Neutral Citation Number: [2009] EWCA Crim 255

Case No: 200800572 C1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Date: Tuesday, 27th January 2008

B e f o r e:

LORD JUSTICE TOULSON

MR JUSTICE BEAN

HIS HONOUR JUDGE PAGET QC

Sitting as a Judge of the Court of Appeal Criminal Division

- -

R E G I N A

v

STEVEN BREEZE

- -

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(Official Shorthand Writers to the Court)

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Mr M D Barlow appeared on behalf of the **Appellant**

Mr J Hillis appeared on behalf of the **Crown**

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J U D G M E N T

1.
LORD JUSTICE TOULSON: On 4th July 2003 at Sheffield Crown Court before His Honour Judge Lawler QC, the appellant was convicted by a majority of rape (counts 1 to 6) and indecent assault (counts 7 to 10). He was subsequently sentenced to 12 years' imprisonment concurrent for the offences of rape and 4 years' imprisonment concurrent for the offences of indecent assault. He appeals against conviction by leave of the full court.

2.

It will be appreciated from the dates recited that this is a very stale appeal. The reasons for its staleness were considered by the full court when granting leave and need not be repeated.

3.
The complainant, "J", was the appellant's stepdaughter. On 1st November 2002 she told the police that he had sexually abused her on numerous occasions between 1982 and 1989 when she was aged between 8 and 14 years old. The counts on the indictment were all specimen counts.

4.
The complainant was five years old when her mother married the appellant. Living also in the house from that time on were the complainant's sister and brother. She said that she did not tell anyone what happened to her during the years of abuse because she was frightened and did not want to upset her mother.

5.
Her evidence was that from the age of about 8 the appellant sexually abused her on a regular basis day and night. The abuse often took place while she was in bed with her sister, but her sister never woke up. She said that the abuse stopped in 1989 when she was 14 years old because she was then able to stand up to the appellant. She carried on living at home with her mother and the appellant until she was 21 years old. In 1995 she left home. In 1998 she was married and the appellant gave her away at her wedding. In the following year, the appellant and the complainant's mother separated and the appellant began living with another woman, whom he later married and who gave evidence on his behalf at the trial.

6.
In September 2000 the complainant said something to her mother about the way in which her stepfather had allegedly treated her. By now the appellant was the mother of two young children, the second of whom was just 4 months old. Under pressure from her mother, the complainant told her husband. She then underwent a period of counselling. This was two years or so before she made a complaint to the police, following which the appellant was arrested and interviewed. He denied the allegations in their entirety throughout his interview and throughout his evidence at the trial.

7.
The appellant was given leave to appeal on four grounds. Ultimately, this appeal turns on one point which is short but far from easy. First, we must deal with the others.

8.
The first ground of appeal was that the record of the police interviews with the appellant were not edited, as they should have been, to exclude allegations of the complainant which he she did not maintain in the witness box, and prejudicial irrelevant material about the appellant's relationship with his current wife. As to the first, in interview it had been put to the appellant that the complainant said, among other things, that he used to caress her body and kiss her in an adult fashion. That part of the alleged abuse did not emerge in her evidence, and so should strictly have been edited from the interview before it went before the jury. However, that form of abuse was much less grave than much of the abuse about which the complainant did give evidence, and it is, in our judgment, simply unrealistic to suppose that the omission to edit that part had any prejudicial effect in leading to the jury's verdicts.

9.

The second part of the interview about which complaint is made was a short passage where the interviewing officer elicited the fact that the appellant's current wife was aged 18 when they met, and he suggested that this indicated that the appellant had a preference for younger women. Nobody could sensibly think that there was any relevant comparison to be drawn between an adult male entering into a relationship with a woman of 18 and engaging in paedophile activities with a stepchild of 8 to 14. The question was certainly irrelevant, but we cannot suppose that it could realistically have affected the jury's verdict. Experienced trial counsel took the view that it was too innocuous to require exersion, and that was a realistic view.

10.
The second ground of appeal is that the judge failed to direct the jury as to the legal status of the evidence of the complainant having spoken to her mother in September 2000 about the appellant's alleged conduct towards her. In her evidence in-chief, the complainant was asked if, during the period of the alleged abuse, she had ever mentioned it to anyone else. She confirmed that she had not. In cross-examination, counsel for the appellant drew out the fact that she had first mentioned the matter to her mother. This was a perfectly understandable form of cross-examination. Counsel for the appellant was wanting to draw out before the jury the full length of the delay before the complainant had mentioned this matter to anybody. In order to do that, it was necessary to find out from the witness to whom she had first spoken. That then led to him developing a line of argument to the effect that the appellant and her mother had had a volatile relationship. They fell out again in relation to what she had said to her mother. At about the same time her mother was falling out with her stepfather. In short, the complainant was in a state of some emotional turmoil, and surrounded by unstable relationships, at the time when she first came out with the matter. The defence were also anxious to find out from the complainant what it was that supposedly caused her first to mention it to her mother. All this, as already mentioned, was in the context of her own change of domestic circumstances, in that she was now a young mother coping with all the emotional and physical stresses of childbirth and the aftermath.

11.
There is authority, to which Mr Barlow has taken us, to the effect that whenever evidence comes out at a trial on charges of sexual offences about a complaint having been made, the judge should direct the jury about the limited relevance of such evidence. The obvious reason why this has been seen as necessary is because in cases of so-called recent complaint a jury might otherwise treat what the complainant is said to have said to others as somehow reinforcing the quality of the evidence given by the complainant herself or himself.

12.
In this context, the fact of the report was brought out for entirely different reasons. It was in no sense a recent complaint, and the jury were told nothing about the details of it, because it was not material. In our judgment, it is unnecessary for this court to decide whether, under the line of authorities to which we have referred, it was incumbent on the judge to give the jury a direction about the potential significance of this evidence, in circumstances where nobody was putting it forward as evidence which in any way positively supported the prosecution's case, and, as we have mentioned, no details of what she had said had been given to the jury. If there had been such a direction, it would have been to the effect that the only relevance of what they had heard about the complainant's recounting of matters to her mother in September 2000 was in relation to the question of whether her delay in doing so undermined or weakened the jury's confidence in the accuracy of her evidence. But it is plain from the transcript of the proceedings and the summing-up as a whole that that is the way in which

that issue was approached by everybody involved in the case. We can see no serious basis for supposing that the omission of such a direction can in any way have affected the result.

13.
Grounds three and four are of a different ambit. It is complained that the judge failed to direct the jury in respect of the inconsistencies in the account provided by the complainant, and the judge made unfair comments during his summing-up. It is convenient to take those two together.

14.
What have been described as inconsistencies in the accounts provided by the complainant were not contradictions, but were instances where the complainant said things in her evidence which she had not said in her previous statement. In each case the point was drawn to the jury's attention by the judge in the course of his narrative summary of her evidence, without further comment. But the judge gave no direction to the jury as to how they should approach those matters.

15.
The real complaint is that the summing-up was unbalanced because the judge made certain remarks which were positively supportive of the prosecution's case, and could have left the jury in no doubt what he thought about the facts, and that those comments were not balanced by any reciprocal underlining of points made by the defence so as to give the jury a balanced presentation.

16.
This was a case in which the trial had been short and closing speeches had been delivered on the same day as the summing-up by experienced counsel, who had made, succinctly, all the major points which were to be made on either side. Unusually, we have transcripts of those closing speeches. The task for the judge in these circumstances was essentially a simple one. All that he needed to do was give the jury the necessary directions of law and to remind them of the salient evidence and the issues in the case. It was not necessary for him to go further into reiteration of arguments in favour of the prosecution or the defence, and, in the view of this court, there was very good reason in such circumstances not to do so. He was, of course, entitled to make comments, but, if so, it was necessary to ensure that it was done in a balanced fashion.

17.
Mr Barlow identified a number of the points which had been made on behalf of the appellant. The main points were these:

1. There was no independent evidence to support the complainant's account.

2. It was strange that the abuse should have carried on in the family home for six years with the regularity that she alleged but without detection or suspicion falling on the appellant.

3. It was remarkable that on the complainant's account she suffered no visible injury or bleeding, although the prosecution alleged forced intercourse at the age of 8. Had there been bleeding, her mother, who did the washing, might have been expected to wonder why her daughter's pants were bloodstained. But on the complainant's account she never did bleed until she started her periods, and that was after the abuse had finished.

4. The complainant had remained living at home until the age of 21.

5. The appellant had given her away at her wedding.

6. A number of things said by the complainant in her evidence emerged then for the first time, as we have already mentioned.

7. There was a delay of well over a decade before the complainant made any mention of the alleged abuse to anyone.

18.
Mr Hillis, who had the misfortune of receiving the prosecution's brief only late last night, used the intervening hours constructively, because in his helpful submissions he analysed these various points and showed that each of them was dealt with by the judge in the course of his summing-up. They may not have been emphasised, but they were points about which argument had been presented on the appellant's behalf by his trial counsel and they were dealt with by the judge in his summing-up. It is also right to note that the judge, when he came to remind the jury of the appellant's evidence, did so largely (although not entirely) without adverse comment.

19.
The problem is not in truth that the judge failed to mention any material point which the appellant says ought to have been put to the jury. The concern is the disparate treatment given to the evidence and points made on behalf of the complainant and the appellant.

20.
One of the points made by counsel for the prosecution was the absence of any obvious motive for the complainant to lie. This was a fair point for the prosecutor to make, and she made it vigorously but without going over the top. In her closing address to the jury, counsel for prosecution said as follows:

"Members of the jury, I would invite you to consider this question. Why on earth should the liar be [the complainant]? What on earth does [the complainant] stand to gain from telling a pack of wicked, shameless lies? Don't get me wrong, ladies and gentlemen. I am not trying to go behind that principle I told you about right at the very start, the burden and the standard of proof. Don't think for a moment that I am suggesting the defence have to provide a reason for you to believe why [the complainant] should lie, but you may think it wouldn't half help. [The complainant] has never been described in fact by anybody other than herself as a difficult teenager, a habitual liar. To be fair to her, she didn't say that about herself; she said she was a proper little madam and a bit of a rebellious teenager. But nobody has said, 'This is a girl who you could never believe a single word she said. She was always lying her head off'. It has never been suggested to her by anybody, 'Oh, you're lying for this reason, that reason or the other reason', or 'You could be lying for any of those reasons'. So why on earth should she?

If we are going to tell lies we usually have a reason for it. We don't usually do it just for the sake of it. If we are telling lies, we usually don't do it in such a way that makes us look rather bad, such as describing yourself as a bit of a teenage rebel and a proper little madam. Yet [the complainant] says 'That was me as a teenager'. Bizarrely, you may think, [the appellant] is saying, 'No, she was fine. She's got a brilliant personality. I really got on with her, no problems with her'.

Members of the jury, just think what [the complainant] has put herself through for the sake of these lies, as the defence would have you accept."

21.
That was the closing note to the prosecution's address. The judge picked the point up. It was proper for him to refer to it, because it was a major part of the prosecution's case. But the complaint made is

that in his summing up he made the same point time and again, without setting it against any other factors. At page 148 of the transcript of the trial, he said:

"I now move to another area, which is when the abuse ceased. She told you that was when she was 14. The effect of her evidence was that she had gained in confidence and began to say no. [Her brother] was also at home rather more of the time. She said the defendant did stop, but he tried it on and pestered her for sex when he saw the opportunity. She resisted those advances. He did not pursue her physically or threaten her.

Now, it is a matter for you, members of the jury, but you will have to ask: if she is lying about all of this, why did she choose this particular time to say the abuse stopped? She could, if she is lying about it, have said it went on for another few years. That is a matter for you."

Two pages on, after referring to the delay in reporting the appellant's alleged treatment of the complainant and telling the jury that experience has shown that sometimes children keep quiet for fear of the consequences within the family setting, he went on to say:

"Members of the jury, it is a matter for you, but you will have to ask whether she would have put herself through all that mental anguish if she was lying about this whole thing."

Two pages on he said this:

"Equally, members of the jury - and this is another matter which the Crown invite you to consider - if all was well and he was the caring stepfather, why has she not only made but followed through these allegations to this court? The defence, I remind you, do not have to establish a motive for why she should say these things. It is for the prosecution to prove their case, but the prosecution invite you to consider this matter and the absence of any motive put to [the complainant]. The Crown say to you, 'What has she to gain?'"

Another three pages on, when going through the appellant's evidence, the judge made the same point again.

22.
It is said that nobody on the jury listening to that repeated theme could have been left in any doubt but that the judge, for his part, was impressed by the complainant's credibility. It is said that the vice running through the way in which the judge dealt with this point, which had already been firmly made by the prosecution, was that he came back to it again and again as a refrain in between dealing with other aspects of the evidence, and that this was to unbalance the summing-up by constant repetition of the point. Furthermore, it was not balanced by reminding the jury that not all sexual complaints are necessarily true, or by inviting them in this context to consider any of the various defence points which he had mentioned at different stages when reminding the jury of the evidence, or making reference to her own circumstances at the time when she first brought these matters to light.

23.
We have found this a difficult matter. It is more than likely that the judge delivering his summing-up did not realise quite how often he was repeating the point. But each member of the court, on reading the summing-up, has been troubled by the drum like repetition of the point. Cases involving allegations of historical sexual abuse are always difficult, especially where there is no material independent evidence to support either side. It is proper for the judge to remind the jury, as he did in this case, that there may be understandable reasons why child abuse does not come to light until many years afterwards, and the fact that a complaint is unsupported by other evidence is not of itself

an indication that the evidence is untrue. But balance has to be preserved. We have been driven to the regretful conclusion that this summing-up was not balanced and that the resulting convictions are unsafe. We recognise that this is deeply unsatisfactory, coming some years after the event. This court will always hesitate long before overturning a conviction based on a jury's assessment of the truthfulness of witnesses whom it has seen. But there is a principle at stake. Whatever the nature of the case, the summing-up has to be balanced. As already indicated, we rather suspect that the judge may not himself have appreciated, as he was delivering this summing-up, how much he was emphasising the case advanced by the prosecution without reference to other factors which the jury had to take properly into account. For those reasons, this appeal must be allowed.

24.
MR HILLIS: My Lord, for the sake of completeness we ask my Lord to confirm that my Lord does not regard this matter as suitable for retrial.

25.
LORD JUSTICE TOULSON: No, the appellant has served 6 years' imprisonment. On a case of this kind it would be wholly improper for this court to express any views as to merits. We do understand that from the complainant's point of view the result is unsatisfactory because she has given her evidence and been believed and now the conviction is being quashed with no retrial, but it would be wholly wrong to order a retrial in circumstances where the appellant has served 6 years' imprisonment.

26.
MR HILLIS: I am obliged, my Lord.