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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 19 April 2018

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE EDIS

THE RECORDER OF LEEDS
HIS HONOUR JUDGE COLLIER QC
(Sitting as a Judge of the CACD)

R E G I N A
v
GRAHAM MICHAEL WARD

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Mr T Dyke appeared on behalf of the **Applicant**

J U D G M E N T

(Approved)

LORD JUSTICE SIMON:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions where 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. This is a renewed application for leave to appeal against conviction and sentence following refusal by the single judge. The applicant is Graham Wood, now aged 67. He was convicted on 6 February 2017 at the Crown Court at Kingston-upon-Thames before His Honour Judge Lodder QC and a jury of a number of serious sexual offences including rape, indecent assault, and indecency with a child. On 9 February he was sentenced to an overall term of 17 years' imprisonment.

3. It is unnecessary to set out the underlying facts relied on by the Crown since the issue in relation to the conviction application is confined. It is sufficient to say that the alleged victim of all the offences, EF, was a girl, and that the sexual abuse was alleged to have occurred between May 1998 and May 2000 when she was between the ages of 6 and 10.

4. Following the disclosure of the allegations by EF the applicant was arrested on 11 November 2014 and taken to Guildford Police Station. When he arrived he was seen to be extremely nervous. He was informed of his right to consult a solicitor, but declined.

At some point it was considered that an appropriate adult should be made available as he was becoming increasingly anxious about being in custody and had difficulties in reading.

5. Carolina Smith, a volunteer appropriate adult, happened to be in the police station having previously acted for a juvenile in this capacity. She was asked to act as an appropriate adult for him and said she was happy to do so. According to the ruling made by His Honour Judge Campbell on 19 July 2016, which is challenged on this application, she was not told what the charges were and she noted that she had been asked to sit with the applicant because he was "very shaken" and was "in a bad way of anxiety". She explained her role as an appropriate adult to him, which included explaining to him what was happening. He told her that he could not afford a solicitor and she told him that he did not have to pay for a solicitor in the police station. He then told her that he wanted a solicitor and she informed the Custody Sergeant of that decision.

6. The applicant remained in an anxious state and did not want to be put in a cell, so Mrs Smith stayed with him while they waited for the solicitor to arrive. According to what she said later in a statement, the applicant made a number of remarks to her. These included that "It would be silly to put a rope around his neck now that this had come into the open"; that "his wife would slap him in the face as soon as he told her what happened with that girl"; that "he would get his whole family together but that he would own up to it"; that "he knew it was coming"; that "it was so wrong what I did, I was a lot older and should have known better", and other remarks in the same vain.

7. Mrs Smith tried to steer him away from the subject of his confessions. According to her statement she tried to calm him down but he insisted on talking about the allegations. When she reminded him that he should not do so and should wait for his solicitor, he became agitated. He insisted he was going to confess. She was plainly uncomfortable about what he was saying.

8. Mrs Smith seems to have been present when he was seen by the solicitor and it is clear that she was present in the subsequent interview in which he gave no comment responses to questions from the police.

9. The appeal against conviction relates to the ruling by His Honour Judge Campbell which specifically addressed the admissibility of Mrs Smith's evidence, made over six months before the trial.

10. The defence applied to exclude Mrs Smith's evidence under section 76 and 77 of the Police and Criminal Evidence Act 1984. It was argued that the applicant had been in a vulnerable state, that it did not appear that Mrs Smith had explained that she had no duty of confidentiality towards him and that it did not occur to her that the conversation was highly inappropriate until it had gone on for some time. An appropriate adult was there for the protection of a suspect. Code C of the Police and Criminal Evidence Act is intended to provide protection for suspects during the interview process. To allow her evidence to be adduced at trial would amount to bypassing those protections, all the more so since the applicant gave a "no comment" police interview. It was also submitted that the applicant had been vulnerable, hence the need for an appropriate adult, and that in

these circumstances the court should be very careful in scrutinising any evidence of confessions made by him. It was further submitted to the judge that Mrs Smith's evidence was unreliable as she accepted that she started to panic and had made no record of his alleged remarks until after the interview.

11. The judge rejected the application and ruled that the evidence would be admitted. He found that section 76 of the Police and Criminal Evidence Act did not apply to the situation. The "confession" was not obtained by oppression and was not "obtained as a result of anything said or done which was likely to render unreliable any confession". The real question in the view of the judge was whether the evidence should be excluded under section 78 of the Police and Criminal Evidence Act. The judge considered that he should not exclude the evidence under section 78. It was clear from Home Office guidance for appropriate adults that conversations between an appropriate adult and a detained person are not covered by legal privilege. On her evidence Mrs Smith realised that what the applicant was saying might put her in a difficult situation and so she tried to steer the conversation away to other subjects, but the applicant continued to make similar remarks. It might be that she could have made clearer to him that there was no duty of confidentiality and that she should have withdrawn after the solicitor arrived. The judge said she should not have been there when he was later interviewed but, by then, the applicant, according to her, had made the remarks that he had and so the argument as to the admissibility of those remarks would have arisen in any event. It was a matter for the jury to determine the reliability of Mrs Smith's evidence, whether the remarks were made and, if so, their significance.

12. Although Mr Dyke challenges these conclusions, much of his argument was based on what emerged at trial. We will come to the argument shortly, but we note that no application was made to the trial judge in relation to Mrs Smith's evidence and no application was made to discharge the jury. Therefore Mr Dyke has to say that as a result of what emerged at trial, Mrs Smith's evidence should not have been admitted and that because it was admitted the verdict is unsafe.

13. Mr Dyke made three broad submissions. First, the evidence of Mrs Smith should have been excluded under section 78 of the Police and Criminal Evidence Act. He relied on section 67(9) which provides:

> Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of ... a code.

14. In this case, he submits that Mrs Smith, at least at some point, became a person charged with an investigative or charging function. He relies on passages during Mrs Smith's cross-examination when she said she became upset by what the applicant was telling her and told the custody sergeant of her concerns, saying that the applicant was very anxious and "talking about the allegations".

15. Mr Dyke relied on the unreported case of *Dennison*, a decision of this court on 2 February 1998, which addressed the interplay of section 67(9) and section 78 of the Police and Criminal Evidence Act. We do not regard that case as being of any assistance to the applicant. It is certainly no support for the proposition that an appropriate adult

falls within section 67(9) in these circumstances. Rather the contrary. As the court observed at page 13:

> While of course the appellant was in a very distressed state, there is no reason to think that he was not in a condition to speak the truth.

16. In any event, we note Mr Dyke's argument depends on there being a change in her function from being an appropriate adult to being part of the prosecution team. While Mr Dyke's argument, if right, might exclude the evidence after the change of function, there could be no reason to exclude it before the change of function.

17. The general unreality of Mr Dyke's submission is apparent from the logical consequence of it. Mrs Smith, as an appropriate adult, would have been bound to comply with Code C.

18. Secondly, he submits that the confession should have been excluded on the broad principle of fairness enshrined in section 78 of the Police and Criminal Evidence Act. He complains that Mrs Smith did not explain that although there was a relationship between them of confidentiality, what the applicant told her was not protected by legal privilege. He relies on the decisions of this court in *McDonald* [1991] Crim.L.R 122 and *Elleray* [2003] 2 Cr.App.R 11. The former in the context of statements made to a doctor and the latter in the context of statements made to a probation officer. We quote from his grounds of appeal:

> In *Elleray* the Court of Appeal considered the admissibility of confessions made to the appellant's probation officer. Again the court emphasised that the prosecution should carefully consider whether or not it was right and proper to rely on such evidence, given in an atmosphere of trust and conference.

> Although the court did not impugn the trial judge's decision to allow the evidence to go before the jury, they noted a number of relevant factors. In particular, a judge should consider:
>
> (i) The contrast between the position where a suspect is interviewed by police and where he speaks to another professional;
>
> (ii) The lack of safeguards in a non-PACE environment;
>
> (iii) The fact that there might not be a reliable report of the suspect's words;
>
> (iv) The fact that the suspect had not been cautioned prior to the conversation; and
>
> (v) The fact that the suspect had not had the benefit of legal advice prior to the conversation.

19. We do not regard either case as a proper foundation for a principle that an appropriate adult either generally or in the circumstances that prevailed in this case falls into a special category of cases where section 78 is in play. The general principles in section 78 apply and the discretion to exclude is that of the decision maker, in this case His Honour Judge Campbell.

20. One of the functions of an appropriate adult is "to ensure that the accused fully understands his rights and understands the position which he finds himself in" - see *W* [2010] EWCA Crim. 2799 at 20. That is what occurred here. Mrs Smith was the unwilling recipient of unsolicited confessions.

21. Thirdly, Mr Dyke relies on the provisions of section 76(2) of the Police and Criminal Evidence Act:

> If, in any proceedings where the prosecution proposes to give in evidence a

> confession made by an accused person, it is represented to the court that the confession was or may have been obtained-
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

22. Mr Dyke submits that subsection (b) covers omissions and that there were a number of matters that rendered the confessions unreliable: the failure to caution, the failure to record the confessions and the fact that the statement was made the following day.

23. We agree with the judge that section 76(2) did not apply to the situation that arose in this case. The "confession" was not obtained by oppression and was not "obtained as a result of anything said or done which was likely to render unreliable any confession." The confession was made to Mrs Smith acting as an appropriate adult. She was not a police officer or anything to do with the prosecution of the offences. She was not bound in the discharge of her duty to have regard to the relevant provisions of the code, as she would have been if she had been someone charged with a duty of investigating offences or charging offenders - see section 67(9). She was there to assist the applicant. There was no oppression of him, and nothing was said or done either by her or anyone else which was likely to render the confession unreliable.

24. On proper analysis, in our view, the position was no different to that which would apply

if the applicant had made confessional statements to anyone else either inside or outside the police station who was unconnected with the investigation of the offences or charging an offender. In our view the real question was, as the judge found it to be, whether the evidence should have been excluded under section 78 of the Police and Criminal Evidence Act.

25. The terms of section 78 are familiar and we do not propose to set them out in this judgment. When determining the admission or exclusion of evidence, a judge applies a broad discretion, as Mr Dyke recognised. The judge in this case considered all the circumstances in relation to Mrs Smith's evidence, including the way in which the applicant came to make his admissions, whether its admission would have such an adverse effect on the fairness of the trial. The applicant was not tricked into making admissions to Mrs Smith. On the contrary, she made efforts to steer him away from discussing the charges. However, it seems that the applicant was determined to say what he did, albeit he later, perhaps on advice, changed his mind. He was noted to be nervous and anxious but it has not been suggested he was under a disability, other than a difficulty with reading. Mrs Smith would give evidence at trial and what was alleged to have been said and the circumstances in which the conversation took place were capable of being and fully explored in the evidence. This is what counsel for the applicant and the co-defendant did.

26. In cross-examination (summing-up page 38F) it was put to Mrs Smith that she had made it up, to which she answered: "Why would I do that?" In his own evidence (summing-up page 44G) the applicant indicated that it was all a lie. These were matters for the jury's

evaluation.

27. In our view this was a ruling that was open to the judge and we see no proper reason for revisiting it.

28. We should however deal with three points raised by Mrs Dyke which are relevant to this aspect of the application. First, the function of appropriate adults is to ensure that the accused fully understands his rights and understands the position in which he finds himself. We do not consider that the ruling undermined this principle. Second, nor was this a position in which the appropriate adult had received admissions prior to acting as such, where plainly different considerations apply. Third, we accept that those who are mentally vulnerable may provide information that may be unreliable or incriminating, and this may require the presence of an appropriate adult to be involved in questioning if there is doubt about a person's mental state or capacity. But the appropriate adult is not there to stop an accused from making admissions.

29. For all these reasons, we refuse leave to appeal against conviction.

30. We turn then to the appeal against sentence. In addition to the sentence of imprisonment, the judge ordered the applicant to make a contribution of £3,500 towards the prosecution costs and ordered him to pay £15,000 compensation to the victim of his crimes, which might, in the judge's words, "afford her some small consolation for the damage you inflicted on her life."

31. The applicant seeks to challenge that order. Mr Dyke submits that the judge failed to

follow the approach to compensation orders indicated by the Court of Appeal in the case of *Islam* [2013] EWCA Crim. 2355.

32. He argues that the facts of the case fell outside the range of straightforward summary cases in which compensation orders are appropriate. The assessment of quantum was based primarily on Mr Ward's financial circumstances, rather than the loss suffered by the victim, and there was insufficient evidence for the judge to arrive at a proper quantification of loss. Mr Dyke referred to the caution expressed in relation to matters relevant to an assessment of damage expressed by Irwin J in *B v Nugent Care Society* [2010] EWHC 1005 at paragraph 83.

33. When refusing leave to appeal, the single judge said this:

> A judge who at the end of a criminal trial tried to definitively assess the quantum of damages in order to make a compensation order in a case where the victim of criminal offending had suffered potentially complex personal injury would usually be faced with such insuperable difficulties that such an assessment would not be attempted. However, that is not the task that this judge undertook. What the judge did here, on the basis of the evidence before him, was to make a compensation order in a sum below the minimum figure which any detailed assessment following a full enquiry would arrive at. It is not submitted ... that this is not the case. Moreover, it is not suggested that you do not have the means to meet the order.

34. With those observations we entirely agree. The criteria for making and the inhibitions against making compensation orders against a defendant following a trial are set out clearly in the 38th Edition of the Crown Court Index at pages 243 to 252. The making of the order in the amount that was made in this case was not wrong in principle, nor was the sum awarded disproportionate. The applicant had the means of paying. He was

convicted of serious sexual offences against EF. She was entitled to be compensated and the £15,000 represented the very minimum that would compensate her for the commission of the crimes against her. The application for leave to appeal against sentence is accordingly refused.