE HICKINBOTTOM

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R E G I N A

v

SEAN ROBINSON

- -

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MR R HALLOWES appeared on behalf of the **Appellant**

MR D FUGALLO appeard on behalf of the **Crown**

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J U D G M E N T

1. **LORD JUSTICE ELIAS:** On 6 October 2010, in the Crown Court at Guildford, before HHJ Addison on a retrial, the appellant was convicted on one Count of indecent assault (Count 1) and two Counts of rape (Counts 3 and 7). There were unanimous verdicts on Counts 1 and 3 and a majority verdict of 11 to 1 on Count 7. He was sentenced to 9 years on the two Counts of rape, concurrent with each other, and 1 year for the indecent assault, giving 9 years' imprisonment in all. He was acquitted of Count 2 (gross indecency) by the jury on the judge's direction, and of Counts 5 and 8 (rape) and Count 6 (sexual intercourse with a girl under the age of 13) by the jury. The Crown

offered no evidence on Count 9. The jury was discharged from returning a verdict on Count 4.

2. All of these Counts, except Count 9, were against the same complainant. Count 9, on which he was acquitted was against the complainant's sister and it is not necessary to say anything more about it.

3. The Counts with respect to which he was convicted concern the following conduct. Count 1 was an act of indecent assault when the appellant touched the complainant's leg; Count 3 was a specific act of rape when she was 12 years old; Count 7 was a sample Count alleging multiple occasions of rape when the girl was aged 13. Count 4, on which the jury was discharged from returning any verdict, was the alternative to the Count 3 rape count of sexual intercourse with a girl under the age of 13. Count 5 was a sample Count alleging multiple occasions of rape when the girl was 12 and Count 6 was an alternative to that Count of sexual intercourse with a girl under the age of 13. Count 8 was multiple occasions of rape when she was aged 14. As we have said, the appellant was found not guilty on that count.

4. There was an earlier trial where the appellant had been tried on nine Counts. The jury had acquitted on two Counts of indecent assault but had failed to agree on the other seven Counts. One of the grounds of the appeal is that the judge at the retrial wrongly refused to allow the jury to hear evidence of the acquittal on Counts 1 and 2 in the previous trial.

5. This is a historic sex case, the events in question having occurred between the years of 1996 and 1998. They did not come to light until the complainants made allegations many years later.

6. The background is as follows. The appellant, in the mid 1990s, formed a relationship with the complainant's mother, SS, following the breakdown of her marriage. He formed a particularly close relationship with her daughter, ZK. She would visit him at his flat and play computer games when she was 11 or 12. She referred to a particular occasion when she got into bed with the appellant and her mother and he touched her legs under the cover. He would kiss and stroke her leg when they were in the car together. He showed her pornographic films on television when she was at his flat. Gradually, this developed into a fuller sexual relationship and they had sexual intercourse, first when she was 12, and thereafter the relationship continued for some 3 years. As we have said, some of the Counts were sample Counts to reflect the continuing conduct.

7. There was evidence from a number of witnesses who alleged that ZK had disclosed the abuse to them, and the mother gave evidence of a diary that had been kept by the complainant when she was young which had revealed elements of this improper relationship. She had in fact challenged the appellant with it at the time.

8. The appellant was a man of good character. He denies that anything untoward had

occurred at all. He accepted that he had played games with ZK, he held her hand, he told her she was pretty, but he did not find her sexually attractive. He denied that there was anything inappropriate in the relationship.

9. The grounds of appeal concern two rulings by the judge. The first was that he rejected a submission of no case to answer at the end of the prosecution case with respect to the charges of rape. The judge did in fact uphold a submission in relation to Count 2, which had concerned indecency with the child, on the basis that the complainant was not sure whether or not she was 14 at the time, and if she was then the offence would not have been committed. But he rejected the submission with respect to the rape cases.

10. The basis of the application was that, looking at the evidence as a whole, there was insufficient evidence to go before the jury because the evidence suggested that, far from objecting to the sexual intercourse, the complainant had been a willing participant. In his ruling rejecting the application, the judge referred to passages from the very lengthy video interview which the complainant had given and noted that he was taking them into consideration.

11. We have been taken to those passages. It is not necessary to go to them in any detail but, to give one or two examples, the complainant said that during the act of intercourse she felt detached from it, that she did not initiate it, that it was something that happened to her, and that she did not think that she had had any orgasm. She was specifically asked whether she had said no to having sex with the appellant and she said this:

> "I remember sort of half-heartedly saying no, and then -- especially to things I didn't want to do, or at first just being very like 'no, I don't think so'. And it was, I remember, it was being him definitely persuading me a lot, but not, maybe not really forcibly, just like 'oh, come on, what are you worried about?' and almost talking me through it, like 'why are you so nervous? Why don't you want me to do this?'"

There are various other passages to like effect.

12. Mr Hallowes, counsel for the appellant, has also referred us to a number of passages which clearly demonstrate that the child was infatuated with the appellant, and that she thought he had fallen in love with her and that she wanted to be with him, at least at various stages during the period of their relationship.

13. The judge noted that the interviewing officers had not in terms asked the complainant whether she had consented and he posed the question himself when she was being cross-examined. He asked her about the first occasion of sexual intercourse when she was 12 and his summary of her answer was as follows:

> "I did not ask the defendant not to, I did not move to stop him. He reassured me that it was okay. I did not make it plain to him that I didn't

> want to. There was no occasion when I said that I didn't want him to do it, at least not before I met Tristan".

The reference to Tristan is to a boyfriend with whom she started a relationship at the age of 15.

14. The judge recognised that she was comparatively sexually mature for her age. She had started her periods at the age of 11 and grown breasts. She was a bright girl, she had no learning difficulties, and he described her as intelligent, attractive and sensible. But he concluded, nonetheless, that there were passages in the interview, some of which we have now referred to, which were consistent with her submitting to the intercourse rather than consenting to it.

15. The judge said this:

> "It does seem to me that it was perfectly open to the jury on these facts to infer that she did not genuinely consent, or, put the other way, to infer that what happened was mere submission on her part, having been comprehensively groomed by him, and there is the curious possible evidence of that, not only from Z but from other sources as well. The defendant spent a great deal of time with her, he played with her, watched films with her, and enjoyed her company, and indeed continually praised her, said how pretty she was and clever she was, and indeed how much he loved her. They held hands, he sat her on his lap, stroked her hair and so on. Clear evidence of grooming."

He recognised that it would be more difficult to infer that she had not consented as she grew older, but considered that it was difficult to draw any hard and fast line and that it was a matter which should be left to the jury, with appropriate directions.

16. The second ground of appeal relates to a different ruling by the judge, which he in fact reiterated after returning to it on two occasions, where he refused to allow evidence of the eariler acquittals to be put before the jury. Mr Hallowes, who was counsel below, wanted the acquittals to be adduced in order to show that the previous jury could not have been sure either of the complainant's reliability or her credibility. That, he submitted, was relevant evidence and it was fair that it should be admitted.

17. The judge rejected this application. He noted that the jury knew nothing about the earlier indictment and would merely be told that the jury had disagreed on the Counts that were now before them. He said that the acquittals may possibly have indicated no more than a compromise which demonstrated that the earlier jury had not been sure that these offences had been committed. That did not take matters any further and was of no assistance to the jury. He said this:

> "It would simply confuse the jury in this case, and it is entirely unreasonable that they should hear about these two Counts and then be

> faced with the totally unnecessary arguments as to what the consequences of the previous jury's verdicts on those two Counts are, and what they prove and what they do not prove. It is all entirely unnecessary. My ruling is that they should not hear it."

18. Discussion.

19. We consider these two grounds in turn. As to the first, counsel for the appellant accepts that the distinction between consent and submission is well established by the authorities, such as Olugboja [1982] QB 320 and Malone [1998] 2 Crim App R 447, but he submits that there was no proper evidential basis for concluding that there might be submission here. He relies, in particular, upon the complainant's response when posed questions by the judge.

20. He refers to a passage in Malone to illustrate what he submits are the kind of circumstances where a jury might properly find that there has been submission. Roche LJ, giving the judgment of the court (Roche LJ, Sachs and Collins JJ) said this:

> "No doubt in order to obtain a conviction there will have to be some evidence of lack of consent to go before the jury. But what that evidence will be will depend on the particular circumstances of the case that the jury is trying. The evidence may be of widely differing kinds, as a few illustrations will show. It may be the complainant's simple assertion 'I did not consent to sexual intercourse with the defendant', it may be evidence of threats uttered by the defendant, it may be evidence of the use of physical force by the defendant, it may be the evidence that the complainant was, by reason of drink or drugs, incapable of giving consent ... it may be evidence that, by reason of age or lack of understanding due to mental handicap, the complainant did not give consent".

21. Counsel submits that in this case there is no evidence of submission of the kind falling within the situations described there. He accepts that, with respect at least to the first alleged act of intercourse when the complainant was 12, age is potentially relevant when considering whether there is true consent. But here, where the judge had found on the evidence that she was a mature 12-year old, that she plainly understood the nature of the sexual act and was capable of making up her own mind, then the only proper inference was that she had full capacity. She never expressed any lack of enthusiasm for sex and did not at any stage say she was an unwilling participant. He was also critical of the fact that, in his ruling, the judge put some weight on the finding that the girl may have been groomed by the defendant. That was what the Crown were alleging. He submitted that this is not necessarily pertinent to the question of consent at all. He asked rhetorically whether, if she positively asserted that she was consenting, could the issue of consent have been left to the jury because of her grooming?

22. Grooming is not a term of art, but it suggests cynical and manipulative behaviour

designed to achieve a particular sexual objective. Not all relationships with underage children can fairly be characterised as involving grooming, although many will. But even where they can, the fact of grooming plainly does not necessarily vitiate consent. Many a seducer achieves his objectives with the liberal and cynical employment of gifts, insincere compliments and false promises. But such manipulative and deceitful methods could not be relied upon to establish a lack of consent whenever the seduction was successful. The situation will often be no different where the complainant is under age. But where the exploitation is of a girl who is of an age where she does not, or may not, have the capacity to understand the full significance of what she is doing, and in particular, where, as here, there was evidence of acquiescence or acceptance rather than positive consent, we think that, as the judge found, it would be open to the jury to conclude that the complainant, perhaps out of embarrassment or some other reason, had in reality unwillingly gone along with the acts which she did not in fact wish to engage in.

23. The judge was asked a question by the jury about this in the course of the summing up. The question was this:

> "If a person has been groomed to believe that sex is normal in a relationship, can they be considered to be capable of consenting to it at any point in that relationship and therefore the defendant can be considered reckless towards that consent?"

And he responded as follows:

> "Now, on the point of grooming, it is really an essential part of the prosecution's case, isn't it, that she was groomed; that he chatted her up and said that she was pretty and clever and all the rest of it. Of course, that is the prosecution's case. His case? Well, that is rubbish. I didn't, I was just trying to be helpful and to get on with her. It is an essential part of the prosecution's case that he groomed her. If you consider that he did, well then you will have to consider the effect that had so far as the question of whether her consent was genuine or not, and if you were sure that he did groom her then you will have to consider the question of whether or not he knew that she did not consent or was reckless about it, in the light of the fact that he had groomed her."

No complaint is made about the judge's response to that question, and we respectfully think it was an appropriate one.

24. The only question we have to decide is whether, in view of this girl's age, and having regard to the passages in her interview and when she gave evidence, there was sufficient evidence from which the jury could infer a lack of consent. We are satisfied that the judge was right to say that there was. As Galbraith emphasises, the judge should not usurp the jury's functions by withdrawing the case from them. Some 12-year olds plainly do not have the capacity to consent. Whilst this young girl did not

fall into that category, in our judgment there was evidence on which a jury was entitled to find that her immaturity, coupled with the evidence of acquiescence rather than enthusiastic consent, particularly in the context of what could be perceived as grooming, meant that there was no proper consent.

25. In Olugboja, Dunne LJ said, at page 351, that it should be for the jury to determine where the dividing line is between consent and mere submission, "applying their combined common sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case."

26. In Hysa [2007] EWCA Crim 2056, a case in which a judge had upheld a half time submission where there was strong evidence that a drunk 16-year old had consented to intercourse, the Court of Appeal held that the issue ought to have been left to the jury. Hallett LJ observed that questions of capacity and consent should normally be left to the jury. It is therefore only in the clearest of cases that a judge is entitled to conclude that there is no evidence on which the jury could properly convict in a case of this kind and accede to a submission of no case. This was not such a case.

27. Counsel submits, further, that even if there was evidence to go to the jury as to whether she consented at the age of 12, the position must have been different as she had got older. There was no justification for denying consent as she became older, so he submitted that Counts 7 and 8, which were the sample Counts alleging rape when she was 13 and 14, ought not to have been left to the jury.

28. The judge recognised that this was a difficult issue. He concluded that it was a matter that had to be left to the jury and, in our judgment that was the only sensible view he could take. In fact, of course, the jury acquitted on Count 8, which suggests that they fully understood and applied the judge's observations in the summing up that as the complainant got older so it would be more difficult to say that she was not consenting.

29. We therefore dismiss the first ground of appeal.

30. We turn to the second ground, which concerns the refusal to admit the evidence of the two acquittals to be put before the jury. As we have said, these were concerning relatively trivial indecent assaults of stroking the complainant's leg and kissing her in the car. Mr Hallowes, realistically, did not object to the facts of these earlier Counts being before the jury, since they were plainly a part of the context. He also accepted that he could not rely on the acquittals to show that these acts had not occurred. That was plainly correct, as the cases of Z [2000] 2 AC 281 and Terry [2005] 2 Crim App R 7 demonstrate. He wished to rely on these acquittals to show that the previous jury must have harboured doubt about the claimant's reliability or credibility. He wished to use them, in other words, in a positive way.

31. There is no doubt that the general principle is that evidence of acquittals is irrelevant, since it amounts to no more than evidence of what another jury thought on the facts presented to them: see the decision of the Privy Council in Hui Chi-Ming v R [1992] 1

AC 34. There are exceptions to this principle where, for example, an acquittal on the first trial necessarily involves a finding by the previous jury that they did not believe a particular witness. A particularly vivid example of this is the case of Cooke [1987] 84 Crim App R 286 where the defendant was accused of offences of conspiracy to commit forgery and other related offences and it was alleged that they had made admissions to a police officer in a related case but involving a different defendant. The jury had acquitted the defendant in circumstances which strongly suggested that the police officer had been lying because, in that case too, he had alleged that there had been a confession in interview. The question was whether the police officer could be cross-questioned about that earlier acquittal. The judge held that he could not but the Court of Appeal, on appeal, held that he was wrong to reach that conclusion.

32. Archbold 2011, at paragraph 4332, states that the principle to be derived from Cooke is as follows:

> "Where there is a clear inference from a verdict that the jury has rejected a witness' testimony on the basis that they do not believe him, as opposed to thinking he might have mistaken, and that witness' credibility is directly in issue in a subsequent trial, evidence of the outcome of the first trial is relevant."

33. Counsel's submission is as follows. The incidents relied on in the earlier trial were plainly evidence of indecent assaults. It was never suggested otherwise. Given the age of the complainant, there could be no consent, so the only question for the jury was whether they had occurred. In finding that they were not sure they had occurred, the jury must at least have had reservations about the reliability of the evidence of the complainant. That was a necessary inference and it was something about which the jury ought to have been informed. In a historic sex abuse case in particular, the judge should ensure that all matters in favour of a defendant are put before the jury. Counsel referred to cases of Joseph Robert H [1990] 90 Crim App R 440 and a short note of the case of R v Y [1992] CLR 436 which he submitted, in principle, supported this proposition. We do not think they do because on the facts of those cases it was not possible to infer that the jury must have acquitted because they were unsure of the reliability of the complainant's testimony. These were old cases and, as the court noted in each of those cases, the jury may simply have acquitted because there was no corroboration of the testimony of the witness' evidence. Counsel submits that since the change in rules about corroboration, the lack of corroboration could not explain the acquittals in this case.

34. We think that certain observations in the case of Joseph Robert H are in fact pertinent to the submissions being advanced here. In that case, at a first trial, the appellant was charged with various sexual offences. He was acquitted on some and the jury failed to agree on others. As in this case, the appellant's counsel sought to adduce evidence of acquittal on the Counts of indecent assault at the first trial to test the reliability of the complainant's evidence. The Lord Chief Justice, sitting with Rose J and Sir Bernard Caulfield, noted that the fact of the acquittal could not demonstrate that the complainant

was a liar, otherwise the jury would not have disagreed on the other Counts. The Lord Chief Justice also identified a number of reasons why the acquittals could have occurred in circumstances which would not necessarily have cast any adverse reflection on the reliability of the witness at all. Then he said this (page 445):

> "It seems to us that, in a case such as this, the judge has a very difficult exercise to perform. He has to balance the interests of the defendant against the interests of the prosecution and he has to determine, in the light of those considerations, what, in his judgment, would be fair. Because, like so many problems in the criminal trial, it is fairness rather than any remote abstruse legal principle which must guide the judge. Coupled with that fairness, if indeed it is not part of it, is a necessity for the judge to ensure that the jury whom he is assisting do not have their minds clouded by issues which are not the true issues which they have to determine."

35. In this case, one possible explanation for the acquittal is that the jury did not consider that the acts were indecent. Counsel submits that in fact that was not the way in which the case was ever put to the jury at the original trial. That may be correct, but it would not exclude the jury from reaching a conclusion on that basis. Even if that is wrong, at best, as counsel accepts, the only necessary inference one can draw from the acquittals is that the original jury did not find the evidence sufficiently reliable so that they were sure with respect to these particular incidents.

36. It seems to us that in the light of the passage from the Lord Chief Justice's judgment in Joseph Robert H to which we have made reference, in circumstances such as this, the question of whether the acquittals should be allowed to go before the jury with respect to the question of reliability is a matter for the judge to determine, balancing the interests of the defendant against those of the prosecution and having regard to what is fair overall. The judge in this case thought that these were relatively trivial matters, that they would have little bearing on the substantial issues that the jury had to determine at the retrial, and that they would necessarily distract the jury from its task and invite speculation as to why the earlier jury had reached the verdict that it had. We think the judge was entirely justified in taking that line. This was not a case, as in Cooke, where the inference which a jury could be invited to draw, and for which there was powerful evidence, was that a witness had been lying.

37. Even if we are wrong about that, we are satisfied that, as counsel for the Crown submits, any failure did not render these verdicts unsafe. These were, as we have said, relatively trivial incidents, and the jury on the retrial did not necessarily have to reach a concluded view as to guilt on all the alleged acts of indecency raised in the course of the trial. They were not counts on the indictment. Further, this particular jury would have to make up their own minds as to whether certain events had occurred or whether they had not in the light of the evidence they heard. In that context, the view of the original jury, if it be the view, that the complainant's evidence was such that they were not sure that these events had occurred, would be of very limited relevance indeed to

their deliberations. We have no doubt that they do not begin to cast doubt on the safety of the verdicts.

38. Accordingly, for these reasons, this appeal is dismissed.