Neutral Citation Number: [2015] EWCA Crim 1792

Case No: 201304298 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CRIMINAL CASES REVIEW COMMISSION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2015

Before:

LADY JUSTICE RAFFERTY DBE
MRS JUSTICE LANG DBE
and
MRS JUSTICE PATTERSON DBE

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Between:

Regina	**Respondant**
- and -	
L	**Appellant**

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- -

Miss Adrienne Lucking QC for the **Respondant**
Peter McCartney for the **Appellant**

Hearing date: 15th October 2015

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Approved Judgment

Lady Justice Rafferty:

1. On 4th December 2002 in the Crown Court at [place removed] the appellant [name removed] (56) was convicted and sentenced concurrently thus: for two indecent assaults, five years imprisonment, for indecency with a child three years imprisonment, for three rapes twelve years imprisonment and for attempting to commit an act of gross indecency three years imprisonment, all concurrent.

2. The total loss of liberty was 12 years. He was acquitted of three counts of Indecent Assault (Counts 8 – 10). On 12th January 2006 the Full Court refused his renewed application for leave to appeal conviction.

3. He appeals against conviction upon a reference by the Criminal Cases Review Commission ("CCRC") on the basis of two Grounds of the four it identified. First, fresh evidence that the medical evidence unchallenged at trial could not now be relied upon as consistent with previous sexual abuse and possible penetration, and that the documented medical findings would now be said neither to support nor refute the allegations. Second, previously undisclosed police material detailing a conviction by G in 1998 for wounding with intent. Knowledge of that would have allowed more effective cross-examination of him which could have further undermined his credibility and supported the defence case that L so feared his violence that she dared not name him as her abuser.

4. L, born on [DOB], 13 at trial, daughter of GL, was the appellant's niece. Her sister was the complainant on Counts 8 – 10 of which the appellant was acquitted. L alleged the appellant had indecently touched her over a three-year period and raped her on a number of occasions, the last in June 2001.

5. GL and his wife had two other daughters. L also had two half-brothers. Between May 1997 and May 2001 GL was serving a custodial sentence and had asked the appellant to help look after his family.

6. On 30th December 2001 L made initial disclosure and the police were contacted

7. A consultant paediatrician and a GP, neither of whom was called and each of whose evidence was agreed, were ad idem that L's hymen had old tears at three seven and ten o'clock, described as 'consistent with previous sexual interference and possible penetration'.

8. The Crown's case was that the appellant abused L during a course of conduct moving from sexualised rubbing to digital penetration of her vagina to rape. The counts were examples. Medical evidence was consistent with her allegations.

9. In interview the appellant's account foreshadowed his evidence, it was a complete denial. If N had been abused [G] was the guilty party.

10. N told the jury the appellant abused her over some three years. She did not initially tell anybody thinking nobody would believe her. The first incident, between January 1997 and April 1998, was at his home where he pulled her to the floor and rubbed against her groin. Both of them were fully clothed. (Count 1). He told her not to tell

anyone their little secret and stopped when he heard someone coming. This form of assault was repeated over twenty times over a few months.

11. Between January 1998 and April 1999 he and his partner would visit virtually every Sunday. He would read the sisters bedtime stories and when her sisters fell asleep play with her genitals and put his fingers inside her. Sometimes she was scratched by his fingernails. (Count 2). He would get under the blankets and touch her genitals with his toes.

12. As they watched television he would make her hold his penis (Count 3). He was once nearly caught when a young woman [Name removed] came in and he claimed they were play-fighting.

13. She said she was about ten when first he raped her. He pulled her legs in the air, put two fingers inside her, took out his penis and penetrated her vagina (Count 4). The penetration hurt. She said this happened on seventeen occasions.

14. On another occasion he pulled off her clothes and penetrated her with his penis (Count 5). He warned her they could both end up going to prison. He raped her on another occasion when he withdrew and ejaculated onto a towel he always had with him (Count 6). On the bed he straddled her and kept repeating, "Will she put it in?" and tried to open her mouth with his finger. He attempted it again that same night but she held him off. (Count 7) He would try to kiss her and put his hands down her trousers. Once she scratched his face. Sometimes post-rapes she would feel a scab and sometimes be really red. After the first rape she bled.

15. She kept a diary in which she told the jury she recorded that she was sick and tired of her [G] trying to touch her. She claimed she did not mean "indecently". She blamed [G] for what had happened. She denied the diary recorded other accusations against him or that her life had become hell after he had returned whereas things were fine when the appellant looked after her. Her mother had questioned her on the basis that the diary contained an accusation of indecent touching and warned her that its contents could mean her [G] going back to prison. She said she had not then told her mother about the appellant, scared she would not be believed. She had burned the diary as it could have destroyed the family. She ran away from home not to escape [G] but the appellant. She was not scared of [G] but post-release, by then a young lady, she was uncomfortable alone with him. Her parents never asked questions triggering her disclosure of what the appellant did.

16. [Name removed] said the appellant, his face scratched, once said "That bitch is getting too rough". A mature woman witness said N had alleged that the Appellant had "tried to put it in her mouth and down below as well". N had made no allegation against [G].

17. N's mother said the appellant caused her no concerns. N's diary recorded [G] walking in on her when she was getting changed. Mother asked daughter whether [G] had been abusing her which N denied.

18. GL told the jury he once found N on the bed, the appellant straddling her. She had scratch marks. He explained his conviction for wounding with intent as his having lashed out at a woman and beaten her so badly he nearly killed her. He explained an entry in N's diary, "If dad touches my boob once more I will go barmy" or, "… I will explode" as reflecting playful touching of her clothed breasts in front of the family. He denied touching her indecently or having had sex with her.

The defence case

19. The appellant told the jury that at the request of GL, when the latter lost his liberty, the Appellant began to look after the family, visiting at weekends. He had a brilliant relationship with his nieces as he supported, loved, and protected them. They were bathed in pairs and he was seldom upstairs with N. Nothing happened between them and he never rubbed himself against her at bathtime. If the house got too rowdy he would go upstairs to the computer. He would read to the children whilst lying on the bed. He never touched N indecently and any opportunity would have been limited. Play fighting led to cuts, scratches, and nosebleeds.

20. When N kicked him on the shin causing him to bleed he said, "Look what she's done." the comment overheard by [Name removed]. He denied raping N. He would have been seen had he crossed the landing to ejaculate.

21. Just before [G]was to be released she expressed her worries about his return, she was "frightened of being his next victim". Her diary recorded that everything had been rosy until his release. He said she wrote "He touches me up and walks into my bedroom when I get undressed. If it doesn't end I'm going to explode". Her mother later said the entry was not intended as it appeared.

22. He did not recall being punched in the genital area. He would take a towel into the bedroom because he sweated. It would not be unusual for him to sit astride her back when he tickled the children.

23. His fiancée supported his account in general. He called character evidence

Grounds of Appeal

24. Reflecting, at least in part, the CCRC's Statement of Reasons the Grounds rely on fresh evidence, primarily as to current medical practice. Sensibly Mr McCartney for the appellant conceded that were his arguments unsuccessful on this Ground his second submission, as to the potentially more powerful cross-examination of GL, which he did not abandon, would not cure the deficiency. That was plainly right and we were grateful to him.

25. Dr. Catherine White, instructed by the CCRC, in a report dated 20/11/11 found the documentation of the medical examination of N such as to preclude any significant conclusion. What was documented neither supported nor refuted the allegations. Dr. Ritchie in a report of 06/10/04 had taken a like position.

26. The Royal College of Paediatrics and Child Health paper "The Physical Signs of Child Sexual Abuse" ("the RCPCH report") first published in 2008 has long been

accepted as authoritative. It reviewed the development of medical knowledge and the more extensive research base now available to experts.

27. In her 2004 report Dr Ritchie was critical of the lack of documentation recording the examination and findings, specifically of the apparent failures to examine the hymen using a moistened cotton bud to see whether irregularities were full thickness tears. She said (as this court knew in 2006):

> "….the only diagnostic finding of previous penile penetration …is a full thickness transaction between three and nine o'clock. …The findings of "hymenal tears" at three and ten o'clock… may be naturally occurring …variants….of no forensic significance…. If the tear at seven o'clock was (sic) not clearly demonstrated to be a complete transaction…then it could have been ..naturally occurring…If all three "tears" were not …complete transactions.. …then together they could represent the notches in a naturally occurring fimbriated hymen. If the tear at seven o'clock was (sic) ….a full transaction…not a partial tear cleft or notch, …that finding would be diagnostic of previous penetration with an object the size of a penis….The documented findings, statements of the two doctors and the contemporaneous notes of [the GP] fall short of the requirements for reliable interpretation and possible corroboration between the findings and the allegation"

28. Refusing leave in a renewed application the court said:

> "…..Dr Ritchie concludes that the tears, or at least two.. ..could have been congenital variants. It is apparent therefore that even had Dr Ritchie's evidence been adduced at trial the medical evidence would have been inconclusive one way or the other. The evidence of all the experts would have been consistent either with abuse or in the case of Dr Ritchie …with a congenital variation"

Conclusion

29. The CCRC seeks to qualify that quotation to this extent: it suggests that Dr Ritchie had said in terms that were the three "tears" not clearly demonstrated to be complete transections then all three could have been naturally occurring.

30. This is accurate only so far as it goes. It is also accurate to add that all three could have been transections, or two of them, or one, for all we know. This is not a case in which advanced medical technique now permits reviewing doctors confidently to describe a diagnosis as ill-founded. Taken at their highest in the interests of the appellant the comments suggest that the medical evidence, interpreted as now it is, would be described as neither supporting nor refuting the allegation, effectively neutralised by later learning.

31. In ***S,B,C,R v R [2012] EWCA Crim 1433***, approving the RCPCH report and quashing a conviction, medical evidence was central. In the instant case it was not. No defence

medical evidence was called because the entirely competent tactical decision was made to run the case on the basis that sexual misconduct had occurred but at the hands of GL. The medical evidence, therefore, went unchallenged.

32. Consequently the position now is as was that confronting this court in 2006. Although the CRCC concluded that the jury would have found the medical evidence supportive of N's account whereas now those findings could not be relied upon as consistent with previous sexual interference and possible penetration, it was never the appellant's case that nothing happened. Rather, it was that whatever sexual indignity N suffered was at the hands of GL.

33. A review of his summing-up shows that the judge dealt with the medical evidence as background agreed evidence. It was far from central, an epithet in contrast applicable to the credibility of N.

34. The evidence of Dr. Ritchie before the Court of Appeal foreshadowed the conclusions later reached in the RCPCH report. The evidence of Dr. White although potentially fresh adds little, if anything, to her views. Neither doctor, in contrast to the consultant and the GP whose agreed evidence the jury heard, examined N. The RCPCH report refines best practice and sets out a template which might not have been followed at the examination of N. If it were, one would have expected notes in greater detail and they are not before this court. We have been careful to remind ourselves that that does not necessarily equate to their not having been compiled, hence our cautious use of syntax.

35. Best practice as currently identified would include the use of vocabulary which without more conveyed detail. Once again we have reminded ourselves that its absence does not necessarily indicate that the examination was deficient. For all we know it adhered to standards now espoused but did not record them as now would be best practice.

36. Taken at its highest for the appellant medical evidence following best practice today would have explained that tears can be natural as opposed to a result of sexual activity, that only the lesion at 7 o'clock was likely to be diagnostic of penile penetration and then only if a complete transection, and that digital penetration would be unlikely to leave a lasting tear.

37. This position would undoubtedly have been more favourable to the defence. That said, even on that (correct) basis, the conclusion would still have been that the documented evidence neither supported nor refuted the allegations. The jury would still have had to decide upon the non-medical evidence, particularly the credibility of L. It would still have been reminded that evidence from other sources ([Name removed] for example) supported her account. The defence would still have been that if there were abuse it was at the hands of GL, not the appellant.

38. The fresh medical evidence does not undermine the safety of the conviction for the reasons we have set out. Since we agree with Mr McCartney's concession that if this Ground did not succeed none other would, it is unnecessary for us to review the balance of his argument. We add merely that had we done so we should not have been sympathetic.

Judgment Approved by the court for handing down.

39. This appeal is dismissed.