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No: 201800279 C1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 5 July 2019

B e f o r e:

LORD JUSTICE BEAN

MR JUSTICE CHOUDHURY

HIS HONOUR JUDGE POTTER

R E G I N A

v

LEE UNDRILL

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Mr B Newton appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. LORD JUSTICE BEAN: The provisions of the Sexual Offences (Amendment) Act 1992 apply, and in any report of this judgment or of this hearing the victim must not be identified.
2. On 30 March 2017 in the Crown Court at Snaresbrook, following a trial before His Honour Judge Shanks and a jury, the applicant was convicted of an offence of assault on a child under 13 by penetration contrary to section 6(1) of the Sexual Offences Act 2003. He subsequently admitted that that constituted a breach of a Sexual Offences Prevention Order which had previously been imposed. He renews his application for leave to appeal against conviction following refusal by the single judge.
3. His application in respect of the matter of breach of the Sexual Offences Prevention Order in effect stands or falls, as counsel recognised, with his challenge to the conviction on the count of assault by penetration. If that conviction stands, there is no possible basis for questioning the conviction for breach of a Sexual Offences Prevention Order; if not, then the breach proceedings also might be the subject of an appeal.
4. He was acquitted of an allegation of sexual assault on a child under 13, which formed Count 3 of the indictment. There was also a Count 2 of the indictment, an alternative to the charge of assault by penetration, namely sexual assault on a child under 13, that being the same incident as in Count 1. In view of the jury's decision to convict on Count 1, no

verdict was taken on that alternative charge.

5. No application was made in time for permission to appeal against conviction. He made an application out of time. That was refused on its merits by the single judge, and he now applies, again late in the day, to the full court, renewing the application for leave to appeal against conviction. We will put the question of extension of time to one side and focus, as did the single judge, on the merits.
6. The applicant had begun a relationship in 2015 with CH, and later moved into her home. On occasions, Ms H babysat for a friend of her foster mother who had three children, one of whom was a 6 year-old girl, the complainant, to whom we will refer as E. On 28 August 2014, Ms H was looking after E and her twin sister. She was initially at home alone but was later in the company of the applicant and a friend called ID. For most of the day, the twins watched television.
7. In an Achieving Best Evidence interview conducted on 10 September 2015, E gave evidence that the applicant had come into Ms H's bedroom. At the time E was watching a film with her sister in the bedroom. Ms H and Ms D had gone outside to have a cigarette. E alleged that the applicant had then hugged her and proceeded to touch her bottom. He then, to summarise a passage in the ABE interview, to which we shall come later in greater detail, put his hands under her knickers and put his finger into

her vagina.

8. There was also a complaint by E's twin sister, S. In her ABE interview she stated that the applicant had put his hand down her and her sister's knickers and touched their bottoms. In evidence, however, she stated that the applicant had not touched her. That allegation was the subject of Count 3, of which, we have noted, the applicant was acquitted.
9. The jury heard the evidence of the complainants. We are told and accept that in cross-examination E could not be persuaded to say any more than she had said in the ABE interview, at least so far as relevant for the subject of the grounds of appeal. They heard evidence from an expert, Dr Gray, in relation to a medical examination.
10. The defence case was that the applicant had not assaulted the complainants, either as alleged or at all. Indeed, the applicant gave evidence that he had not been alone with the complainants, he had had no opportunity to commit the offences, and as to the day of the alleged incident, he had supporting evidence in the form of Ms D saying that on the day of the incident the applicant was never left alone with the complainants. The applicant gave evidence, as did Ms D. The jury, as we have said, convicted on Count 1 but acquitted on Count 3.

11. The grounds of appeal against conviction on Count 1 are three in number. We will deal with each of them as put forward by Mr Newton in this court.

12. The first is that the trial judge should have withdrawn Count 1 from the jury at the close of the prosecution case, Mr Newton puts it in this way: because there was no submission at the close of the prosecution case of no case to answer on Count 1. There had been a previous attempt before Judge Paneth to have Count 1 dismissed on the grounds that the ABE interview did not disclose a case to answer. The judge found that it did.

13. The fact that counsel did not make the submission of no case in relation to Count 1 is very striking. Counsel did make a submission in relation to Count 3, and it succeeded. We think that trial counsel was entirely right in not making the submission of no case to answer in respect of Count 1. This is not because of any need to be deferential to the ruling given on the application to dismiss. There is no rule in a case of this kind that where an unsuccessful application to dismiss on the grounds that the factual evidence does not disclose a case to answer is made before the trial begins, that that submission cannot be renewed at the end of the prosecution case. We think that counsel was right because there was in fact a case to answer.

14. If one puts together the passages at pages 9, 10 and 17 of the ABE interview, one finds phrases such as, "He done it under my knickers," page 9; "He put it in but it wasn't

hurting," page 10; "He put his finger sideways" and "He put it at the front", page 17.

Just as Judge Paneth had been right to refuse the application to dismiss Count 1, a similar application at the end of the prosecution case on the grounds that there was no case to answer, had it been made, would have been rejected.

15. We turn to ground two. This criticises the directions given to the jury as a matter of law.

The judge first explained at page 92 of the transcript the difference between Count 1 and Count 2. He did so in clear terms. He then returned in greater detail on page 93 to what was required to constitute the offence on Count 1, and emphasised correctly that on an allegation of assault by penetrating the vagina, the slightest penetration is enough. Then at 94F, in the passage of which Mr Newton complains, the judge went on, "The real issue is whether it happened at all." Mr Newton complains that this phrase, and the passage which followed in support of it, amounted to telling the jury that there was a simple binary choice: if they believed the complainant, then they should convict; if they disbelieved the complainant, or had a reasonable doubt as to whether the complainant was telling the truth, then they should acquit.

16. We do not think there is anything to be criticised in that passage of the summing-up; on the contrary. The difficulty in the submission which Mr Newton makes is that it is tantamount to saying that the judge should have told the jury, in effect, "The defendant's primary case is that this never happened at all. Further or alternatively, however, if it did happen, you need to focus on whether there was penetration, as alleged by the

complainant, or whether it was mere touching." That would have detracted from the simplicity of the defence case. We do not think the judge can be criticised in any way for having set out the legal directions as to the ingredients of the offence under Count 1, the alternative offence under Count 2, and then of course Count 3.

17. The third ground is that it is said that the jury was not given a balanced picture, taking the summing-up as a whole, as between the prosecution evidence and the defence evidence, including that of the defendant's supporting witness, Ms D. Mr Newton has told us about the number of pages devoted to the prosecution evidence in the summing-up and the number of pages devoted to the defence evidence, but this is, with respect, of no use as a ground of appeal. It is very common for the prosecution evidence to contain much greater detail than the defence evidence, particularly when, as in the present case, the thrust of the defence evidence is that what the complainants have said simply did not take place and he, the defendant, had no opportunity to carry out the offences alleged on the day in question. That is capable of brief summary. We asked Mr Newton what essential point in the defence evidence should have been made to the jury but was not, and he was unable to give an answer. We think there is nothing in ground three.

18. Ground four relates to the separate offence of breach of the Sexual Offences Prevention Order. As we said at the outset, that stands or falls with the safety of the conviction on Count 1.

19. For the reasons we have given, we do not consider that there is any arguable basis for

giving permission to appeal against the applicant's convictions. Permission is accordingly refused and the extension of time sought is likewise refused.

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

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