Neutral Citation Number: [2023] EWCA Crim 58

Case Nos: 202202021 B5 & 202203003 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BRADFORD CROWN COURT
His Honour Judge Nadim
Ind. No. T20217095

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2023

Before :

LORD JUSTICE DINGEMANS
MRS JUSTICE CUTTS
and
HIS HONOUR JUDGE CONRAD KC

- -

Between :

Peter Andrew Holmes	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Mr Edward Hetherington for the **Appellant**
Mr Michael Morley for the **Respondent**

Hearing date : 24 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 14.00 hrs on 31.1.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Lord Justice Dingemans :

Introduction

1. This is the hearing of an appeal against conviction and sentence. The appeal against conviction raises issues about whether the facts relied on by the prosecution, which the jury, by their verdict, must have been sure were proved and were carried out for the appellant's sexual satisfaction, amounted to "gross indecency" for the purposes of section 1 of the Indecency with Children Act 1960. The statement of offence for the purposes of an indictment is referred to as "indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960", see Archbold, Criminal Pleading Evidence and Practice 2023 ("Archbold") at 20-380a, and in the summary of the factual background we have referred to the offence as indecency with a child even though the statutory wording is "gross indecency".

2. The appellant was a school master teaching English and coaching rugby and cricket at Malsis Preparatory School, Crosshills, North Yorkshire between 1976 and 1991, which is the period during which the offending is alleged to have taken place. Malsis school was a boarding school for children up to the age of 13 years. There were 21 complainants who gave evidence at the trial of the appellant. They have the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992. 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. The complainants are referred to below as C followed by a number to preserve their anonymity.

3. The appellant was tried in the Crown Court at Bradford in relation to 42 counts, some of which were multi-incident counts. A submission of no case to answer was successful on eight counts of indecency with a child, being counts 2, 19, 22, 31, 35, 36, 40 and 42. On 30 May 2022 the appellant (then aged 73 years) was convicted of various counts of indecent assault on a male person, contrary to section 15(1) of the Sexual Offices Act 1956 and 17 counts of indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960. The jury were unable to reach verdicts on five counts being counts 9, 10, 11, 12 and 15 which were later ordered to lie on the file. That meant that the appellant was convicted on 29 counts which comprised of at least 50 separate incidents relating to 18 separate complainants. On 16 September 2022 the appellant was sentenced to an overall sentence of 12 years' imprisonment.

Factual circumstances of the offences

4. As the appeal against conviction raises the issues of whether alleged acts were capable of amounting to "gross indecency" for the purposes of the counts of indecency with a child, it is necessary to set out the factual circumstances of the offences in some detail.

5. Complaints came to light about the appellant's activities between 1976 and 1991 in the 1990's during an investigation into another teacher at the school. At that time the appellant was living abroad and matters were pursued only against the other teacher. In 2017 further allegations were made against the other teacher. It was then discovered that the appellant had returned to the UK and the investigation against him restarted.

The appellant was interviewed about the allegations. The appellant denied any sexual abuse or improper conduct with or towards any of the pupils in his care.

6. C1 was aged between 8 and 13 years and was the subject of count 1 indecent assault on a male and count 2 indecency with a child. As far as count 1 is concerned C1 remembered an occasion when he was in the bathroom one evening wearing his pyjamas and the appellant asked him to go to his flat to discuss a piece of work he had done. He went through the front door of the appellant's flat into his study. The appellant was sitting at the desk and had a piece of work on his desk. C1 stood to the side of the appellant. They discussed the work then C1 became conscious of the appellant's left hand on his left buttock. The appellant's hand touched C1 and slid down, skin-on-skin. While doing so, the appellant pulled C1 towards him. C1's reaction was to pull away. The incident lasted 20 to 30 seconds. This was count 1. The appellant said that he remembered C1 as an under-11 cricketer but didn't remember putting a hand in his pyjama bottoms and did not have a sexual interest in children. The appellant was convicted of count 1, indecent assault on a male.

7. C1 was invited into the appellant's flat with three or four other boys. The appellant told them he had bought a new rowing machine. He then told the boys that to use the rowing machine they had to strip down to their underpants only. C1 recalled the appellant and two of the boys stripped down to their underpants. The appellant then demonstrated how to use the rowing machine and the two boys took it in turns to use it. C1 did not strip. This was count 2, inciting C1 to commit gross indecency. The judge found that there was no case to answer.

8. C2 was aged between 11 and 13 years and was the subject of counts 3 and 4, both of which were offences of indecency with a child. C2 went to the appellant's flat many times, however, two occasions stood out. The first involved an occasion when C2 was play fighting with two other boys. The appellant caught them and told them to go up to his room. They followed the appellant up. Once they reached the appellant's room, the appellant told the boys to strip down to their underwear. The appellant also stripped down to his underwear and lay down on the floor. He told the boys they were going to play a wrestling game. The boys were told to kneel over the appellant and push his hands down. The boys did as instructed. The appellant's mood was jovial. C2 suspected that the appellant had an erection, or at least a partial erection. The appellant then got up and left the room for a period of time. This was count 3.

9. The second occasion was when the appellant instructed C2 to go to the appellant's flat to exercise on the bull-worker exercise equipment. The appellant instructed C2 to strip to his underwear then watched him as he exercised. Whilst C2 was using the bull-worker, the appellant patted him on the bottom. C2 remembered the appellant's finger going into his underpants. At the time C2 thought it was an accident. The appellant had told C2 not to let the Matron see him coming from the appellant's flat. This was count 4.

10. The appellant said he didn't remember what C2 said as happening and would not have given that punishment. He only stripped in his flat during wine making and did not do the push ups as described, he was not asking for sexual gratification and did not get an erection. He had a vague memory of the bull worker. The appellant was convicted of counts 3 and 4 of indecency with a child.

11. C3 was aged 7 to 13 years and was the subject of counts 5 and 6, both of which were offences of indecency with a child.

12. The appellant instructed C3 to attend his private flat on multiple occasions. C3 was taken into the appellant's bedroom and made to use the rowing machine in front of the appellant having first been told to take off his school uniform and strip down to just his underpants. It was not part of organised physical education at the school. Whilst C3 rowed, the appellant instructed him to pull his underpants down so that his bottom would be exposed. The appellant then watched C3 as he moved backwards and forwards with exposed buttocks. This was count 6 which was a multiple incident count of at least six occasions.

13. On the same occasions that C3 was made to row, the appellant also stripped down to his underwear or shorts. The appellant laid on his bed and instructed C3 to straddle him so that C3 was sitting across the appellant's bottom. C3 was wearing uniform shorts or underpants. Sitting in that position, C3 massaged Deep Heat into the appellant's back and shoulders. This was count 5, multiple incident count of at least 3 occasions.

14. The appellant said C3 was a pleasant boy who was in the wine club and that he might have asked for a massage when the boy was aged 12 years but there was no sexual element to it. The massage might have happened in the bedroom and although he might have had a naked torso, he would have been wearing tracksuit bottoms or rugby shorts. He would not have instructed boys to lower underpants to reveal their buttocks. The appellant was convicted of counts 5 and 6 of indecency with children.

15. C4 was aged 10 to 12 years and was the subject of counts 7 and 8. Count 7 was indecent assault on a male and count 8 was indecency with a child.

16. C4 recalled the appellant organised several camping trips. On one such trip, C4 was taken there in the appellant's car. One night, the appellant invited C4 into his tent for hot chocolate, C4 agreed. The appellant then started to cuddle up to C4 in a spooning position so the majority of the appellant's body was touching C4's body. C4 felt vulnerable and scared so he decided to leave the tent. This was count 7.

17. C4 was in the rugby team and was summoned by the appellant to his room under the pretence that it was for fitness for rugby. He attended on a number of occasions (at least three times a month for 5-6 months) to use the rowing machine. He was instructed to remove and lower the shorts or pants that he was wearing so that he would get a better grip on the seat. The appellant positioned himself at his desk behind C4 so that he was observing C4 from behind. This was count 8, which involved at least 6 incidents.

18. The appellant's evidence was that he remembered C4 as being a member of the rugby team and wine club, who had also gone on camping trips. He did not remember hot chocolate and did not do what C4 claimed. He would not have made a boy row in underpants. The appellant was convicted of count 7, indecent assault on a male, and count 8 indecency with a child.

19. C5 was aged 8 to 9 years and was the subject of counts 9 to 15. C5 had a hard time at school and was bullied. C5 self-harmed while at the school because "he wanted the pain to stop" and he "felt so alone".

20. C5 gave evidence in relation to allegations of anal penetration, oral penetration and masturbation by the appellant which were counts 9 to 12 but the jury were unable to reach a verdict on these counts.

21. C5 recalled the appellant got boys to row on the rowing machine naked. C5 rowed naked in the appellant's flat two or three times. C5's wife recalled C5 talking about a master who had made him row naked on a rowing machine. The appellant said he recognised the name but not the person. He denied abusing C5 in any way. These were counts 13 and 14 which were indecency with a child on which the appellant was convicted

22. C5 gave evidence about another occasion when he had rowed naked and the appellant had put his hands between C5's legs and touched C5's genitals. C5 slammed his knees shut, the appellant stopped and sat back down. This was count 15 on which the jury were unable to reach a verdict.

23. C6 was aged 8 to 14 years and was the subject of count 16 which was indecency with a child. C6 described the appellant as a very scary man and a bully. He recalled being told to attend the appellant's flat one morning for punishment. He attended wearing his pyjamas. C6 was alarmed to find that the appellant was dressed in his underpants. The appellant instructed C6 to use the rowing machine while the appellant sat behind the machine. C6 recalled slipping on the seat, so, on the appellant's instruction, he pulled his pyjamas down. He was not aware of the appellant masturbating or touching himself while C6 rowed. The appellant said he vaguely remembered C6 whose sporting ability had improved over time but he did not remember him using a rowing machine and he would not have acted as C6 reported. The appellant was convicted of count 16 indecency with a child.

24. C7 was aged 8 to 13 years and was the subject of count 17, which was indecency with a child. C7 recalled the appellant on multiple occasions instructed him to go to his flat as punishment. The appellant instructed C7 to use the rowing machine. On each occasion the appellant told him to pull his pants down to expose his bottom so that he would have better grip on the seat. The appellant sat at his desk behind the machine. The appellant said that C7 might have come to his flat but he had no recollection of him on the rowing machine. The appellant was convicted of count 17 indecency with a child.

25. C8 was aged 11 to 12 years, and was the subject of counts 18 and 19, which were both counts of indecency with a child. C8 described the appellant as very scary and overbearing. On at least one occasion, the appellant got C8 to go to his flat under the pretence of listening to music. The appellant then took him into his bedroom and asked C8 to massage him. The appellant removed all of his clothes and instructed C8 to strip down to his underpants. The appellant lay face down and C8 sat astride, his legs below the appellant's backside. The appellant instructed C8 to rub cream into his back and shoulders and then down to his buttocks. The appellant then turned over and instructed C8 to rub cream into his chest and genitals. The appellant guided C8's hand and assisted C8 in massaging the cream into him. This was count 18. The appellant

remembered C8's name but did not remember him being in the bedroom. It was possible that he rubbed cream, Deep Heat, into his shoulder or back but not into the front and the massage on the front did not happen. The appellant was convicted of count 18 indecency with a child.

26. C8 described another incident when the appellant had exposed his genitals to a group of boys including C8 in the gym. This was count 19 but the judge found that there was no case to answer.

27. C9 was aged 10 to 13 years and was the subject of counts 20 and 21. Count 20 was indecent assault on a male and count 21 was indecency with a child.

28. C9 went to the appellant's flat for a variety of reasons, as did lots of other students. They were specifically invited to the room. On one occasion, C9 went to the flat with another student. The appellant was sitting behind a desk and showed them a notebook the contents of which was of a sexual nature. The appellant put his hands down C9's pants at the back of his waistband. The other student was standing on the other side of the appellant, C9 assumed the appellant had done the same to him. C9 and the other boy were shocked and embarrassed. They reported the matter to Ms Robson-Bayley, a teacher. This was count 20.

29. C9 recalled using the rowing machine and bull-worker in the appellant's flat in his underpants because he was told to use them that way by the appellant. This was count 21. Ms Robson-Bayley gave evidence about concerns from boys about going into Mr Holmes' flat in a state of partial undress. She had reported the matter to the headmaster, who said at a staff meeting that any concerns raised by parents were to be directed to him.

30. The appellant denied that he put his hand down anyone's shorts and would not have had boys in underwear in his flat. The appellant was convicted of count 20 indecent assault, and count 21 indecency with children.

31. C10 was aged 10 to 12 years and was the subject of counts 22, 23 and 24 which were indecency with children.

32. C10 said there was an occasion when the appellant asked him to sit on his knee, the appellant then put his arms around C10 and bounced him up and down on his lap. This was count 22 and the judge found that there was no case to answer.

33. C10 sometimes went to the appellant's flat in a group, other times with close friends and sometimes on his own. He recalled incidents which occurred when he was on his own. On one occasion C10 was wearing a dressing gown, the appellant commented on his weight and asked C10 to undo his dressing down. C10 was naked underneath. He opened his dressing gown for about five seconds. He could not be sure but he thought the appellant might have poked his stomach. This was count 23.

34. On another occasion, the appellant laid on the ground and got C10 to do press ups over him with C10's hands in the appellant's hands. C10 felt the closeness of the appellant and felt uncomfortable. This was count 24. C10 had complained about this to the headmaster and had written down what had occurred but he did not hear anything afterwards.

35. The appellant said that C10 was a reasonably promising under-11 cricketer, but he did not remember him wearing only a dressing gown. The appellant might have commented on his weight but would not have asked him to open his dressing gown. He would not have asked him to do press-ups over him. If he had it would be for rugby and not a sexual thrill. The appellant was convicted of counts 23 and 24 indecency with a child.

36. C11 was aged 10 to 11 years and was the subject of count 25 which was indecent assault on a male. An incident occurred after a rugby match when the appellant told C11 that he wanted to see him in his flat. In the flat, they talked rugby tactics, C11 stood beside the appellant. The appellant then put his arm around C11 and pulled him closer. He then moved his hand down to the bottom of C11's shorts and then up his leg touching C11's upper leg and bottom. The appellant said he did not remember C11 and did not do what he described. The appellant was convicted of count 25 indecent assault on a male.

37. C12 was aged 9 to 10 years and was the subject of counts 26 and 27, indecent assault on a male, and counts 28 and 29 indecency with a male.

38. C12 said the appellant put his hands down the back of C12's shorts on a number of occasions and would try to get inside his clothes but C12 would always try and wriggle away, this was count 26. The appellant used to go up behind C12 and rub himself on him, which was count 27.

39. The appellant instructed C12 to attend his flat on numerous occasions for punishment. C12 was instructed to go dressed just in his underpants. The appellant then instructed C12 to row on the rowing machine in front of him, which was count 28. On one such occasion the appellant instructed C12 to remove his underpants, which was count 29. The appellant said he remembered him as a promising spin bowler for the under 11's but he did not do what he described. The appellant was convicted of counts 26 and 27 indecent assault on a male and counts 28 and 29 indecency with a child.

40. C13 was aged 8 to 9 years and was the subject of count 30 which was indecent assault on a male. The appellant on more than one occasion told C13 to attend his flat to go over a piece of work which C13 had handed in. C13 stood next to the appellant who was sitting at his desk. Throughout the time that C13 was standing there, the appellant caressed and 'groped' C13's bottom over his shorts. The appellant said he did not remember C13 and might have put his arm round him when discussing work out of friendliness and encouragement but he did not grope his bottom. The appellant was convicted of count 30 indecent assault on a male.

41. C14 was aged 11 to 14 years and was the subject of counts 31 and 33, indecency with a child, and count 32 indecent assault on a male. C14 said that the appellant frequently slapped C14 on the backside. C14 told his mother who complained to the school and the incidents stopped for about 18 months to two years. The appellant encouraged C14 to attend a local gym with him during the holidays. The appellant went with C14 and at the end of the workout insisted that C14 went to the sauna with him naked. The first time that occurred C14 tried to keep his swimming trunks on but the appellant insisted he took them off. This was count 31, indecency with a child in respect of which the judge found that there was no case to answer.

42. In the run up to rugby games, the appellant told C14 and a few other players to line up facing the wall. The appellant then massaged Deep Heat into their thighs to prepare them for the game. He massaged right up to C14's groin close to the genitals. This was count 32, which was indecent assault on a male. On one occasion when C14 was at the appellant's flat, the appellant tried to get C14 to sit on his knee. C14 made his excuses and left.

43. C14 was responsible for taking the form room key to the appellant in the evenings. On one occasion the appellant opened his flat door completely naked and stood in the doorway holding the door and looking at C14. The appellant had a grin on his face, C14 felt the appellant was trying to gauge his reaction. C14 gave him the key and left. This was count 33, indecency with a child. C14's wife and sister gave evidence about C14 reporting inappropriate touching and incidents when he had been at school.

44. The appellant said that C14 was a promising rugby player and he had taken him with others to the gym to get experience of using weights. If he had ever opened the door naked it had not been deliberate. The appellant was convicted of count 32 indecent assault on a male and count 33 indecency with a child.

45. C15 was aged 7 to 13 years and was the subject of count 34, which was indecent assault on a male. The appellant was C15's rugby coach. During a rugby tournament the appellant rubbed Deep Heat into C15's legs, up his shorts and touched his inner thigh close to his groin area. The appellant said that C15 was a rugby player and that it was perfectly possible that he had rubbed in Deep Heat to warm up. The appellant was convicted of count 34, indecent assault on a male.

46. C16 was aged 12 to 13 years, and was the subject of count 35 which was indecency with a child. C16 recalled an occasion when the appellant called him into his flat and, as C16 entered, the appellant emerged from the bathroom naked apart from a jockstrap which he was in the process of pulling up. The judge found that there was no case to answer.

47. C17 was aged 9 to 13 years and was the subject of count 36 which was indecency with a child. C17 recalled an incident when he attended the appellant's flat to collect a rugby ball and the appellant went to the door completely naked. The judge found that there was no case to answer.

48. C18 was aged 12 to 13 years and was the subject of count 37, indecent assault on a male and count 38, indecency with a child. The appellant shared a room with C18 on a rugby tournament. The appellant instructed C18 to strip naked then he administered an all over body massage to C18 on the bed, which was count 37. The appellant then instructed C18 to straddle the appellant on the bed and to massage him, which was count 38. C18 had not thought at the time it was sexual but now he did. The appellant remembered C18 as a very good player and said it was possible that they had shared a hotel room and it is possible that he had given him a massage and asked him to strip naked. The appellant was convicted of count 37 indecent assault on a male and count 38 indecency with a child.

49. C19 was aged 8 to 14 years and was the subject of counts 39 and 40 indecent assault on a male. C19 got to know the appellant through rugby training. During one rugby session C19 asked for some Deep Heat to administer himself, however, the appellant

put it on C19. The appellant worked the cream up C19's thigh to his groin area. The appellant slipped into an inappropriate area and his fingers momentarily slid under C19's Y-fronts. He did not touch the genitals. This was count 39. The appellant said he would not have massaged the groin area. The appellant was convicted of indecent assault on a child.

50. On another occasion, C19 attended the appellant's flat to hand in some work and remembered the appellant hugging him from behind while C19 was bent over the appellant's desk. This was count 40 in respect of which the judge found no case to answer.

51. C20 was aged 9 to 14 years and was the subject of count 41, indecent assault on a male. C20 knew the appellant through sports at the school. On occasions C20 suffered injuries and recalled going to the appellant's flat and being massaged by the appellant. The appellant massaged C20's groin and buttock area. The appellant said C20 was a multi talented player and it was possible that he massaged his legs, but it was not for a sexual purpose. The appellant was convicted of count 41, indecent assault on a male.

52. C21 was aged 8 to 13 years and was the subject of count 42, indecency with a child. The appellant took a group of boys to the sports hall saying that he was going to show them how to use a cricket box. The appellant then took his trousers and underpants down and displayed his genitals to the boys throughout the exercise. This was count 42 and the judge found that there was no case to answer.

The submission of no case to answer

53. Counsel for the Defence submitted that there was no case to answer in respect of 19 of the counts of indecency with a child. These were counts 2, 4, 5, 6, 8, 16, 17, 19, 21, 22, 23, 28, 29, 31, 33, 35, 36, 40, 42. No submission was made in respect of counts 3, 13, 14, 24 and 38 because it was accepted that the acts in those counts might amount to the offence of indecency with a child. The appellant did not make any submission in respect of the counts of indecent assault on a male.

54. The basis of the submission in respect of the counts for which it was pursued was that the evidence, taken at its highest, did not disclose any criminal offence. The prosecution conceded the defence application in respect of counts 22 and 40 but rejected the submission in respect of the other counts.

55. The Judge ruled that counts 19, 22, 31, 35, 40 and 42 did not disclose a case to answer. The Judge ruled that there was a case to answer on the remaining 14 counts subject to the submission (counts 2, 4, 5, 6, 8, 16, 17, 21, 23, 28, 29, 33 and 36). It was a question for the jury to determine on the evidence presented before them, whether the act relied on by the prosecution in support of the particular charge of indecency with a child that they were considering, whether the act relied on by the prosecution amounted to an act of gross indecency.

56. The judge conducted a further review of the evidence and the applicable law during the weekend break, and revisited the submission of no case to answer. The Judge ruled that there was also merit in the defence application in relation to counts 2 and 36 and accordingly the jury were to return a verdict of not guilty in respect of counts 2, 19, 22, 31, 35, 36, 40 and 42. The evidence in relation to those offences suggested that the

conduct was or may have been accidental or that it did not lend itself to the conclusion of being indecent. The evidence in relation to the other counts was capable of making a jury sure that the ingredients of the offence of indecency with a child, as set out in the directions of law, were proved.

57. The effect of the rulings was that the jury considered 34 counts, the judge having found no case to answer on 8 counts.

The summing up

58. The judge gave written and oral directions to the jury. So far as is material the judge directed that in order to convict the appellant of indecency with a child the jury needed to be sure that:

> "1. The defendant intentionally conducted himself in the manner referred to in the Count subject of your particular consideration.
>
> …
>
> 2. The conduct complained of amounted to an act of gross indecency.
>
> When considering counts 4, 6, 8, 13, 14, 16, 17, 21, 23, 28, 29 and 33, you must first decide whether you are satisfied so that you are sure that the defendant did make the complainant referred to in the particular count visit him in his flat and instruct the complainant to use the rowing machine or a bull-worker whilst in a state of undress or partial undress and watch the complainant or appear before the complainant naked knowing that he was being watched by the complainant.
>
> …
>
> However , If you are sure that the defendant did conduct himself as identified in any of or all of these counts (4, 6, 8, 13, 14, 16, 17, 21, 23, 28, 29 and 33) then you must decide whether that conduct amounts to an act. If this conduct did not or may not have amounted to an act then you will not consider the particular count any further, the defendant would be entitled to a verdict of not guilty. If however, you are satisfied so that you are sure that defendant did conduct himself as identified in any of or all of these counts (4, 6, 8, 13, 14, 16, 17, 21, 23, 28, 29 and 33) and that conduct amounts to an act then you will proceed to decide if the conduct in question amounts an act of gross indecency in accordance with direction 3 below.
>
> … [The judge directed the jury that it was common ground that counts 3, 5, 18, 24 and 38 were acts within the meaning of the offence if they took place].

> 3. You members of the jury decide whether an act is one of gross indecency by taking into account the context and all relevant circumstances in which it is said to have taken place.
>
> If you conclude that the act in question was not or may not be one of gross indecency then the defendant is entitled to a verdict of not guilty in respect of the particular count subject of your consideration. However, if you are sure that the act in question was one of gross indecency you will then proceed to decide whether the Prosecution have satisfied you so that you are sure that the act in question was with or towards the complainant in accordance with direction 4 below.
>
> 4. For an act to be with or towards the complainant simply means that the conduct should involve the complainant
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> …
>
> 5. That the complainant was, at the material time, under the age of 14 years.
>
> …
>
> Needless to say, it is the Prosecution case that the defendant derived sexual satisfaction from each of the acts that they rely on as evidence of acts of gross indecency. Therefore, when considering a particular count, you must find the defendant not guilty of that particular count, unless you are sure that the defendant derived sexual satisfaction from the act that is identified by the Prosecution in the particular count as an act of gross indecency."

59. As appears above the jury were told that they should "decide whether an act is one of gross indecency by taking into account the context and all relevant circumstances in which it is said to have taken place". The jury were told that they needed to be sure that "the defendant derived sexual satisfaction from the act …".

The verdicts

60. The jury convicted the appellant on the counts which had been left to them save for counts 9, 10, 11, 12 and 15, which related to one particular complainant, where they could not reach a verdict. These were the counts which were then ordered to lie on the file.

Grounds of appeal against conviction

61. There are three grounds of appeal against conviction. These are: (1) that the judge erred in refusing the submission of no case in respect of the 11 counts of gross indecency; (2) that the judge misdirected the jury as to the elements and nature of the offence of gross indecency with a child; and (3) that the prejudicial effect of those counts remaining before the jury which should not have remained before the jury adversely affected the proceedings as a whole such that the remaining convictions should be quashed.

62. Mr Hetherington submitted on behalf of the appellant that proof of gross indecency requires some form of intercrural contact, either masturbation, mutual masturbation or oral-genital contact. "Gross indecency" was a term of art with particular legal meaning. The judge's direction to the jury was inadequate and amounted to an invitation that they simply apply contemporary moral standards to the alleged acts and decide whether they were "indecent" and if so whether the level of indecency was "gross". This was impermissibly vague. Further, if the appellant's submissions on "gross indecency" were upheld, it would mean that all of the counts should be set aside, because the jury would have heard inadmissible evidence which might have affected their verdicts on the other counts.

63. Mr Morley submitted on behalf of the Crown that there is no legal requirement for contact or touching. The term "gross indecency" had never been fully defined by statute or common law. The authorities indicate that whether an act is or is not grossly indecent is a matter for the jury. If a jury is satisfied that the reason the defendant instructed the child to use the equipment whilst naked or with buttocks exposed or in their underwear was to gain sexual gratification from observing them, then the prosecution submits that the jury would be entitled to conclude that this was gross indecency. The evidence of the other counts, even if they did not amount to gross indecency, would have been admissible to prove a propensity to have a sexual interest in young boys. Further, the jury were directed to treat each count separately and only have regard to the evidence under their consideration. It is apparent from their verdicts in relation to one of the complainants that the jury were able to consider each count on its own merits.

64. We are very grateful to Mr Hetherington and Mr Morley for their helpful written and oral submissions.

Relevant principles of law

65. At the material time, section 1 of the Indecency with Children Act 1960 provided that "(1) Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction …".

66. The term "gross indecency" has featured in criminal statutes in England and Wales from the nineteenth century, following what was termed as the Labouchere Amendment which became section 11 of the Criminal Law Amendment Act 1885. The courts have never set out comprehensive definition of the concept of "gross indecency" but, as the common law has developed, reported decisions have identified boundaries for the offence.

67. *R v Hunt* [1950] 2 All ER 291 was a case of gross indecency between male persons contrary to section 13 of the Sexual Offences Act 1956, which was decided at a time when consensual male same sex sexual relations were criminal. It is not clear from the report exactly what sexual activity was taking place but it was described in the report as "exhibitions by the one to the other". *Hunt* established that gross indecency did not require actual physical contact between persons. It was for the jury to decide whether or not there was an act of gross indecency and "an act of gross indecency could be supported on the evidence that the two men were making a grossly indecent exhibition".

68. The Report of the Departmental Committee on Homosexual Offences and Prostitution 1957 ("the Wolfenden report") recommended the abolition of the criminalisation of consensual male same sex sexual relations in private. In the report reference was made to "gross indecency" in the context of section 13 of the Sexual Offences Act 1956 which related to male same sex sexual relations and stated:

> "104. 'Gross indecency' is not defined by statute. It appears, however, to cover any act involving sexual indecency between two male persons. If two male persons acting in concert behave in an indecent manner the offence is committed even though there has been no actual physical contact (*R v Hunt* …).
>
> 105. From the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations." (underlining added)

69. Although there was reference in the Wolfenden report to the offence "usually" taking one of three forms, it is apparent from the reported cases that the offence was not restricted to those forms of activity. Further the report was not addressing the limits of the offence of gross indecency with children under the Indecency with Children Act 1960, which had not yet been enacted.

70. In *R v Speck* [1977] 2 All ER 859 the Court of Appeal held that it was open for the jury to find that gross indecency, within the meaning of the Indecency with Children Act 1960, was made out from the appellant's inactivity where an eight-year-old girl had placed her hand on his penis outside his trousers and left it there for approximately five minutes where the pressure of the child's hand had caused the appellant to have an erection. The appeal raised the issue of whether a criminal offence could be committed by inactivity, and it was held that his inactivity was capable of amounting to an invitation to the child to act or continue to act in a particular way. The court did not offer any statement about what constituted gross indecency.

71. In *R v Francis* (1989) 88 Cr App R 127 the Court of Appeal allowed an appeal against conviction where two children had witnessed a man masturbating while wearing pants in a changing room of a public swimming pool. The trial judge had failed to direct the jury sufficiently that the offence of indecency had to be "with or towards" a child, which should be read as one term and simply meant involving the child, and the jury might have misunderstood the directions to mean that masturbation in the presence of the child was enough. In the course of the judgment it was said "on the other hand where a man masturbates in the presence of children knowing that they are watching him, whether he has deliberately attracted their attention or not, and deriving excitement from the fact that they are watching him masturbating, then, in the view of this court, he can truly be said to be committing an act of gross indecency towards those children …".

72. The House of Lords in *R v Court* [1989] AC 28 considered indecent assault contrary to section 14(1) of the Sexual Offences Act 1956. Section 14 referred to "indecent assault" rather than "gross indecency". Lord Ackner considered a definition of "indecent" suggested in a textbook as "overtly sexual" but held, at page 42B-C, that a simpler way of putting the matter to the jury is to ask them whether a "right-minded person would consider the conduct indecent or not". The formulation of asking whether right-minded persons, or the jury, would consider the conduct "indecent" or to amount to "gross indecency" is a formulation adopted by trial judges, and was the approach taken by the judge in this case.

73. In *ADT v The United Kingdom* [2000] 2 FLR 697 the European Court of Human Rights ("ECtHR") considered the offence of gross indecency committed between men contrary to section 13 of the Sexual Offences Act 1956. Although same sex sexual relations between two men in private had been decriminalised, the criminal law continued to criminalise "gross indecency" between more than two men. The ECtHR held that ADT's conviction in that case infringed his rights under article 8 of the European Convention on Human Rights. The ECtHR noted at paragraph 15 that: "There is no statutory definition of `gross indecency'". The ECtHR then referred to paragraphs 104 and 105 of the Wolfenden Report set out above.

74. The Sexual Offences Act 2003 was enacted to modernise the law on sexual offences and to deter and manage sex offenders. A research paper dated 10 July 2003 on what was then the Sexual Offences Bill set out some of the problems with the previous law. The appellant has relied on a passage at page 41 which noted that the Crown Prosecution Service had not prosecuted a man who had induced some young girls to undress. It was said in the research paper "In short, a lack of physical contact lay behind the problem with bringing a prosecution". We record that this was a report only of a decision about whether to bring charges, and the details of the man's activity is not fully described. That said if the real issue was "a lack of physical contact" then the decision not to charge appears to have overlooked the decisions in *Hunt* and the dicta in *Francis* set out above. This was a point made in the research paper in the passage which followed which referred to *Halsbury's Statutes* which had mentioned the decision in *Hunt.*

75. We have looked at various textbooks to see whether a definition of "gross indecency" has been provided. The Notes on the Indecency with Children Act 1960 in Halsbury's Statutes, Fourth Edition, Volume 12, 1997 Reissue (referred to in the research paper) provided:

> "Gross Indecency. There is no statutory definition of this expression, which is that used in the Sexual Offences Act, s 13 ante, but it was held in *R v Hunt* [1950] 2 All ER 291, 114 JP 382, that in order to constitute the offence of gross indecency between male persons actual physical contact is not essential; it is sufficient if the persons charged have placed themselves in such a position that a grossly indecent exhibition is going on between them. Inactivity can amount to an act of gross indecency if it amounts to an invitation to the child to continue doing the act (*R v Speck* [1977] 2 All ER 859, (1977) 121 Sol Jo 221, CA)."

76. Archbold at paragraph 20-384 refers to the elements of indecency with a child. Reference is made in the text to the decision in *R v Speck* and the need for an act to be with or towards a child. There was no discussion of what "gross indecency" meant.

77. Blackstone's Criminal Practice 2023 at paragraph B3.394 addressed gross indecency saying "English courts have declined to define the concept of `gross indecency'. Clearly it is conduct which represents a marked departure from decent conduct." Reference was then made to the case of *R v Speck*.

78. The current edition of the Sexual Offences Referencer, Third Edition, provides at paragraph 5.42:

> "Gross indecency is not defined by statute or common law, but would usually cover inter-crural (leg or thigh) contact, mutual masturbation or oral-genital contact. The behaviour has to be 'directed towards' or 'against' the other person".

79. Sexual Offences Law and Practice HH Peter Rook KC and Robert Ward CBE KC referred to at 30.34 to "gross indecency with a child" but simply recorded changes to maximum sentences.

A case to answer, proper directions and safe convictions

80. We do not consider that we should accept the appellant's invitation to attempt a definition of "gross indecency". This is because: first the phrase "gross indecency" has an ordinary meaning which juries have been able to determine and apply without difficulty for many years; secondly, as appears above, decided cases have set the boundaries of the offence so that it is sufficiently certain to have regulated the behaviour of persons subject to the criminal law and section 1 of the Indecency with Children Act 1960; thirdly, and part evidencing the second reason set out above, it was apparent from the appellant's own evidence at trial that he knew what were proper boundaries for his behaviour. He gave evidence that he had not acted or conducted himself in the grossly indecent way alleged by the complainants but it is apparent from their verdicts that the jury were sure that he had.

81. Further reasons are that the courts have avoided accepting such an invitation to define "gross indecency" for over a hundred years, and "gross indecency", while still relevant for prosecution of some older offences pre-dating the Sexual Offences Act 2003, has now been replaced by different statutory wording in the 2003 Act.

82. In our judgment the judge was entitled to find that there was a case to answer on the counts that he left to the jury. There was evidence on which the jury could find that the appellant, for his sexual satisfaction, had among other acts, directed boys: to row naked, or to row in underpants with the pants pulled down to expose their buttocks, or to row in underpants, on a rowing machine; to strip to their underpants, sit astride the appellant and massage him; to stand naked in front of a boy in an attempt to gauge his reaction; and to strip naked so that the appellant could massage the boy.

83. It is right to record that the submission of no case to answer was not made in respect of: the wrestling in count 3; counts 13 and 14 which involved naked rowing; the press ups over the appellant in count 24; and the massage by the boy on the appellant in count

38. In our judgment a jury, properly directed, was entitled to find that all of the counts amounted to gross indecency.

84. The judge's directions to the jury about the elements of the offence of indecency with children were proper directions. The jury must, on the basis of the judge's directions, have been sure that: the appellant committed the acts alleged; derived sexual satisfaction from the act identified; and that the acts were ones of "gross indecency" taking account of the context and all the relevant circumstances.

85. In circumstances where we have found that the judge was right to find a case to answer on the counts that he did, and we have not found any misdirection on the law, there is no basis on which to consider the verdicts unsafe.

The sentencing remarks

86. The judge said that the appellant fell to be sentenced for 29 sexual offences, 13 offences of indecent assault and 16 offences of gross indecency spanning a period of at least 10 years. The offending encompassed some 50 separate incidents against 18 pupils at Malsis School where he was a teacher. The parents of the victims would have expected the school to care and provide for the emotional and physical safety of their children and they invested trust in the school towards that objective. The appellant breached that trust at every level. He knew the pupils understood that his wish was their command. The appellant knew the victims were vulnerable by virtue of being boarders at the school. By reason of their vulnerability and isolation, the victims were not able to muster the confidence needed to challenge the appellant when he abused them.

87. The appellant was spoken to about his conduct by the headmaster, it did not lead to any alteration in the appellant's behaviour. The combined effect of the vulnerability and isolation of the pupils at the school and the school showing utter disregard for the welfare of the pupils meant that the appellant was able to act with virtual impunity.

88. The most serious offence was against C5, a troubled child who was particularly unhappy as a result of being away from home and being in a boarding school environment. The seriousness of the offending against C4 was also noteworthy. Evidence was heard from some of the victims concerning the impact upon them of the appellant's offending. Their ability to trust and form relationships had been compromised. They had been left damaged to varying degrees by the experience of being abused. Due to the nature of the abuse the appellant engaged in against C5, not only did C5 practice self-harm at school, but he was continuing to suffer from the effects of the deep trauma the appellant had caused.

89. Regard was had to the age of the appellant and the impact of the sentence upon him. There were no sentencing guidelines. In considering the comparator offences for indecency with a child and indecent assault, it was borne in mind that the sentences for the comparator offences were greater than the maximum sentences available to the court for the offences for which the appellant had been convicted. In order to achieve a sentence which was just and proportionate to the appellant's overall culpability whilst giving regard to the principle of totality, the Judge bore in mind all that had been said on the appellant's behalf, the seriousness of the offences committed, the number of offences committed and the period over which they were committed. The least sentence that was proportionate to the appellant's culpability was one of 12 years' imprisonment.

90. The sentence was made up as follows: Count 7, indecent assault: 18 months' imprisonment; Counts 13 and 14, indecency with a child: 18 months' imprisonment, concurrent with each other but consecutive to Count 7. This gave a sentence of 3 years. The remainder of the indecent assault offences, being counts 1, 20, 25, 26, 27, 30, 32, 34, 37, 39 and 41: 9 months' imprisonment on each (making a total of 9 years' imprisonment) consecutive to each other and consecutive to the 3 years. In the defence sentencing note Count 38 had been wrongly labelled as being an offence of indecent assault. As a result it was treated as such by the Judge when passing sentence and fell within the calculation of the 12 indecent assault offences. This was subsequently drawn to the Judge's attention, but the judge did not alter or vary the sentence. The gross indecency offences, Counts 3, 4, 5, 6, 8, 16, 17, 18, 21, 23, 24, 28, 29 and 33 were each the subject of 9 months' imprisonment, concurrent with each other and concurrent with the sentences above. Consequential orders were made.

The grounds of appeal against sentence

91. The grounds of appeal against sentence were that the sentence was manifestly excessive and wrong in principle. It was wrong to pass consecutive sentences for the indecent assault counts and concurrent sentences on the indecency with children counts. This was arbitrary, as appeared from the fact that one of the indecent assaults in fact was a count for indecency with children and the judge did not then adjust the sentence. A lead offence should have been identified for each category.

A permissible sentence

92. This was historic sexual offending. The appellant had to be sentenced in accordance with the regime applicable at the time and was limited to the maximum sentence available at the time of the offence. The court should have measured regard to the applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003. The prosecution and defence had supplied sentencing notes making reference to guidelines for: sexual assault; sexual assault of a child under 13; causing or inciting a child to engage in sexual activity; and causing or inciting a child under 13 to engage in sexual activity.

93. The Sentencing Council Guideline on Totality provides that when sentencing for more than a single offence, the court should pass a total sentence which reflects all of the offending behaviour before it which is just and proportionate. It is usually impossible to arrive at a just and proportionate sentence by adding together notional single sentences. There is, however, no inflexible rule governing whether sentences should be structured as concurrent or consecutive sentences.

94. In our judgment the Judge accurately reflected on what would be a just and proportionate sentence for all of the criminality of which the appellant had been convicted. This was a teacher carrying out sexual offending against 18 separate children in serious breach of trust, over a sustained period of time, which had caused very real harm to those children. For some of the complainants the effects of the offending had lasted throughout their whole life. In these circumstances the judge was entitled to consider that a determinate sentence of 12 years was just and proportionate. Having calculated the just and proportionate sentence, the judge structured the consecutive and concurrent sentences to achieve the sentence of 12 years. It was not wrong in principle to adopt the approach that he did, and the fact that he used one

sentence of indecency with a child with 11 separate offences of indecent assault on a male to achieve the aggregate consecutive sentence of 9 years was permissible. We dismiss the appeal against sentence.

Conclusion

95. For the detailed reasons set out above we dismiss the appeals against conviction and sentence.