Neutral Citation Number: [2023] EWCA Crim 1331

Case No: 202202061 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NEWPORT CROWN COURT
Assistant Judge Advocate General Robert Hill
Ind. No. T20200017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2023

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE JAY
and
MR JUSTICE KERR

- -

Between :

Allen Brutnell	**Appellant**
- and -	
Rex	**Respondent**

Mr John McNally (who did not appear below) instructed by the **Registrar of Criminal Appeals** on behalf of the **Appellant**
Mr Ahmed Hossain KC instructed by **the Crown Prosecution Service** for the **Respondent**

Hearing date : 8 November 2023

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Approved Judgment

This judgment was handed down remotely at 12 noon on 15.11.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Dingemans :

Introduction

1. This is the hearing of an appeal against conviction pursuant to leave granted by the full Court. The appellant is a 37 year old man who was at the time of his conviction working as a carpenter. He was convicted on 30 May 2022 in the Crown Court at Newport on the Isle of Wight, following a trial before Assistant Judge Advocate General Robert Hill (the judge) and a jury. The conviction followed an earlier trial at which the jury had been unable to agree.

2. The convictions were for five counts of indecent assaults on a girl aged under 14 contrary to section 14(1) of the Sexual Offences Act 1956, and five counts of sexual assault of a girl aged under 13 years contrary to section 7(1) of the Sexual Offences Act 2003. Some of those counts were multiple incident counts pursuant to rule 10(2) of the Criminal Procedure Rules. In total the appellant was convicted of 26 separate occasions on which the jury were sure that the appellant had touched the vagina, over underwear but under dresses or skirts, of three separate complainants. The appellant was aged between 16 to 18 years for half of the offences and aged between 18 and 21 years for the remainder of the offences. The appellant was sentenced to an overall sentence of 3 years 9 months.

3. The ground of appeal for which leave was granted relates to the fairness, balance and sufficiency of the summing up.

The relevant factual background

4. The prosecution case was that the offences took place between 2003 and 2009 at Cheeky Chimps, a day care nursery and after school club in Ryde on the Isle of Wight, against three complainants. The complainants have the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences Amendment Act and they have been referred to in the papers before us at C1, who had been born in 1994, C2, who had been born in 1996, and C3, who had also born in 1996. C1 and C2 were sisters. The sexual assaults were the touching of the vaginas of the complainants over their underwear while the appellant pretended to be engaged in innocent physical play involving giving piggybacks, having them sit on his lap and tickling.

5. Cheeky Chimps catered for children aged 5 to 13 years. It was run by the appellant's half-brother Ricky Larbalestier. Between 2003 and 2009 the three complainants each attended there when aged between 9 and 13 years. The appellant worked there initially before he left school, aged 14, and then on a permanent basis after he had left school, aged 16 until he left aged 21. This was between 2003 to 2009 and the period during which the prosecution alleged that the offences occurred. During this period it was common ground that the appellant encountered each of the complainants whilst working there.

6. An allegation was first reported to the police in November 2017. It followed disclosures by C1 to a psychiatric therapist, when undergoing counselling for depression, that the appellant had repeatedly touched her vagina when she was sitting on his lap watching television. At this time C1 was 23 years old.

7. The prosecution relied on the evidence of C1. C1 said that she had discussed matters with her sister, C2, when she had been 15 or 16 years old. She had asked her whether the appellant had touched her, her sister had been embarrassed and had said no, so she could not be sure that they had been sexually assaulted in the same way. C1 accepted that she knew C3 but said that she had not discussed her allegations with her and had not seen her since they were at Cheeky Chimps.

8. C1 had also told her counsellor that the abuse had also happened to a friend. She later clarified that she meant her sister C2, but that she was protecting her identity. The appellant relied on C1's use of the word friend to suggest that C1 was referring to C3, and that this showed collusion and contamination of the respective accounts.

9. C2 attended Cheeky Chimps every day after school with her sister, C1. She could not recall the exact dates but had started going there when she was attending primary school and stopped going when she started at middle school. She knew the appellant as 'Big Al'. She disclosed to a male friend when she was in middle school that she had been sexually assaulted whilst at Cheeky Chimps.

10. She accepted that she and C1 had discussed their allegations before C1 had reported matters to the police, but she could not recall what had been discussed. She thought that it had also happened to C3, but she had not kept in contact with her. She recalled that there had been a discussion at Cheeky Chimps when she was about 8 years old, and she believed that C3 had made reference to Big Al tickling and had asked 'when he tickles you does he tickle your fanny?'.

11. C2's male friend from middle school gave evidence to rebut the allegation that C2's complaint was a recent fabrication. He said he had met C2 when they were both aged between 9 and 11. They became good friends and she disclosed to him that she had been inappropriately touched at Cheeky Chimps by 'Big Al' who would tickle her 'fanny'.

12. C3 gave evidence that when she was aged 7 or 8 she attended the after school club 'Cheeky Chimps'. She had disclosed to her Mum that the applicant had touched her vagina at the time but no action was taken. Her mother knew the appellant and his family and may have thought that her daughter was mistaken and that any touching had been accidental.

13. She had no recollection of the discussion or comment made at Cheeky Chimps, referred to by C2, when C2 said that C3 made reference to the appellant tickling and touching her fanny. C3 denied that she was friends with C1 or C2, or that she had spoken to either of them since being at Cheeky Chimps in 2010.

14. C3's mother gave evidence to rebut allegations that C3's complaints were a recent fabrication, and confirmed that when her daughter was approximately 8 years old she disclosed to her that the appellant had touched her vagina whilst he gave her a piggyback, but that the mother had not pursued the matter.

15. The appellant was arrested and interviewed. In interview he denied the allegations. He agreed that he had helped at Cheeky Chimps when he was 14 years old. He had worked there properly from the age of 16 helping with the supervision of the children. He did not recall giving any of the complainants piggybacks or being aroused by C1 sitting on

his lap and he did not touch their vaginas. The appellant said that he had been told by Hayley Sparshott, who was his partner's sister, that C1 and C3 were friends at High School and they had all socialised together. C3 had frequently visited Hayley Sparshott whilst the appellant had been looking after her and they had engaged in conversation. He emphatically denied the allegations.

16. At trial the appellant gave evidence denying the allegations. His case was that the complainants had colluded and fabricated their evidence. He repeated the accounts he had provided to the police in interview. He said he had never been alone with any children at Cheeky Chimps. There were about eight other adults working there at the time, and everyone could wander around the building. He had never placed any children on his lap. Although he would tickle children he would never tickle them under their dress or touch their vaginas.

17. In about 2011 (the appellant had originally said 2017 but there seems to have been some confusion about the dates) he and his partner Stacey Sparshott had been looking after Stacey's siblings, Hayley Sparshott and their brother. C3, who was about 14 at the time, was friends with Hayley Sparshott and had visited the address and had sleepovers. It was accepted that the appellant had said that C3 stayed for sleepovers for the first time at the retrial, but he denied suggestions in cross examination that he was making it up. He said that prior to that in 2011 and 2012 he frequently saw C3. The appellant suggested that the disclosure by C3 to the friend at middle school had not occurred and that, instead, C3 had contacted that person much later and 'roped him in' to the investigation.

18. Hayley Sparshott gave evidence to the effect that she was close friends with C3 and frequently saw her. Whilst the appellant looked after her and her sibling, C3 came to the address and slept over. C3 and the appellant had 'high fived' each other, there was no suggestion of any animosity or awkwardness. She declined to comment on whether C1 and C3 knew each other.

19. The case for the appellant relied on: (1) his denials; (2) his good character in the sense that he had dissimilar and minor previous conviction for which he was conditionally discharged and fined, which meant that he had no previous convictions for sexual offending at all. He was less likely than not to have committed the offences with which he was charged; (3) the evidence of Hayley Sparshott to rebut the evidence that C3 had not seen the appellant since she and he had left Cheeky Chimps; (4) the discrepancies in the accounts given by C1 and C3, which undermined their credibility, about their friendship with each other after they had left Cheeky Chimp; (5) C1, C2 and C3 had colluded and fabricated their evidence. It was accepted that C1 and C2, who were sisters, had discussed their allegations, which provided further support that they had colluded or that their accounts had been contaminated.

The summing up

20. The judge circulated his draft directions to counsel and it is apparent that those directions were modified in the light of submissions made by trial counsel for the appellant. The judge gave a split summing up. The judge gave directions on the functions of Judge and jury; the burden and standard of proof; the elements of the offences; the need for a separate consideration of counts; the meaning of multiple and single incident counts; the changes in the law and the relevant dates for that; collusion

and innocent contamination; delay; the relevance of good character; cross admissibility; and the need for unanimity. The first set of directions took 19 pages of the transcript.

21. After closing speeches, the judge completed his summing up. His summing up went from pages 22 to 71 of the transcript.

22. After the first part of the summing up, the judge asked if there were matters arising and counsel for the appellant clarified the date of the appellant's drink driving conviction (the convictions had been led by the defence because they were minor, did not relate to sexual offences and the judge gave a direction on good character). After the judge had finished summarising the evidence in the second part of the summing up, he sent the jury away for the evening, and confirmed with counsel that he did not intend to sum up what he referred to as peripheral witnesses and confirmed that there was nothing arising from counsel. The next morning he took the jury through the routes to verdict, and at the end of that process trial counsel for the appellant identified that one of the steps needed to be clarified and that was corrected for the jury.

The issues on appeal

23. Mr McNally identified six ways in which the summing up was defective in his perfected ground of appeal. These were: (1) The narrative background summing up being inadequately and unhelpfully constituted; (2) The Court's directions as to the maturity, comprehension and capacity of the complainants being inappropriate both as to form and content; (3) The Court did not sum up inaccuracies and inconsistencies in the Crown's case, nor the defence case sufficiently fully; (4) The treatment of the separate issues of collusion, contamination and delay was inadequate in law and as it related to the matters of evidence before the jury (particularly as related to the discussions that had taken place in the past about allegations); (5) the characterisation of the allegations as 'surreptitious' did not properly reflect the totality of the evidence or the defence case which acknowledged the possibility of an accidental contact (albeit not accepting that such occurred); and (6) The defence case was not properly or adequately summed up, whether in relation to the Defendant or witnesses called in his case.

24. Mr McNally on behalf of the appellant submitted that the structure of the summing up was unhelpful because the judge mixed the legal framework with a narrative of contentious and non-contentious matters. The judge gave a commentary which trespassed on the province of the jury. There was a failure to sum up the evidential issues including the defence case. The treatment of collusion and contamination was not balanced. The judge's description of the offending as surreptitious minimised the defence points about the unlikelihood that the appellant could have acted as alleged without being seen and maximised the possibility of guilt. Even if the points individually might not have been enough on their own, the effect of all of these matters made the convictions unsafe.

25. Mr Hossain KC on behalf of the prosecution submitted that the judge's directions were fair and sufficient, and the draft legal directions had been modified in the light of submissions by trial counsel on behalf of the appellant. The judge's split summing up was appropriate, the judge's commentary was not unbalanced, and he had summed up both the prosecution and defence cases fairly. The judge's directions on collusion and contamination were proper directions, which highlighted the jury's need to take particular care. The use of the word surreptitious was a perfectly permissible

description of what the complainants had said had happened, in that the appellant had taken the opportunity to put his hand under dresses and over underwear to touch their vaginas, and had piggybacked the complainants in such a way that he could touch their vaginas.

26. In the written and oral submissions the points were advanced by Mr McNally and responded to by Mr Hossain under slightly different headings, and we have considered each of them under the heading "the specific complaints" below. We are very grateful to Mr McNally on behalf of the appellant and Mr Hossain on behalf of the prosecution for their helpful written and oral submissions.

Relevant legal principles

27. As the ground of appeal for which leave was given relates to the balance and fairness of the summing up it is relevant to record that this Court will allow an appeal against conviction if we think that the conviction is unsafe, see section 2(1) of the Criminal Appeal Act 1968. Paragraph 3(a) of Part 25.14 of the Criminal Procedure Rules requires a judge to give the jurors directions about the relevant law and to summarise for them, to such extent as is necessary, the evidence relevant to the issues they must decide. The judge must remain impartial.

28. The form and content of any summing up can almost always be improved, but the fact that it could be improved will not, of itself, make a conviction unsafe. Everything will depend on the directions given and the issues at the trial. A judge is entitled to comment on the facts, but should do so with care and avoid the summing up becoming fundamentally unbalanced, see *Mears v The Queen* [1993] 1 WLR 818. In *Mears* a judge had impermissibly undermined the main defence argument which was to the effect that the defendant's confession to his partner, which was disputed, did not match with the pathological evidence as to the cause of death.

29. On the specific issue of fairness, in *Randall v The Queen* [2002] UKPC 19; [2002] 1 WLR 2237 at paragraph 28 Lord Bingham stated:

> "While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders the trial unfair … But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."

30. In *Bernard v The State of Trinidad and Tobago* [2007] UKPC 34; [2007] 2 Cr App R. 22 the court stated that "in a case of procedural unfairness … determination of such an issue involves weighing the seriousness of the irregularities. If the defects were relatively minor, the trial may still be regarded as fair. Conversely, if they were sufficiently serious it cannot be accepted as fair, no matter how strong the evidence of guilt."

31. As was emphasised in *R v Awil* [2022] EWCA Crim 1802 at paragraph 32 and *R v BKY* [2023] EWCA Crim 1095 at paragraphs 77 to 82, the guiding principle must always be balance and fairness. At paragraph 87 of *BKY* it was said that when assessing issues of balance and fairness on appeal, the fact that trial counsel did not raise a point at trial is not necessarily fatal to an appeal, but it is often a good indication of whether a particular omission seemed important at the time to those immersed in the trial and who were well able to judge the significance of a point being made.

The specific complaints

32. Before turning to the summing up we deal with one particular point made on behalf of the appellant to the effect that the judge had descended into the arena and cross examined the appellant. It is correct that at the end of the appellant's evidence the judge had asked questions of the appellant, but it is apparent that this was because there appeared to be some confusion over dates, and in particular when C3 had gone to visit Hayley Sparshott. The judge's questioning was to ensure that his note was accurate. It is right that the questioning did continue for some time as appears from the transcript, but it seems that was because the appellant had some difficulty in working out the dates. In the end the position was clarified. This questioning was permissible and did not represent the judge appearing to take sides.

33. Mr McNally submitted on behalf of the appellant that the "summing up was unhelpful from its outset" and the judge should not have mixed introductory legal matters with what he described as a handed down narrative. The legal directions should not have descended into the detail of the case. It had led to the bolstering of the complainant's evidence because there was an implied endorsement of what they had said. It was said that there was no clear and logical framework to the summing up.

34. We do not accept the overarching complaint that the judge should not have tailored his legal directions to the specific circumstances of this case. It is the duty of any trial judge to tailor their legal directions to the specific circumstances of the case before them. This is because a jury is not likely to be assisted by an academic summary of principles of criminal law. That said, it is important to ensure that legal directions are not to be seen as deciding issues of fact for the jury, and we address below the specific complaints about the legal directions that were given.

35. Mr McNally submitted that "a number of passages amounted to commentary or explanation which it was not for the Court to give as it impermissibly trespassed on the province of the jury". Particular complaint was made about the way in which the judge had referred to the maturity, comprehension or otherwise of each complainant which existed at the time of the events, leading to an implied endorsement of what complainants said. Mr McNally also complained about the way in which the judge had dealt with "the issues of collusion and contamination".

36. The judge started this part of his summing up by briefly summarising the prosecution case and then turning to the defence case summarising it as follows: "The Defendant denies all allegations made against him and maintains that each complainant has fabricated their evidence. He invites you to consider whether, in fabricating their evidence, they have, in the vernacular, put their heads together." This was a succinct and accurate summary of the defence case.

37. The judge then turned to the issue of collusion and contamination. The judge noted that the sisters had discussed in broad terms the allegations being made and noted that as sisters it would be extraordinarily odd if it were otherwise. The judge went on: "However, in a case of this nature when the evidence they give is both similar and related to matters that were alleged to have happened many years ago when they were children, when you consider their evidence, you should necessarily as a matter of common sense take great care" (underlining added). This showed the judge was dealing with the issues of collusion and contamination carefully.

38. The judge went on to deal with what collusion and innocent contamination were saying: "For the purpose of this case, collusion refers to a situation where two or more witnesses deliberately get their heads together to concoct a false story. So here, to falsely concoct allegations of indecent touching against the Defendant. Innocent contamination refers to a situation where one witness either consciously or subconsciously picks up on another witness' recollections when told about them and their own memory plays tricks and they falsely adopt or at least to some degree incorporate or are influenced by the other witness' recollections when they try to recall, recollect matters themselves". This was a proper approach to collusion and contamination in the circumstances of the case.

39. The judge concluded this aspect of his directions saying: "If you decide the Defendant's suggestion the three complainants colluded to make similar false allegations against him either is or even might be right, then obviously he'd be entitled to be acquitted on all counts. However, if you reject the suggestion it does not automatically follow that he must be guilty. You must go on and consider the case in accordance with the directions I now come to give you. You could not convict the Defendant of the counts you are considering unless you are first sure that the evidence of the Complainant to that count is truthful, accurate and reliable." This was a fair and proper summary of the position.

40. The judge then turned to directions about "preconceived ideas or expectations" as to how victims might respond. Mr McNally criticised the passage in which the judge addressed the fact that the complainants were now adults but at the time were childlike and immature. We see nothing wrong with that direction, in circumstances where the judge had started the passage saying that they were young children "at the point in time when the offence is alleged to have occurred". This made it clear that the issue whether the offences had occurred was for the jury to determine. Mr McNally is right that the judge did say at one stage that "you will need to bear in mind and take into account that they were not telling you about matters laid down as memories in recent years but laid down in their memory as children a long time ago" but to be fair to the judge it followed the introduction to this passage where he said: "As they gave their evidence to you, the complainants were, of course, setting out what they say are their memories of these events from childhood many years afterwards …" (underlining added). As the underlining emphasises, the judge had not made the mistake of treating the complainants accounts as being true, but had left that for the jury. The fact that the judge had said that these matters, if they occurred, would have been experienced by the complainants as children did not undermine the appellant's evidence about the relative maturity of the respective complainants. This is because the appellant was not contending that the complainants were not children at the time.

41. The judge dealt with the issue of delay in reporting making the point that the fact that a complaint is not made at the time did not necessarily mean that it must be false any

more that a complaint made immediately meant that it was true. The judge dealt fairly with the effect of delay. He made it clear that he was not prejudging the evidence, saying that the complainants "in making these allegations are all recalling as adult matters that <u>if they happened</u> …" (underlining added).

42. Mr McNally drew attention to a passage where the judge did say, when summarising the evidence that C2's evidence that there had been no contact with C3 after leaving Cheeky Chimps "again, firm evidence there's no contact post Cheeky Chimps days between her and [C3]". The judge, however, went on immediately to say "you'll decide whether you accept that evidence or not and if you do, well you've got the prosecution's suggestions in regard to it". The use of the phrase "firm evidence" when followed by the passage did not suggest that was the judge's assessment of it, but that it was C2's firm evidence, for the jury to decide whether to accept or reject.

43. We turn next to consider the complaint that "There was a failure to properly sum up the evidential cases on relevant issues (including the defence case)". Mr McNally complained about the fact that the judge recited extracts from the ABE interviews given by the complainants. In fact the judge had fairly summarised the complainants' evidence, and specifically reminded the jury of the relevant cross examination about discussions with the other complainants.

44. As to the complaint that the judge did not deal with the defence we have looked carefully at the whole of the summing up. The judge had summarised succinctly the defence case at the start of his directions, and he then picked up the points made by trial counsel for the appellant throughout the summing up. For example when summarising the evidence of C3 he set out her evidence about whether she had visited a particular house and said "when we come to the defendant's evidence, he and Ms Sparshott give a different account of that". The judge provided a full summary of the appellant's evidence and set out his case about collusion between the complainants. The judge referred to the fact that the appellant was engaged, had two children and summarised his case about each complainant, reminding the jury that the appellant had said that C3 was "a bit more grown up" than the sisters C1 and C2. The judge summarised the evidence of Hayley Sparshott which was relied on to show that C3 had met the appellant after she had finished attending Cheeky Chimps and greeted him normally. We can see no unfair failure to set out the defence case.

45. We turn finally to the complaint that the judge characterised the touching of the complainants as "surreptitious". It is apparent that this word first featured when used by the judge in the draft directions that he sent to counsel. He used it in the legal directions and in his summary of the evidence. The first reference was: "All three female complainants have alleged that Adam Brutnell sexually abused them as children when they were in his care. The nature of the abuse being quick surreptitious touching of their vaginas over their knickers whilst outwardly engaged in innocent physical activity in the course of his duties". The second reference was: "In this case, the alleged pattern of multiple offending as far as both, it should be [C1] and [C2] are concerned is one of the same surreptitious touching occurring on very many occasions …". The third reference was: "The nature of the allegation, of course, is that it was surreptitious quick touching". This was said in the context of the evidence of C1 who did say that the touching did not last for any length of time, as opposed to the complaint made by C3.

46. It is apparent that when the judge used the word "surreptitious" he was summarising the prosecution case. The judge was not saying that he considered the touching to be surreptitious, but that the prosecution case was that it was surreptitious. This was a permissible description of the prosecution case because it was the evidence of the three complainants that the appellant had taken advantage of the piggybacking or having them sit on the lap to put his hand under their dresses and to touch their vaginas above their underwear. That behaviour can properly be described as surreptitious. The judge was not in these passages saying that the abuse had happened. Indeed the judge had specifically said before the last use of the word surreptitious "The, the point, you'll appreciate, from the defendant's perspective is that there were a number of adults there. It was all every open plan, and it would be very difficult to behave in this way repeatedly without being seen".

47. We have read through the summing up carefully, but we do not find that the summing up was unfair. There is nothing in the summing up to suggest that these convictions are unsafe.

Conclusion

48. For the detailed reasons set out above the appeal is dismissed.