

Neutral Citation No. [2019] EWCA Crim 1547  
2018/03875/B1  
IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Wednesday 28<sup>th</sup> August 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE JEREMY BAKER

and

MR JUSTICE FREEDMAN

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**REGINA**

**- v -**

**IB**

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**Mr F Dillon** appeared on behalf of the Applicant

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**APPROVED JUDGMENT**

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Wednesday 28<sup>th</sup> August 2019

**LORD JUSTICE SIMON:** I shall ask Mr Justice Jeremy Baker to give the judgment of the court.

**MR JUSTICE JEREMY BAKER:**

1. On 3<sup>rd</sup> August 2018, following a trial in the Crown Court at Chester, the applicant was convicted of four counts of indecent assault in respect of which he was sentenced to five years' imprisonment, concurrently on each count.

2. The applicant seeks to renew his application for leave to appeal against his convictions following refusal by the single judge.

3. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. No matter relating to any person shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her as a victim of the offences.

4. The indictment with which the jury were concerned contained seven counts of indecent assault, all of which involved the same complainant. She gave evidence that over a period of about three years, between 1998 and 2001, when she was aged between 10 and 13 and he was aged between 36 and 39, the applicant indecently assaulted her. Counts 1 to 6 alleged that whilst the complainant was in the bath, the applicant variously touched her vagina, bottom or chest, whilst counts 7 to 10 alleged that either whilst she was sitting on his knee or she was in bed, the applicant touched her vagina (counts 7 and 8), licked her vagina (count 9), and placed a hand on his penis to masturbate him (count 10). The applicant was acquitted by the jury of counts 1 to 6, but was convicted of counts 7 to 10.

5. The first ground of appeal is that the applicant's convictions on the latter counts are inconsistent with the applicant's acquittal on the latter counts.

6. The second ground of appeal concerns evidence, which was disclosed to the defence subsequent to the convictions, that the complainant had recently been involved in a fraud concerning the encashment of gaming tickets.

7. In order to determine whether these matters give rise to arguable grounds of appeal, it is necessary to consider the evidence which was before the jury, the directions of law provided by the trial judge in his summing-up to the jury, and the disclosure which was made to the defence concerning the complainant.

8. The history of the relationship between the applicant and the complainant goes back to the 1990s when the applicant commenced a relationship with the complainant's mother, who at that time had three children, including the complainant. Thereafter, the applicant married the complainant's mother who gave birth to their son. Some years later, the couple's relationship broke down and the applicant moved to separate accommodation. He maintained contact with the complainant who would stay over at his home at the weekends, which was where the sexual abuse was alleged to have taken place.

9. In 2003 the complainant was admitted to hospital, having attempted suicide. Whilst she was there, the complainant reported to her mother that the applicant had sexually abused her. The complainant's mother reported the matter to the police who made a note of what the mother told them that the complainant had said to her in the following terms:

"(i) When she was 10/11 years old, he put her on his knee and rubbed her vagina over her clothing, saying 'do you like it?'

(ii) Whilst she was in bed, he put his hand under the covers and touched her between the legs. She pretended to be asleep and rolled over.

(iii) Whilst in the bedroom getting changed, she heard him heavy breathing outside the door, which had a hole in it. When she went to the door, she heard the floorboards creak as he went away.

(iv) He put his 'bits' in her hand."

The written note also included the following comment by the police officer:

"I asked if there were four incidents only. Mum said she only told her of the four as mum could not stand to listen anymore. There could be more."

10. When the applicant was seen about these allegations at the time, he denied them and it would appear that, as the complainant did not wish to take the matter any further, no further investigation or prosecution took place at that time.

11. In 2005, the complainant emigrated. Before she left the United Kingdom, she provided a written note to a friend of hers which gave details of the sexual abuse which she alleged she had been subjected to by the applicant. Although the complainant provided details of being indecently assaulted by the applicant at his home in various ways, she did not allege that the applicant had touched her whilst she was in the bath or that he had licked her vagina.

12. In 2016, the complainant provided an Achieving Best Evidence interview to the police in which she alleged that she had been sexually abused in the various ways set out in counts 1 to 10 on the indictment.

13. When he was interviewed by the police about these matters, the applicant denied that he had sexually touched the complainant and alleged that her allegations were fabrications.

14. In addition to the above mentioned evidence, the prosecution also relied upon the complainant's older sister who gave evidence that at the material time the applicant had not only peered at her through a hole in the door whilst she was undressing, but that he had entered the bathroom and washed her back. The complainant gave evidence that the applicant had spied upon her through a hole in the door while she was undressed and that when she provided her written note to her friend in 2005, she had omitted a number of matters from it. Moreover, both the complainant and her mother provided a description of the applicant's penis which was consistent with one another.

15. The applicant gave evidence in which he provided his account of the history of the relationship between himself and the complainant in accordance with his police interview. A

character witness was relied upon. It was agreed that the applicant had no relevant previous convictions. A friend of his also gave evidence to the effect that he had visited the applicant's home during the material time and not only had he not noticed anything untoward in the relationship between the applicant and the complainant, but the bathroom door had a lock on it.

16. In the course of his summing-up, which is not the subject of any criticism, the judge accurately set out the relevant law and provided a fair and balanced summary of the evidence. In relation to the jury's consideration of the various counts on the indictment, the judge said this:

"First of all, it is important to note that there are a number of counts or charges, ten in all, and that means that each one deserves and must have from you separate consideration. It may be that if you believe [the complainant], then your verdicts may be the same throughout the case. They do not have to be. It may be that on an aspect of evidence you are less than sure about it. It is a matter for you to decide. Equally, if you decide that [the complainant] cannot be believed, it is likely that your verdicts will be the same in the other direction. It is for you to decide that. It is entirely within your province."

17. After they retired, the jury sent a note to the judge in the following terms:

"Would it be possible to see the transcript of the video of 2017? That's the police interview with [the complainant], specifically licking the vagina incident?"

Having discussed the matter with counsel, it was agreed that, although they would not be provided with a transcript of the interview, the judge would remind the jury, as he did, of the salient parts of what the complainant had said, including the three references which he had made to the applicant having licked her vagina.

18. Prior to the trial, the prosecution had disclosed to the defence that on three previous occasions the complainant had made allegations of a sexual nature against other individuals, two of whom had been partners of her mother at various times, and none of which had resulted in a conviction.

19. Following the applicant's convictions, the prosecution disclosed a further unused material schedule which referred to the fact that at the time of the applicant's trial the complainant was under investigation in respect of financial fraud which she had admitted in the course of her police interviews about the matter in the following terms:

"[The complainant] stated that her ex-partner is [CB]. She made full admissions to being involved in the fraud and for her part. She stated that she asked [CB] to pay for their daughter to go on holiday and that he came round to the house with some gaming tickets. [The complainant] was asked to go and cash in the tickets at various service stations. [CB] would change the value and she would give him the cash. She stated that she warned him

he would get in trouble and stated the amounts were lower at the start but got larger towards the end. [The complainant] stated that, for example, she would get £2400 from cashing in the ticket. She would get the £400 and [CB] the £2000. [The complainant] stated she wouldn't know how much she was getting until she inserted the ticket. [CB] would access the machines remotely. Most of the time he would give her the tickets at her home address. She stated she paid this into her bank account and then transferred to [CB]. [The complainant] stated she was involved from April to June 2018. She knew [CB] had £68000 but she only had about £3000 of that. [The complainant] said that she spent it on cannabis and bought a tablet and phone."

20. Since that time, it has been ascertained that the complainant has pleaded guilty to one offence of fraud and two offences of converting criminal property arising out of those matters and on 25<sup>th</sup> April 2019 she was sentenced for those offences to a community order.

21. On behalf of the applicant, Mr Dillon, who appeared at trial and before us today, submits that there is no logical evidential basis for the distinction which the jury made between the acquittal of the applicant in relation to counts 1 to 6 and the conviction of the applicant in relation to counts 7 to 10. It is submitted that no reasonable jury could have returned those verdicts, which are inconsistent and render the applicant's convictions unsafe.

22. In relation to the second ground of appeal, Mr Dillon submits that the recent disclosure concerning the complainant's involvement in a financial fraud amounted to bad character evidence which, had he had known about it, he would have applied to introduce into the trial under section 100(1)(b) of the Criminal Justice Act 2003. It is submitted that if the application had been granted, the evidence would have had a significant detrimental impact upon the creditworthiness of the complainant, which was a central issue in the case, and therefore renders the convictions arguably unsafe.

23. In the original grounds of appeal there was a further argument to the effect that had this evidence been admitted, Mr Dillon would have sought further information about the three previous occasions upon which the complainant had made allegations of a sexual nature against other individuals and would have applied to cross-examine the complainant about them. However, understandably, Mr Dillon accepts, on reflection, that this matter does not afford an arguable ground of appeal and withdraws it. This accords with our preliminary view about the matter and we do not consider it any further.

24. The issue concerning inconsistent verdicts has been discussed on a number of previous occasions by this court. Following an extensive review of those authorities, the law has been most recently set out in *R v Fanning* [2016] EWCA Crim 550, in which this court confirmed that the burden of establishing that verdicts returned by a jury are inconsistent with one another rests upon the appellant who must be in a position to establish that no reasonable jury who had properly applied their mind to the facts of the case could have arrived at those verdicts; moreover, that absent a specific direction, it is generally permissible for a jury to be sure of the credibility or reliability of a complainant in relation to one count, whilst not sure of the credibility or reliability of a complainant on another count.

25. It is properly conceded by Mr Dillon that this was not a case which required such a specific

"all or nothing" type of direction and that the judge's direction to the jury to consider separately the evidence relating to each count was correct, as was the direction that whilst the jury may convict of some counts, they may acquit of others, depending upon their views upon the evidence relating to those counts. Therefore, in the present case there was nothing to prevent the jury from taking a different view of the complainant's credibility and/or reliability, depending upon their views of the evidence relating to those counts. Moreover, having reviewed the evidence before the jury for ourselves, not only are we not satisfied that the verdicts were ones which it was not open to a reasonable jury, but we consider that a logical basis may be discerned for those verdicts based upon the evidence in the trial.

26. In this regard, with the exception of count 9, all of the counts upon which the jury convicted the applicant were ones which had been foreshadowed in the note which the police had recorded of what the complainant's mother had reported to them that she had been told by the complainant in 2003; whilst, in contrast, the note did not contain any allegation relating to the complainant being touched by the applicant whilst she was in the bath. This position was mirrored by the written note that the complainant had left with her friend prior to her emigration in 2005. Moreover, there was also evidence from the applicant's friend that there was a lock on the bathroom door.

27. Although the fact that the complainant's sister gave evidence of having her back washed by the applicant whilst she had been in the bath may appear at first blush to be supportive of the evidence relating to counts 1 to 6, it was also, of course, a matter for the jury to consider the credibility and/or reliability of this witness. It may well be that they were not satisfied in relation to this aspect of her evidence, just as it is apparent from the jury's verdicts in relation to these counts that they were not satisfied about the complainant's credibility and/or reliability in relation to this aspect of the case.

28. In relation to count 9, although we acknowledge that there was no evidence that the specific allegation had been mentioned previously by the complainant, not only had the complainant's mother made it clear to the police that there could have been other allegations to which she had been unable to listen, but in her evidence the complainant stated that she had omitted a number of matters from her written note. Moreover, it is clear that the jury carefully considered the evidence relating to this count, as it was the subject of the only question upon which they asked the judge for assistance during their retirement, who properly reminded them of the three passages from her ABE interview, where she mentioned this aspect of the case.

29. In our judgment, these were all evidential matters for the jury to evaluate for themselves and, as we have explained, not only are we unsatisfied that the resulting verdicts were not ones which no reasonable jury could have returned, but the evidence as a whole provided a logical rationale for them.

30. In relation to the unused material schedule, which was disclosed to the defence after the applicant's conviction, we are prepared to consider this evidence, *de bene esse*, without further consideration of the matters relevant to its admissibility under section 23 of the Criminal Appeal Act 1968.

31. This evidence was undoubtedly bad character evidence relating to the complainant and would, absent agreement, require to be admitted under section 100(1)(b) of the Criminal Justice Act 2003, which provides that it may be admitted if

"it has substantial probative value in relation to a matter which –

- (i) is a matter in issue in the proceedings, and
- (ii) is of substantial importance in the context of the case as a whole."

32. In this regard, it is clear that one of the issues in the case was the creditworthiness of the complainant and that this was of substantial importance in the context of the case as a whole. Therefore, the real question which arises is whether the further evidence is of substantial probative value in relation to the complainant's credibility, as explained in *R v Brewster and Cromwell* [2010] 2 Cr App R 20.

33. In our judgment, it is important to bear in mind that this case largely concerned the credibility and reliability of the complainant concerning events of a sexual nature which took place some twenty years ago when she was aged between 10 and 13, in relation to which she made complaints in both 2003 and again in 2005. In contrast, the evidence which can be gleaned from the schedule and her convictions is that relatively recently she had become involved with a fraudulent scheme perpetrated by her partner to encash gaming tickets, about which she made admissions to the police.

34. Given both the substantial remove in time and the entirely different subject matter between the allegations in relation to which the jury were concerned and the recent fraud in which the complainant had become involved, we do not consider that this evidence would have been of substantial probative value in relation to the issue of the complainant's creditworthiness for the purposes of the trial and therefore do not consider that it would have been admissible under section 100(1)(b) of the 2003 Act.

35. In these circumstances, we consider that the single judge was correct to refuse leave to appeal in this case, and for the reasons we have sought to explain the renewed application is also refused as there are no arguable grounds which affect the safety of the convictions.

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