Regina v Benjamin Cooley

Court of Appeal Criminal Division

[2018] EWCA Crim 2648

Before: Lord Justice Simon Mr Justice Foskett Mr Justice Warby

Friday, 24 August, 2018

Representation

Mr A Morgan (via video link) appeared on behalf of the Appellant.
Mr H Forgan appeared on behalf of the Crown.

Mr Justice Foskett:

1 The applicant's application for an extension of time of 124 days in which to seek permission to appeal against conviction and sentence has been referred by the single judge to the full court. The single judge said: "This case must be resolved as expeditiously as possible. It raises serious issues for the complainant, the applicant and the public."

2 We heard both applications on Wednesday 22 August. We granted permission in both respects with the necessary extensions of time, but dismissed the appeal against conviction. We indicated that we would give our reasons for that in due course, which we do today. We adjourned the appeal against sentence until today in order to obtain further information and this judgment will deal with that aspect too. Henceforth, we will refer to the applicant as "the Appellant".

3 The provisions of the Sexual Offences (Amendment) Act 1992 apply to the offences with which this case is concerned. It follows that no matter relating to any victim of those offences shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence.

4 The Appellant was born on 27 August 1998 and so will be 20 in a few days' time. He is currently serving a sentence of three years and four months, in other words, 40 months' detention, in a young offender institution at HMP Highdown. He has been in custody since August 2017, after his arrest for the final assault to which we will shortly make reference. The sentence itself was imposed by His Honour Judge Black at Guildford Crown Court on 30 November 2017.

5 Before turning to the offences with which the case is concerned, it is to be noted that the Appellant has a number of personal difficulties that underlie his offending. He has a number of mental disorders including ADHD, Autistic Spec-

trum Disorder, Tourette's Syndrome, learning disability and mild intellectual disability. He was adopted by his adoptive parents when he was a baby. They have shown a close interest in his welfare and have been present in court during the course of this appeal.

6 He pleaded guilty on 2 November 2017 before His Honour Judge Moss to one count of sexual assault (count 1), four counts of breaching a sex offender order (counts 2, 4, 6 and 8) and three counts of sexual assault on a child under 13 (counts 3, 5 and 7). We will say a little more about the circumstances in which he came to plead guilty shortly because the basis of the proposed appeal against conviction was that he was unfit to plead and should not therefore be bound by those pleas. As the single judge observed from the perspective of dealing with the matter on the papers, that is "a difficult challenge and success is by no means certain or even likely".

7 In order to understand the offences to which he pleaded guilty, it is to be noted that on 3 July 2017, and thus only a few weeks before these offences were committed, the Appellant was sentenced at Surrey Magistrates' Court to a community order and a Sex Offender Order for taking a child without lawful authority and pursuing a course of harassment in relation to another child. The Sex Offender Order included a prohibition against talking to or trying to talk to, whether face to face or on the telephone, iPad or similar computer, any child under the age of 16 years, whether the child was alone or with an adult.

8 The circumstances of those offences were as follows. He enticed a 13-year-old child away from a park with the promise of a free iPhone and then he tried to take the child to his home, but as his father was in he then arranged to meet him at the boy's house later. When that happened the boy's mother heard voices and made the Appellant leave. The harassment related to a 13-year-old female who he followed and on occasions threatened to come and get her. He also tried to get her into his car. He pleaded not guilty to those matters and a trial took place. We do infer from that that the view was taken at that time that he was capable of deciding whether to plead guilty or not guilty.

9 Simply to complete the offending history, there had been a previous incident when the Appellant was aged 14. He had approached an eight-year-old boy in the changing room of a public swimming pool, tickled his stomach and then put his hands down the boy's swimming trunks touching his penis. For that he received a conditional caution.

10 In the pre-sentence report prepared for the Surrey Magistrates' Court, dated 30 June 2017, the author referred to a previous psychiatric report in which it was concluded that the Appellant would be "unlikely to be able to act upon the terms of any order made by the court that involve a social judgment which he is able to make appropriately because of his developmental difficulties." The author also said that the instances of apparent sexual interest with children "indicates a

treatment need surrounding this".

11 Returning to the matters giving rise to the present proceedings, in summary the allegations forming the offences to which he pleaded guilty reflected four separate incidents with the associated breach of the Sex Offender Order.

12 Counts 1 and 2 .

13 On 17 July 2017, just after 4.00 pm, the 14-year-old male complainant, HS, was on a bus travelling home from school. The Appellant was on the same bus and alighted at the same time as HS. A short while later the Appellant approached him, grabbed him by the arm and asked: "Do you like that?" HS asked him what he was doing, to which the Appellant replied that it was just a joke and he walked off. HS returned home and told his mother.

14 Counts 3 and 4 .

15 Later that evening at about 6.30 pm the 8-year-old complainant, HSH (not the same complainant as in Counts 1 and 2) was with his father in Tesco. At some point he went to the lavatory where he became aware of the Appellant's presence. The Appellant approached him, touched his stomach and asked him whether he liked it. The Appellant continued to touch him, described as "grabbing and tickling at the same time" and asked him to lift up his T-shirt. At this point HSH was able to enter a cubicle and the Appellant made off. HSH left a short while later and returned to his father.

16 Before moving to the remaining counts, it should be noted that on 20 July 2017 the Appellant surrendered himself to Staines Police Station. In interview he answered 'no comment' to all the questions that were put to him. Two days later and by agreement, a Buddi GPS personal tag/electronic tracker was fitted to the Appellant so that his movements could be monitored.

17 Moving on to counts 5 and 6.

18 Counts 5 and 6.

19 Notwithstanding that, within about two weeks or so another offence was committed. On 6 August 2017 the 8-year-old complainant, JR, was in Poundland with his mother. The Appellant poked him in the chest before calling him over to the corner of the shop. Once there he tickled JR's chest and put his hands down JR's trousers. His hand went inside JR's underwear and onto his penis. He repeated the tickling and the hand sequence three or four times. He told JR not to tell his mother, but he did do so and the police were called subsequently.

20 Counts 7 and 8 .

21 On 14 August 2017 at about 2 pm the 10-year-old complainant, RU, was walking along a street to a friend's house. The Appellant was ahead and was repeatedly looking back at him. When RU entered into an alleyway the Appellant

stopped and as RU went to pass, the Appellant moved towards him and touched his groin with his open hand. RU pushed his hand away and screamed. The Appellant said he was only joking and left the scene.

22 He was arrested shortly after this and as we have indicated has remained in custody ever since. The fact that these offences were committed against the background of the order to which we have referred and to the existence of the Buddi tracker suggests that it is behaviour that the Appellant could not easily control. No treatment had been put in place by then to address it.

23 The offences are very troubling and will have been a considerable concern to the children involved and their parents. Whilst it is important not to understate the troubling nature of this behaviour on the part of the Appellant, it is equally important not to overstate it. The judge said that, as things were, the offending was, to use his words, "largely at the lower end of the scale". Not unnaturally, he was concerned about possible future escalation.

24 During the course of preparing for the court proceedings below, his then solicitors commissioned two reports, a psychological report dated 25 October 2017 from Dr Alison Conning and a psychiatric report dated 26 October 2017 from Dr Michael Alcock. Dr Conning had seen the Appellant previously. Although she recognised that the issue of fitness to plead was usually a matter for psychiatric opinion, she ventured the view that "as a consequence of his various disorders …it is highly unlikely that he would be able to (a) understand the course of the proceedings at the trial so as to make a proper defence, (b) understand the substance of the evidence, (c) give adequate instructions to his legal advisers, and (d) plead with understanding to the indictment." Dr Alcock, on the other hand, said that, "although finely balanced, it [was his] opinion that [the Appellant's] mental disorders *per se* are not of a nature or degree that would impair his cognitive capacity to an extent that would render him unfit to plead and stand trial and therefore the standard *Pritchard* criteria can be met" provided a Registered Intermediary was available "to assist him in communication with his legal advisers and when participating in the trial itself." He did, however, say crucially that so far as the *Pritchard* criteria were concerned, he considered that the Appellant had the ability to understand the charges and to decide whether to plead guilty or not guilty.

25 The position therefore as at the end of October 2017 was that the Appellant's then solicitors had one report from Dr Conning supporting the view that he was not fit to plead and another from Dr Alcock supporting the view on balance that he was, provided a Registered Intermediary was available to help.

26 That was the position at the PTPH that took place before Judge Moss on 2 November 2017. Neither report was shown to him nor had been downloaded to the DCS System by then, but counsel then appearing for the Appellant summarised the conclusions of each using the expression in relation to Dr Alcock's report that Dr Alcock was of the view that the Appellant was "fit". This was shorthand

and probably did not fully reflect the more nuanced view of Dr Alcock that we have summarised. Nonetheless, the exchanges in court between counsel and the judge revealed a robust view of the judge about the need to make progress with the case and it would probably be right to say that even had the matter been examined in greater detail, the conclusion on the available evidence would have been that the Appellant could decide whether to plead guilty or not guilty, that being Dr Alcock's expressed view. The judge wanted the Appellant to be arraigned and he gave his counsel an opportunity to take further instructions.

27 After a consultation with the Appellant via video-link in the detention centre - not ideal circumstances for a consultation in the circumstances - the case came back into court, the Appellant was arraigned and pleaded guilty to all counts. His father, who had seen the CCTV images of at least some of the incidents, contributed his views to counsel then acting before counsel spoke to the Appellant. There appears to be a difference in recollection between counsel and the father about what the father said. At all events, as we have indicated, the Appellant pleaded guilty to all counts.

28 As we have also indicated, sentence was adjourned. We will return to the issue of sentence in due course.

29 What has happened subsequently is that through the efforts of some people who know the Appellant's father, arrangements were made for Ms Karen Todner, a consultant solicitor with GSG Law Limited and who specialises in representing and advising those on the autistic spectrum, to review the case. She asked Dr Juli Crocombe, a Consultant Forensic Psychiatrist with considerable experience of autism, to prepare a report on the Appellant. Her report was dated 29 March 2018 and was prepared after seeing the Appellant for two hours at HMP Highdown, speaking to his parents and reading various reports previously prepared, including the reports of Dr Conning and Dr Alcock.

30 Her report covers a number of issues, but the central issue for present purposes is the question of fitness to plead. Her conclusion is that –

> "The Appellant is not fit to plead as this is primarily because of his diagnosis of mild intellectual disability and ASD (Autism Spectrum Disorder), both life-long development disorders. It is possible to state that he would not have been fit to plead at the time of the hearing in November 2017 and he will not become fit to plead in the future."

31 In relation to the question of whether he could decide whether to plead guilty or not guilty, she ventured the view that the use of an intermediary would enable him to do so and if proceedings took place the presence of an intermediary would help him to understand the course of those proceedings but it would not enable him to meet any of the remaining *Pritchard* criteria.

32 Mr Adam Morgan, who now represents the Appellant, instructed by Ms Todner, seeks to adduce that evidence pursuant to section 23 of the Criminal Appeal Act 1968 . We have indeed considered this evidence. He submits that there is in fact little between the views of Dr Alcock and Dr Crocombe. He says that they are both of the view that an intermediary is necessary whenever the Appellant is discussing matters with his legal advisers. It does have to be observed that this was not how the Appellant's previous solicitors or indeed his previous counsel interpreted Dr Alcock's report and it does not immediately stand out as Dr Alcock's opinion. Given his view that the Appellant was able to decide between pleading guilty or not guilty, that appeared to be a decision which could be expected to have been made without the intervention of an intermediary. As we have already indicated, we consider that this would have been the position taken by Judge Moss had his attention been drawn to Dr Alcock's report and we do not think that such a conclusion would have been wrong.

33 Even if our view on that matter was wrong, since the views of at least two registered medical practitioners are required to support a conclusion that a defendant is not fit to plead, there would have been an insufficient evidential basis for the issue to be raised before Judge Moss.

34 However, we think it right to consider what would have been the position had an intermediary been available during the discussion about the appropriate plea or pleas on 2 November 2017. If an intermediary had been present, he or she would have explained the nature of the charges. The Appellant would probably have said that he did not remember any of the incidents. That, as we understand it, has largely been his position. If that was so, then his legal advisers, through the intermediary, would have explained that he was not really in a position substantially to challenge what each of the complainants had said. It might have been said to him that he could put the prosecution to proof by calling these children to give evidence, but doubtless it would also have been explained to him that he could forfeit any credit that he might otherwise achieve by pleading guilty by putting the children through that ordeal. It is impossible to believe that the Appellant would have failed to understand that, assisted by counsel and perhaps his father. If that analysis is correct, and we consider that it is, the same position would have been reached on 2 November as was in fact reached without the intervention of an intermediary. It follows that, in our view, in the circumstances of this case, the presence of an intermediary would not have made any difference.

35 Setting aside a plea of guilty on the basis sought to be achieved is, as the single judge observed, a difficult task. We do not consider that there relevant threshold has been reached in the present case and whilst we gave permission for the argument to be advanced, we have rejected it for the reasons given and the appeal against conviction is dismissed.

Sentence

36 That brings us to the question of the appeal against sentence. We adjourned consideration of that matter in light of the helpful intervention of Miss Jennifer Francis, the Court's Duty Probation Officer, on Wednesday who we had invited to review the up-to-date position in this case. She felt that there may have been unaddressed features that could be looked at by MAPPA (the Multi-Agency Public Protection Arrangements) and raised the possibility of a community disposal at this stage, possibly in the context of a suspended sentence order. Without prejudice to any final decision we felt we needed more information about that before taking the issue any further. If we had acceded to any such proposal it could have resulted in the Appellant's immediate release.

37 We have now had further helpful input from Miss Ann Poulton, the Appellant's current Offender Manager. At very short notice she produced a 5-page letter indicating a number of factors to be considered and we are extremely grateful to her for her industry in this regard.

38 Without, we hope, doing an injustice to that industry, we can summarise the position in this way. If the court was to accept any proposal that involved the Appellant's immediate release, he would be required to live with his parents, report to the police within a matter of days and then engage with the MAPPA team which would convene on 6 September to consider the way forward. It would require some urgent steps to be taken but Miss Poulton was plainly concerned about this. Her letter contained the following passage:

> "In light of the information provided and, having interviewed him via video link as part of general case management, it is my assessment that at this stage Mr Cooley demonstrates limited insight into the triggers and motives for his behaviour although he states that he recognises that he could benefit from 'help'. This, along with existing treatment needs suggests that the potential for further offending is an immediate concern. It is consequently my view that his risk cannot be managed in the community without a robust and stringent risk management plan and he should remain in custody at this time allowing the National Probation Service and other agencies to prepare for his release in a controlled way. A Professionals Meeting had already been scheduled for 10 September 2018."

39 Leaving aside other matters for present purposes, that encapsulated our provisional concerns about any step that would result in his immediate release. Her letter also itemises two risk factors of relevance which she characterises as –

(1) unexplored triggers and motives which will help [the Appellant] understanding his behaviour and building a relapse prevention plan,
(2) that risk will prevail whilst deviant sexual interests remain unknown and un-

treated.

40 This, we observe, mirrors the concerns expressed in the pre-sentence report dated 30 June 2017 to which we have referred. Indeed, the prophecy in that report was realised by the offending the subject of this case only a matter of a month or so after that report was written.

41 Miss Poulton says that factors which are likely to reduce risk are these:

- Full exploration and understanding of triggers and motives both by Mr Cooley and by professionals

- Full exploration and understanding of deviant sexual interests and presence of a robust treatment plan

- Treatment needs being fully identified and presence of plans to address them and develop effective relapse prevention plans

42 She draws attention to the fact, as had Dr Crocombe in her report, that, as she put it in her letter, "Unfortunately, there are no suitable offending behaviour courses available at HMP Highdown at this time so [the Appellant] has not completed any treatment."

43 He has been engaging with the Mental Health In-Reach Team (MHIRT) on a bi-weekly basis, as well as having an assessment by the Adult Social Care but that is not to same as treatment for his offending behaviour.

44 It is obvious that there is a risk to the public of releasing him immediately and it would be of no benefit to him to do so if within a short period he was to resume his offending, which he is likely to do unless arrangements are set in place for the kind of treatment that he requires.

45 The sentencing judge had no constructive plan before him even to consider some kind of treatment approach and he cannot be criticised in those circumstances for imposing a significant custodial sentence to protect the public. However, the longer term protection of the public requires this young man's problems to be addressed.

46 The recent interventions of the Probation Service indicate to us that arrangements can be put in place to this end within the community, but they will require planning and proper implementation. They will require the co-operation of the Appellant and his family. Given his incarceration for a lengthy period of time, it is to be hoped that the incentive for such co-operation will be in place.

47 Although our decision is not dictated by this new evidence, it has assisted us in coming to the view we have. We think that the judge should have been persuaded that the level at which the Appellant functions was not that of a 19-

year-old. We do not need to repeat the contents of the various reports, but he demonstrated some child-like features that are a reflection of his underlying mental health issues. Furthermore, in his case custody has been more difficult for him to bear than for others.

48 Overall, we think that a sentence totalling 30 months' detention would have sufficed and certainly suffices on the material before us. The practical effect of that is that he is likely to be released in about 3 months' time. That should be sufficient for the various agencies to prepare for his release and for him and his family also to prepare.

49 We will ask the Registrar to commission an early transcript of this judgment, which we will then invite the Probation Service to send on to all relevant agencies. Dr Crocombe's report should also be made available. With that judgment, the agencies will know what we hope can be achieved in this case.

50 For those reasons, the appeal will be allowed and the overall sentence will be reduced from 40 months to 30 months. We will reduce the sentence on count 5 from two years and eight months to one of two years' detention and on count 3 we will reduce the sentence of eight months to one of six months.

51 We have just noted the terms of an addendum to the psychiatric report of Dr Juli Crocombe. That should also be made available to the relevant agencies.

Lord Justice Simon:

52 Mr Morgan, is there any sense in sending the report of Dr Crocombe to the prison?

53 MR MORGAN: I certainly think that would be very helpful in the circumstances.

54 LORD JUSTICE SIMON: We will direct that the Court of Appeal Office send Dr Crocombe's report to the prison. Is there anything else?

55 MR MORGAN: The only thing that occurred to me is the terms of the order, the Sexual Harm Prevention Order. I am sure that is a matter that can be dealt with in the period before he is released in the lower court. I will not necessarily trouble your Lordships with it this afternoon.

56 LORD JUSTICE SIMON: There is no appeal on the Sexual Harm Prevention Order, is there?

57 MR MORGAN: There was reference to it in the grounds of appeal but it is not something I have to pursue this afternoon before your Lordships in terms of the effectiveness.

58 LORD JUSTICE SIMON: It may be a matter you can raise in the Crown Court, but I do not think it is a matter for us now.