Neutral Citation Number: [2018] EWCA Crim 2534
No: 201705448 C5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 24 October 2018

B e f o r e:

LADY JUSTICE HALLETT DBE
(VICE PRESIDENT OF THE CACD)

MR JUSTICE NICOL

MR JUSTICE BUTCHER
R E G I N A
v
DARREN SIMMONS

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr M Barlow appeared on behalf of the **Appellant**
Mr J Price QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. THE VICE PRESIDENT:

2. Background

3. On 23 April 2007, at the Lewis Crown Court, the appellant was convicted by a majority of 10 to 2 of causing a child to watch sexual activity and sexual activity with a child (digital penetration). He was acquitted of three counts of sexual activity with a child and one count of causing a child to watch sexual activity in respect of the same complainant.

4. On 25 April 2007, he was sentenced to a total of 4 years, a term he has now served.

5. On 4 September 2007, the single judge refused an application for leave to appeal conviction on the basis of allegedly inconsistent verdicts and the application was not renewed.

6. Five years, later, fresh solicitors and counsel applied to the Criminal Cases Review Commission ("CCRC") on his behalf and they have now referred to the case to us under section 9 of the Criminal Appeal Act 1995 and he therefore appeals against conviction.

7. The basis for the CCRC's referral is that the prosecution failed to disclose relevant and admissible material and misled the defence in their response to defence disclosure requests.

8. At trial the case was prosecuted by Ms Constance Briscoe and before us by MrJohn Price QC. Ms Farrelly represented the appellant at trial and he is now represented by Mr Barlow.

Facts

9. Reporting restrictions apply to protect the identity of the complainant. We shall call her X.

10. The case involved the alleged sexual abuse of X when she was 14 years of age and in the foster care of the appellant's mother. X first complained about the alleged abuse in September 2005. She locked herself in the bathroom of her foster home after a dispute with other children in the house; she had allegedly taken an overdose. She spoke to her father on the telephone and his questions prompted her to make an allegation against the appellant. The social services and the police were called.

11. In an ABE interview she claimed that over the course of 2 to 3 weeks in 2005, when appellant's mother left her in the appellant's care, he behaved in a sexually inappropriate way towards her. The allegations included his showing her pornographic material involving the sexual abuse of young people (using a LimeWire application), rubbing her vagina, kissing her with his tongue, trying to photograph her breasts, digital penetration, placing her hand on his erect penis and simulating intercourse. She said

she had not told anyone at that time because she was only 14 and she felt scared, worried and creepy. She had no-one to tell but she did tell someone within a matter of the days of the abuse ending. She felt the appellant had taken away part of her childhood.

12. An expert forensically examined the computers seized from the appellant's home address. No images were found on his family computer but on a computer tower registered to his daughter the expert recovered a file within which was an image showing child abuse. The image could have been part of the "child lover" series but the link was described as tenuous. The series is a method of file sharing amongst paedophiles.

13. Another expert discovered the LimeWire application had been downloaded on a computer belonging to the appellant's mother. The expert discovered on the computer 56 file names, 10 of which potentially related to child abuse images. Search terms such as 'preteen rape girls', 'underaged Lolitas', '15-year-old chicks' and '14-year-old sexy girls' had been used. None of the files were videos and they had apparently been downloaded before the LimeWire application had been installed. There appeared to be files relating to adult pornography as well in the same folder but the material could not be accessed. This may have been because a cleaning programme had been installed and had been used the day before the appellant's mother returned home.

14. The appellant was interviewed and gave an account to the police. Essentially his defence at trial was to the same effect, namely that the complainant was lying about the sexual activity. He accepted using his mother's computer to view pornography but denied showing it to the complainant and said she must have seen it by accident. He relied on his own account, that of his wife, sister and his mother to rebut specific allegations made by the complainant.

15. Disclosure

16. In the reference by the CCRC most of the appellant's grounds were rejected. However, the Commission considered in detail the pre-trial disclosure process. It began with a letter dated 20 July 2006 from a Crown Prosecution Service lawyer, Ms Travis. She informed the appellant's solicitors that there was no prosecution material requiring disclosure at that stage. A schedule of non-sensitive unused material accompanied the letter and revealed that X had received a reprimand for three offences against the person in April 2005 and two assaults occasioning actual bodily harm on 16 and 17 May 2005. We must assume therefore that the defence received notification of her previous bad character. Ms Travis sought copies of the material on the schedule from the police officer because she wished to review them.

17. The defence case statement dated 3 August set out fully the defence case that X had fabricated the entirety of the allegations against him for 'unknown personal and psychological reasons'. The defence requested disclosure of any material relating to previous allegations made by the complainant against her grandfather and a summary of any decision to withhold material.

18. Ms Travis asked DC Staker, who knew of the complainant and had dealt with her before, to review the social services and child protection team material for secondary disclosure, namely any material that might undermine the case for the prosecution or assist the appellant's case. He reported on the material but a copy of that report was not sent to the defence and we have not seen a copy.

19. Another officer, Mr Parsons, conducted a review of the material Mr Staker had identified and he agreed with Mr Staker's assessment that X's problems appeared to be "behavioural" brought on by her troubled family history rather than mental health issues.

20. By letter dated 3 October 2006, Ms Travis wrote to the trial solicitors. She indicated she had not identified any further prosecution material that may be of assistance to the defence. In response to their direct inquiry she confirmed that she had been informed that X had told clinic staff that her grandfather was a paedophile and that "her mother and stepfather were in on it" but she did not make any direct allegation that offences had been committed against her.

21. Ms Travis went on to explain the background to the allegation that the grandfather was a paedophile. X was simply asserting making a statement of fact because her grandfather, admitted an offence or offence against another or others. She did not allege he had abused her. Other than that Ms Travis had no information the complainant had made any complaint of sexual abuse against anyone inside or outside her family. She exaplaiend that the complaints of physical abuse X made against her mother had been substantiated by evidence of injury and information from X's sister.

22. Ms Travis further explained that X had been taken into care because of physical and emotional abuse by her mother and that she had harmed herself in the past. The defence were told she had been admitted to a psychiatric unit in October 2004 and she was not discharged until March 2005 with a diagnosis of adjustment disorder, mixed anxiety and depressive disorder. The lawyer concluded there was no evidence to suggest that previous mental health difficulties had given rise to her making a false allegation that she was the victim of any criminal conduct including sexual abuse. She made no mention of the fact that medical staff treating X for alleged overdoses questioned whether or not she might be suffering from Munchausen Syndrome; no diagnosis was ever made.

23. On 25 January 2007, Ms Travis wrote a further letter. She repeated her assurance there was nothing more to disclose and that her intention was strongly to resist any speculative 'trawl'.

24. The trial solicitors, by letter and affidavit dated March 2007, requested disclosure of the records held by third parties. On 3 April 2008, Ms Farrelly appeared at court instructed to make the third party application. The Crown was directed to review the social services files for material of potential relevance. It was agreed the review would be carried out on the first day of the trial. The Crown's papers were passed to Ms Briscoe.

25. During the Commission's review they were unable to establish whether Ms Briscoe ever reviewed the files as the Crown had been directed. She has not responded to the Commission's letters requesting her to provide her notes to them; this may be because she is no longer in practice. The Crown Prosecution Service file no longer exists. The CCRC therefore concluded that there is a strong inference that Crown prosecuting counsel had all the material generated in respect of disclosure and the reports of the officers but failed to review it. Mr Price did not suggest we should approach the case on any other basis. We know for certain that no further disclosure was made. This has been confirmed by Ms Farrelly.

26. The CCRC has unearthed material that Mr Price accepts should have been disclosed. Ms Farrelly states that had she seen it, she would have sought to use at least some of it. She could have placed the material before the jury as agreed admissions thereby limiting the need to cross-examine the complainant.

27. Unfortunately, the original material was returned to the social services and it has been destroyed. Mr Barlow and Mr Price are content to rely on the schedule produced by the CCRC. Both have very helpfully addressed the relevance and admissibility of each of the items on the schedule.

Disclosure items

28. In the CCRC's opinion there about 20 items that should have been disclosed because they were capable of undermining the Crown's case. They include:

i. 29. In 2001, X aged 9 made allegations of assault by her stepfather.

ii. 30. In October 2002, X aged 11 made her first allegation of assault against her mother to a teacher. It was investigated and marked NFA.

iii. 31. In December 2003, X aged 12 made a second allegation of assault against her mother.

iv. 32. In March 2004, there was a third allegation of assault against her mother.

v. 33. In April 2004, X aged 13 made a comment about sexual abuse at home to paramedics. It followed on from her taking an overdose at school.

vi. 34. In June 2004, X's doctor wrote a letter about her mental health when she was 14. The records reveal concerns about her mental health and attention-seeking.

vii. 35. In July 2004, X was allegedly violent to her mother, brother and stepfather.

viii. 36. In September 2004, X self-harmed at school.

ix. 37. In November 2004 there was a discussion about whether X suffered from borderline Munchausen Syndrome.

x. 38. In November 2004, X made the allegations about a paedophile ring including her grandfather.

xi. 39. In March 2005, X's father reported she had tried to stab herself and alleged her mother had beaten her.

xii. 40. Later that month a neighbour reported a similar incident of self-harm after an argument with her mother.

xiii. 41. In May 2005, X made another allegation against her mother. X made a 999 call reporting that her mother had attacked her, kicking and punching her and throwing her against a wall. She claimed she had taken a packet of 96 ibuprofen tablets. An ambulance was dispatched. The ambulance crew examined her and noticed just one bruise. They did not believe she had taken any tablets.

xiv. 42. In May 2005, X's mother called the police because X had locked herself in the kitchen and was threatening to stab herself (it was this incident that led to X being placed into the appellant's mother's foster care). X admitted having difficulties in controlling herself when provoked and that she did retaliate sometimes, losing her temper and she had assaulted her mother on three separate occasions.

xv. 43. In August 2005, X confirmed that the week with Mr Simmons was fine.

xvi. 44. On 29 August 2005, she gave her first account of her relationship with him. She told Nurse Fuller that she was involved in a relationship with the appellant. She described it as happy, caring and loving. She loved him and he loved her. She claimed he had told her that if he was not married with his own child they would be together. The day before the ABE interview she is recorded as saying she did not want to get him into trouble.

xvii. 45. In the run up to the trial X admitted misuse of cannabis and cocaine.

xviii. 46. In January 2006, there was a further hospital admission.

xix. 47. In May 2016, she received a final warning for assault occasioning actual bodily harm (on her ex-stepfather's girlfriend) and possession of cannabis.

xx. 48. In October 2007, X was convicted of battery. This was after the trial had concluded but presumably was relevant because she must have been awaiting trial for it at the time of the appellant's trial.

Grounds of appeal

49. Mr Barlow advanced two grounds of appeal, both interlinked:

50. (1) The misleading nature of the correspondence from the CPS would have misled the defence into thinking there were no records of X making complaints of sexual abuse, that her complaints of physical abuse against her mother were substantiated, that her mental health difficulties were in response to the abusive family situation and there was

no evidence that those difficulties had ever given rise to a false allegation of criminal conduct;

51. (2) The failure of the CPS and Ms Briscoe to disclose to the defence relevant material from the child protection team and social services files meant that the defence were prevented from making the necessary inquiries and then obtaining the judge's permission to admit material either by way of admission and/or in the form of cross-examination of the complainant.

52. Mr Barlow contends that the material uncovered by the CCRC is relevant and admissible because it indicates, first, X was capable of making her complaints known. Second, her behaviour demonstrated a pattern of attention-seeking. Third, the circumstances in which she made some of the complaints were similar, they usually followed a falling out with someone or expressed hostility towards someone. Fourth, she had a history of violence and admitted she had a temper and lashed out to those immediately around her. Fifth, she told a social worker that having spent a week with the appellant everything was fine. Sixth, her first account of abuse at the hands of the appellant was very different from what she told the police and the jury.

53. Mr Barlow emphasised that his intention was not to suggest the material could have been used to establish that X had a history of making false allegations, it is the fact that X made the complaints and the circumstances in which they were made that he insists the defence were entitled to elicit. Accordingly it would not have been necessary to engage in satellite litigation over whether X had made genuine complaints about physical abuse at the hands of her mother.

54. He claims, supported by Ms Farrelly's observations, that had the jury been made aware of the material or some of it, it would have impacted upon their assessment of the reliability of the complainant. Mr Barlow reminded the court that the jury acquitted on those counts where evidence was called that undermined the complainant's account. Accordingly, he maintained that the appellant did not receive a fair trial and the convictions are unsafe.

55. Response

56. Mr Price, for the Crown, invited us to consider the appeal in stages. First, we should consider whether the material should have been disclosed. Second, we should consider whether the defence would have wished to deploy it. Third, we should decide whether the material was admissible. Fourth, if it was admissible we should decide the impact on the safety of the conviction.

57. Generally Mr Price accepts that the material within the files identified by the CCRC met the test for disclosure and ought to have been disclosed. He divided the material into two categories: material to do with the facts of the case and material to do with X's history.

58. The only material directly relating to the allegations at trial related to the first complaint against the appellant. She gave an account of her relationship with the appellant

between 29 August and 1 September 2005 before the police became involved. Mr Price accepts that X spoke about the appellant in terms of affection. Furthermore, he accepted that her later accounts differed. Mr Price suggested there could be many reasons why an adolescent who has willingly taken part in sexual activity with an adult may change their account in this way for example regret, embarrassment, shame or guilt. This is an argument that could have been advanced successfully before the jury. Her comments before the police were involved show there had been a relationship between the complainant and the appellant and this was supported by other evidence showing an overly familiar physical relationship between X and the appellant.

59. On that basis, he submits that had this material been disclosed to the parties, the Crown would have used it under section 117(2) of the Criminal Justice Act 2003 as evidence of the truth of its content. He submitted that as such it would have amounted to compelling evidence. It would also have explained why she did not complain until a few days after the appellant had ceased caring for her.

60. He then considered the remaining material 'to do' with her history. He submitted that for much of it significant issues of admissibility would have arisen, particularly under section 100 of the Criminal Justice Act 2003.

61. In respect to the allegations of assault by her mother and stepfather, Mr Price insists the material was simply not admissible. First, there was no evidence of falsity and, second, the allegations were not pursued because the police officers doubted the truth of what X was saying. The documents revealed that although X was only 9, at that early age she was being characterised by her mother as an attention-seeker and this may well have come to influence the response of professionals to her subsequent complaints and to her assertions that she had taken an overdose and to her self-harming. They may not have appreciated that her complaints were justified and that she was seeking ways of being taken into care.

62. Mr Price described some of the CCRC analysis, with respect, as depending to a large extent upon a fallacy, in that the CCRC reference construes inaction by the authorities and the fact that an allegation by X was unsubstantiated as evidence of falsity, whereas this is by no means the case. Indeed some of the evidence that has come to light suggests that her allegations were true, in which case her self-harming and attention-seeking would be put into a very different context.

63. Furthermore, he reminded us that some of the records of her comments are second or third hand. We cannot distinguish between her words and any gloss put on them by the record maker. We do not know, for example, what she said about the paedophile ring, although it seems that she was not making any suggestions about her own mother and stepfather and what she did say was supported by other evidence.

64. Similarly, Mr Price did not accept the observations as to her mental health and possible diagnosis of Munchausen's were admissible. These were all premised on the suggestion that her allegations about her home life were untrue. The professionals dealing with her may have realised that she was a very troubled adolescent but they may not have appreciated the reasons for her being troubled.

65. In any event, sufficient of X's background was made known to the defence to enable them to put relevant and admissible matters before the jury, for example, the defence knew enough about X's medical history, about her taking overdoses and her being admitted to a psychiatric unit. Ms Farrelly explored the general background in her questions in cross-examination.

Our conclusions

66. It is extremely unfortunate that there have been disclosure failings in this case. The criminal trial process can only operate effectively if those with the responsibility for disclosure understand fully the obligations upon them. In far too many cases coming before this court and trial judges the defence can point to inadequate disclosure. We accept that it is not always easy to trawl through social services records and through social media entries highlighting potential relevant material, but nor is it always straightforward to counter allegations of sexual abuse based primarily on the word of a complainant. If the Crown decides to prosecute it must do so fairly. The trial judge and the defence rely on them to do so.

67. Having said that, we echo Mr Price's concerns that it is important when reviewing material of this kind that one does not fall into the trap of equating unsubstantiated allegations with false allegations and of assuming from unsubstantiated allegations that a child who has responded with a cry for help has been guilty of unjustified attention-seeking. An abused child may well seek attention from those in authority and one cannot assume that the opinions of the professionals as to the truthfulness of a complainant are necessarily accurate and/or even admissible.

68. Sadly, it is far from unknown for a teacher, social worker or police officer wrongly to believe an apparently credible parent and disbelieve a troubled and abused child. However, that does not mean that the reviewer for the prosecution can form their own view of what has been going on and keep the material from the defence and from the trial judge. All material that may undermine the prosecution case or assist the defence should be disclosed. Ultimately, it is for the trial judge, not the prosecutor, to decide if the records are admissible.

69. We accept that had Ms Farrelly known of the material in the detail now provided by the CCRC she may have tried to obtain the judge's permission to use some of it. Thus, as Mr Price conceded, the first two stages of the questions we must ask are answered in the appellant's favour.

70. It is at the next stage that we found difficulties with Mr Barlow's argument. Some of the material would undoubtedly have been admissible, for example the first complaint about the appellant and the complainant's description of her time with him during the period of the alleged abuse. We see some force in Mr Price's suggestion that not only would this have been admissible at the behest of the defence but the Crown would also have wished to adduce it. Although it had the potential to undermine the complainant's credibility, it may well have confirmed in the jury's mind that she had been groomed into the sexual activity and that is why she did not complain until she and the appellant parted.

71. As to her previous allegations of violence by her mother and stepfather, first, we do not know where the truth lies but there is evidence to suggest she was telling the truth. If the intention of the defence was not to show they were false but to show she was capable of complaining, the defence had evidence that she had made complaints. Ms Farrelly asked a question to that effect. In any event, one would need to know far more about the allegations and when the complaints were made and in what circumstances. This may well have involved far too great a journey down the path of satellite litigation. We question therefore whether the evidence of previous allegations would have been admissible given their limited probative value. Ms Farrelly knew and the jury knew that there was "a history of violent incidents between X and her mother". The judge referred to this in his summing-up.

72. In relation to X's other history, her medical history, and the previous incidents of admitted violence on her part, again Ms Farrelly knew enough to trigger the kind of questions that Mr Barlow submits would have been asked. Again she asked some of them. It is right to say she did not know that the idea of a Munchausen Syndrome diagnosis had been floated but, in our judgment, that material was not admissible at trial. The diagnosis was never made and we do not know the basis for the suggestion.

73. As far as her previous offences are concerned, the defence had been sent most, if not all, the material and could ask what questions the judge ruled were relevant and admissible. We question whether there was any real probative value in them in the context of this case.

74. We do not accept that the defence were misled about the paedophile ring, having seen the explanation advanced by Ms Travis and explored further by Mr Price during the course of submissions this morning. It appears that X gave an accurate account of abuse of another child by her grandfather.

75. The defence may have been misled as to whether X had previously complained of sexual abuse at home. We know not. All we know is that there is a record that paramedics had made such an entry. It is impossible now to know the truth or otherwise of what the child said and about whom she was referring. In any event she later retracted the allegation. We fail to see how that material could have been used to any significant extent, had the defence known of it.

76. Ultimately, the only issue that cause us any concern was whether the general picture of the complainant put before the jury was a sufficiently accurate one. We have explored this today in some detail both with Mr Barlow and with Mr Price. We have considered the material disclosed by the CCRC with care to assess whether any of it would have led the jury to see a somewhat different complainant from the one put before them.

77. Ultimately, we have decided that the picture put before the jury was a sufficiently accurate picture. The jury knew that X was a troubled child and that she came from a background where there was a history of violent incidents involving her and her mother. They knew that she had made previous complaints. They knew that she had been described as having what were called behavioural problems and that she had

indulged in self-harming as a result of those problems. Any distinction between what a layman might call a behavioural problem and a mental health issue we fail see.

78. For those reasons, therefore, we were not persuaded, despite the CCRC's analysis and Mr Barlow's analysis, that the failure to disclosure this material has undermined the safety of the convictions. So, although we understand why the matter was put before us, we will dismiss the appeals.

79. In doing so, we should add that we have considered the safety of the two individual convictions because they did not necessarily stand or fall together. In the result, we have concluded that both convictions are safe.

80. Thank you very much for your help, Mr Barlow, and for the analysis, particularly in written submissions, and the same to you, Mr Price, we are very grateful to you both.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk