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Neutral citation No. [2024] EWCA Crim 1146

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LEICESTER
HHJ KEITH RAYNOR T20230131

CASE NO 202403288/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 20 September 2024

Before:
LORD JUSTICE DINGEMANS

MRS JUSTICE THORNTON

MR JUSTICE LINDEN

REX
V
PROSECUTION APPEAL AGAINST A TERMINATING RULING S.56 CRIMINAL JUSTICE ACT 2003
RICKY THOMPSON

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MR A WILKINS appeared on behalf of the Applicant.

MS K SAUDEK appeared on behalf of the Respondent.

J U D G M E N T
(Draft Approved)

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of a prosecution appeal which we will allow for the reasons that we will give now. A typed draft of this ex tempore judgment is now being provided to both counsel now. That is simply to assist with note taking. The transcript, when approved, will remain the only accurate record of the judgment but we hope it makes your life easier. The complainants in this case have the benefit of life-long anonymity, pursuant to the provisions of the Sexual Offences (Amendment) Act 1992.

2. Although the provisions of section 71 of the Criminal Justice Act 2003 applied to these proceedings when the ex tempore judgment was given, the parties have notified the Registrar of Criminal Appeals that the trial has now concluded. The respondent, Ricky Thompson, was convicted of count 2 (which was one of the counts the subject of this appeal) and of count 3. The jury could not agree on count 1 (the other count the subject of this appeal) and the prosecution then offered no evidence, so that Mr Thompson was acquitted of that count.

3. Mr Thompson (who is the defendant in the trial) is being tried on an indictment containing three counts of sexual assault of a child under 13, contrary to section 7 of the Sexual Offences Act 2003. The three counts relate to two separate complainants. The trial started in the Crown Court at Leicester on 2 September 2024. After the close of the prosecution case, a submission of no case to answer on counts 1 and 2 only was made, and that related to only one of the complainants. On 10 September, the trial judge ruled that there was no case to answer on counts 1 and 2. The prosecution appealed on

11 September 2024 and gave the required acquittal undertaking. The jury has not been discharged and we were told, in the course of the hearing today, that the trial is rescheduled to start, at least on count 3, on Monday 23 September 2024.

The case as at trial

4. The prosecution against the defendant was that he had sexually assaulted two children, “B” and her older sister, “A”. Count 3 alleged that on the evening of 21 May 2022, while the defendant was babysitting B (who at the time was aged 11), he massaged and rubbed her legs and thighs in circumstances being that the touching was sexual. Her sister A (who was 15 at the time) saw what was happening and took videos of the defendant massaging B, in which his thumbs seemed to go into her groin area. A said that the defendant had told her that he used to do the same to her. At the time of taking the videos, A was in communication with her friend via Snapchat and WhatsApp. A told her friend that the defendant used to do the same to her. The agreed facts state that the times of the Snapchat messages are not apparent, but the WhatsApp messages are timestamped 10.19 pm and 11.23 pm. It is apparent from the screenshots that this was not the start of the conversation. However, the earlier part of the conversation has not been preserved.

5. At the beginning of the available messages, A states she is annoyed and that he is: “Doing what he used to do to me but to her”. The friend told her to be careful. She says that: “He just keeps touching her legs” and he asked her to send a video if she can. She asked if they could FaceTime but he replies that he cannot as he is playing games on his phone. She sends some videos; he tells her to let her parents know and she replies: “I’ll tell them tomorrow as they won’t be back til like 5 in the morning and they’ll be drunk so

probs Monday". A little later she types: "He used to do this to me when I was, like, 3/4. "

6. When spoken to by police A said that the defendant had previously done the same to her when she was aged 6 or 7. Count 1 was that he rubbed her legs and thighs, the circumstances being that the touching was sexual and this was confirmed to be above the knee. A also later said when she was 9 years old, which was count 2, Mr Thompson rubbed her legs and thighs, the circumstances being the touching was sexual. This was confirmed to be below the knee in the evidence.

7. A's first ABE interview was on 30 May 2022. It was the prosecution's case that in essence A's account was that she did not recall what the defendant had done until she saw what was happening to her sister. She initially did not want to talk about it. Her recollection had improved by the time of her second ABE interview. In her section 28 recording, when she was being cross-examined, she also said she had been wary of the defendant and felt protective of her sister as she was "getting little flashbacks and I tried to forget about it". In the police interview the defendant denied any sexual offences. He was showing her how to do a normal massage from her feet up but not all the way up. He never intended to touch anywhere near there (referring to her private parts) and had obtained her consent to massage her feet and knees. There was no intention of being sexual.

The ruling of no case to answer

8. A written half-time submission was made and it was accompanied by a schedule of

inconsistencies in the evidence. We have had an opportunity to consider this document and it shows very many inconsistencies in A's evidence and, in particular, whether A first remembered because the defendant had said he used to do the same to her or whether A had first remembered because she had had some flashbacks before the incident involving B. Oral submissions were made.

9. The judge ruled there was no case to answer on both counts 1 and 2. These were the counts which concerned A. The judge said the jury had a Route to Verdict setting out in very simple questions the elements that the prosecution had to prove in terms of sexual assault. Question 1 for the jury related to intention; question 2 related to might be sexual and question 3 related to circumstances and/or purpose.

10. The judge then addressed the evidence in respect of the counts. The judge stated that he was not covering every scrap of evidence from A in respect of those two counts but was putting the main thrust of her accounts. The judge set out relevant extract from *R v Galbraith* [1981] WLR 1039.

11. The judge first dealt with count 2, where it was touching below the knee. That was touching which the judge said could not, on any analysis, be interpreted as inherently indecent; indeed the Route to Verdict concentrated on section 78B of the Sexual Offences Act 2003. Question 2 for the jury was whether a reasonable person would consider that the rubbing of the legs and thighs, because of its nature, may be sexual? Question 3 engaged circumstances or purpose. Defence counsel's primary submission had been that there was no evidence from which a jury could, relying on the circumstances of the

touching, come to the conclusion that it might be sexual and then be sure that it was sexual. In dealing with this, the judge reminded himself of limb 1 of *Galbraith* and the evidence of A. He was not dealing with inconsistencies and other aspects of the skeleton argument but the judge accepted the defence submission on *Galbraith* limb 1 on the basis there was no case to answer on count 2 with the allegation of touching below the knee.

12. In respect of count 1, the judge was dealing with touching above the knee. The judge first approached limb 1 of *Galbraith* because this was touching just above the knee, but accepting it was skipping over private parts and to the tummy, the judge would not be withdrawing the case on limb 1 because there was some evidence to go before the jury. The judge then had to consider the submission under limb 2 of *Galbraith* and the starting point was that count 3 was an allegation of sexual assault by the defendant on B (who was A's sister). The primary evidence in support of that was video recordings that A had taken recording the activity. A had given an account of the touching but there was evidence in terms of the video recording of what was going on and when A was asked: "When did you first remember what the defendant had done to you?". Her answer was: "Well, during the incident with B [the defendant] told me he'd done the same thing to me." She did not say this just once, she had given that version on a number of occasions.

13. So it seemed to the judge that A was quite clear and plain at one point that she had no independent recollection of what had happened to her when she was younger until the defendant told her that he had done the same thing to her. At paragraph 5 of defence counsel's skeleton argument dealing with limb 2, she had made reference to the defendant telling A that he used to do the same and also a message from A to her friend:

"He used to do this to me when I was, like, 3/4". In the first ABE interview A had said she told her friend: "He told me he used to do similar to me". At paragraph 6 of the skeleton argument, counsel for the defence had picked up, on other occasions, when A said that the trigger was when the defendant told her about it. She thought it had happened once or twice; she was not sure whether it was once or twice. Another extract was: "He said he used to do this to me when I was younger as well." At various points she said: "I can't remember" as to age. The judge said that might not be material. The real thrust of the submissions in respect of count 1 and *Galbraith* limb 2 was that certain evidence from A which did not make any sense at all in terms of approaching the case from the basepoint that she was saying "was when the defendant told me that he used to do this to me." That was wholly inconsistent, the judge said, with what she said with other points of her interview. For example, when she had said at page 13 of her first ABE interview: "Why do you feel bad for [B]?", to which she replied: "Because I haven't told anyone he did it to me until that day, so I could stop it" and "I did feel a bit uncomfortable about him being there because, obviously, I know what he did to me."

14. A also said in evidence about trying to keep her distance from the defendant because of what he did. She was asked at one point: "Are you sure you kept your distance…?", to which she replied "Yes", although there was then questioning from defence counsel along the lines of staying with B to make sure that the defendant did not do anything and she asked: "Why do you think before you remembered about him massaging…?". A's answer was, which she had written down on the section 28 interview and had been read by an intermediary: "Because I tried to forget about it, but when it happened to [B] it all came back to me." There was another about feeling bad for B as she had not told anyone,

and she was asked about that and she said: “I’d had little flashbacks of it happening to me.”

15. The judge held that was a really important inconsistency because it drove at the reliability of A’s recollection as to the previous incidents because, on the one hand, she was saying: “I had in mind the previous incidents” and that was wholly inconsistent with the evidence that the first primer to her was of previous experiences as to what the defendant had said to her during the course of the incident involving B.

16. The judge had to have regard to inconsistencies under the second limb of *Galbraith*. The judge had only teased out certain inconsistencies and the judge referred to the chart of inconsistencies. There were a number of inconsistencies in the account which the judge weighed up. Prosecution counsel had submitted that there are often differences or inconsistencies and these were relatively insignificant and of a type that the jury should deal with them.

17. The judge ruled that the defence submission on limb 2 of *Galbraith* was made out on count 1. The judge took the view no reasonable jury, properly directed, could convict, largely because of the inconsistencies in the evidence of A, the lack of detailed context and circumstances in respect of the previous incident. The judge stated there was no evidence before the court regarding any sexual purpose behind any of the two previous incidents and certainly not express evidence.

The appeal and respective cases

18. Mr Wilkins, on behalf of the prosecution, submits that first, the judge erred in finding that no properly directed jury could consider that the defendant touching the leg of a young child could amount to a sexual assault in the circumstances of the case. Further the judge erred in finding that there were such inconsistencies in the account of A that no properly directed jury could convict on the basis of her account. The judge had failed to take any or sufficient account of the evidence of A that the defendant had admitted touching her in the same way that he was touching B and that, in all the circumstances, the judge was wrong to withdraw both counts.

19. Ms Saudek, on behalf of the defendant, submits that the judge went through the specific questions to be asked with reference to carefully drafted and approved legal directions. He had addressed his mind to the appropriate test and correctly applied the test to the evidence. The judge was correct to conclude that touching below the knee could not, on any analysis, be interpreted as inherently indecent. The judge's conclusion was not only reasonable but correct. Secondly, the judge's ruling in respect of the second limb of *Galbraith* on count 1 was neither wrong in law nor was there an error of law or principle and the ruling was one which it was reasonable for the judge to have made. The judge considered all the evidence and decided that, even taken at its highest, the evidence was so tenuous, self-contradictory and beyond all sense that no properly directed jury could convict.

20. We are very grateful to both Mr Wilkins and Ms Saudek for their excellent written and oral submissions.

Relevant provisions of law

21. Section 7(1) provides that:

    "1)A person commits an offence if—
    (a)he intentionally touches another person
    (b)the touching is sexual, and
    (c)the other person is under 13."

"Sexual" is defined in section 78 of the Sexual Offences Act 2003 which provides:

> "For the purposes of this Part... touching or any other activity is sexual if a reasonable person would consider that—
> (a)whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
> (b)because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual."

22. The approach to indecent assaults under the previous legislation was set out by the House of Lords in *R v Court* [1989] AC 28. There had been cases where distinctions between forms of touching had become very refined. A foot fetishist's attempted removal of shoes from girls' feet, which gave the defendant a perverted sexual gratification in that case, did not amount to an indecent assault (see *R v George* [1956] Crim LR 52). It had, however, been held that stroking legs below the knee might amount to an indecent assault (see *R v Price* [2003] EWCA Crim 2405 at [7]).

23. In *R v H* [2005] EWCA Crim 732; [2005] 1 WLR 2005, the Court of Appeal considered section 7 of the 2003 Act. The Court held that the scheme of section 7, taking into account the circumstances and purpose, where the touching might be sexual, was consistent with the approach taken by the House of Lords in *R v Court*. However, the Court said in paragraph 10 that: "The only difficulty that we have with applying Lord

Ackner's approach is that he referred to *R v George* [1956] Crim LR 52." The Court referred to the ruling that none of the assaults involving removal of the shoes could be sexual. The Court went on to say at paragraph 11: "We would express reservations as to whether or not it would be possible for the removal of shoes in that way... to be sexual...That in our judgment may well be a question that it would be necessary for a jury to determine." It is suggested in *Rook & Ward* on Sexual Offences, sixth edition, at paragraph 2.68 that the definition of "sexual" might now mean that the decision in *R v George* will be different.

24. As is well known, the relevant test for a submission of *no case to answer* is set out in *R v Galbraith* [1981] 1 WLR 1039 and the Court said:

> "How then should the Judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the Judge."

25. The prosecution has a right of appeal under section 58 of the Criminal Justice Act 2003. Under section 61(1) of that 2003 Act, the Court of Appeal has power to confirm, reverse or vary any ruling to which the appeal relates. Section 67 provides that the Court of Appeal may not reverse a ruling under this part of the Act:

> "... unless it is satisfied—
> (a)that the ruling was wrong in law
> (b)that the ruling involved an error of law or principle, or
> (c)that the ruling was a ruling that it was not reasonable for the judge to have made.

Count 2 and a case to answer

26. We deal with count 2 first. The judge found that there was no case to answer on count 2 because touching below the knee could not be sexual. We do not agree. This is because we consider that whether the touching might be sexual and a separate question of whether a jury could be sure from the circumstances and purposes that touching was sexual was a question for the jury. This approach is consistent with the suggestion in paragraph 11 of *R v H*. We note that such an approach is also consistent with the decision in *R v Price* under the old law, where it was held that stroking legs below the knee might be considered to be an indecent assault. In this case there was touching of a young girl's leg, over clothing, below the knee by the defendant who was babysitting A and B. A reasonable jury might, with the benefit of proper directions including a direction on cross-admissibility in relation to the use to be made of the video of Mr Thompson's actions in relation to B, be sure that the defendant had sexually assaulted A's sister B, starting with a massaging of the legs, and that this was the same reason or purpose, to use the words of the statute, that he had massaged A's legs. In our judgment, the judge should not have withdrawn count 2 from the jury on the basis that there was no evidence

that the jury had that the offence had been committed by a defendant. This should be determined by the jury.

Count 1 and a case to answer

27. The judge had heard the evidence given by A, an advantage which we do not have, and had full regard to the schedule of inconsistencies helpfully prepared by Ms Saudek in this case. There are obviously important points to be made about when A recollected what she said the defendant had done to her and whether A had realised what had been done was wrong and kicked the defendant off or thought it was normal at the time. The judge seems to have considered the difference in recollection about when she had remembered the incident, because the defendant said she had done the same to her or because she independently remembered, meant that the prosecution case, taken at its highest, was such that no jury, properly directed, could convict on it. We do not agree with that approach. A reasonable jury might be unable to resolve when and why A remembered the incident, although there is contemporaneous evidence of A saying when B was being massaged that the defendant had said he had done the same to A. A reasonable jury might consider that the differences about whether A thought it was normal or had known that it was wrong at the time was significant. There is, however, evidence from A of the incident, part supported by what she said was an admission from the defendant that he had done the same to her when she was watching the massaging of B, which means a jury might be sure that the act had taken place, for both the touching above the knee in count 1 and below the knee for count 2. There was, in our judgment, a case to answer and the judge was wrong in law in withdrawing the two counts.

28. For these reasons, we will allow the prosecution's appeal. We will order the resumption of the trial in the Crown Court and we are told that will be on Monday.

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

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