COURT OF APPEAL

4th July, 1991 88

Before: Sir Godfray Le Quesne, Q.C., (President),
J.M. Chadwick, Esq., Q.C., and
A.C. Hamilton, Esq., Q.C.

Appeal of LM against his conviction by the Royal Court (Inferior Number) on 20th February, 1991, for an offence under Article 9(1) of the Children (Jersey) Law, 1969.

Miss S.C. Nicolle, Crown Advocate.
Advocate A.D. Hoy for the appellant.

JUDGMENT

HAMILTON, J.A.: This is an appeal, with leave, by LM against his conviction before the Royal Court (Inferior Number) on the 20th February, 1991, for an offence under Article 9(1) of the Children (Jersey) Law, 1969.

The particulars of the offence as set forth on the indictment were as follows: "That LM between the 3rd and the 19th September, 1990, at premises in the Parish of St. Clement, being a person who had attained the age of 16 years, wilfully assaulted

A , a child under that age of whom he had the custody, care or charge in a manner likely to cause unnecessary suffering to the said child or injury to her health".

The period to which the indictment relates extended to some 17 days and the evidence led at the trial encompassed injuries which the child may have sustained at various times during that period. However, as matters stand on this appeal, the issue is within a narrower time span.

In accordance with practice the Inferior Number did not specify the particular factual conclusions which they had reached upon the evidence, but an indication as to their conclusions is to be found in the manner in which the Court proceeded to sentence. Sentence was pronounced by the Bailiff speaking on behalf of the Court, which included the two Jurats who had determined the issue in the indictment.

The Bailiff said: ".... we have to deal with these difficult cases having regard to the wickedness and the injury. In this case, LM , you took this child out of her room to your own room. You took off her "babygrow" and you inflicted these assaults on her, we are satisfied, quite deliberately. In fact Dr. Spratt described the unfortunate child as having been the subject of a "sadistic game"."

It appears from that passage that sentence was pronounced on the basis that the offence which the Jurats had found proved against the appellant was in respect of events in his room on an occasion when he had taken the child there and taken off her "babygrow".

Scrutiny of the evidence reveals that the occasion in question can only have been an occasion in the evening of the 19th September when, on the appellant's own evidence, he and the child were for a time alone together in that room. It is also clear that the Crown case was that on that occasion the appellant had inflicted on the child two injuries: one to the upper part of her right arm, and the other to the left arm in the vicinity of the inner aspect of the elbow.

The Crown Advocate, before us, accepted that it was legitimate to have regard to the observations made by the Royal Court when sentencing, in seeking to ascertain on the face of the Court's proceedings what the Jurats had found proved. The Crown did not seek to argue that the finding of guilty should be construed more widely than relating to events in that room on that occasion. We would add that consideration of the medical and other evidence in the case leads to a clear conclusion that a conviction of the appellant on any wider ambit of time or of injuries could not on any view have been sustained.

The primary issue before this Court accordingly resolves itself into whether there can or cannot be supported, having regard to the evidence, a verdict against the appellant of having, contrary to Article 9(1) of the Children (Jersey) Law, 1969, wilfully assaulted the child in his room on the evening of the 19th September, and thereby caused the injuries to her arms referred to above.

There is no doubt that if the appellant so assaulted the child it was in a manner to cause unnecessary suffering to her.

A further question arises on the appeal as to whether on the evidence the child was at the relevant time a child of whom the appellant had custody, care or charge within the meaning of

the Law. But having regard to the decision we have reached on the primary issue, it is unnecessary to determine that question.

The general circumstances of the household at the relevant time can be shortly stated. They comprised the appellant's sister, Mrs. H, her husband, Mr. H, their four children being four girls ranging in age from six years downwards, and the appellant. The youngest child, A mentioned in the indictment was as in September, 1990, about eighteen months of age. The appellant had been living with his sister and her family from about the beginning of September, 1990. She had agreed to give him accommodation temporarily as he had then nowhere to live.

At about 1.00 p.m. on the 20th September, A was examined at the General Hospital by Dr. Henry Spratt, Consultant Paediatrician, and Dr. Bayes, the Police Surgeon. A number of marks or injuries were seen on her. Some of these were readily consistent with what might be expected in a child of that age, particularly one from a household in which there were a number of other young children. Others gave cause for concern. These latter included but were not limited to the two injuries to the child's arms. Suspicion fell upon the appellant who gave certain statements to the police and was ultimately charged with having wilfully assaulted her.

Circumstances suggestive of possible child abuse are naturally and properly matters of serious concern and require thorough investigation and appropriate action. Criminal prosecutions in such cases often give rise to difficult questions of evidence and of fact. Because the child will, as in the present case, often be of an age where he or she is unable to give an account of events, and because of the nature of the alleged offence, it will often be that direct evidence of

the primary facts is not available and material facts, if they are to be proved, will require to be proved by indirect evidence. The issue will often be whether the evidence available is sufficient to warrant the inferences necessary to establish guilt to the standard required by the criminal law. Such difficulties are undoubtedly present in this case. There is no direct evidence that the appellant assaulted the child in the manner alleged. Apart from such inferences as may be drawn from the injuries themselves, there is no evidential material which points to the infliction of deliberate harm.

Although the appellant gave lengthy statements to the police and himself gave evidence at the trial, he made no statement implicating himself in any assault or otherwise pointing to his having committed any offence. He gave a long account of events including a possible explanation of how one of the arm injuries might have been caused while the child was with him. The Jurats were entitled to reject that explanation but their rejection of it would not in the circumstances of this case have allowed or assisted them to infer that he had in fact committed a wilful assault.

In the end the Crown case depended on two bodies of evidence, namely medical evidence as to the nature of the injuries and how they could have been caused, and secondly lay evidence as to the opportunity which the appellant had to inflict any injury or injuries. The principal medical evidence was given by Dr. Spratt, Consultant Paediatrician. He described both arm injuries as burn marks. He was confident that these injuries were recent, possibly as recent as within 24 hours of his examination of the child, which examination commenced at about 1.00 p.m. on 20th September. He considered that both burns might have been friction injuries. This certainly might be so in relation to the injury to the right arm. However, he

thought it unlikely that they were friction burns and more likely that they were the result of direct contact with a hot object. This greater likelihood was certainly the case in his opinion as regards the injury to the left forearm. The burn on the left arm was in a distinctive U-shape configuration but Dr. Spratt was unable to reach any firm conclusion as to what object might have caused it. He specifically excluded classical cigarette injury by stub action as a cause of either injury. He was not in a position to diagnose the injuries or either of them as having been caused by a lit cigarette, although a light brush with a cigarette was a possible explanation of both injuries. It was possible that a brush stroke injury by a cigarette could be accidental in each case, although having regard to the position of the right arm injury under the child's arm, he thought it unlikely to be accidental. He was unable to offer a confident explanation for that injury and was unable to speculate as to its causation. No plausible mechanism for the infliction of deliberate injury was suggested in evidence.

The domestic situations in which a young child in a busy household might have come into contact with a hot object or objects were hardly explored. The burn injury to the left arm was not typical of burning by any particular object which Dr. Spratt was able to identify. He was firmly of the view that those burn injuries, on being sustained, would be very painful and that the shock and distress would require twenty minutes of direct comfort to calm the child.

While the burden of Dr. Spratt's evidence was that it was more likely than not that these injuries were deliberate rather than accidental, his evidence was qualified in a number of important respects; the injuries were not typical of injuries caused wilfully. Dr. Spratt did not state that he as a medical man was satisfied beyond reasonable doubt that the injuries were

caused deliberately or wilfully, nor can his evidence, read as a whole, support the inference that he was so satisfied with that degree of confidence. His conclusion that A had been the victim of a sadistic game of some form or other he expressed as his "mainly subjective view".

The other medical evidence from Dr. Bayes takes the matter no further. The medical evidence, read as a whole, was not in the opinion of this Court sufficient on its own to warrant the Jurats being satisfied beyond reasonable doubt that the injuries were wilfully caused; they may have been but that is insufficient. While evaluation of evidence is a matter for the Jurats, it is a matter of law whether the evidence is such as could sustain the requisite conclusion.

It is against the background of that medical evidence that the remaining evidence relied on by the Crown to implicate the appellant must be considered. According to Dr. Spratt the injuries were recent. They had possibly been caused within 24 hours prior to his examination, though in his evidence Dr. Spratt does not exclude a longer time interval. A crucial element in the Crown case was to establish when the child had last been seen in a state when she did not have these injuries. There was no evidence in the case to establish any such point of time. The person who might have been in a position to give such evidence was the child's father but he gave no such evidence in relation to any period relevant for this purpose.

There is thus a tract of time, unexplored in the evidence, in which the child might have come by her injuries. Moreover in relation to the events of the evening of 19th September, when according to the Crown's case the alleged assaults must have occurred, the evidence in the case allows of no satisfactory conclusion. If burn injuries were inflicted on the child by the

appellant when he was alone with her in his room, these injuries would, on the medical evidence, have caused the child in Dr. Spratt's words "to scream the house down". Some twenty minutes of direct comforting would have been required to pacify her. Throughout the period relied on by the Crown the child's mother was, on the evidence, in the house, but was apparently not disturbed, nor so far as appears from the evidence was any of the other children who were in bed in an adjacent room. The child's mother was downstairs, apparently watching television without being attracted to any particular programme. There was no evidence to suggest that the television was at a volume which would preclude the mother hearing such cries if they occurred. In many other respects the evidence relating to the events of that evening is inconsistent and difficult to reconcile. At least three adults had access to the child during the relevant period in addition to a number of children.

Taking the medical evidence along with the remaining evidence in the case, there is in this Court's view no satisfactory evidential basis for a conclusion in criminal proceedings that the injuries in question were wilfully inflicted and in particular that they were wilfully inflicted by the appellant.

Suspicion even grave suspicion that something untoward happened to this child is not enough. In these circumstances we have reached the conclusion that a verdict of wilful assault by the appellant cannot be supported having regard to the evidence and that the verdict must accordingly be set aside.

In these circumstances it is unnecessary for the Court to determine whether at the relevant time the child was in the care of the appellant within the meaning of the 1969 Law. It is

likewise unnecessary to reach a view on the argument on duplicity of charges advanced on behalf of the appellant.

The appeal is allowed, the conviction quashed and a judgment and verdict of acquittal directed to be entered.

Authorities

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