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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 550



CASE NO 202301487/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 9 May 2024

Before:

LADY JUSTICE WHIPPLE DBE
MR JUSTICE WALL
HER HONOUR JUDGE LUCKING KC
(Sitting as a Judge of the CACD)

REX
V
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(Non-discharge of Juror and Jury)

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MR P HUNTER appeared on behalf of the Appellant
MISS A HAMILTON appeared on behalf of the Crown

J U D G M E N T

1. LADY JUSTICE WHIPPLE: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.
2. The appellant has leave to appeal his conviction on 8 March 2023 at Chelmsford Crown Court following a trial before His Honour Judge Walker of 13 counts of sexual offending against children. No issue arises in relation to sentence.
3. The focus of this appeal relates to the judge's handling of a juror who became upset during the course of the defence's closing speech. In circumstances which we shall describe the judge discharged a different juror but allowed the trial to continue to its conclusion with the remaining 11 jurors, including the juror who had got upset, in charge. That decision is now challenged by the appellant who argues that at the very least the juror who had got upset should have been discharged, alternatively the trial should have been aborted with the whole jury being discharged.

The facts

4. The case concerned allegations of sexual offending by the appellant against his daughter (who was the first complainant) and his nieces (the second and third complainants) between 2016 and 2020. Given the limited ambit of this appeal only a short summary of the facts is required.
5. Complainant 1 said that the abuse started when she was 12 and continued until she was 17. She said that the appellant initially started to slap her on the bottom and then progressed to touching her breasts and vagina. She said that the appellant acted in this

way whenever there was an opportunity to do so, mostly when her mother was working night shifts. She said that on one occasion the appellant laid on top of her, held her wrists and hovered his mouth over her nipples without making contact. She also said that she used to come out of the bathroom in her towel and the appellant would remove this so that she was naked. She said that on another occasion the appellant took her towel off, grabbed her wrists, pulled her to the ground and hovered his mouth over her nipples. She said that on two occasions when she was play fighting with the appellant he digitally penetrated her vagina. She said that she told complainant 2 and her aunt what had happened. The allegations were then relayed to her mother and the police were informed. In 2019 she told the police that she did not want to carry on with the investigation but in 2021 she changed her mind. The police informed her that they had new evidence and as a result she decided to pursue her allegations.

6. Complainant 2 said that when she was about 13 the appellant had sexually abused her by touching her vagina over her clothing, touching her breasts and her vagina underneath her clothing and on multiple occasions digitally penetrating her vagina. He also tried on at least two occasions to make her touch his penis. She said that the appellant would abuse her almost every time she went to his house. She also said that on a couple of occasions she was lying on the bed and the appellant got on top of her while they were both fully clothed and the appellant moved his body and rubbed his penis against her vagina.
7. Complainant 2 told her mother that the appellant had slapped her bottom but she was embarrassed and did not feel comfortable to disclose the other things that he had done to her. At first her mother did not believe her and called her a liar. Complainant 2 said that complainant 1 had disclosed what had happened to her and then she (complainant 2) made complainant 1 speak to her mother. She did not disclose her own allegations until a

year later. She told her boyfriend and later her family and then the police what had happened.

8. Complainant 3 said that the appellant would slap her bottom whenever no one else was around. She thought that this happened around 3 or 4 times a week. She was 14 years old at the time. She said that on two occasions the appellant touched her breasts and vagina over her clothing.
9. The prosecution case was that the appellant had sexually assaulted the complainants as alleged. To prove their case, the prosecution relied on evidence from each of the three complainants, evidence from complainant 2's boyfriend about her disclosures to him, evidence from the mother of complainants 2 and 3 about disclosures made to her by complainants 1 and 2, evidence from the mother of complainant 1 about her working patterns and about disclosures made to her by complainants 1 and 2, and evidence from the Officer in the Case.
10. The appellant denied the allegations. He denied that he had behaved in a sexual manner towards any of the girls. He said that he slapped complainants 1 and 2 on their bottoms when they were children but stated that this was only in a playful way. He said that he stopped doing so when complainant 1 started developing sexually at around the age of 10 or 11. He said that complainant 1's behaviour started to change towards him after she had spent time with complainant 2. She would no longer play with him and did not appear to be as close to him. He did not know why her behaviour had changed. After the first complaint was made in May 2019 he initially did not know what to do. He subsequently decided to go to the police and explain his case. He maintained he was not guilty of the offences and that the complainants had fabricated their accounts. The issue for the jury was whether they were sure that the appellant had committed the offences as alleged.

The juror issue

11. During the closing speech by counsel for the defence one of the jurors became upset.

The judge invited the jury to leave court and the judge subsequently received a note from that juror which said this:

"I have personal experience of similar abuse myself and I find it hard to listen to the defence saying the girls are lying."

12. The judge then sent a message asking her not to discuss the issue or her note with the other jurors. The judge heard submissions. Counsel for the defence submitted that the juror had made it clear that she was not considering the evidence and was rejecting the defence case and submitted that the juror should be discharged and that further enquiries should be made to establish whether she had discussed her experiences with the other jurors. The prosecution disagreed, saying that the juror should continue.

13. The judge decided that enquiries did need to be made of the juror. The juror was called into court, which was by this point sitting in chambers. She confirmed on questioning by the judge that she had discussed the reason why she became upset with her fellow jurors, that she had told them that she had suffered abuse as a child as well and how hard it was for the girls and how they felt, and that she could relate to them. She told the judge she had mentioned it several times and said that she could not detach herself from her own life experiences. The judge then asked her this:

"You swore an oath to try the defendant in accordance with the evidence. Do you think you will be able to return verdicts in accordance with that oath?"

14. To that the juror answered: "Yes." She was then invited to leave court. The court was

opened and the judge heard further submissions.

15. In light of that exchange with the juror, counsel for the defence submitted that the entire jury should be discharged; the harm done could not, he submitted, be cured by way of judicial direction.
16. Counsel for the prosecution submitted that the juror should not be discharged given that the juror had simply brought her own life experiences with her, as was the ordinary expectation, and under questioning had confirmed specifically and expressly that she was able to remain faithful to her oath. Further, the prosecution submitted that there was no basis to discharge the whole jury.
17. After taking time to consider, the judge ruled that it was not necessary to discharge the jury or indeed the single juror. He said that the appropriate test in such an application was whether there was a high degree of need to do so and whether a fair-minded and informed observer would conclude that there was a real possibility that a single juror or indeed the entire jury would be biased. The trial had already lasted one week and the jury had heard all the evidence. As to the single juror, she had found it difficult to listen to the defence submissions that the girls were lying and had discussed with the other jurors how she could relate to the girls' feelings but she had said that she felt able to try the appellant in accordance with the evidence and with her oath. Jurors are routinely directed to bring their life experiences to the jury box. They are also told that they must determine their verdicts according to the legal directions and the evidence, which she had indicated she could do. The high test was not met in her case. Her answer to the question should be taken at face value. As to the other jurors, the judge ruled that there had been no indication given by any of the other jurors that they did not feel able to continue to abide by their oath. However the remaining jurors would be asked whether, having heard from

this one juror, they were able to continue to try the appellant on the basis of the evidence heard and in accordance with their oaths.

18. The judge therefore called the jury in and asked them the following question:

"Members of the jury, one of your number has disclosed to me that she has discussed certain life experiences with you both today and during the course of the trial which may be similar to the matters alleged against this defendant. You are aware she became emotional earlier today. She was quite right to write me a note advising me of her circumstances. At the outset of this trial you each swore an oath to try the defendant on the basis of the evidence provided. I need to be satisfied that your verdicts will not be influenced by the life experiences told to you by this juror and that you are able to return verdicts based only on the evidence you have heard in court. I am going to ask you to retire and take a few minutes to consider the following question and provide me with a note simply saying yes or no together with your juror number. Can I return verdicts in this case in accordance with the oath that I swore only in accordance with the evidence I have heard in court and not be influenced by the life experiences which may have been told to me by a fellow juror? The answer will be yes or no."

19. The jurors retired to address that question on instruction from the judge that it was a secret ballot and their answers would not be discussed. Eleven jurors answered "yes", one answered "no". The juror who answered "no" was not the same juror as had originally become upset. Following further discussion with counsel the judge discharged the one juror who had answered "no". The remaining 11, including the original one juror who had become upset, continued to the end of the trial. As part of his summing-up the judge reminded them that they swore an oath to try the defendant and to return verdicts based on the evidence heard in court and to ignore life experiences shared by the one juror. That panel ultimately returned unanimous guilty verdicts to all counts on the indictment.

Grounds of appeal and opposition

20. By grounds of appeal drafted by Mr Hunter, who represented the appellant at trial and on the appeal, the appellant argues:

- a. Ground 1. The judge erred in refusing the application to discharge the entire jury. The revelation from one juror that she had been a victim of sexual abuse had affected one other juror who confirmed that she could not remain faithful to her oath. As a result this could have influenced the remaining jurors.
- b. Ground 2. The judge erred when determining that the general rule that all jurors bring their life experiences to the jury was applicable in the appellant's case. The fact that the juror's experiences were so similar to the facts of the case was unfair and placed pressure on other members of the jury who had been directed to keep an open mind and only reached their verdicts based on the evidence adduced in court.

21. Miss Hamilton represented the Crown at trial and on appeal. She opposes this appeal, submitting that the judge took appropriate steps to ascertain the reason for the juror's distress, made proper enquiries of that juror and the other members of the jury and confirmed that each who remained in charge would try the case in accordance with their oaths. His decision not to discharge the entire jury cannot be criticised. There is no distinction between the experiences that jurors bring to cases involving sexual allegations and other cases. The judge correctly applied the relevant test and the appellant was not prejudiced by his decision to refuse to discharge the jury.

22. We are grateful to counsel and their respective legal teams for focused and helpful submissions.

Discussion

23. It is common ground that the judge identified and applied the correct test in law. That

test was stated in R v Gynane [2020] EWCA Crim 1348 at paragraph 40 as follows:

"A judge only has the power to discharge a juror where there is an evident need to do so. An evident need may arise if a juror displays actual or apparent bias. Jurors bring with them their life experiences. That is one of the strengths of the jury system. Where a particular juror's life experiences are said to have caused him or her to display actual or apparent bias, the test to be applied is that stated in *Porter v Magill*. A trial judge must make a judgement of fact as to whether, in the circumstances of the particular case, that test is met."

24. Further explanation of that test was given in R v Skeete [2022] EWCA Crim 1511 at paragraph 25, drawing again on Porter and Magill [2001] UKHL 67:

"The question the judge had to address in deciding what steps to take was whether a fair-minded and informed observer would conclude that there was a real possibility or danger that the jury would be biased."

25. We make four preliminary comments before addressing the specific points raised in this case.

26. First, whether the individual juror got very upset or modestly upset makes no real difference to the analysis. The issue for the trial judge related to that juror's ability to remain true to her oath, at whatever stage she got upset and to whatever extent she manifested that upset.

27. Secondly, there was no jury screening at the outset of this trial, for obvious reasons. It is accepted as part and parcel of the criminal justice system that jurors are entitled to sit on juries even if they have life experiences which might touch on the matters canvassed at trial. Jurors are not disqualified because of that.

28. Third, the fact that this juror showed her upset is, in one sense, happenstance. If that juror had been more stoic, so that she had not demonstrated her upset, then there would

have been no enquiry, no submissions, no ruling and no appeal. We would never have known about her life experiences, yet she would still have harboured her own emotional responses to the evidence and might well have shared her life experiences, quite properly, with her fellow jurors.

29. Fourth, the issue in this case was whether these complainants were telling the truth so that the jury could be sure of that. This jury would not have been confused about what was the issue in the case given the judge's clear directions and the evidence that was called. There was no risk of conflation of that issue with the completely different question of whether this particular juror may or may not have been abused as a child.
30. Against those introductory comments we deal first of all with the judge's ruling in relation to the individual juror. That juror had become upset during defence counsel's speech but not before. She had listened to all the evidence that had gone before, including suggestions put to the complainants in cross-examination that they were lying. She had done so without becoming visibly upset. Her upset only manifested towards the end of the case. Within a short time of becoming upset that juror was separated from the rest of the jury. She provided an explanation of why she had become upset which reflected her own life experiences, namely that she had personal experience of abuse as a child so that she found it hard to listen to the defence saying that the complainants were lying. In further exchanges it was clear that she related to the complainants.
31. What the juror was describing was her own life experiences affecting her response to the proceedings. As emphasised by the court in *Gynane*, the criminal justice system depends on members of the public performing the role of jurors and bringing their experience of life into the jury box with them. That they have experiences which might in some ways resemble the allegations in a case is, as we have said, not a disqualification from acting as

a juror.

32. The critical issue for the judge at this stage was whether this juror, with the life experiences she described and her responses as she had indicated them, could still remain true to her oath and return a verdict according to the evidence. This juror was asked that question not once but, so it appears, twice - once in chambers and the second time when the whole panel was asked to complete the secret ballot by answering the question in writing. Both times she said that she could fulfil her oath and return a verdict on the evidence. The judge was entitled to take her answers at face value. A fair minded and informed observer would conclude that this juror understood her responsibility as a juror. She stood by her oath and she would reach a verdict on the evidence. In light of her answer there was no need to discharge her from the jury.
33. The next question is whether other members of the jury might have been influenced consciously or subconsciously by that one juror bringing her experiences of life into the jury room and disclosing those experiences and expressing some sympathy for these complainants. The jury were asked in terms, noting the background of why the question was being asked, whether they could abide by their judicial oath and return a verdict according to the evidence. Eleven said "yes". Again, the judge was entitled to take their answers at face value. The fair-minded and informed observer would do the same. There was no need to discharge those jurors. That one juror answered "no" does not change the position. The remaining 11 jurors had answered truly and fairly to the question as posed.
34. We doubt that the juror's distress properly comes within the concept of a "jury irregularity" of the sort addressed by the Criminal Procedure Rules in Part 6, paragraph 26M. But the judge's handling of this issue was entirely consistent with the guidance provided in that rule. This was careful and considered handling which ensured that the

trial remained fair. This conviction is safe and we dismiss this appeal.

35. MR HUNTER: I am grateful, my Lady. The Registrar made a point that within the sentence some counts were wrongly passed. I do not know whether I should address you on them now or put it into writing and it can be done administratively.

36. LADY JUSTICE WHIPPLE: We have discussed this outside because obviously we had seen the issue raised in the Registrar's note. The defect, as we understand it, is purely technical; it does not affect the length of sentence. So far as an adjustment to sentence may be required, there is not an application for leave to appeal sentence before us so we have no jurisdiction today to deal with it. Therefore, Mr Hunter, I must invite you to take instructions about what, if anything, you want to do about the technical problem and if a decision is taken to try to rectify that problem -- not that I am in a position of giving you advice, you understand -- the right course would be to lodge an application to appeal against sentence on that technical ground.

37. MR HUNTER: I am very grateful.

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