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No: 201801548

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 16 October 2018

B e f o r e:

LADY JUSTICE HALLETT DBE
VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION

MR JUSTICE STUART-SMITH

SIR RODERICK EVANS

R E G I N A

v

PMH

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Mr N L Biddle appeared on behalf of the **Appellant**

Mr B Jones appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LADY JUSTICE HALLETT:

Background

1. This application for leave to appeal against conviction has been referred to us by the Registrar because it raises issues about the impact of the provisions of Section 28 of the Youth Justice and Criminal Evidence Act 1999 (the “YJCEA”) and the pre-recorded cross-examination of a vulnerable child witness.
2. On 16 March 2018 at Liverpool Crown Court before his Honour Judge Warnock the applicant was convicted of several offences of sexual assault of a child under 13, assault of a child under 13 by penetration and sexual activity with a child family member. On 26 March his Honour Judge Warnock sentenced him to a total custodial term of 9 years and an extension period of 1 year. The court imposed a restraining order prohibiting contact with the complainant and her mother. Reporting restrictions apply to protect the identity of the complainant.

Facts

3. Given the nature of the grounds of appeal advanced by Mr Biddle who appeared for the applicant this morning, we do not need to rehearse the facts of the alleged offences in any detail. The complainant alleged that when she was aged between 8 and 13 the applicant, a family member, repeatedly assaulted her sexually. The assaults included touching her breasts, her vagina and penetrating her vagina with his finger. Medical evidence indicated an injury to her hymen consistent with penetration. The defence case was

denial. The applicant relied on his own account and that of his current partner to support his case that the complainant was lying.

Grounds of Appeal

4. Mr Biddle has attacked two aspects of the trial. It was heard at one of the pilot courts to receive pre-recorded cross-examination of a vulnerable child witness pursuant to section 28 of the YJCEA. This, Mr Biddle described as a significant departure from usual practice, so much so that it is incumbent on the courts carefully to control the procedure to avoid an injustice. In this case, the procedure seems to have gone somewhat awry.
5. A timetable was set at the pre-trial preparation hearing for the proposed questions to be asked in the pre-recorded cross-examination to be submitted by 16 October 2017, a ground rules hearing to be heard on 23 October 2017 and cross-examination on 1 December 2017.
6. This first problem was that there was no continuity of advocate for the prosecution and the defence. Mr Jones, who had been instructed to prosecute, was unable to attend the cross-examination on 1 December 2017 and another advocate substituted for him. This was despite the fact he made strenuous but unsuccessful efforts to be released from the trial in which he was then engaged. Similarly, the defence advocate who attended and conducted the cross-examination on behalf of the applicant was unable to attend the continuation of the trial in March 2018, despite his attempts to get released from an on-going trial. Mr Biddle was instructed for the defence just a matter of one or two working days before the trial continued.

7. The second problem arose when for reasons that are not entirely clear neither counsel gained access to the disc containing the recorded cross-examination in time for them to see it before the trial continued. Access to the disc may have been granted to the advocates who attended the cross-examination
8. The third problem arose in the recording itself. No-one appears to have checked it. When counsel saw it on the day the trial continued, they realised that the body and lower face of the complainant were not visible on the recording. No one knows how this occurred. None of those present at the recording noticed it at that time.
9. Having discussed the issue with Mr Jones and Biddle, the trial judge decided to continue with the recording flawed as it was. He informed the jury just before it was played that the bottom half of the witness's face was obscured, but added: "it is certainly agreed by counsel that it is not going to cause any particular problem in terms of the trial."
10. Despite Mr Biddle's approach at trial, he has argued that the effect of playing the recording was to breach the applicant's right to a fair trial. He wanted the jury to be able to see the witness and see her demeanour so that they could assess properly how she responded to the questions asked.
11. Mr Biddle's second complaint is that the judge failed to give the jury any direction as to the limitations imposed on the cross-examination of a child witness. At the ground rules hearing the usual constraints of style on cross-examining a child witness were imposed (for example no leading questions and no tagged questions). However, no limitations were placed on the content of the cross examination. Nonetheless, Mr Biddle submitted that the judge should have warned the jury, who may otherwise have been expecting the

witness to be cross-examined robustly, that modern practice is to cross examine a vulnerable child witness differently from an adult witness.

Response

12. Mr Jones accepted that it was unfortunate that the witness's face was partially obscured during the whole of the recording of the cross-examination, but he did not concede that this resulted in any unfairness affecting the safety of the verdicts. He informed us that the cross-examination lasted only some 20 minutes and consisted of 53 questions on matters of detail rather than challenges to the witness's credibility, save for the final question. He argues that if one watches the recording, one can discern sufficiently the complainant's manner and demeanour as she answered her questions and it was clear from the audio recording. The jury had seen the lengthy ABE interview and been able to judge her demeanour during those questions and could compare that with any change when she was cross-examined. He claims that in fact, close examination of the ABE and the section 28 recording reveals that there were no changes. Her responses to questions were given in precisely the same tone and manner throughout. He insisted that the ability to see the bottom half of the witness's face would not have given any clues to the jury as to her honesty or accuracy.

13. He also emphasised, not surprisingly, that nobody at the trial sought to make any complaint or suggest that the cross-examination should be conducted again. On the contrary, Mr Biddle accepted that the recording could be played.

14. Mr Jones pointed out that the defence case at trial rested on attempting to undermine the credibility of the witness not by challenging her to any great extent but by the questioning

of other witnesses whom they were able to call. If Mr Biddle had the concerns he now expresses, the proper course would have been for him to apply to have the recording excluded pursuant to the Practice Direction [2017] EWCA Crim 1076 at 18E.42. No doubt he made no such application because, despite the flaw in the recording, he was able to present the defence case fully and fairly.

15. On the second ground, Mr Jones further conceded that the summing-up did not contain any specific direction about the limitations on cross-examination, but again, Mr Biddle sought no such direction. At the time he was content with the judge's draft written directions. Although Mr Jones accepted that it was his general practice to invite a judge to give the kind of directions Mr Biddle now seeks, the failure to do so, he contended, does not undermine the safety of the conviction.

Our conclusions

16. Much of the argument advanced by Mr Biddle in his written submissions appeared to be a thinly disguised attack on the use of pre-recorded cross examination. Whatever his views or the views of others, Parliament has provided for this procedure in section 28 of the YJCEA and those who are accustomed to it report that, if operated properly, it can work well. It does not undermine the defendant's right to a fair trial. However, all parties should follow the steps as set out in section 18E of the Criminal Practice Directions 2015 (as amended).

17. In so far as the provisions of 18E affects this case, we note first that there should be no change of advocate: "continuity (of advocate) at trial is obligatory except in exceptional circumstances". (see 18E.59). If difficulties arise in getting released from an ongoing trial

the Resident Judge or Judges should be contacted (18E.59). It is unfortunate that the changes in the advocates occurred in this case and that no one contacted the Resident Judge or Judges to ensure continuity. As a result, neither of the advocates at the continuation of the trial had seen the recording before they arrived for the trial to continue.

18. Second, it is also unfortunate that the recording was less than perfect. We do not understand how the mistake in recording the cross-examination could have occurred and despite the help given by Mr Jones and Mr Biddle, we do not understand why the problem was not detected at an earlier stage. We assume that after a recording is made, somebody has responsibility for checking the reliability of the recording as well as checking for possible editing. Although the 'designated court clerk' must ensure the equipment is working properly, it is not clear upon whom the responsibility to check the recording rests. We invite those responsible for the pilot programme to consider how best to ensure that this problem does not arise at such a late stage or at all in the future.
19. As far as any restrictions placed on the cross-examination are concerned, the section 28 procedure and the modern regime for cross-examining vulnerable witnesses has led to a sea change in advocacy techniques. Advocates must adapt to the needs of the witness and ask questions in the manner and form approved by the judge, but as this court has stated on several occasions, it does not follow from that fact that a defendant cannot have a fair trial. There are many ways in which the parties can ensure that all relevant material is put before the jury for them to consider by way of admissions and the calling of any other witnesses.

20. In any event, as Mr Jones observed, in many cases the limitations imposed on cross-examination do not restrict the content that may be put to a witness. It is often simply a matter of style and avoiding questions that the witness will not understand or will find confusing. Inevitably this will mean a difference in style in cross-examining a vulnerable witness as opposed to a non-vulnerable witness. Section 32 of the Youth Justice and Criminal Evidence Act provides that where evidence has been given in accordance with a special measures direction the judge must give the jury such warning, if any, as the judge considers necessary to ensure that the fact the direction was given in relation to the witness does not prejudice the accused. A special measures direction includes allowing pre-recorded cross-examination pursuant to section 28. The CPD suggests that the judge discuss with the advocates at the ground rules hearing how any limitations on questioning should be explained to the jury (18E.36). If the issue has not been discussed at the ground rules hearing, the judge *should* discuss with the advocates how any limitations should be explained to the jury before the summing up. (see 18E.57)

21. Bearing those provisions in mind, we have identified the following areas of best practice which we hope will assist trial judges and advocates. We accept that this best practice may evolve with experience.

- (i) At the ground rules hearing the judge should discuss with the advocates how and when any limitations on questioning will be explained to the jury.
- (ii) If this has not happened, or there have been any changes, the judge should discuss with the advocates how any limitations on questioning will be explained to the jury *before* the recording of the cross examination is played.

- (iii) The judge can then give the jury the standard direction on special measures with a direction on the limitations that the judge has imposed on cross-examination and the reasons for them *before* the cross examination is played.
- (iv) The judge should consider if it is necessary to have a further discussion with the advocates before their closing submissions and the summing-up on the limitations imposed and any areas where those limitations have had a material effect. In this way the advocates will know the areas upon which they can address the jury.
- (v) In the summing-up the judge should remind the jury of the limitations imposed and any areas identified where they have had a material effect upon the questions asked.
- (vi) If any written directions are provided to the jury the judge should include with the standard special measures direction a general direction that limitations have been imposed on the cross-examination.

22. We hope that best practice of this kind will avoid the kind of arguments we have considered this morning. However, if such best practice is not followed, it does not follow that any convictions are unsafe.

23. We turn to the issue in this case and whether Mr Biddle has identified any aspects of the applicant's trial that have undermined the safety of his conviction. We accept that it would have been preferable had the recording of the cross-examination not been flawed and had the judge given the jury an explanation that there were restrictions or limitations in place on the cross-examiner.

24. However, if the jury could not see the complainant's full face during cross examination, they could see her demeanour and hear her clearly in the ABE interview. They could hear exactly what she said on the audio recording of the cross-examination and they could see half her face on the visual recording of the cross-examination. Mr Biddle was unable to identify to our satisfaction anything about her demeanour that may have changed and that may have assisted the jury in assessing her credibility had they been able to see her full face. The impact of the technical failure was not, therefore, in our view significant. This must have been Mr Biddle's view at trial because he made no application to exclude the recording either on the basis of its content or on the basis of the technical problem. We are satisfied that this ground does not undermine the safety of the conviction.
25. Second, having identified best practice, we accept that the judge did not direct the jury in the way that we would have wished on the restrictions placed on the cross-examination at any stage. However, apart from the general restrictions as to style in cross-examining a vulnerable child witness, Mr Biddle was again unable to identify for us any areas of content where restrictions were placed and about which he claims the judge should have given specific directions.
26. We are satisfied from all that we have seen and read that the defence were able to explore fully and fairly all the relevant areas both with the complainant and in other evidence and in submissions to the jury. The defence case was clear. The jury would have been in no doubt of the nature of the challenges to the complainant's account and would have understood why the cross-examination was not as robust as it would have been of an adult witness.

27. Accordingly, taking the grounds separately and or cumulatively, we are satisfied that nothing has been put before us which has undermined the safety of the conviction and we give leave but dismiss the appeal.
28. That means, Mr H, that your appeal against conviction has failed. We now have a system whereby Mr Biddle can talk to you through the video booth once we have left court. If you wish to speak to him, please, stay where you are. We will be cutting this link but he can talk to you outside.
29. Thank you both very much for your help. I am sorry we used you as a sounding board on best practice but we do want to make sure the system works properly.

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