

Neutral Citation Number: [2017] EWCA Civ 2680

IN THE COURT OF APPEAL - CIVIL DIVISION  
ON APPEAL FROM THE PLYMOUTH COMBINED COURT  
HER HONOUR JUDGE ROBERTSHAW  
PL16C00238

Case No: B4/2017/0711

Room E307  
Royal Courts of Justice  
Strand  
London  
WC2A 2LL

12.50pm – 1.23pm  
Thursday, 7<sup>th</sup> September 2017

Before:  
THE RIGHT HONOURABLE LADY JUSTICE KING  
THE RIGHT HONOURABLE LORD JUSTICE HENDERSON

RE:

B-S (A CHILD)

MR A BOND appeared on behalf of the Applicant  
MS A CROOKES appeared on behalf of the 1<sup>st</sup> Respondent  
MR N BRADLEY appeared on behalf of the 3<sup>rd</sup> Respondent

JUDGMENT  
(For Approval)

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**Lady Justice King :**

1. This is an appeal against a decision by Her Honour Judge Robertshaw sitting at the Family Court at Plymouth on 22 February 2017. By her judgment, the judge found that the appellant mother was the sole perpetrator of injuries sustained by her daughter L.
2. L was born in February 2016. Upon her admission to hospital on 29 March 2016 when she was five weeks old, she had suffered bruising to her face, jaw, chest, and back, and had sustained fractures to three of her ribs. The injuries had probably been caused on three separate occasions. There is no appeal against the judge's findings that these were non-accidental injuries.
3. The basis of the appeal, and in relation to which permission was given by Black LJ (as she then was), is that the judge was wrong in finding that the mother alone caused the injuries to L, and rather that, on the analysis of all the evidence, a proper finding would have been that both the mother and the second respondent, SP (the mother's then boyfriend), were both potential perpetrators.

*Background*

4. The mother had her troubles and difficult upbringing. She was subject to a child protection plan for a period of time due to alleged abuse and violence from her father. She suffered from depression, situational anxiety, lack of confidence, and anger management issues. The mother's relationship with her own mother was described by the judge as "difficult" and "acrimonious". Twice in the year before L's birth, the maternal grandmother had to call the police because she felt threatened by the mother.

5. The natural father of L has played no part in the proceedings, and the mother's case was that her pregnancy was consequent upon her having been raped by the father. The mother met SP online. When the mother moved into her flat during the course of her pregnancy, SP also moved in, allegedly to help her to settle and to cope. He remained supporting the mother during her pregnancy and after L's birth. SP himself had had a troubled upbringing and had his own difficulties with anger and managing his own lifestyle.
6. During the course of the pregnancy, the mother had engaged well with the midwifery services. There were, however, some concerns about the mother's mental health and the role of the maternal grandmother who, it was said, had been violent to the mother during her own childhood.
7. When L was born, the mother was just 19 and SP, 17. There were immediate concerns after L's birth in relation to the mother's ability to care for L and, importantly, to bond with her. As a consequence, the mother was kept in hospital longer than would ordinarily have been the case. Arrangements were made for her to be visited daily upon her discharge and there seemed to be some positive progress in the early days of March 2016. Unhappily, these positive signs were short-lived. By 14 March, the grandmother was raising concerns about problems in the relationship between the mother and SP, complaining of shouting between them and of banging of doors. At a visit by the health visitor on 23 March, both the mother and grandmother raised concerns with the health visitor in relation to the mother's ability to bond with L. The mother was anxious that she was unable to stop L crying at night and she was worried that L may be, what she regarded as, 'rejecting her'. It was at this visit that the mother subsequently alleged that she had drawn some marks on L's legs to the attention of the health visitor. The judge was completely satisfied that the mother was lying about this and that she had at no time pointed out any marks on L to the health visitor.

8. In those early days, the pattern, it would seem, was that the mother cared for L until about midnight each night and thereafter SP would look after her (as he was routinely up throughout the night playing on his Xbox). The mother would then resume the care of L the next morning, at sometime around 9 or 10 o'clock.
9. On either the evening of 27 March, or the morning of 28 March, KB, a friend of the mother's who had given her unstinting help and support, noticed bruises to L's face, jawline, and cheek. KB drew the injuries to the mother's attention. The mother, the judge found, lied to KB, telling her that L had caused the bruise herself and further that she, the mother, had told her social worker about the bruising. In evidence, the mother denied that there had been any bruising to L's face at this time. The judge held, and there is no challenge to the finding, that the mother was lying in this regard; there was bruising and she knew about it, not least because KB had specifically drawn it to her attention.
10. Matters came to a head over the Easter weekend (27 to 29 March 2016). The principal dispute in relation to the events before the judge related to the morning of 29 March. By this time, it is clear from the judge's findings that L already had substantial non-accidental bruising to the face. At approximately 12.35 that morning, the mother sent a text to her social worker, Gary Neal, saying that something urgent was happening at home and could he call her. The social worker went to the flat in the early afternoon where he saw and spoke to the mother, the grandmother, and SP. It is unnecessary for the purposes of this short judgment to set out the various accounts given by the mother as to what happened which had led to her call Mr Neal.
11. At some stage the mother suggested that she had seen SP "strangling" L. Strangling was not, however, what she in fact described, she spoke of SP having moved L "roughly with his hand

in the collarbone area” and, thereafter, that “strangling” was the closest word she could think of to explain what she saw which was “his hand by her collarbone”.

12. In cross-examination, the mother accepted that she did not see SP try to strangle L and that contrary to an earlier account, she had not, as a consequence, asked him to leave their flat. Unfortunately, the judge was not adequately assisted by the evidence of Mr Neal. The judge described Mr Neal as having been “ill-prepared for giving evidence”. His notes, however, record the maternal grandmother telling him that there were three marks on L’s neck which Mr Neal had felt to have been consistent with strangling. Mr Neal did not, however, examine L. The judge described the social worker’s involvement with SP as follows:

“At the mother’s invitation, Gary Neal spoke with SP and the mother in the bedroom. He described there being a heightened state of anxiety. SP was quite distressed and he looked very worried. He was starting to panic. Mr Neal said he could not recall if the mother or SP told him he had tried to strangle L but when he asked SP to demonstrate what he meant by strangling, SP did not demonstrate strangling action. Mr Neal was confused as to what SP had meant by using the word strangling and had doubts about the story presented to him by the mother and Grandmother. He did not manage to get any clarity from SP and the conversation led from that to the mother saying that SP needed help with anger management. She suggested this in front of Gary Neal and SP. SP agreed and said he would be willing to have help. Gary Neal spoke with his manager and said L would need to go to hospital for a child protection medical. In his statement, Gary Neal said the mother had told him that SP had put his hand around L’s neck and it was suggested on her behalf in cross-examination that that was the best verbal description she could use having seen SP’s hand move up towards the neck area.”

13. A child protection medical was arranged and five separate areas of bruising to L’s body identified. The description given by the mother of what SP was said, by her, to have done was not consistent with that bruising. The judge concluded that, “whatever the mother saw, on the basis of her narrative, it is unlikely to have resulted in any bruising”. The judge described how, in evidence, the grandmother had demonstrated a gentle rocking motion on

the chest area, and not a hand around L's neck. The grandmother had moved her hand when she realised that the demonstration in court was not in the right area for the bruising.

14. The findings that there had been bruising prior to 29 March and that (whatever the mother saw or allegedly she saw on 25 March) it would not have resulted in any of the bruising subsequently seen at the medical examination are not challenged.
15. As there is no challenge to the judge's finding in relation to what occurred on the morning of 29 March, it follows that, in reaching her findings as to who caused the injuries to L, the judge was doing so against the backdrop of: (1) the mother having lied that she pointed out marks on L's body to the health visitor and lied when she said there was no bruising present prior to the morning of 29 March; (2) that nothing SP had been seen to do on the morning of 29 March 2016 had caused the non-accidental bruising to L; and (3) that the mother had 'set up' SP to take responsibility for the bruising in the invented strangling incident which he, SP, had been willing to go along with.
16. The judge was, therefore, faced with the situation whereby it was clear that the serious injuries had been inflicted upon L on more than one occasion prior to 29 March 2016. The judge had no direct evidence of violence towards L other than the alleged "strangling" incident on 29 March which she had ruled out as a possible cause of injury. There were no accounts of any incidents within the household which might have provided an explanation for the injuries, or any of them.
17. By the time the matter came to trial, the mother was putting forward a positive case that SP was responsible for causing the injuries to L. She said that her relationship was over and that there was no ongoing communication, either between herself and SP or between the grandmother and SP. It was on that basis that the trial commenced in September 2016. On

about day three of the trial, SP told his counsel that, contrary to the mother's case, he and her mother were in regular communication. The judge directed the transcribing of WhatsApp exchanges between the mother and SP which, far from showing no communication between them, produced some 170 pages of transcript which included exchanges up to, and during the course of, the first day of the trial.

18. Subsequently, the judge discovered that she had also been misled as to whether or not the grandmother was in touch with SP. The judge looked at SP's phone and decided that it too needed to be interrogated. The judge's decision, that it was necessary to have the phone professionally examined, resulted in a delay of four months for this young baby, which delay was occasioned entirely by the deceit of the mother and grandmother.
19. The information on the phone, it is accepted, reveals the mother cynically manipulating the father who was, as the judge found, completely besotted with her. The messages reveal the mother leading SP to believe they still had a relationship and that she loved him, even though the reality was that she was now in a relationship with someone else. SP gave £200 to the mother which she accepted. This was a sum which he had saved up and was, for him, a quite astonishing amount of money. The grandmother, for her part, offered SP both support and accommodation at her home during the course of the trial. At no point in the hundreds and hundreds of communications between them did the mother ever accuse or suggest to SP that he had ever done anything to hurt her baby.
20. SP, having attended the hearing in September, did not attend the resumed hearing in February notwithstanding all attempts by his legal team to try and contact him. The judge made the following findings about the text and social media communications and SP's failure to attend court for the resumed hearing. At paragraph 79:

“It is clear that SP was besotted with the mother and would say anything she wished. Had it not been for pressure placed upon him by the mother and grandmother and what they told him about their desire to promote the mother’s case and sacrifice that of SP, it is likely that he would have attended the second part of this hearing.”

21. This is in fact a summary of the more extensive finding made by the judge a little earlier in her judgment at paragraph 70:

“The mother and maternal Grandmother have sought to manipulate SP in these proceedings. They wanted him to take responsibility and blame for L’s injuries. The mother has consciously and deliberately manipulated him to keep him on her side and ensure he did not harm her case. The mother and maternal Grandmother put emotional pressure on SP to take the blame. The mother sent texts and messages expressing affection and love for SP when she was already seeing someone else. She even extracted money from him. The messages were untrue and nothing more than devious attempts by the mother to manipulate SP and keep him on board so that he did not give evidence against her case. The maternal Grandmother did likewise, having SP to stay with her during the first part of the hearing. The mother’s explanation that she sent such texts and messages because she was worried and concerned about SP, were completely false. She and the maternal grandmother knew SP was vulnerable and likely to respond in the way they desired and planned that they pressurised him to do so. He said as much in his messages saying he would take the blame for the mother. I am satisfied the mother in particular but also the grandmother sought to influence and probably succeeded in influencing SP not to attend this hearing believing this would help the mother’s case and that he would be held responsible in his absence. SP is compliant with what he knew the mother wanted and has failed to attend and give evidence.”

22. The judge, however, went a little further at paragraph 17, and it is in relation to this paragraph in particular that Mr Bond takes issue; the judge having said, “Neither the mother nor the maternal grandmother wanted him to give evidence. They actively sought to discourage him from doing so and sought to influence him against attending”. When Mr Bond was asked by Henderson LJ during the course of the hearing whether the word ‘actively’ been replaced by the phrase “it is to be inferred that they sought to discourage him...”, he would have felt able to challenge the finding. Mr Bond very properly said that he could not and accepted that, on the evidence before the court, the judge could properly have found that the content of the texts and social media led to an inference that SP had been influenced against attending. In my



judgment, this was effectively what the judge had said in her principal analysis at paragraph 70.

23. The judge may, during the course of her judgment, have chosen the wrong word or overstated the position in reaching her unappealable conclusion as to what the mother and grandmother's manipulation of SP was intended to achieve. That error, if it was one, cannot in itself possibly undermine her essential conclusion as to the reason why SP did not attend court to give evidence.
24. Having heard the evidence and submission over a period of nine days, the judge made the following core findings in relation to this young couple:

“The mother and SP were inexperienced and very young carers for a new baby. The health visitors were concerned about the mother's inability to prioritise L's needs above her own as was to the social worker Gary Neal and Dr KL. Both the mother and SP had significant issues of their own, a lack of maturity, commitment or motivation to prioritise L's care and wellbeing. The mother preferred to pursue her own interest and desire for a social life and SP played on Xbox throughout the night. They were and probably remain immature and selfish. They had enormous financial pressures. Money was extremely tight and home circumstances were poor. Their relationship was toxic and at time volatile and violent. Both had problems with anger and temper. The mother was manipulating. She took advantage of KB's friendship and goodwill and relied heavily upon her looking after L. She could have easily delegated responsibility for caring for L to KB. SP was lazy and did little to support the mother and L. He was not ready for and did not want the responsibility of looking after and providing for a new baby. The same sadly was so with the mother.”

25. In seeking to identify a perpetrator (if that was to be possible and appropriate), the judge was faced with the significant difficulty presented by SP's non-attendance. The judge was alert to the impact upon her task of SP's failure to attend and, in particular, for him to be available for cross-examination saying at 79:

“Adverse inferences could easily be drawn against him. They could be drawn against him because he failed to attend and because of his background and

history. Adverse inferences could be drawn that he had something to hide as to responsibility for L's injuries and that this is why he has not attended this hearing. What I must not do is speculate about the evidence he might have given. Mr Karen submits SP cannot be excluded from the pool of possible perpetrators all except the only persons in this pool are the mother and SP. It does not necessarily flow from this that SP is to be held responsible for the injuries or that the court cannot make findings that the mother is responsible for them. Equally the fact that SP has not attended and given evidence does not mean that he cannot be held responsible or that the court is unable to identify the perpetrator. All of the evidence must be considered including the inferences that can properly be drawn. The court must not speculate and I do not do so."

26. At paragraph 78:

"The mother and SP have difficult and in many respects turbulent backgrounds. There are clearly factors that point to SP having problems with temper and lack of control and other matters I have described about him that would enable the court to find that the injuries were caused by either the mother of SP..."

27. It is understandably Mr Bond's central submission that the court, as a consequence of SP's failure to attend, had only a partial picture of the two key people in the pool of potential perpetrators. Further, he submitted, that, whilst it was within the role, and ambit of the judge to make adverse findings against the mother, the judge had been unable to make any equivalent assessment of SP's credibility or reliability nor to consider his demeanour in court. In those circumstances, Mr Bond submits, where both people had significant care for L within the relevant timeframe for the injuries having been inflicted, and where both of those people had adverse findings in relation to their backgrounds, the judge had been in error in concluding that the mother was the sole perpetrator of the injuries in the absence of having heard from SP. Further, Mr Bond submitted, that, where both SP and the mother had had a significant role to play in the care of L, if the judge was to find the mother to be culpable (not having heard from the father) she should have carried out a careful analysis of why she had reached that conclusion, particularly given the adverse findings made not only about the mother but also about SP.

28. The judge heard the mother give evidence and saw her demeanour in court which had included losing her temper and storming out of the court. Many of the findings made by the judge arose out of the mother's own evidence. In particular, the judge found: (1) the mother was an unreliable and untruthful historian. She fabricated and exaggerated her narrative and gave inconsistent accounts, even within her own evidence; (2) the mother's evidence was riddled with "lies, fabrication, exaggeration, and inconsistencies". She was "emotionless and self-promoting". "Lying seemed to come very easily to the mother". The question the judge posed was whether or not she had "told all the lies" as a consequence of realising that she had failed to protect L, or because she was trying to avoid responsibility for having hurt her; (3) the mother had previously assaulted her own mother, including threatening her with a knife; (4) during the course of the hearing the mother's temper was close to the surface even allowing for the tenseness of court proceedings; (5) it is clear that the mother's health, anger management, and anxiety have remained very significant issues.
29. Each of these are in themselves significant findings even before putting these findings together with the findings that the mother and the grandmother had "set up" SP to take the blame for whatever happened to L in circumstances when he cannot possibly have caused the injuries. That being the case, the judge was entitled to conclude that the only reason for the mother to have blamed and manipulated SP in such a way was to deflect the court from identifying the real culprit where the only other person in the pool of potential perpetrators was the mother.
30. In my judgment, the fact that a person who, at the beginning of the trial is in a pool of potential perpetrators of non-accidental injury, thereafter fails to attend for a full cross-examination does not mean, as is accepted by Mr Bond, that the court can never identify the perpetrator.

It is, however, crucial that the court is astute to the impact of the failure of that person to attend court and to be available for cross-examination. The judge had that well in mind.

31. The judge gave appropriate direction on the law in relation to SP's failure to attend court. The question is whether she failed thereafter to give his absence the weight it deserved and which weight, if properly factored in, would have led her to conclude that, whatever her suspicions may or may not have been, she could not, on the balance of probabilities, properly make a finding that the mother was solely responsible for inflicting the injuries sustained by L.
32. The judge's position was that, whilst adverse inferences could easily be drawn against SP as a consequence of his failure to attend and given his own background history, he was besotted by the mother and had been manipulated by her and the grandmother in order to place upon him responsibility for causing the injuries to L.
33. The important submission is whether Mr Bond is correct in his assertion that the judge had been wrong to conclude that the mother was the perpetrator. In order to succeed in that submission, Mr Bond has to satisfy the court that the findings of fact made are ones that no reasonable judge could have reached. In my judgment, the judge was entitled to conclude that the mother had inflicted each of the injuries on L. This was a finding made by the designated family judge at the end of a trial which had lasted nine days and was a conclusion reached against a backdrop of all the evidence available to her. This not only included the mother's personal history and the difficulties she had had in bonding with L, but also her lies to the health visitor and KB and her attempts to blame SP for causing the bruises on 29 March 2016. The judge was entitled to take into account the positive case put by the mother that SP had caused the injuries, against the backdrop of the mother being unable to put forward any

evidence to back up such an assertion, and, finally, to her cruel manipulation of SP during the course of the proceedings.

34. An examination of the texts and social media communication and the finding that the mother had manipulated SP into failing to attend court, supported and confirmed the judge's view that he was besotted with the mother and that on at least one occasion he had offered to take the blame (whatever that meant). These findings were capable of undermining the mother's case that he had not attended court as he feared for his own position. It may be that the judge went a little too far in relation to all her findings in relation to the WhatsApp messages but they were, in my view, not essential findings critical to the judge's ability to properly make findings as to perpetration. It may be that another judge would have taken a more cautious approach and declined to making a finding of a perpetration in the absence of SP, but this judge, in my view, had well in mind the law and specifically said at paragraph eight:

“Mr Karen submits SP cannot be excluded from the pool of possible perpetrators all except the only persons in this pool are the mother and SP but it does not necessarily flow from this that SP is to be held responsible for the injuries or that the court cannot make findings that the mother is responsible for them. Equally, the fact that SP has not attended and given evidence does not mean that he cannot be held responsible or that the court is unable to identify the perpetrator. All the evidence must be considered including the inferences that can be properly drawn but the court must not speculate.”

35. She went further in the following paragraph, saying:

“It would be grossly unfair and unjust to a person who is not a perpetrator to have a finding made that either they and/or another person caused the injuries if on the evidence in accordance with the legal principles to be implied a finding can properly be made that the other person was the perpetrator. A finding that a person has harmed a child has adverse serious and long-term consequences for that person. It is important that the court does not shirk from identifying the perpetrator if it is possible to do without straying. I have not had to stride or strain to identify the perpetrator in this case.”

I would endorse that observation.

36. For the reasons that I have given in my judgment, there was ample evidence available to the judge enabling her safely to have made the findings that she did. With respect to Mr Bond, his submission that the judge failed adequately to pull the case together with a “rolled-up” analysis of the conclusions which had led her to make her findings may have some force, but is arguably a counsel perfection when considering this judgment was given a matter of days after the conclusion of the trial by a busy designated family judge. In my judgment, any ordinary reading of the judgment as a whole gives the reader a clear picture of how and why the judge reached the conclusion she did.
37. In those circumstances I would dismiss the appeal.

LORD JUSTICE HENDERSON: I agree.

**End of Judgment**

**Court of Appeal Unapproved Judgment:**  
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